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OF

THE SUPREME COURT

JUNE 25 THROUGH OCTOBER 2, 2015

END OF TERM

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 576 (Pp. 473–978; 1048–1096)
UNITED STATES REPORTS
Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, Jr., Chief Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.
SAMUEL A. ALITO, Jr., Associate Justice.
SONIA SOTOMAYOR, Associate Justice.
ELENA KAGAN, Associate Justice.

RETIRED

JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
DAVID H. SOUTER, Associate Justice.

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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 September 28, 2010, 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, ANTONIN SCALIA, 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.

September 28, 2010.

(For next previous allotment, see 561 U. S., p. VI.)

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Cases reported before page 1001 are those decided with opinions of the Court. Cases reported on page 1001 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

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

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KING ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

No. 14–114. Argued March 4, 2015—Decided June 25, 2015

The Patient Protection and Affordable Care Act grew out of a long history of failed health insurance reform. In the 1990s, several States sought to expand access to coverage by imposing a pair of insurance market regulations—a "guaranteed issue" requirement, which bars insurers from denying coverage to any person because of his health, and a "community rating" requirement, which bars insurers from charging a person higher premiums for the same reason. The reforms achieved the goal of expanding access to coverage, but they also encouraged people to wait until they got sick to buy insurance. The result was an economic "death spiral": premiums rose, the number of people buying insurance declined, and insurers left the market entirely. In 2006, however, Massachusetts discovered a way to make the guaranteed issue and community rating requirements work—by requiring individuals to buy insurance and by providing tax credits to certain individuals to make insurance more affordable. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—enabled Massachusetts to drastically reduce its uninsured rate.

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. 42 U. S. C. §§ 300gg, 300gg–1. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the Internal Revenue Service, unless the cost of buying insurance would exceed eight percent of that individual's income. 26 U. S. C. § 5000A. And third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B.

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish "such Exchange" if the State does not. 42 U. S. C. §§ 18031, 18041. Relatedly, the Act provides that tax credits "shall be allowed" for any "applicable taxpayer," 26 U. S. C.

§ 36B(a), but only if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under [42 U. S. C. § 18031]," §§ 36B(b)–(c). An IRS regulation interprets that language as making tax credits available on "an Exchange," 26 CFR § 1.36B–2, "regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR § 155.20.

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so they should not receive any tax credits. That would make the cost of buying insurance more than eight percent of petitioners' income, exempting them from the Act's coverage requirement. As a result of the IRS Rule, however, petitioners *would* receive tax credits. That would make the cost of buying insurance *less* than eight percent of their income, which would subject them to the Act's coverage requirement.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. The Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit viewed the Act as ambiguous, and deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Section 36B's tax credits are available to individuals in States that have a Federal Exchange. Pp. 484–498.

(a) When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron*, 467 U. S. 837. But *Chevron* does not provide the appropriate framework here. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.

It is instead the Court's task to determine the correct reading of Section 36B. If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words "in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133. Pp. 484–486.

Syllabus

(b) When read in context, the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it could also refer to *all* Exchanges—both State and Federal—for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 to establish an Exchange, the Act tells the Secretary of Health and Human Services to establish "such Exchange." § 18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not. Several other provisions in the Act—*e. g.*, Section 18031(i)(3)(B)'s requirement that all Exchanges create outreach programs to "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B"—would make little sense if tax credits were not available on Federal Exchanges.

The argument that the phrase "established by the State" would be superfluous if Congress meant to extend tax credits to both State and Federal Exchanges is unpersuasive. This Court's "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536. And rigorous application of that canon does not seem a particularly useful guide to a fair construction of the Affordable Care Act, which contains more than a few examples of inartful drafting. The Court nevertheless must do its best, "bearing in mind the 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320. Pp. 486–492.

(c) Given that the text is ambiguous, the Court must look to the broader structure of the Act to determine whether one of Section 36B's "permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371.

Here, the statutory scheme compels the Court to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. Under petitioners' reading, the Act would not work in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way, because so

many individuals would be exempt from the requirement without the tax credits. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange. The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. It is implausible that Congress meant the Act to operate in this manner. Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and tax credits. It thus stands to reason that Congress meant for those provisions to apply in every State as well. Pp. 492–496.

(d) The structure of Section 36B itself also suggests that tax credits are not limited to State Exchanges. Together, Section 36B(a), which allows tax credits for any "applicable taxpayer," and Section 36B(c)(1), which defines that term as someone with a household income between 100 percent and 400 percent of the federal poverty line, appear to make anyone in the specified income range eligible for a tax credit. According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit, but the *amount* of that tax credit would always be zero because of two provisions buried deep within the Tax Code. That argument fails because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468. Pp. 496–497.

(e) Petitioners' plain-meaning arguments are strong, but the Act's context and structure compel the conclusion that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid. Pp. 497–498.

759 F. 3d 358, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 498.

Michael A. Carvin argued the cause and filed briefs for petitioners.

Solicitor General Verrilli argued the cause for the respondents. With him on the brief were *Acting Assistant*

Counsel

Attorney General Branda, Deputy Solicitors General Gershengorn and *Kneedler, Deputy Assistant Attorney General Brinkmann, Brian H. Fletcher, Mark B. Stern, Alisa P. Klein, Christopher J. Meade, M. Patricia Smith,* and *William B. Schultz.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller,* Attorney General of Indiana, *Thomas M. Fisher,* Solicitor General, *Heather Hagin McVeigh* and *Lara Langeneckert,* Deputy Attorneys General, and *Andrew M. McNeil*; 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 of their respective States as follows: *Luther Strange* of Alabama, *Sam Olens* of Georgia, *Jon Bruning* of Nebraska, *Alan Wilson* of South Carolina, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow, Stuart J. Roth, Cece Noland-Heil,* and *Laura B. Hernandez*; for the American Civil Rights Union by *Peter J. Ferrara*; for the Cato Institute by *Ilya Shapiro*; for Consumers' Research by *Ronald A. Cass*; for the Galen Institute et al. by *C. Boyden Gray* and *Adam J. White*; for Judicial Watch, Inc., by *Michael Bekesha*; for the Landmark Foundation by *Richard P. Hutchinson*; for the Missouri Liberty Project et al. by *D. John Sauer* and *Erin Morrow Hawley*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Research Institute et al. by *Bert W. Rein, William S. Consovoy, Thomas R. McCarthy,* and *J. Michael Connolly*; for Senator John Cornyn et al. by *Charles J. Cooper, David H. Thompson, Howard C. Nielson, Jr., Peter A. Patterson, Michael E. Rosman,* and *Carrie Severino*; for Texas Black Americans for Life et al. by *Lawrence J. Joyce*; for Virginia Delegate Mark Berg et al. by *Herbert W. Titus, William J. Olson, Jeremiah L. Morgan,* and *John S. Miles*; for the Washington Legal Foundation et al. by *Cory L. Andrews*; for Jonathan H. Adler et al. by *Bradley A. Benbrook, Eric Grant,* and *Stephen M. Duvernay*; for Joseph R. Evanns by *Egon Mittlemann*; and for Jeremy Rabkin by *Thomas M. Christina.*

Briefs of *amici curiae* urging affirmance were filed for the State of Virginia et al. by *Mark R. Herring,* Attorney General of Virginia, *Stuart A. Rappael,* Solicitor General, *Cynthia Bailey,* Deputy Attorney General, *Trevor S. Cox,* Deputy Solicitor General, *Kim Piner,* Senior Assistant Attorney General, and *Carly L. Rush,* Assistant Attorney 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, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage

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Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healy* of Massachusetts, *Jim Hood* of Mississippi, *Joseph A. Foster* of New Hampshire, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *William Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for AARP by *Stuart R. Cohen*; for the American Academy of Pediatrics et al. by *Walter Dellinger* and *Kara M. Kapke*; for the American Cancer Society et al. by *Mary P. Rouvelas* and *Brian G. Eberle*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, and *James B. Coppess*; for the American Hospital Association et al. by *Neal Kumar Katyal*, *Dominic F. Perella*, *Sean Marotta*, and *Frank Trinity*; for the American Thoracic Society by *Michael T. Kirkpatrick*; for America's Health Insurance Plans by *Andrew J. Pincus*, *Brian D. Netter*, *Joseph Miller*, and *Julie Simon Miller*; for the Asian & Pacific Islander American Health Forum et al. by *Jonathan M. Cohen*, *Mark A. Packman*, *Priscilla Huang*, *Meredith Higashi*, *Doreena P. Wong*, and *Janelle R. Hu*; for Bipartisan Economic Scholars by *Matthew S. Hellman*; for the Catholic Health Association of the United States et al. by *Christopher J. Wright* and *Lisa J. Gilden*; for Families USA by *Robert N. Weiner*; for the Harvard Law School Center for Health Law and Policy Innovation et al. by *Mark C. Fleming*; for HCA Inc. by *Robert A. Long, Jr.*, *Christian J. Pistilli*, *David M. Zionts*, and *Paige M. Jennings*; for Health Care Policy History Scholars by *Benjamin J. Horwich*; for the Jewish Alliance for Law & Social Action (JALSA) et al. by *Andrew M. Fischer*; for the Lambda Legal Defense & Education Fund, Inc., et al., by *Kirsten V. Mayer*, *Nicole P. Cate*, *Gregory R. Nevins*, *Douglas Hallward-Driemeier*, and *Nicholas C. Perros*; for Members of Congress et al. by *Douglas T. Kendall*, *Elizabeth B. Wydra*, *Simon Lazarus*, and *Brianne J. Gorod*; for the National Alliance of State Health CO-OPs by *Woody N. Peterson* and *Peter W. Morgan*; for the National Association of Community Health Centers et al. by *Deanne E. Maynard*, *Brian R. Matsui*, and *Marc A. Herron*; for the National Education Association by *Alice O'Brien*, *Jason Walta*, and *Lisa Powell*; for the National Women's Law Center et al. by *Catherine E. Stetson*, *Jaclyn L. DiLauro*, *Marcia D. Greenberger*, *Gretchen Borchelt*, and *Emily J. Martin*; for Public Health Deans, Chairs, and Faculty et

in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an "Exchange" in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.

I

A

The Patient Protection and Affordable Care Act, 124 Stat. 119, grew out of a long history of failed health insurance reform. In the 1990s, several States began experimenting with ways to expand people's access to coverage. One common approach was to impose a pair of insurance market reg-

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al. by *H. Guy Collier* and *Ankur J. Goel*; for the Small Business Majority Foundation, Inc., et al. by *Pratik A. Shah*, *Hyland Hunt*, *Z. W. Julius Chen*, and *John B. Capehart*; for Trinity Health by *J. Mark Waxman*; for Maurice F. Baggiano by *Mr. Baggiano*, *pro se*; for David Boyle by *Mr. Boyle*, *pro se*; for William N. Eskridge, Jr., et al. by *Lawrence S. Robbins* and *Daniel N. Lerman*; for Thomas W. Merrill by *James A. Fledman* and *Gillian E. Metzger*; and for Marilyn Ralat-Albernas et al. by *Judith A. Scott*, *Nicole G. Berner*, *Claire Prestel*, and *Walter Kamiat*.

Briefs of *amici curiae* were filed for Administrative & Constitutional Law Professors by *Robert A. Destro*; for the Citizens' Council for Health Freedom et al. by *David P. Felsher*; and for Former Government Officials by *Boris Bershteyn* and *Sally Katzen*.

ulations—a "guaranteed issue" requirement, which barred insurers from denying coverage to any person because of his health, and a "community rating" requirement, which barred insurers from charging a person higher premiums for the same reason. Together, those requirements were designed to ensure that anyone who wanted to buy health insurance could do so.

The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence—known as "adverse selection"—led to a second: Insurers were forced to increase premiums to account for the fact that, more and more, it was the sick rather than the healthy who were buying insurance. And that consequence fed back into the first: As the cost of insurance rose, even more people waited until they became ill to buy it.

This led to an economic "death spiral." As premiums rose higher and higher, and the number of people buying insurance sank lower and lower, insurers began to leave the market entirely. As a result, the number of people without insurance increased dramatically.

This cycle happened repeatedly during the 1990s. For example, in 1993, the State of Washington reformed its individual insurance market by adopting the guaranteed issue and community rating requirements. Over the next three years, premiums rose by 78 percent and the number of people enrolled fell by 25 percent. By 1999, 17 of the State's 19 private insurers had left the market, and the remaining two had announced their intention to do so. Brief for America's Health Insurance Plans as *Amicus Curiae* 10–11.

For another example, also in 1993, New York adopted the guaranteed issue and community rating requirements. Over the next few years, some major insurers in the individ-

ual market raised premiums by roughly 40 percent. By 1996, these reforms had "effectively eliminated the commercial individual indemnity market in New York with the largest individual health insurer exiting the market." L. Wachenheim & H. Leida, The Impact of Guaranteed Issue and Community Rating Reforms on States' Individual Insurance Markets 38 (2012).

In 1996, Massachusetts adopted the guaranteed issue and community rating requirements and experienced similar results. But in 2006, Massachusetts added two more reforms: The Commonwealth required individuals to buy insurance or pay a penalty, and it gave tax credits to certain individuals to ensure that they could afford the insurance they were required to buy. Brief for Bipartisan Economic Scholars as *Amici Curiae* 24–25. The combination of these three reforms—insurance market regulations, a coverage mandate, and tax credits—reduced the uninsured rate in Massachusetts to 2.6 percent, by far the lowest in the Nation. Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform before the Senate Committee on Health, Education, Labor, and Pensions, 111th Cong., 1st Sess., 9 (2009).

B

The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. First, the Act adopts the guaranteed issue and community rating requirements. The Act provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U. S. C. §300gg–1(a). The Act also bars insurers from charging higher premiums on the basis of a person's health. §300gg.

Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS.

26 U. S. C. § 5000A. Congress recognized that, without an incentive, "many individuals would wait to purchase health insurance until they needed care." 42 U. S. C. § 18091(2)(I). So Congress adopted a coverage requirement to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Ibid.* In Congress's view, that coverage requirement was "essential to creating effective health insurance markets." *Ibid.* Congress also provided an exemption from the coverage requirement for anyone who has to spend more than eight percent of his income on health insurance. 26 U. S. C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii).

Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B. Individuals who meet the Act's requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual's insurer. 42 U. S. C. §§ 18081, 18082.

These three reforms are closely intertwined. As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. § 18091(2)(I). And the coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement. Given the relationship between these three reforms, the Act provided that they should take effect on the same day—January 1, 2014. See Affordable Care Act, § 1253, redesignated § 1255, 124 Stat. 162, 895; §§ 1401(e), 1501(d), *id.*, at 220, 249.

C

In addition to those three reforms, the Act requires the creation of an "Exchange" in each State where people can shop for insurance, usually online. 42 U. S. C. § 18031(b)(1).

An Exchange may be created in one of two ways. First, the Act provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." *Ibid.* Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services "shall . . . establish and operate such Exchange within the State." § 18041(c)(1).

The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits "shall be allowed" for any "applicable taxpayer." 26 U. S. C. § 36B(a). The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act [hereinafter 42 U. S. C. § 18031]." 26 U. S. C. §§ 36B(b)–(c) (emphasis added).

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. 77 Fed. Reg. 30378 (2012). As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through "an Exchange," 26 CFR § 1.36B–2 (2013), which is defined as "an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS," 45 CFR § 155.20 (2014). At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.

D

Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia's Exchange does not qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so they should not receive any tax credits. That would make the cost of buying insurance more

than eight percent of their income, which would exempt them from the Act's coverage requirement. 26 U. S. C. § 5000A(e)(1).

Under the IRS Rule, however, Virginia's Exchange *would* qualify as "an Exchange established by the State under [42 U. S. C. § 18031]," so petitioners would receive tax credits. That would make the cost of buying insurance *less* than eight percent of petitioners' income, which would subject them to the Act's coverage requirement. The IRS Rule therefore requires petitioners to either buy health insurance they do not want, or make a payment to the IRS.

Petitioners challenged the IRS Rule in Federal District Court. The District Court dismissed the suit, holding that the Act unambiguously made tax credits available to individuals enrolled through a Federal Exchange. *King* v. *Sebelius*, 997 F. Supp. 2d 415 (ED Va. 2014). The Court of Appeals for the Fourth Circuit affirmed. 759 F. 3d 358 (2014). The Fourth Circuit viewed the Act as "ambiguous and subject to at least two different interpretations." *Id.*, at 372. The court therefore deferred to the IRS's interpretation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). 759 F. 3d, at 376.

The same day that the Fourth Circuit issued its decision, the Court of Appeals for the District of Columbia Circuit vacated the IRS Rule in a different case, holding that the Act "unambiguously restricts" the tax credits to State Exchanges. *Halbig* v. *Burwell*, 758 F. 3d 390, 394 (2014). We granted certiorari in the present case. 574 U. S. 988 (2014).

II

The Affordable Care Act addresses tax credits in what is now Section 36B of the Internal Revenue Code. That section provides: "In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle . . . an amount equal to the premium assistance credit amount." 26 U. S. C. § 36B(a). Section 36B then defines

the term "premium assistance credit amount" as "the sum of the *premium assistance amounts* determined under paragraph (2) with respect to all *coverage months* of the taxpayer occurring during the taxable year." § 36B(b)(1) (emphasis added). Section 36B goes on to define the two italicized terms—"premium assistance amount" and "coverage month"—in part by referring to an insurance plan that is enrolled in through "an Exchange established by the State under [42 U. S. C. § 18031]." 26 U. S. C. §§ 36B(b)(2)(A), (c)(2)(A)(i).

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not "an Exchange established by the State under [42 U. S. C. § 18031]," and that the IRS Rule therefore contradicts Section 36B. Brief for Petitioners 18–20. The Government responds that the IRS Rule is lawful because the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" should be read to include Federal Exchanges. Brief for Respondents 20–25.

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U. S. 837. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. *Id.*, at 842–843. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Ibid.*

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Fed-

eral Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 160). It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. See *Gonzales* v. *Oregon*, 546 U. S. 243, 266–267 (2006). This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U. S., at 132. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.*, at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 290 (2010) (internal quotation marks omitted).

A

We begin with the text of Section 36B. As relevant here, Section 36B allows an individual to receive tax credits only if the individual enrolls in an insurance plan through "an Exchange established by the State under [42 U. S. C. § 18031]." In other words, three things must be true: First, the individual must enroll in an insurance plan through "an Exchange." Second, that Exchange must be "established by the State." And third, that Exchange must be established "under [42 U. S. C. § 18031]." We address each requirement in turn.

First, all parties agree that a Federal Exchange qualifies as "an Exchange" for purposes of Section 36B. See Brief for Petitioners 22; Brief for Respondents 22. Section 18031 provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." § 18031(b)(1). Although phrased as a requirement, the Act gives the States "flexibility" by allowing them to "elect" whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary "shall . . . establish and operate *such Exchange* within the State." § 18041(c)(1) (emphasis added).

By using the phrase "such Exchange," Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031. See Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). In other words, State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes. Although State and Federal Exchanges are established by different sovereigns, Sections 18031 and 18041 do not suggest that they differ in any meaningful way. A Federal Exchange therefore counts as "an Exchange" under Section 36B.

Second, we must determine whether a Federal Exchange is "established by the State" for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines "State" to mean "each of the 50 States and the District of Columbia"—a definition that does not include the Federal Government. 42 U. S. C. § 18024(d). But when read in context, "with a view to [its] place in the overall statutory scheme," the meaning of the phrase "established by the State" is not so clear. *Brown & Williamson*, 529 U. S., at 133 (internal quotation marks omitted).

After telling each State to establish an Exchange, Section 18031 provides that all Exchanges "shall make available qualified health plans to qualified individuals." 42 U. S. C. § 18031(d)(2)(A). Section 18032 then defines the term "qualified individual" in part as an individual who "resides in the State that established the Exchange." § 18032(f)(1)(A). And that's a problem: If we give the phrase "the State that established the Exchange" its most natural meaning, there would be *no* "qualified individuals" on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on *every* Exchange. As we just mentioned, the Act requires all Exchanges to "make available qualified health plans to qualified individuals"—something an Exchange could not do if there were no such individuals. § 18031(d)(2)(A). And the Act tells the Exchange, in deciding which health plans to offer, to consider "the interests of qualified individuals . . . in the State or States in which such Exchange operates"—again, something the Exchange could not do if qualified individuals did not exist. § 18031(e)(1)(B). This problem arises repeatedly throughout the Act. See, *e. g.*, § 18031(b)(2) (allowing a State to create "one Exchange . . . for providing . . . services to both qualified individuals and qualified small employers," rather than creating separate Exchanges for those two groups).[1]

These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context.

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[1] The dissent argues that one would "naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals." *Post*, at 508 (opinion of SCALIA, J.). But the fact that the dissent's interpretation would make so many parts of the Act "inapplicable" to Federal Exchanges is precisely what creates the problem. It would be odd indeed for Congress to write such detailed instructions about customers on a State Exchange, while having nothing to say about those on a Federal Exchange.

Third, we must determine whether a Federal Exchange is established "under [42 U. S. C. § 18031]." This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to "establish and operate such Exchange." But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term "Exchange" to mean "an American Health Benefit Exchange established under section 18031." § 300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to "establish and operate such 'American Health Benefit Exchange established under section 18031.' " That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an "Exchange" at all. See *Halbig*, 758 F. 3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031).

This interpretation of "under [42 U. S. C. § 18031]" fits best with the statutory context. All of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision. In addition, every time the Act uses the word "Exchange," the definitional provision requires that we substitute the phrase "Exchange established under section 18031." If Federal Exchanges were not established under Section 18031, therefore, literally none of the Act's requirements would apply to them. Finally, the Act repeatedly uses the phrase "established under [42 U. S. C. § 18031]" in situations where it would make no sense to distinguish between State and Federal Exchanges. See, *e. g.*, 26 U. S. C. § 125(f)(3)(A) (2012 ed., Supp. I) ("The term 'qualified benefit' shall not include any qualified health plan . . . offered through an Exchange established under [42 U. S. C. § 18031]"); 26 U. S. C. § 6055(b)(1)(B)(iii)(I) (2012 ed.) (requiring insurers to report

whether each insurance plan they provided "is a qualified health plan offered through an Exchange established under [42 U. S. C. § 18031]"). A Federal Exchange may therefore be considered one established "under [42 U. S. C. § 18031]."

The upshot of all this is that the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish "such Exchange." § 18041. And by using the words "such Exchange," the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.[2]

The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. For example, the Act requires all Exchanges to create outreach

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[2] The dissent argues that the phrase "such Exchange" does not suggest that State and Federal Exchanges "are in all respects equivalent." *Post*, at 505. In support, it quotes the Constitution's Elections Clause, which makes the state legislature primarily responsible for prescribing election regulations, but allows Congress to "make or alter such Regulations." Art. I, § 4, cl. 1. No one would say that state and federal election regulations are in all respects equivalent, the dissent contends, so we should not say that State and Federal Exchanges are. But the Elections Clause does not precisely define what an election regulation must look like, so Congress can prescribe regulations that differ from what the State would prescribe. The Affordable Care Act *does* precisely define what an Exchange must look like, however, so a Federal Exchange cannot differ from a State Exchange.

programs that must "distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B." § 18031(i)(3)(B). The Act also requires all Exchanges to "establish and make available by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B." § 18031(d)(4)(G). And the Act requires all Exchanges to report to the Treasury Secretary information about each health plan they sell, including the "aggregate amount of any advance payment of such credit," "[a]ny information . . . necessary to determine eligibility for, and the amount of, such credit," and any "[i]nformation necessary to determine whether a taxpayer has received excess advance payments." 26 U. S. C. § 36B(f)(3). If tax credits were not available on Federal Exchanges, these provisions would make little sense.

Petitioners and the dissent respond that the words "established by the State" would be unnecessary if Congress meant to extend tax credits to both State and Federal Exchanges. Brief for Petitioners 20; *post*, at 502. But "our preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004); see also *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385 (2013) ("The canon against surplusage is not an absolute rule"). And specifically with respect to this Act, rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute.

The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." Cannan, A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History, 105 L. Lib. J. 131, 163 (2013). And Con-

gress passed much of the Act using a complicated budgetary procedure known as "reconciliation," which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. *Id.*, at 159–167. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. Cf. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545 (1947) (describing a cartoon "in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.' ").

Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U. S., at 320 (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.

B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs.* v.

Dublino, 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").[3]

As discussed above, Congress based the Affordable Care Act on three major reforms: first, the guaranteed issue and community rating requirements; second, a requirement that individuals maintain health insurance coverage or make a payment to the IRS; and third, the tax credits for individuals with household incomes between 100 percent and 400 percent of the federal poverty line. In a State that establishes its own Exchange, these three reforms work together to expand insurance coverage. The guaranteed issue and community rating requirements ensure that anyone can buy insurance; the coverage requirement creates an incentive for people to do so before they get sick; and the tax credits—it is hoped—make insurance more affordable. Together, those reforms "minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U. S. C. § 18091(2)(I).

Under petitioners' reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent

[3] The dissent notes that several other provisions in the Act use the phrase "established by the State," and argues that our holding applies to each of those provisions. *Post*, at 502. But "the presumption of consistent usage readily yields to context," and a statutory term may mean different things in different places. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320 (2014) (internal quotation marks omitted). That is particularly true when, as here, "the Act is far from a *chef d'oeuvre* of legislative draftsmanship." *Ibid.* Because the other provisions cited by the dissent are not at issue here, we do not address them.

of an individual's income. 26 U. S. C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. HHS, A. Burke, A. Misra, & S. Sheingold, Premium Affordability, Competition, and Choice in the Health Insurance Marketplace 5 (2014); Brief for Bipartisan Economic Scholars as *Amici Curiae* 19–20. If petitioners are right, therefore, only one of the Act's three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. § 18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 702 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) ("Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all."). Congress

made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well.[4]

Petitioners respond that Congress was not worried about the effects of withholding tax credits from States with Federal Exchanges because "Congress evidently believed it was offering states a deal they would not refuse." Brief for Petitioners 36. Congress may have been wrong about the States' willingness to establish their own Exchanges, petitioners continue, but that does not allow this Court to rewrite the Act to fix that problem. That is particularly true, petitioners conclude, because the States likely *would* have created their own Exchanges in the absence of the IRS Rule, which eliminated any incentive that the States had to do so. *Id.*, at 36–38.

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[4] The dissent argues that our analysis "show[s] only that the statutory scheme contains a flaw," one "that appeared as well in other parts of the Act." *Post*, at 511. For support, the dissent notes that the guaranteed issue and community rating requirements might apply in the federal territories, even though the coverage requirement does not. *Post*, at 511–512. The confusion arises from the fact that the guaranteed issue and community rating requirements were added as amendments to the Public Health Service Act, which contains a definition of the word "State" that includes the territories, 42 U. S. C. § 201(f), while the later-enacted Affordable Care Act contains a definition of the word "State" that excludes the territories, § 18024(d). The predicate for the dissent's point is therefore uncertain at best.

The dissent also notes that a different part of the Act "established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies." *Post*, at 511. True enough. But the fact that Congress was willing to accept the risk of adverse selection in a comparatively minor program does not show that Congress was willing to do so in the general health insurance program—the very heart of the Act. Moreover, Congress said expressly that it wanted to avoid adverse selection in the *health* insurance markets. § 18091(2)(I).

Section 18041 refutes the argument that Congress believed it was offering the States a deal they would not refuse. That section provides that, if a State elects not to establish an Exchange, the Secretary "shall . . . establish and operate such Exchange within the State." 42 U. S. C. § 18041(c)(1)(A). The whole point of that provision is to create a federal fallback in case a State chooses not to establish its own Exchange. Contrary to petitioners' argument, Congress did not believe it was offering States a deal they would not refuse—it expressly addressed what would happen if a State *did* refuse the deal.

C

Finally, the structure of Section 36B itself suggests that tax credits are not limited to State Exchanges. Section 36B(a) initially provides that tax credits "shall be allowed" for any "applicable taxpayer." Section 36B(c)(1) then defines an "applicable taxpayer" as someone who (among other things) has a household income between 100 percent and 400 percent of the federal poverty line. Together, these two provisions appear to make anyone in the specified income range eligible to receive a tax credit.

According to petitioners, however, those provisions are an empty promise in States with a Federal Exchange. In their view, an applicable taxpayer in such a State would be *eligible* for a tax credit—but the *amount* of that tax credit would always be zero. And that is because—diving several layers down into the Tax Code—Section 36B says that the amount of the tax credits shall be "an amount equal to the premium assistance credit amount," § 36B(a); and then says that the term "premium assistance credit amount" means "the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year," § 36B(b)(1); and then says that the term "premium assistance amount" is tied to the amount of the monthly premium for insurance purchased on "an Exchange established by the State under [42 U. S. C. § 18031]," § 36B(b)(2); and then says that the term "coverage

month" means any month in which the taxpayer has insurance through "an Exchange established by the State under [42 U. S. C. § 18031]," § 36B(c)(2)(A)(i).

We have held that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). But in petitioners' view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of "applicable taxpayer" or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.[5]

D

Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. § 18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 343 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and at-

[5] The dissent cites several provisions that "make[ ] taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero." *Post*, at 508 (citing 26 U. S. C. §§ 24, 32, 35, 36). None of those provisions, however, is crucial to the viability of a comprehensive program like the Affordable Care Act. No one suggests, for example, that the first-time-homebuyer tax credit, § 36, is essential to the viability of federal housing regulation.

tempted interpretation of legislation becomes legislation itself." *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939). For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

* * *

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—"to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

Affirmed.

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

The Court holds that when the Patient Protection and Affordable Care Act says "Exchange established by the State" it means "Exchange established by the State or the Federal Government." That is of course quite absurd, and the Court's 21 pages of explanation make it no less so.

I

The Patient Protection and Affordable Care Act makes major reforms to the American health-insurance market. It provides, among other things, that every State "shall . . . establish an American Health Benefit Exchange"—a marketplace where people can shop for health-insurance plans. 42 U. S. C. § 18031(b)(1). And it provides that if a State does not comply with this instruction, the Secretary of Health and Human Services must "establish and operate such Exchange within the State." § 18041(c)(1).

A separate part of the Act—housed in § 36B of the Internal Revenue Code—grants "premium tax credits" to subsidize certain purchases of health insurance made on Exchanges. The tax credit consists of "premium assistance amounts" for "coverage months." 26 U. S. C. § 36B(b)(1). An individual has a coverage month only when he is covered by an insurance plan "that was enrolled in through an Exchange established by the State under [§ 18031]." § 36B(c)(2)(A). And the law ties the size of the premium assistance amount to the premiums for health plans which cover the individual "and which were enrolled in through an Exchange established by the State under [§ 18031]." § 36B(b)(2)(A). The premium assistance amount further depends on the cost of certain other insurance plans "offered through the same Exchange." § 36B(b)(3)(B)(i).

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under § 36B, an individual must enroll in an insurance plan through an "Exchange established by the State." The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who

buy health insurance through such an Exchange get no money under § 36B.

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

II

The Court interprets § 36B to award tax credits on both federal and state Exchanges. It accepts that the "most natural sense" of the phrase "Exchange established by the State" is an Exchange established by a State. *Ante*, at 488. (Understatement, thy name is an opinion on the Affordable Care Act!) Yet the opinion continues, with no semblance of shame, that "it is also possible that the phrase refers to *all* Exchanges—both State and Federal." *Ante*, at 490. (Impossible possibility, thy name is an opinion on the Affordable Care Act!) The Court claims that "the context and structure of the Act compel [it] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *Ante*, at 497.

I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Con-

text always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that lawmakers use words in "their natural and ordinary signification." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 12 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today's interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that "Exchange established by the State" means "Exchange established by the State *or the Federal Government*"? Little short of an express statutory definition could justify adopting this singular reading. Yet the only pertinent definition here provides that "State" means "each of the 50 States and the District of Columbia." 42 U. S. C. § 18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State.

Far from offering the overwhelming evidence of meaning needed to justify the Court's interpretation, other contextual clues undermine it at every turn. To begin with, other parts of the Act sharply distinguish between the establishment of an Exchange by a State and the establishment of an Exchange by the Federal Government. The States' authority to set up Exchanges comes from one provision, § 18031(b); the Secretary's authority comes from an entirely different provision, § 18041(c). Funding for States to establish Exchanges comes from one part of the law, § 18031(a); funding for the Secretary to establish Exchanges comes from an entirely different part of the law, § 18121. States generally run state-created Exchanges; the Secretary generally runs federally created Exchanges. § 18041(b)–(c). And the Sec-

retary's authority to set up an Exchange in a State depends upon the State's "*[f]ailure* to establish [an] Exchange." § 18041(c) (emphasis added). Provisions such as these destroy any pretense that a federal Exchange is in some sense also established by a State.

Reading the rest of the Act also confirms that, as relevant here, there are *only* two ways to set up an Exchange in a State: establishment by a State and establishment by the Secretary. §§ 18031(b), 18041(c). So saying that an Exchange established by the Federal Government is "established by the State" goes beyond giving words bizarre meanings; it leaves the limiting phrase "by the State" with no operative effect at all. That is a stark violation of the elementary principle that requires an interpreter "to give effect, if possible, to every clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883). In weighing this argument, it is well to remember the difference between giving a term a meaning that duplicates another part of the law, and giving a term no meaning at all. Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void). Lawmakers do not, however, tend to use terms that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803). So while the rule against treating a term as a redundancy is far from categorical, the rule against treating it as a nullity is as close to absolute as interpretive principles get. The Court's reading does not merely give "by the State" a duplicative effect; it causes the phrase to have no effect whatever.

Making matters worse, the reader of the whole Act will come across a number of provisions beyond § 36B that refer to the establishment of Exchanges by States. Adopting the Court's interpretation means nullifying the term "by the State" not just once, but again and again throughout the Act. Consider for the moment only those parts of the Act that

mention an "Exchange established by the State" in connection with tax credits:

- The formula for calculating the amount of the tax credit, as already explained, twice mentions "an Exchange established by the State." 26 U. S. C. § 36B(b)(2)(A), (c)(2)(A)(i).
- The Act directs States to screen children for eligibility for "[tax credits] under section 36B" and for "any other assistance or subsidies available for coverage obtained through" an "Exchange established by the State." 42 U. S. C. § 1396w–3(b)(1)(B)–(C).
- The Act requires "an Exchange established by the State" to use a "secure electronic interface" to determine eligibility for (among other things) tax credits. § 1396w–3(b)(1)(D).
- The Act authorizes "an Exchange established by the State" to make arrangements under which other state agencies "determine whether a State resident is eligible for [tax credits] under section 36B." § 1396w–3(b)(2).
- The Act directs States to operate Web sites that allow anyone "who is eligible to receive [tax credits] under section 36B" to compare insurance plans offered through "an Exchange established by the State." § 1396w–3(b)(4).
- One of the Act's provisions addresses the enrollment of certain children in health plans "offered through an Exchange established by the State" and then discusses the eligibility of these children for tax credits. § 1397ee(d)(3)(B).

It is bad enough for a court to cross out "by the State" once. But seven times?

Congress did not, by the way, repeat "Exchange established by the State under [§ 18031]" by rote throughout the Act. Quite the contrary, clause after clause of the law uses a more general term such as "Exchange" or "Exchange es-

tablished under [§ 18031]." See, *e. g.*, 42 U. S. C. §§ 18031(k), 18033; 26 U. S. C. § 6055. It is common sense that any speaker who says "Exchange" some of the time, but "Exchange established by the State" the rest of the time, probably means something by the contrast.

Equating establishment "by the State" with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any "Exchange established by the State" uses a "secure electronic interface" to determine an individual's eligibility for various benefits (including tax credits). 42 U. S. C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by "an Exchange established by the State." § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides "Assistance to States to establish American Health Benefit Exchanges" and directs the Secretary to renew this funding "if the State . . . is making progress . . . toward . . . establishing an Exchange." § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only "for purposes of the tax credits." *Ante*, at 490. (Contrivance, thy name is an opinion on the Affordable Care Act!)

It is probably piling on to add that the Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so. The Act includes a clause providing that "[a] *territory* that . . . establishes . . . an Exchange . . . shall be treated as a State" for certain purposes. § 18043(a) (emphasis added). Tellingly, it does not include a comparable clause providing that

the *Secretary* shall be treated as a State for purposes of § 36B when *she* establishes an Exchange.

Faced with overwhelming confirmation that "Exchange established by the State" means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used "by the State" to mean "by the State or not by the State."

The Court emphasizes that if a State does not set up an Exchange, the Secretary must establish "such Exchange." § 18041(c). It claims that the word "such" implies that federal and state Exchanges are "the same." *Ante*, at 490. To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter *such Regulations*." Art. I, § 4, cl. 1 (emphasis added). Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit. The Court's argument also overlooks the rudimentary principle that a specific provision governs a general one. Even if it were true that the term "such Exchange" in § 18041(c) implies that federal and state Exchanges are the same in general, the term "established by the State" in § 36B makes plain that they differ when it comes to tax credits in particular.

The Court's next bit of interpretive jiggery-pokery involves other parts of the Act that purportedly presuppose the availability of tax credits on both federal and state Exchanges. *Ante*, at 490–491. It is curious that the Court is willing to subordinate the express words of the section that grants tax credits to the mere implications of other provisions with only tangential connections to tax credits. One would think that interpretation would work the other way around. In any event, each of the provisions mentioned by the Court is perfectly consistent with limiting tax credits to state Exchanges. One of them says that the minimum functions of an Exchange include (alongside several tasks that have nothing to do with tax credits) setting up an electronic calculator that shows "the actual cost of coverage after the application of any premium tax credit." 42 U. S. C. § 18031(d)(4)(G). What stops a federal Exchange's electronic calculator from telling a customer that his tax credit is zero? Another provision requires an Exchange's outreach program to educate the public about health plans, to facilitate enrollment, and to "distribute fair and impartial information" about enrollment and "the availability of premium tax credits." § 18031(i)(3)(B). What stops a federal Exchange's outreach program from fairly and impartially telling customers that no tax credits are available? A third provision requires an Exchange to report information about each insurance plan sold—including level of coverage, premium, name of the insured, and "amount of any advance payment" of the tax credit. 26 U. S. C. § 36B(f)(3). What stops a federal Exchange's report from confirming that no tax credits have been paid out?

The Court persists that these provisions "would make little sense" if no tax credits were available on federal Exchanges. *Ante*, at 491. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provi-

sions all lined up perfectly with each other. This Court "does not revise legislation . . . just because the text as written creates an apparent anomaly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 794 (2014). At any rate, the provisions cited by the Court are not particularly unusual. Each requires an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft "a single statutory provision" to cover "different kinds" of situations. *Robers* v. *United States*, 572 U. S. 639, 643 (2014). Lawmakers need not, and often do not, "write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed." *Id.*, at 643–644.

Roaming even farther afield from § 36B, the Court turns to the Act's provisions about "qualified individuals." *Ante,* at 488. Qualified individuals receive favored treatment on Exchanges, although customers who are not qualified individuals may also shop there. See *Halbig* v. *Burwell*, 758 F. 3d 390, 404–405 (CADC 2014). The Court claims that the Act must equate federal and state establishment of Exchanges when it defines a qualified individual as someone who (among other things) lives in the "State that established the Exchange," 42 U. S. C. § 18032(f)(1)(A). Otherwise, the Court says, there would be no qualified individuals on federal Exchanges, contradicting (for example) the provision requiring every Exchange to take the " 'interests of qualified individuals' " into account when selecting health plans. *Ante,* at 488 (quoting § 18031(e)(1)(b)). Pure applesauce. Imagine that a university sends around a bulletin reminding every professor to take the "interests of graduate students" into account when setting office hours, but that some professors teach only undergraduates. Would anybody reason that the bulletin implicitly presupposes that every professor has "graduate students," so that "graduate students" must really mean "graduate or undergraduate students"? Surely not.

Just as one naturally reads instructions about graduate students to be inapplicable to the extent a particular professor has no such students, so too would one naturally read instructions about qualified individuals to be inapplicable to the extent a particular Exchange has no such individuals. There is no need to rewrite the term "State that established the Exchange" in the definition of "qualified individual," much less a need to rewrite the separate term "Exchange established by the State" in a separate part of the Act.

Least convincing of all, however, is the Court's attempt to uncover support for its interpretation in "the structure of Section 36B itself." *Ante*, at 496. The Court finds it strange that Congress limited the tax credit to state Exchanges in the formula for calculating the *amount* of the credit, rather than in the provision defining the range of taxpayers *eligible* for the credit. Had the Court bothered to look at the rest of the Tax Code, it would have seen that the structure it finds strange is in fact quite common. Consider, for example, the many provisions that initially make taxpayers of all incomes eligible for a tax credit, only to provide later that the amount of the credit is zero if the taxpayer's income exceeds a specified threshold. See, *e. g.*, 26 U. S. C. § 24 (child tax credit); § 32 (earned-income tax credit); § 36 (first-time-homebuyer tax credit). Or consider, for an even closer parallel, a neighboring provision that initially makes taxpayers of all States eligible for a credit, only to provide later that the amount of the credit may be zero if the taxpayer's State does not satisfy certain requirements. See § 35 (health-insurance-costs tax credit). One begins to get the sense that the Court's insistence on reading things in context applies to "established by the State," but to nothing else.

For what it is worth, lawmakers usually draft tax-credit provisions the way they do—*i. e.*, the way they drafted § 36B—because the mechanics of the credit require it. Many Americans move to new States in the middle of the year. Mentioning state Exchanges in the definition of "coverage

month"—rather than (as the Court proposes) in the provisions concerning taxpayers' eligibility for the credit—accounts for taxpayers who live in a State with a state Exchange for a part of the year, but a State with a federal Exchange for the rest of the year. In addition, § 36B awards a credit with respect to insurance plans "which cover the taxpayer, *the taxpayer's spouse, or any dependent . . . of the taxpayer* and which were enrolled in through an Exchange established by the State." § 36B(b)(2)(A) (emphasis added). If Congress had mentioned state Exchanges in the provisions discussing taxpayers' eligibility for the credit, a taxpayer who buys insurance from a federal Exchange would get no money, even if he has a spouse or dependent who buys insurance from a state Exchange—say a child attending college in a different State. It thus makes perfect sense for "Exchange established by the State" to appear where it does, rather than where the Court suggests. Even if that were not so, of course, its location would not make it any less clear.

The Court has not come close to presenting the compelling contextual case necessary to justify departing from the ordinary meaning of the terms of the law. Quite the contrary, context only underscores the outlandishness of the Court's interpretation. Reading the Act as a whole leaves no doubt about the matter: "Exchange established by the State" means what it looks like it means.

III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. As relevant here, the Act makes three major reforms. The guaranteed-issue and community-rating requirements prohibit insurers from considering a customer's health when deciding whether to sell insurance and how much to charge, 42 U. S. C. §§ 300gg, 300gg–1; its famous individual mandate requires everyone to maintain insurance coverage or to pay what the Act calls a "penalty," 26 U. S. C. § 5000A(b)(1), and what we

have nonetheless called a tax, see *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 570 (2012); and its tax credits help make insurance more affordable. The Court reasons that Congress intended these three reforms to "work together to expand insurance coverage"; and because the first two apply in every State, so must the third. *Ante*, at 493.

This reasoning suffers from no shortage of flaws. To begin with, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner* v. *Solis*, 568 U. S. 41, 56, n. 4 (2012). Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear? To mention just the highlights, the Court's interpretation clashes with a statutory definition, renders words inoperative in at least seven separate provisions of the Act, overlooks the contrast between provisions that say "Exchange" and those that say "Exchange established by the State," gives the same phrase one meaning for purposes of tax credits but an entirely different meaning for other purposes, and (let us not forget) contradicts the ordinary meaning of the words Congress used. On the other side of the ledger, the Court has come up with nothing more than a general provision that turns out to be controlled by a specific one, a handful of clauses that are consistent with either understanding of establishment by the State, and a resemblance between the tax-credit provision and the rest of the Tax Code. If that is all it takes to make something ambiguous, everything is ambiguous.

Having gone wrong in consulting statutory purpose at all, the Court goes wrong again in analyzing it. The purposes of a law must be "collected chiefly from its words," not "from extrinsic circumstances." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202 (1819) (Marshall, C. J.). Only by concentrating on the law's terms can a judge hope to uncover the

scheme *of the statute*, rather than some other scheme that the judge thinks desirable. Like it or not, the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits. The guaranteed-issue and community-rating requirements continue to ensure that insurance companies treat all customers the same no matter their health, and the individual mandate continues to encourage people to maintain coverage, lest they be "taxed."

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." *Ante*, at 492. If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says. Moreover, it is a flaw that appeared as well in other parts of the Act. A different title established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies. §§ 8001–8002, 124 Stat. 828–847 (2010). This program never came into effect "only because Congress, in response to actuarial analyses predicting that the [program] would be fiscally unsustainable, repealed the provision in 2013." *Halbig*, 758 F. 3d, at 410. How could the Court say that Congress would never dream of combining guaranteed-issue and community-rating requirements with a narrow individual mandate, when it combined those requirements with *no* individual mandate in the context of long-term-care insurance?

Similarly, the Department of Health and Human Services originally interpreted the Act to impose guaranteed-issue and community-rating requirements in the Federal Territories, even though the Act plainly does not make the individual mandate applicable there. *Ibid.*; see 26 U. S. C.

§ 5000A(f)(4); 42 U. S. C. § 201(f). "This combination, predictably, [threw] individual insurance markets in the territories into turmoil." *Halbig, supra,* at 410. Responding to complaints from the Territories, the Department at first insisted that it had "no statutory authority" to address the problem and suggested that the Territories "seek legislative relief from Congress" instead. Letter from G. Cohen, Director of the Center for Consumer Information and Insurance Oversight, to S. Igisomar, Secretary of Commerce of the Commonwealth of Northern Mariana Islands (July 12, 2013). The Department changed its mind a year later, after what it described as "a careful review of [the] situation and the relevant statutory language." Letter from M. Tavenner, Administrator of the Centers for Medicare and Medicaid Services, to G. Francis, Insurance Commissioner of the Virgin Islands (July 16, 2014). How could the Court pronounce it "implausible" for Congress to have tolerated instability in insurance markets in States with federal Exchanges, *ante,* at 17, when even the Government maintained until recently that Congress did exactly that in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands?

Compounding its errors, the Court forgets that it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way. No law pursues just one purpose at all costs, and no statutory scheme encompasses just one element. Most relevant here, the Affordable Care Act displays a congressional preference for state participation in the establishment of Exchanges: Each State gets the first opportunity to set up its Exchange, 42 U. S. C. § 18031(b); States that take up the opportunity receive federal funding for "activities . . . related to establishing" an Exchange, § 18031(a)(3); and the Secretary may establish an Exchange in a State only as a fallback, § 18041(c). But setting up and running an Exchange involve significant burdens—meeting strict deadlines, § 18041(b), implementing

requirements related to the offering of insurance plans, § 18031(d)(4), setting up outreach programs, § 18031(i), and ensuring that the Exchange is self-sustaining by 2015, § 18031(d)(5)(A). A State would have much less reason to take on these burdens if its citizens could receive tax credits no matter who establishes its Exchange. (Now that the Internal Revenue Service has interpreted § 36B to authorize tax credits everywhere, by the way, 34 States have failed to set up their own Exchanges. *Ante*, at 483.) So even if making credits available on all Exchanges advances the goal of improving healthcare markets, it frustrates the goal of encouraging state involvement in the implementation of the Act. *This* is what justifies going out of our way to read "established by the State" to mean "established by the State or not established by the State"?

Worst of all for the repute of today's decision, the Court's reasoning is largely self-defeating. The Court predicts that making tax credits unavailable in States that do not set up their own Exchanges would cause disastrous economic consequences there. If that is so, however, wouldn't one expect States to react by setting up their own Exchanges? And wouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work *and* promoting state involvement in the Act's implementation? The Court protests that the very existence of a federal fallback shows that Congress expected that some States might fail to set up their own Exchanges. *Ante*, at 496. So it does. It does not show, however, that Congress expected the number of recalcitrant States to be particularly large. The more accurate the Court's dire economic predictions, the smaller that number is likely to be. That reality destroys the Court's pretense that applying the law as written would imperil "the viability of the entire Affordable Care Act." *Ante*, at 497. All in all, the Court's arguments about the law's purpose and design are no more convincing than its arguments about context.

IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante*, at 491. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie* v. *United States Trustee*, 540 U. S. 526, 542 (2004) (internal quotation marks omitted). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the Affordable Care Act "creates three separate Section 1563s." *Ante*, at 491. But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges*, 4 Wheat., at 203. But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

Let us not forget that the term "Exchange established by the State" appears twice in § 36B and five more times in other parts of the Act that mention tax credits. What are the odds, do you think, that the same slip of the pen occurred in seven separate places? No provision of the Act—none at all—contradicts the limitation of tax credits to state Exchanges. And as I have already explained, uses of the term "Exchange established by the State" beyond the context of tax credits look anything but accidental. *Supra*, at 503–504. If there was a mistake here, context suggests it was a substan-

tive mistake in designing this part of the law, not a technical mistake in transcribing it.

V

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989).

Trying to make its judge-empowering approach seem respectful of congressional authority, the Court asserts that its decision merely ensures that the Affordable Care Act operates the way Congress "meant [it] to operate." *Ante*, at 494. First of all, what makes the Court so sure that Congress "meant" tax credits to be available everywhere? Our only evidence of what Congress meant comes from the terms of the law, and those terms show beyond all question that tax credits are available only on state Exchanges. More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, not by the unenacted will of our lawmakers. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, *supra*, at 542. In the meantime, this Court "has no roving license . . . to disregard clear language

simply on the view that . . . Congress 'must have intended' something broader." *Bay Mills*, 572 U. S., at 794.

Even less defensible, if possible, is the Court's claim that its interpretive approach is justified because this Act "does not reflect the type of care and deliberation that one might expect of such significant legislation." *Ante,* at 492. It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.

Rather than rewriting the law under the pretense of interpreting it, the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges. If Congress values above everything else the Act's applicability across the country, it could make tax credits available in every Exchange. If it prizes state involvement in the Act's implementation, it could continue to limit tax credits to state Exchanges while taking other steps to mitigate the economic consequences predicted by the Court. If Congress wants to accommodate both goals, it could make tax credits available everywhere while offering new incentives for States to set up their own Exchanges. And if Congress thinks that the present design of the Act works well enough, it could do nothing. Congress could also do something else altogether, entirely abandoning the structure of the Affordable Care Act. The Court's insistence on making a choice that should be made by Congress both aggrandizes judicial power and encourages congressional lassitude.

Just ponder the significance of the Court's decision to take matters into its own hands. The Court's revision of the law authorizes the Internal Revenue Service to spend tens of

billions of dollars every year in tax credits on federal Exchanges. It affects the price of insurance for millions of Americans. It diminishes the participation of the States in the implementation of the Act. It vastly expands the reach of the Act's individual mandate, whose scope depends in part on the availability of credits. What a parody today's decision makes of Hamilton's assurances to the people of New York: "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over . . . the purse; no direction . . . of the wealth of society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

* * *

Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual "shall" maintain insurance or else pay a "penalty." 26 U. S. C. § 5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U. S., at 547–575 (principal opinion). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing *all* Medicaid funding. 42 U. S. C. § 1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the *incremental* funds associated with the Medicaid expansion. 567 U. S., at 575–588 (principal opinion). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act

that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

I dissent.

Syllabus

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS ET AL. *v.* INCLUSIVE COMMUNITIES PROJECT, INC., ET AL.

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

No. 13–1371. Argued January 21, 2015—Decided June 25, 2015

The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§ 804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered nondiscriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of "race, color, religion, or national origin." In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

Held: Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 530–547.

(a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both § 703(a)(2) of Title VII of the Civil Rights Act of 1964 and § 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under *Griggs* v. *Duke Power Co.*, 401 U. S. 424, and *Smith* v. *City of Jackson*, 544 U. S. 228, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci* v. *DeStefano*, 557 U. S. 557, 578. These cases provide essential background and instruction in the case at issue. Pp. 530–533.

(b) Under the FHA it is unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic, § 804(a), or "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic, § 805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, *e. g.*, *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 16–18. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e. g.*, if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs*, *supra*, at 431. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 533–546.

747 F. 3d 275, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 547. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 557.

Scott A. Keller, Solicitor General of Texas, argued the cause for petitioners. With him on the briefs were *Ken Paxton*, Attorney General, *Charles E. Roy*, First Assistant Attorney General, *Joseph D. Hughes*, *Beth Klusmann*, and *Alex Potapov*, Assistant Solicitors General, and *Greg Abbott*, former Attorney General, *Jonathan F. Mitchell*, former Solicitor General, *Daniel T. Hodge*, former First Assistant Attorney General, and *Andrew S. Oldham*, former Deputy Solicitor General. *Brent M. Rosenthal* filed a brief for respondent Frazier Revitalization Inc. under this Court's Rule 12.6 in support of petitioners.

Michael M. Daniel argued the cause for respondent Inclusive Communities Project, Inc., et al. With him on the brief was *Laura B. Beshara*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on

Counsel

the brief were *Acting Assistant Attorney General Gupta*, *Deputy Solicitor General Gershengorn*, *Sarah E. Harrington*, *Dennis J. Dimsey*, *April J. Anderson*, and *Michelle Aronowitz*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Lisa S. Blatt*, *Nancy L. Perkins*, and *Anthony J. Franze*; for the American Civil Rights Union by *Peter J. Ferrara*; for the American Financial Services Association et al. by *Paul F. Hancock* and *Andrew C. Glass*; for the American Institute Association et al. by *Kannon K. Shanmugam* and *Allison B. Jones*; for the Consumer Data Industry Association et al. by *Christopher A. Mohr*; for the Houston Housing Authority by *Michael W. Skojec* and *Bryan J. Harrison*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes*, *Robert D. Popper*, and *Chris Fedeli*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard*, *Ralph W. Kasarda*, and *Joshua P. Thompson*; for the Project on Fair Representation by *William S. Consovoy*, *Thomas R. McCarthy*, and *J. Michael Connolly*; for the Texas Apartment Association by *Sean D. Jordan* and *John Sepehri*; for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp*; for Gail Heriot et al. by *Anthony T. Caso* and *Ms. Heriot*, *pro se*; and for James P. Scanlan by *Mr. Scanlan*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *Martha Coakley*, Attorney General of Massachusetts, *Jonathan B. Miller* and *Genevieve C. Nadeau*, Assistant Attorneys General, *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Kristen Clarke*, Chief, Civil Rights Bureau, and *Matthew W. Grieco*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Lori Swanson* of Minnesota, *Chris Koster* of Missouri, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Sean D. Reyes* of Utah, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City of San Francisco et al. by *David T. Goldberg*, *Dennis J. Herrera*, *Christine Van Aken*, *Laura S. Burton*, *George Nilson*, *William R. Phelan, Jr.*, *Herman Morris*, *Michael B. Brough*, *Teresa Knox*, *Barry A. Lindahl*, *Zachary W. Carter*, *Peter S. Holmes*, *Michael N. Feuer*, *James P. Clark*, and *Adam Loukx*; for the American Planning Association et al. by *Edward Sullivan*; for Current and Former Members of Congress by *Deepak Gupta*; for Housing Scholars by *Daniel R. Shulman* and *Stephen Menendian*; for the Lawyers' Com-

JUSTICE KENNEDY delivered the opinion of the Court.

The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate ra-

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mittee for Civil Rights Under Law et al. by *Bill Lann Lee*, *Philip D. Tegeler*, *Thomas Silverstein*, *Alan Jenkins*, *Wade J. Henderson*, and *Lisa M. Bornstein*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Leslie M. Proll*, *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*, and *Rachel M. Kleinman*; for the National Association for the Advancement of Colored People et al. by *Stephen M. Dane*; for the National Black Law Students Association by *Deborah N. Archer*; for the National Community Land Trust Network by *Joseph M. Sellers*; for the National Fair Housing Alliance et al. by *John P. Relman* and *Sasha Samberg-Champion*; for Real Estate Professional Trade Organizations by *Michael B. de Leeuw* and *Linda Riefberg*; for Sociologists et al. by *Eva Paterson*, *Richard A. Rothschild*, *William C. Kennedy*, and *Rachel D. Godsil*; and for John R. Dunne et al. by *Samuel R. Bagenstos*.

Briefs of *amici curiae* were filed for AARP et al. by *Susan Ann Silverstein*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Laurence M. Schwartztol*, *Sandra S. Park*, *Lenora M. Lapidus*, and *Stuart T. Rossman*; for the Constitutional Accountability Center by *Douglas B. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Brianne J. Gorod*; for the Housing Equality Center of Pennsylvania by *Mark A. Packman*; for the Howard University School of Law Fair Housing Clinic et al. by *Valerie Schneider* and *Aderson Bellegarde François*; for the National Association of Home Builders by *Devala A. Janardan* and *Thomas J. Ward*; for the National Leased Housing Association et al. by *John C. Hayes, Jr.*; for the New York University School of Law Seminar on Critical Narratives in Civil Rights by *Mr. François* and *Peggy Cooper Davis*; for Ian Ayres by *Rachel J. Geman* and *Jason L. Lichtman*; and for Henry G. Cisneros et al. by *Diane L. Houk*.

tionale. *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009) (internal quotation marks omitted). The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*

I

A

Before turning to the question presented, it is necessary to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U. S. C. § 42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. § 42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, § 42(m)(1)(C), as well as certain preferences, including that low-income housing units "contribut[e] to a concerted community revitalization plan" and be built in census tracts populated predominantly by low-income residents. §§ 42(m)(1)(B)(ii)(III), 42(d)(5)(B)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer's application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. Tex. Govt. Code Ann. §§ 2306.6710(a)–(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, *4–*6.

The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§ 804(a) and 805(a) of the FHA. The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found "from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." 749 F. Supp. 2d 486, 499 (ND Tex. 2010). Second, it found "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP's prima facie showing of disparate impact. 860 F. Supp. 2d 312, 322–323 (2012). After assuming the Department's proffered interests were legitimate, *id.*, at 326, the District Court held that a defendant—here the Department—must prove "that there are no other less discriminatory alternatives to advancing their proffered interests," *ibid.* Because, in its view, the Department "failed to meet [its] burden of proving that there are no less discriminatory alternatives," the District Court ruled for the ICP. *Id.*, at 331.

The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7, 2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR § 100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed. Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cogniza-

ble under the FHA. 747 F. 3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.*, at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15 (1988) (*per curiam*), and certiorari followed, 573 U. S. 991 (2014). It is now appropriate to provide a brief history of the FHA's enactment and its later amendment.

B

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan* v. *Warley*, 245 U. S. 60 (1917), but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid-20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed,

sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, *e. g.*, M. Klarman, Unfinished Business: Racial Equality in American History 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. See K. Clark, Dark Ghetto: Dilemmas of Social Power 11, 21–26 (1965).

The mid-1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight." *Id.*, at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.*, at 1. To reverse "[t]his deepening racial division," *ibid.*, it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . .

on the basis of race, creed, color, or national origin." *Id.*, at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued § 703(a)(2) covers the discriminatory effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

> "It shall be an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on § 703(a)(2). *Griggs*, 401 U. S., at 426, n. 1.

In interpreting § 703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in § 703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*, at 431. For that reason, as the Court noted, "Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.*, at 432 (emphasis deleted). In light of the statute's goal of achieving "equality of employment opportunities and remov[ing] barriers that have operated in the past" to favor some races over others, the Court held § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.*, at 429–430.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under § 703(a)(2). In this respect, the Court held that "business necessity" constitutes a defense to disparate-impact claims. *Id.*, at 431. This rule provides, for example, that in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a "manifest relationship" to job performance. *Id.*, at 432; see also *Ricci*, 557 U. S., at 587–589 (emphasizing the importance of the business necessity defense

to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U. S., at 431–432.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.*, as amended. Section 4(a) of the ADEA provides:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U. S. C. § 623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* "represented the better reading of [Title VII's] statutory text," 544 U. S., at 235, a plurality of the Court concluded that the same reasoning pertained to § 4(a)(2) of the ADEA. The *Smith* plurality emphasized that both § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such indi-

vidual's' race or age." *Id.*, at 235. As the plurality observed, the text of these provisions "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore compels recognition of disparate-impact liability. *Id.*, at 236. In a separate opinion, JUSTICE SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA to impose disparate-impact liability, see 544 U. S., at 243–247 (opinion concurring in part and concurring in judgment).

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci*, *supra*, at 578. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

Turning to the FHA, the ICP relies on two provisions. Section 804(a) provides that it shall be unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a).

Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.

Section 805(a), in turn, provides:

> "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." § 3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States* v. *Giles*, 300 U. S. 41, 48 (1937) (explaining that the "word 'make' has many meanings, among them '[t]o cause to exist, appear or occur' " (quoting Webster's New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith*, *supra*, at 236. The Court has construed statutory language similar to § 805(a) to include disparate-impact liability. See, *e. g.*, *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130, 140–141 (1979) (holding the term "discriminat[e]" encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with

prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell[,] . . . or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith*, however, dispose of this argument. Both Title VII and the ADEA contain identical "because of" language, see 42 U. S. C. §2000e–2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See *Huntington Branch, NAACP* v. *Hun-*

tington, 844 F. 2d 926, 935–936 (CA2 1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F. 2d 126, 146 (CA3 1977); *Smith* v. *Clarkton*, 682 F. 2d 1055, 1065 (CA4 1982); *Hanson* v. *Veterans Administration*, 800 F. 2d 1381, 1386 (CA5 1986); *Arthur* v. *Toledo*, 782 F. 2d 565, 574–575 (CA6 1986); *Metropolitan Housing Development Corp.* v. *Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977); *United States* v. *Black Jack*, 508 F. 2d 1179, 1184–1185 (CA8 1974); *Halet* v. *Wend Investment Co.*, 672 F. 2d 1305, 1311 (CA9 1982); *United States* v. *Marengo Cty. Comm'n*, 731 F. 2d 1546, 1559, n. 20 (CA11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H. R. Rep. No. 100–711, p. 21, n. 52 (1988) (H. R. Rep.) (discussing suits premised on disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H. R. Rep., at 89–93.

Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The

Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist.* v. *T. A.*, 557 U. S. 230, 244, n. 11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"); *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government").

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First, Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U. S. C. § 3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." § 3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact

liability did not exist under the FHA. See *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 574 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment liability. See, *e. g.*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, *e. g.*, *Kimbrough* v. *United States*, 552 U. S. 85, 98 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the exemption from liability for real-estate appraisers is in the same section as § 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under § 805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith*'s discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U. S. C. § 623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the

Smith plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" 544 U. S., at 239. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.*, at 238.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U. S. C. § 3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith*, *supra*, at 235 (plurality opinion); *Griggs*, 401 U. S., at 432. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U. S. C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H. R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, *e. g.*, *Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing con-

struction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center* v. *St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–578 (ED La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only "'blood relative[s]'" in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, *e. g.*, *Huntington*, *supra*, at 18. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. *Griggs*, *supra*, at 431. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this

case involves a novel theory of liability. See Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed. Reg. 11470 (explaining that HUD did not use the phrase "business necessity" because that "phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities"). As the Court explained in *Ricci*, an entity "could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity." 557 U. S., at 587. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," *Griggs*, *supra*, at 436, so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must

be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed. Reg. 11476.

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, 653 (1989), superseded by statute on other grounds, 42 U. S. C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U. S., at 653.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to chal-

lenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F. 3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici*, in addition to the well-stated principal dissenting opinion in this case, see *post*, at 557–558, 584–586 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher* v. *Magner*, 619 F. 3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] . . . artificial, arbitrary, and unnecessary barriers." *Griggs*, 401 U. S., at 431. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." *Ibid.* If additional measures are adopted, courts should

strive to design them to eliminate racial disparities through race-neutral means. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 509 (1989) (plurality opinion) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 789 (2007) (KENNEDY, J., concurring in part and concurring in judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods"). Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," *Ricci*, 557 U. S., at 585, it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of

disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 ("Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address"). Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to . . . dire consequences." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 196 (2012).

Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," *Parents Involved*, *supra*, at 797 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The

Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.

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

It is so ordered.

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO's dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.*, at 429–431, represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I

A

We should drop the pretense that *Griggs*' interpretation of Title VII was legitimate. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009). It did not include an implicit one either. Instead, Title VII's operative provision, 42 U. S. C. § 2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That provision made it "an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or

> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin." § 703, 78 Stat. 255 (emphasis added).[1]

Each paragraph in § 2000e–2(a) is limited to actions taken "because of" a protected trait, and "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic "was the 'reason' that the employer decided to act." *Id.*, at 350 (some internal quotation marks omitted).[2] In other words, "to take an action against an individual *because of*" a protected trait "plainly requires discriminatory intent." *Smith* v. *City of Jackson*, 544 U. S. 228, 249 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e. g.*, *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009).

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[1] The current version of § 2000e–2(a) is almost identical, except that § 2000e–2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

[2] In 1991, Congress added § 2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted "because of" a protected characteristic by showing that the characteristic was "a motivating factor" in the employer's decision. Civil Rights Act of 1991, § 107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-treatment liability precisely because the former does not require any discriminatory motive.

No one disputes that understanding of § 2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision "must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci*, *supra*, at 577 (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 986 (1988)). The only dispute is whether the same language—"because of"—means something different in § 2000e–2(a)(2) than it does in § 2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that "identical words used in different parts of the same act are intended to have the same meaning," *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 101 (2003) (internal quotation marks omitted), and § 2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph "uses the phrase 'because of . . . [a protected characteristic]' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's [protected characteristic]." *Smith*, *supra*, at 249 (opinion of O'Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between § 2000e–2(a)(1) and § 2000e–2(a)(2) is the type of employment decisions they address. See *Smith*, *supra*, at 249 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas § 2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs "*because of* such individual's race, color, religion, sex, or national origin." §§ 2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority's assumption, see *ante*, at 533–535, the fact that § 2000e–2(a)(2) uses the phrase "otherwise adversely affect" in defining the employment decisions tar-

geted by that paragraph does not eliminate its mandate that the prohibited decision be made "because of" a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that "limit, segregate, or classify . . . employees . . . in any way which would . . . otherwise adversely affect [an individual's] status as an employee," but those that "otherwise adversely affect [an individual's] status as an employee, *because of such individual's race, color, religion, sex, or national origin*." (Emphasis added); accord, 78 Stat. 255. Reading § 2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.[3]

B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, The Civil Rights Era: Origins and Development of National Policy 1960–1972, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, EEOC vs. Discrimina-

[3] Even "[f]ans . . . of *Griggs* [v. *Duke Power Co.*, 401 U. S. 424 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent." Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision's defenders, *Griggs* "was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress." W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

tion, Inc., 75 The Crisis 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.*, at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra*, at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, Black Employment and the Law 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.*, at 59.

EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher* v. *Boca Raton*, 524 U. S. 775, 811, n. 1 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice . . . to give and to act upon the results of any professionally developed ability test provided that such test . . . is not *designed*, *intended*, *or used* to discriminate because of race, color, religion, sex, or national origin," § 2000e–2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2–4 (Aug. 24,

1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed. Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed "'that the record in the case present[ed] a most unappealing situation for finding tests unlawful,'" even though he found the lower court's adherence to an intent requirement to be "'tragic.'" Graham, *supra*, at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.[4]

EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's posi-

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[4] Efforts by Executive Branch officials to influence this Court's disparate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner* v. *Gallagher*, 565 U. S. 1013 (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner*, and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed. Reg. 70921 (2011).

tion was "entitled to great deference." *Griggs*, 401 U. S., at 433–434. With only a brief nod to the text of § 2000e–2(a)(2) in a footnote, *id.*, at 426, n. 1, the Court tied this novel theory of discrimination to "the statute's perceived *purpose*" and EEOC's view of the best way of effectuating it, *Smith*, 544 U. S., at 262 (opinion of O'Connor, J.); see *id.*, at 235 (plurality opinion). But statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth* v. *Levine*, 555 U. S. 555, 586 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119–124 (2015) (THOMAS, J., concurring in judgment).

II

Griggs' disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, Intellectuals and Race 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to believe, that a practice is "discriminatory," 401 U. S., at 431. "Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 750 (2007) (THOMAS, J., concurring) (emphasis added).[5]

[5] It takes considerable audacity for today's majority to describe the origins of racial imbalances in housing, *ante*, at 528–529, without acknowledging this Court's role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal

We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law's usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society. But the absence of racial disparities in multiethnic societies has been the exception, not the rule. When it comes to "proportiona[l] represent[ation]" of ethnic groups, "few, if any, societies have ever approximated this description." D. Horowitz, Ethnic Groups in Conflict 677 (1985). "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy." Weiner, The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective, in From Independence to Statehood 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, "racial or ethnic minorities . . . have owned or directed more than half of whole industries in particular nations." Sowell 8. These minorities "have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others." *Ibid.* (footnotes omitted). "In the seventeenth century Ottoman Empire," this phenomenon was seen in the palace itself, where the "medical staff consisted of 41 Jews and 21 Muslims." *Ibid.* And in our own

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courts contributed to "'white flight'" from our Nation's cities, see *Missouri* v. *Jenkins*, 515 U. S. 70, 95, n. 8 (1995); *id.*, at 114 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today's majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

country, for roughly a quarter century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, Institute for Diversity and Ethics in Sport, U. of Central Fla., The 2014 Racial and Gender Report Card: National Basketball Association 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaffirmed that "'racial balancing'" by state actors is "'patently unconstitutional,'" even when it supposedly springs from good intentions. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 311 (2013). And if that "racial balancing" is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: "Government action that classifies individuals on the basis of race is inherently suspect." *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion); accord, *id.*, at 323–324 (SCALIA, J., concurring in judgment). That is no less true when judges are the ones doing the classifying. See *id.*, at 308 (plurality opinion); *id.*, at 323–324 (SCALIA, J., concurring in judgment). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

III

The decision in *Griggs* was bad enough, but this Court's subsequent decisions have allowed it to move to other areas of the law. In *Smith*, for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the

ADEA. See 544 U. S., at 236. As both I and the author of today's majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.*, at 248–249 (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that "there [wa]s no reason to suppose that Congress in 1967"—four years before *Griggs*—"could have foreseen the interpretation of Title VII that was to come." *Smith*, *supra*, at 260 (opinion of O'Connor, J.). It made little sense to repeat *Griggs*' error in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis*, we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith*, *supra*, at 260 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that "the logic of *Griggs* and *Smith*" leads to the conclusion that "the FHA encompasses disparate-impact claims." *Ante*, at 534. JUSTICE ALITO ably dismantles this argument. *Post*, at 576–583 (dissenting opinion). But, even if the majority were correct, I would not join it in following that "logic" here. "[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis*, designed to be a principle of stability and repose, would become a vehicle of change . . . distorting the law." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas, any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not "'dire consequences,'" *ante,* at 546, is cold comfort for those who actually need a home.

* * *

I agree with the majority that *Griggs* "provide[s] essential background" in this case, *ante,* at 533: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

No one wants to live in a rat's nest. Yet in *Gallagher* v. *Magner*, 619 F. 3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U. S. C. § 3601 *et seq.*, could be

used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F. 3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.*, at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.*, at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i. e.*, there was a "disparate impact." *Id.*, at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner*.[1] This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone "less favorably than others because of a protected trait" is "'the most easily understood type of discrimination.'" *Ricci* v. *DeStefano*, 557 U. S. 557,

[1] We granted certiorari in *Magner* v. *Gallagher*, 565 U. S. 1013 (2011). Before oral argument, however, the parties settled. 565 U. S. 1187 (2012). The same thing happened again in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 571 U. S. 1020 (2013).

577 (2009) (quoting *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci*, *supra*, at 577. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

A

I begin with the text. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a) (emphasis added). Similarly, § 805(a) prohibits any party "whose business includes engaging in residential real estate-related transactions" from "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." § 3605(a) (emphasis added).

In both sections, the key phrase is "because of." These provisions list covered actions ("refus[ing] to sell or rent . . . a dwelling," "refus[ing] to negotiate for the sale or rental of . . . a dwelling," "discriminat[ing]" in a residential real estate transaction, etc.) and protected characteristics ("race," "reli-

gion," etc.). The link between the actions and the protected characteristics is "because of."

What "because of" means is no mystery. Two Terms ago, we held that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 350 (2013) (quoting *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009); some internal quotation marks omitted). A person acts "because of" something else, we explained, if that something else "'was the "reason" that the [person] decided to act.'" 570 U. S., at 350.

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) "because of" religion. See *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 773 (2015). The Court wrote: "'Because of' in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it." *Ibid.*

Nor is this understanding of "because of" an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase "because of" appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.[2]

[2] See al-Mujahed & Naylor, Rebels Assault Key Sites in Yemen, pp. A1, A12 ("A government official . . . spoke on the condition of anonymity because of concern for his safety"); Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ("Jury selection is expected to last four to five months because of a massive pool of potential jurors"); Davidson, Some VA Whistleblowers Get Relief From Retaliation, p. A18 ("In April, they moved to fire her because of an alleged 'lack of collegiality'"); Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ("The Postal Service lost $5.5 billion in 2014, in large part because of continuing declines in first-

Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of," *Nassar*, *supra*, at 350—race, religion, etc. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful." *American Ins. Assn.* v. *Department of Housing and Urban Development*, 74 F. Supp. 3d 30, 41, n. 20 (DC 2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits

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class mail volume"); Editorial, Last Responders, p. A20 ("Metro's initial emergency call mentioned only smoke but no stuck train [in part] . . . because of the firefighters' uncertainty that power had been shut off to the third rail"); Letter to the Editor, Metro's Safety Flaws, p. A20 ("[A] circuit breaker automatically opened because of electrical arcing"); Bernstein, He Formed Swingle Singers and Made Bach Swing, p. B6 ("The group retained freshness because of the 'stunning musicianship of these singers' "); Schudel, TV Producer, Director Invented Instant Replay, p. B7 ("[The 1963 Army-Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy"); Contrera & Thompson, 50 Years On, Cheering a Civil Rights Matriarch, pp. C1, C5 ("[T]he first 1965 protest march from Selma to Montgomery . . . became known as 'Bloody Sunday' because of state troopers' violent assault on the marchers"); Pressley, 'Life Sucks': Aaron Posner's Latest Raging Riff on Chekhov, pp. C1, C9 (" 'The Seagull' gave Posner ample license to experiment because of its writer and actress characters and its pronouncements on art"); A Rumpus on 'The Bachelor,' p. C2 ("Anderson has stood out from the pack . . . mostly because of that post-production censoring of her nether regions" (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter "asked that his name not be used because of his real job"); Boren, Former FSU Boss Bowden Wants 12 Wins To Be Restored, p. D2 ("[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal"); Oklahoma City Finally Moves Past .500 Mark, p. D4 ("Trail Blazers all-star LaMarcus Aldridge won't play in Wednesday night's game against the Phoenix Suns because of a left thumb injury").

actions taken "because of" protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on "'subjective intent.'" *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 53 (2003). Instead, "'treat[ing] [a] particular person less favorably than others *because of*' a protected trait" is "'disparate treatment,'" *not disparate impact*. *Ricci*, 557 U. S., at 577 (emphasis added). See also, *e. g.*, *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (explaining the difference between "because of" and "in spite of"); *Hernandez* v. *New York*, 500 U. S. 352, 359–360 (1991) (plurality opinion) (same); *Alexander* v. *Sandoval*, 532 U. S. 275, 278, 280 (2001) (holding that it is "beyond dispute" that banning discrimination "'on the ground of race'" "prohibits only intentional discrimination").

This is precisely how Congress used the phrase "because of" elsewhere in the FHA. The FHA makes it a crime to willfully "interfere with . . . any person because of his race" (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as "selling, purchasing, [or] renting" a dwelling. 42 U. S. C. § 3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted "because of," *i. e.*, on account of or by reason of, one of the protected characteristics. But the critical language in this section—"because of"—is identical to the critical language in the sections at issue in this case. "One ordinarily assumes" Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 319 (2014). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase "because of" to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U. S. C. § 249, authorizes enhanced sentences for defendants convicted of committing certain crimes "because of" race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these

laws. See, *e. g.*, *Wisconsin* v. *Mitchell*, 508 U. S. 476, 484–485 (1993) ("[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status"). All of this confirms that "because of" in the FHA should be read to mean what it says.

B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase "make unavailable." Under § 804(a), it is unlawful "[t]o . . . make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. § 3604(a). See also § 3605(a) (barring "discriminat[ion] against any person in making available such a [housing] transaction . . . because of race, color, religion, sex, handicap, familial status, or national origin"). The Solicitor General argues that "[t]he plain meaning of the phrase 'make unavailable' includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result." Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General's argument accurately captures the "plain meaning" of the phrase "make unavailable" even when that phrase is not linked to the phrase "because of." "[M]ake unavailable" must be viewed together with the rest of the actions covered by § 804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable*" a dwelling. § 3604(a) (emphasis added). When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to

the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995) (quoting *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)). See also, *e. g.*, *Yates* v. *United States*, 574 U. S. 528, 543 (2015) (plurality opinion); *id.*, at 549 (ALITO, J., concurring in judgment). Here, the phrases that precede "make unavailable" unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.*, *supra*, at 40–41 (citing Webster's Third New International Dictionary 603, 648, 1363, 1910 (1966)). Section 804(a), moreover, prefaces "make unavailable" with "or otherwise," thus creating a catchall. Catchalls must be read "restrictively" to be "like" the listed terms. *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003). The result of these ordinary rules of interpretation is that even without "because of," the phrase "make unavailable" likely would require intentionality.

The FHA's inclusion of "because of," however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable "because of" race or another protected characteristic. In ordinary English usage, when a person makes something unavailable "because of" some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for "unskilled workers," Fuller & Geide-Stevenson, Consensus Among Economists: Revisited, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, *e. g.*, Dept. of Commerce, Bureau of Census, Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2014, online at http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html (all Internet materials as visited

June 23, 2015, and available in Clerk of Court's case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African-Americans or Latinos "because of" their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, http://www.nfl.com/draft/2015. See also Miller, Powerful Sports Agents Representing Color, Los Angeles Sentinel, Feb. 6, 2014, p. B3 (noting "there are 96 players (76 of whom are African-American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts"). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players "because of" their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General's Office who argued cases in this Court, it appears that all but 5 (76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys "because of" their age?

The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done "because of race, color, religion, sex, familial status, or national origin."

II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, "the predominant focus of antidiscrimination law was on intentional discrimination." *Smith* v. *City of Jackson*, 544 U. S. 228, 258 (2005) (O'Connor, J., concurring in judgment). The very "concept of disparate impact liability, by contrast, was quite novel." *Ibid.* (collect-

ing citations). See also Tr. of Oral Arg. 15 ("JUSTICE GINSBURG: . . . If we're going to be realistic about this, . . . in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact"). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text.

Eradicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all. The Court recalls the country's shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combating that evil. *Ante*, at 528–530. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA's text plainly identifies the weapon Congress chose—outlawing disparate treatment "because of race" or another protected characteristic. 42 U. S. C. §§3604(a), 3605(a). Accordingly, in any FHA claim, "[p]roof of discriminatory motive is critical." *Teamsters*, 431 U. S., at 335, n. 15.

III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U. S. C. §§3604(a), (f)(1). Congress

also gave the Department of Housing and Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§ 3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (1) certain actions taken by real property appraisers, (2) certain occupancy requirements, and (3) the treatment of persons convicted of manufacturing or distributing illegal drugs.[3]

According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are "of crucial importance." *Ante*, at 535. This "crucial" argument, however, cannot stand.

A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress

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[3] These new provisions state:

"Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." § 3605(c).

"Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." § 3607(b)(1).

"Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21." § 3607(b)(4).

silently ratified those decisions. See *ante*, at 535–537; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the Judiciary's interpretation of the FHA. The Court writes that by 1988, "all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Ante*, at 535 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have "'consistently'" done so for "'30 years.'" *Milner* v. *Department of Navy*, 562 U. S. 562, 575–576 (2011). See also, *e. g.*, *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 715 (2011) (ROBERTS, C. J., dissenting) (explaining that this Court does not interpret statutes by asking for "a show of hands" (citing *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598 (2001); *McNally* v. *United States*, 483 U. S. 350 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§ 804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: The official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington* v. *Huntington Branch, NAACP*, O. T. 1988, No. 87–1961, p. 15 ("An action taken because of some factor other than race, *i. e.*, fi-

nancial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute"); *id.*, at 14 ("The words 'because of' plainly connote a causal connection between the housing-related action and the person's race or color").[4] This was the same position that the United States had taken in lower courts for years. See, *e. g.*, *United States* v. *Birmingham*, 538 F. Supp. 819, 827, n. 9 (ED Mich. 1982) (noting positional change), aff'd, 727 F. 2d 560, 565–566 (CA6 1984) (adopting United States' "concession" that there must be a " 'discriminatory motive' "). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called "prior-construction canon"—does not apply where lawyers cannot "justifiably regard the point as settled" or when "other sound rules of interpretation" are implicated. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress' failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante*, at 535–537.[5] To change the meaning of language in an already

[4] In response to the United States' argument, we reserved decision on the question. See *Huntington* v. *Huntington Branch, NAACP*, 488 U. S. 15, 18 (1988) (*per curiam*) ("Since appellants conceded the applicability of the disparate-impact test . . . we do not reach the question whether that test is the appropriate one").

[5] In any event, the Court overstates the importance of that failed amendment. The amendment's sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it "left to caselaw and eventual Supreme Court

enacted law, Congress must pass a new law amending that language. See, *e. g.*, *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 100, 101, and n. 7 (1991). Intent that finds no expression in a statute is irrelevant. See, *e. g.*, *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U. S. 519, 544–545 (1979); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering* v. *Hallock*, 309 U. S. 106, 121 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994), a party argued that § 10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because "Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under § 10(b)." *Id.*, at 186. "From that," a party asked the Court to "infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of § 10(b)." *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

> "'It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of as-

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resolution whether a discriminatory intent or discriminatory effects standard is appropriate . . . [in] all situations but zoning." H. R. Rep. No. 100–711, p. 89 (1988). Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us "little" about what a statute means. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante*, at 535–537.

> surance that congressional failure to act represents" affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.' *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting))." *Ibid.* (alterations omitted).

We made the same point again in *Sandoval*, 532 U. S. 275. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.*, at 292–293.

Without explanation, the Court ignores these cases.

B

The Court contends that the 1988 amendments provide "convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA" because the three safe-harbor provisions included in those amendments "would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA." *Ante*, at 537–538. As just explained, however, what matters is what Congress *did*, not what it might have "assumed." And although the Court characterizes these provisions as "exemptions," that characterization is inaccurate. They make no reference to § 804(a) or § 805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E. g.*, 42 U. S. C. § 3607(b)(4) ("Nothing in this subchapter prohibits . . . "). The Court should read these amendments to mean what they say.

In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante*, at 535–537; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H. R. Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact" because the FHA "speaks only to intentional discrimination").[6]

The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do pro-

[6] At the same hearings to which the Court refers, *ante*, at 536, Senator Hatch stated that if the "intent test versus the effects test" were to "becom[e] an issue," a "fair housing law" might not be enacted at all, and he noted that failed legislation in the past had gotten "bogged down" because of that "battle." Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did "not really go one way or the other" on disparate impact since the sponsors were content to "rely" on the lower court opinions. *Ibid.* And he emphasized that "the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court." *Ibid.* See also *id.*, at 10 ("It is not always a violation to refuse to sell, but only to refuse to sell 'because of' another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate . . . . To use any standard other than discriminatory intent . . . would jeopardize many kinds of beneficial zoning and local ordinances" (statement of Sen. Hatch)).

vide additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We "must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U. S. 81, 93–94 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States' argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.[7]

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[7] In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect "the burden-shifting framework" in disparate-treatment cases. *American Ins. Assn.* v. *Department of Housing and Urban Development*, 74 F. Supp. 3d 30, 43 (DC 2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), which some courts have applied in disparate-treatment housing cases, see, *e. g.*, *2922 Sherman Avenue Tenants' Assn.* v. *District of Columbia*, 444 F. 3d 673, 682 (CADC 2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc.* v. *Richmond Heights*, 209 F. 3d 626, 636–637, and n. 7 (CA6 2000).

Even if they were superfluous, moreover, our "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States*

On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O'Gilvie* v. *United States*, 519 U. S. 79 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: "Why . . . would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment's absence, punitive damages did fall within the provision's coverage?" *Id.*, at 89. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O'Gilvie*, the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed that, in the amendments' absence, disparate-impact claims did fall within the FHA's coverage?

The Court rejected the argument in *O'Gilvie*. "The short answer," the Court wrote, is that Congress might have simply wanted to "clarify the matter in respect to nonphysical injuries" while otherwise "leav[ing] the law where it found it." *Ibid.* Although other aspects of *O'Gilvie* triggered a dissent, see *id.*, at 94–101 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court's analysis. Nor was the *O'Gilvie* Court troubled that Congress' amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

Trustee, 540 U. S. 526, 536 (2004). We "presume that a legislature says in a statute what it means," notwithstanding "[r]edundanc[y]." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

The Court saw the flaw in the argument in *O'Gilvie*, and the same argument is no better here. It is true that *O'Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent's attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 ("[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice").

C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the "rodent infestation" case), HUD proposed "to prohibit housing practices with a discriminatory effect, even where there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 568 U. S. 976 (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (2013). The Solicitor General then urged HUD's

rule as a reason to deny certiorari. We granted certiorari anyway, 570 U. S. 904 (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference may be unwarranted. Cf. *Young* v. *United Parcel Service, Inc.*, 575 U. S. 206, 225 (2015) (refusing to defer where "[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari" (discussing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944))).[8]

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group*, 573 U. S., at 328. This rule makes even more sense where the agency's view would open up a deeply disruptive avenue of liability that Congress never contemplated.

IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court's decision today reads far too much into *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and far too little into *Smith* v. *City of Jackson*, 544 U. S. 228 (2005). In *Smith*, the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded—*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

[8] At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 ("[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days"). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

A

Rather than focusing on the text of the FHA, much of the Court's reasoning today turns on *Griggs*. In *Griggs*, the Court held that black employees who sued their employer under § 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(2), could recover without proving that the employer's conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were "job related," the plaintiffs could recover by showing that the requirements "operated to render ineligible a markedly disproportionate number of Negroes." 401 U. S., at 429.

Griggs was a case in which an intent to discriminate might well have been inferred. The company had "openly discriminated on the basis of race" prior to the date on which the 1964 Civil Rights Act took effect. *Id.*, at 427. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428. These new hurdles disproportionately burdened African-Americans, who had "long received inferior education in segregated schools." *Id.*, at 430. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428. By convention, we do not overturn a finding of fact accepted by two lower courts, see, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which

the plaintiffs' claims were based. The only reference to § 703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U. S., at 426, n. 1. Instead, the Court based its decision on the "objective" of Title VII, which the Court described as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430.

That text-free reasoning caused confusion, see, *e. g.*, *Smith*, *supra*, at 261–262 (O'Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in this line, *United States* v. *Black Jack*, 508 F. 2d 1179 (CA8 1974), the heart of the court's analysis was this: "Just as Congress requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing." *Id.*, at 1184 (quoting *Griggs*, *supra*, at 430–431; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, *e. g.*, *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 607, n. 27 (1983) (holding that Title VI, 42 U. S. C. § 2000d *et seq.*, does "not allow compensatory relief in the absence of proof of discriminatory intent"); *Sandoval*, 532 U. S., at 280 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters*, the Court rejected "the *Griggs* rationale" in evaluating a company's seniority rules. 431 U. S., at 349–350. And because *Griggs* was focused on a particular problem, the Court

had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U. S. C. § 206(d) or Title VII, even if a plan has a "disproportionately heavy impact on male employees." 435 U. S., at 711, n. 20. We explained that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Ibid.*

B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally required to face that task in *Smith*, 544 U. S. 228, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§ 4(a)(1) and (a)(2), 29 U. S. C. §§ 623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, § 4(a)(1), does not authorize disparate-impact claims. See 544 U. S., at 236, n. 6 (plurality opinion); *id.*, at 243 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality's reasoning); *id.*, at 249 (O'Connor, J., concurring in judgment) (reasoning that this provision "obvious[ly]" does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of § 4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of JUSTICE SCALIA). See *id.*, at 233–240 (plurality opinion); *id.*, at 243–247 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that § 4(a)(2) of the ADEA was modeled on and is virtually identi-

cal to the provision in *Griggs*, 42 U. S. C. §2000e–2(a)(2). Section 4(a)(2) provides as follows:

> "It shall be unlawful for an employer—
> . . . . . .
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*." 29 U. S. C. §623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

> "It shall be an unlawful employment practice for an employer—
> . . . . . .
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin*." 42 U. S. C. §2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to "age" and the Title VII provision refers to "race, color, religion, or national origin." Because identical language in two statutes having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith*, echoed by JUSTICE SCALIA, saw *Griggs* as "compelling" support for the conclusion that §4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U. S., at 233–234 (plurality opinion) (citing *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith*, namely, §4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

> "It shall be unlawful for an employer—

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U. S. C. § 623(a)(1) (emphasis added).

The plurality opinion's reasoning, with which JUSTICE SCALIA agreed, can be summarized as follows. Under § 4(a)(1), *the employer* must act because of age, and thus must have discriminatory intent. See 544 U. S., at 236, n. 6.[9] Under § 4(a)(2), on the other hand, it is enough if the *employer's actions* "adversely affect" an individual "because of . . . age." 29 U. S. C. § 623(a).

This analysis of §§ 4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble § 4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like § 4(a)(1) of the ADEA, a defendant must act "because of" race or one of the other prohibited grounds. That is, it is unlawful for a person or entity "[t]o refuse to sell or rent," "refuse to negotiate," "otherwise

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[9] The plurality stated:

"Paragraph (a)(1) makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age.' (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer 'to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* age.' (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." 544 U. S., at 236, n. 6.

make unavailable," etc., for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or § 4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality's analysis, moreover, also depended on other language, unique to the ADEA, declaring that "it shall not be unlawful for an employer 'to take any action *otherwise prohibited* . . . where the differentiation is based on reasonable factors other than age.'" 544 U. S., at 238 (quoting 81 Stat. 603; emphasis added). This "otherwise prohibited" language was key to the plurality opinion's reading of the statute because it arguably suggested disparate-impact liability. See 544 U. S., at 238. This language, moreover, was *essential* to JUSTICE SCALIA's controlling opinion. Without it, JUSTICE SCALIA would have agreed with Justices O'Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.*, at 245–246. In fact, even with this "otherwise prohibited" language, JUSTICE SCALIA merely concluded that § 4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.*, at 243.

The FHA does not contain any phrase like "otherwise prohibited." Such language certainly is nowhere to be found in §§ 804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

C

This discussion of our cases refutes any notion that "[t]ogether, *Griggs* holds[10] and the plurality in *Smith* instructs

[10] *Griggs*, of course, "holds" nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of JUSTICE SCALIA's controlling opinion or Justice O'Connor's opinion concurring in the judgment) did not

that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Ante*, at 533. The Court stumbles in concluding that § 804(a) of the FHA is more like § 4(a)(2) of the ADEA than § 4(a)(1). The operative language in § 4(a)(1) of the ADEA—which, per *Smith*, does not authorize disparate-impact claims—is materially indistinguishable from the operative language in § 804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court's conclusion that § 805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is "*discriminat[ion]* . . . because of" race, religion, etc. 42 U. S. C. § 3605(a) (emphasis added). This is precisely the formulation used in § 4(a)(1) of the ADEA, which prohibits "*discriminat[ion]* . . . because of such individual's age," 29 U. S. C. § 623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why § 805(a)'s reference to "discrimination" allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York* v. *Harris*, 444 U. S. 130 (1979), "statutory language similar to § 805(a) [was construed] to include disparate-impact liability." *Ante*, at 534. In fact, the statutory language in *Harris* was quite different. The law there was § 706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that " 'had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . *or* otherwise engaged in discrimination based upon race, color, or national

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understand *Griggs* to create such a rule. See 544 U. S., at 240 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

origin in the hiring, promotion, or assignment of employees.' " 444 U. S., at 132–133, 142 (emphasis added).

After stating that the first clause in that unusual statute referred to a "disparate-impact test," the *Harris* Court concluded that "a similar standard" should apply to the textually "closely connected" second clause. *Id.*, at 143. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory "intent." *Id.*, at 139. The Court explained that the Act's "less than careful draftsmanship" regarding the relationship between the clauses made the "wording of the statute . . . ambiguous" about teacher assignments, thus forcing the Court to "look closely at the structure and context of the statute and to review its legislative history." *Id.*, at 138–140. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

Harris, in other words, has nothing to do with § 805(a) of the FHA. The "wording" is different; the "structure" is different; the "context" is different; and the "legislative history" is different. *Id.*, at 140. Rather than digging up a 36-year-old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phase "because of" means.

V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "dis-

criminatory." 619 F. 3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington* v. *Davis*, 426 U. S. 229, 248 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs (Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.[11]

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates "the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal law often favors projects that revitalize low-income communities. See *ante*, at 525.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress

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[11] Tr. of Oral Arg. 44–45 ("Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position . . . that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right").

surely did not mean to put local governments in such a position.

The Solicitor General's answer to such problems is that HUD will come to the rescue. In particular, HUD regulations provide a defense against disparate-impact liability if a defendant can show that its actions serve "substantial, legitimate, nondiscriminatory interests" that "necessar[ily]" cannot be met by "another practice that has a less discriminatory effect." 24 CFR § 100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a "substantial" interest? Is there a difference between a "legitimate" interest and a "nondiscriminatory" interest? To what degree must an interest be met for a practice to be "necessary"? How are parties and courts to measure "discriminatory effect"?

These questions are not answered by the Court's assurance that the FHA's disparate-impact "analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.'" *Ante*, at 527 (quoting 78 Fed. Reg. 11470). See also *ante*, at 541 (likening the defense to "the business necessity standard"). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody's guess. What is the FHA analogue of "job related"? Is it "housing related"? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of "business necessity"? "Housing-policy necessity"? What does that mean?

Compounding the problem, the Court proclaims that "governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Ante*, at 544. But what does the

Court mean by a "legitimate" objective? And does the Court mean to say that there can be no disparate-impact lawsuit if the objective is "legitimate"? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD's regulations and the Court's pronouncements are so "hazy," *Central Bank*, 511 U. S., at 188–189, courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante*, at 542–543. Certainly Congress did not intend to "engage the federal courts in an endless exercise of second-guessing" local programs. *Canton* v. *Harris*, 489 U. S. 378, 392 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit is fully litigated, the costs of litigation, including the expense of discovery and experts, may "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 559 (2007). Defendants may feel compelled to "abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, *supra*, at 189. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci*, 557 U. S., at 563. All the while, similar dynamics may drive litigation against private actors. *Ante*, at 541–542.

This is not the Fair Housing Act that Congress enacted.

VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E. g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 541–542 (1993) (opinion of KENNEDY, J.); *Hunter* v. *Underwood*, 471 U. S. 222, 233 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

B

The Court also stresses that "many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Ante*, at 546.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation's municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court's position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U. S. C. § 3615 (recognizing local authority).

The Court also claims that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades" has not created "'dire consequences.'" *Ante*, at 546. But the Court concedes that disparate impact can be dangerous. See *ante*, at 540–545. Compare *Magner*, 619 F. 3d, at 833–838 (holding that efforts to prevent violations of the housing code may violate the

FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including "rat problem[s]"). In the Court's words, it is "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing." *Ante*, at 541. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the "purpose" driving the Court's analysis: The desire to eliminate the "vestiges" of "residential segregation by race." *Ante*, at 528, 546. We agree that all Americans should be able "to buy decent houses without discrimination . . . *because of* the color of their skin." 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U. S. C. §§ 3604(a), 3605(a) ("because of race"). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, "'[w]hat the legislative intention was, can be derived only from the words . . . used; and we cannot speculate beyond the reasonable import of these words.'" *Nassar*, 570 U. S., at 353 (quoting *Gardner* v. *Collins*, 2 Pet. 58, 93 (1829)). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*). See also, *e. g.*, *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 373–374 (1986) (explaining that "'broad purposes'" arguments "ignor[e] the complexity of the problems Congress is called upon to address").

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based considerations rather than move beyond them." *Ante*, at 543.

And it agrees that "racial quotas . . . rais[e] serious constitutional concerns." *Ante*, at 543. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such "difficult constitutional questions." *Ante*, at 545. By any measure, the Court today makes a serious mistake.

* * *

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.

Syllabus

JOHNSON *v.* UNITED STATES

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

No. 13–7120. Argued November 5, 2014—Reargued April 20, 2015—Decided June 26, 2015

After petitioner Johnson pleaded guilty to being a felon in possession of a firearm, see 18 U. S. C. § 922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three prior convictions for a "violent felony," § 924(e)(1), a term defined by § 924(e)(2)(B)'s residual clause to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Government argued that Johnson's prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. This Court had previously pronounced upon the meaning of the residual clause in *James* v. *United States*, 550 U. S. 192; *Begay* v. *United States*, 553 U. S. 137; *Chambers* v. *United States*, 555 U. S. 122; and *Sykes* v. *United States*, 564 U. S. 1, and had rejected suggestions by dissenting Justices in both *James* and *Sykes* that the clause is void for vagueness. Here, the District Court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15-year sentence under ACCA. The Eighth Circuit affirmed.

Held: Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 595–606.

(a) The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357–358. Courts must use the "categorical approach" when deciding whether an offense is a violent felony, looking "only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor* v. *United States*, 495 U. S. 575, 600. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James*, *supra*, at 208. Pp. 595–597.

(b) Two features of the residual clause conspire to make it unconstitutionally vague. By tying the judicial assessment of risk to a judicially

imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See *James*, *supra*, at 211. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates. This Court's repeated failure to craft a principled standard out of the residual clause and the lower courts' persistent inability to apply the clause in a consistent way confirm its hopeless indeterminacy. Pp. 597–602.

(c) This Court's cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another. See, *e. g.*, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "substantial risk" in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime. Pp. 602–605.

(d) The doctrine of *stare decisis* does not require continued adherence to *James* and *Sykes*. Experience leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. *James* and *Sykes* opined about vagueness without full briefing or argument. And continued adherence to those decisions would undermine, rather than promote, the goals of evenhandedness, predictability, and consistency served by *stare decisis*. Pp. 605–606.

526 Fed. Appx. 708, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., *post*, p. 607, and THOMAS, J., *post*, p. 607, filed opinions concurring in the judgment. ALITO, J., filed a dissenting opinion, *post*, p. 624.

Katherine M. Menendez argued and reargued the cause for petitioner. With her on the briefs were *Katherian D. Roe* and *Douglas H. R. Olson*.

Deputy Solicitor General Dreeben reargued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *John F. Bash*, and *Scott A. C. Meisler*. *Mr. Bash* argued the cause for the United States on the original argument.

With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Caldwell*, and *Deputy Solicitor General Dreeben*.*

JUSTICE SCALIA delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

I

Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson* v. *United States*, 559 U. S. 133, 136 (2010). The Act defines "violent felony" as follows:

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*Briefs of *amici curiae* urging reversal were filed for Gun Owners of America, Inc., et al. by *Herbert W. Titus*, *Jeremiah L. Morgan*, *William J. Olson*, *John S. Miles*, and *Michael Connelly*; and for the National Association of Criminal Defense Lawyers et al. by *David Debold*, *Molly Claflin*, *Ashley E. Johnson*, *Peter Goldberger*, *Ilya Shapiro*, *Sarah S. Gannett*, *Daniel Kaplan*, *Donna F. Coltharp*, *Mary Price*, and *David M. Porter*.

Briefs of *amici curiae* urging affirmance were filed for the Brady Center to Prevent Gun Violence et al. by *Gregory G. Little* and *Jonathan E. Lowy*; and for Law Professors by *Stephen Rushin*, *pro se*.

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

The closing words of this definition, italicized above, have come to be known as the Act's residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida's offense of attempted burglary, *James* v. *United States*, 550 U. S. 192 (2007); (2) does *not* cover New Mexico's offense of driving under the influence, *Begay* v. *United States*, 553 U. S. 137 (2008); (3) does *not* cover Illinois' offense of failure to report to a penal institution, *Chambers* v. *United States*, 555 U. S. 122 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, *Sykes* v. *United States*, 564 U. S. 1 (2011). In both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare *James*, 550 U. S., at 210, n. 6, with *id.*, at 230 (SCALIA, J., dissenting); compare *Sykes*, 564 U. S., at 15–16, with *id.*, at 33–35 (SCALIA, J., dissenting).

This case involves the application of the residual clause to another crime, Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he

planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and "'liberals.'" Revised Presentence Investigation in No. 0:12CR00104–001 (D Minn.), p. 5, ¶16. Johnson showed the agents his AK–47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses—including unlawful possession of a short-barreled shotgun, see Minn. Stat. § 609.67 (2006)—qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. 526 Fed. Appx. 708 (CA8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. 572 U. S. 1059 (2014). We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws. 574 U. S. 1069 (2015).

II

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process."

Connally v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979).

In *Taylor* v. *United States*, 495 U. S. 575, 600 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, *supra*, at 141.

Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James*, *supra*, at 208. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use . . . of physical force," the residual clause asks whether the crime "*involves conduct*" that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

A

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States* v. *Mayer*, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue." 550 U. S., at 211. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away."

Id., at 226 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay*, 553 U. S., at 143. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 91 (1921). Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. Three of the Court's previous four decisions about the clause concentrated on the level of risk posed by the crime in question, though in each case we found it necessary to resort to a different ad hoc test to guide our inquiry. In *James*, we asked whether "the risk posed by attempted burglary is comparable to that posed by its closest analog

among the enumerated offenses," namely completed burglary; we concluded that it was. 550 U. S., at 203. That rule takes care of attempted burglary, but offers no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes. "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.*, at 215 (SCALIA, J., dissenting).

Chambers, our next case to focus on risk, relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" 555 U. S., at 128–129. So much for failure to report to prison, but what about the tens of thousands of federal and state crimes for which no comparable reports exist? And even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves. See *Sykes*, 564 U. S., at 31–33 (SCALIA, J., dissenting); *id.*, at 40, n. 4 (KAGAN, J., dissenting).

Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.*, at 10 (majority opinion). But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.*, at 38–39 (KAGAN, J., dissenting). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with

respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.

The remaining case, *Begay*, which preceded *Chambers* and *Sykes*, took an entirely different approach. The Court held that in order to qualify as a violent felony under the residual clause, a crime must resemble the enumerated offenses "in kind as well as in degree of risk posed." 553 U. S., at 143. The Court deemed drunk driving insufficiently similar to the listed crimes, because it typically does not involve "purposeful, violent, and aggressive conduct." *Id.*, at 144–145 (internal quotation marks omitted). Alas, *Begay* did not succeed in bringing clarity to the meaning of the residual clause. It did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime. In addition, the enumerated crimes are not much more similar to one another in kind than in degree of risk posed, and the concept of "aggressive conduct" is far from clear. *Sykes* criticized the "purposeful, violent, and aggressive" test as an "addition to the statutory text," explained that "levels of risk" would normally be dispositive, and confined *Begay* to "strict liability, negligence, and recklessness crimes." 564 U. S., at 12–13.

The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.

This Court is not the only one that has had trouble making sense of the residual clause. The clause has "created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently." *Chambers*, 555 U. S., at 133 (ALITO, J., concurring in judgment). The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider. Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *United States* v. *Whitson*, 597 F. 3d 1218, 1222 (CA11 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States* v. *White*, 571 F. 3d 365, 370–371 (CA4 2009). Some judges have assumed that the battery of a police officer (defined to include the slightest touching) could "explode into violence and result in physical injury," *United States* v. *Williams*, 559 F. 3d 1143, 1149 (CA10 2009); others have felt that it "do[es] a great disservice to law enforcement officers" to assume that they would "explod[e] into violence" rather than "rely on their training and experience to determine the best method of responding," *United States* v. *Carthorne*, 726 F. 3d 503, 514 (CA4 2013). Some judges considering whether statutory rape qualifies as a violent felony have concentrated on cases involving a perpetrator much older than the victim, *United States* v. *Daye*, 571 F. 3d 225, 230–231 (CA2 2009); others have tried to account for the possibility that "the perpetrator and the victim [might be] close in age," *United States* v. *McDonald*, 592 F. 3d 808, 815 (CA7 2010). Disagreements like these go well beyond disputes over matters of degree.

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a

failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." *United States* v. *Evans*, 333 U. S. 483, 495 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.

B

The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. See *post*, at 637 (opinion of ALITO, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." See *United States* v. *Johnson*, 616 F. 3d 85 (CA2 2010). That certainly sounds like a violent felony—until one realizes that Connecticut defines this offense to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. Conn. Gen. Stat. § 53a–179b(a) (2012). Who is to say which the ordinary "disorder" most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move," *Johnson*, 616 F. 3d, at 95 (Parker, J., dissenting)?

In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255

U. S., at 89. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates* v. *Cincinnati*, 402 U. S. 611 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." *Post*, at 624–625. It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. *Post*, at 639. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See *post*, at 630. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U. S., at 230, n. 7 (SCALIA, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not

doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash* v. *United States*, 229 U. S. 373, 377 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216, 223 (1914).

Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime. See *post*, at 631–636. In other words, the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor*, see 495 U. S., at 599–602, and reaffirmed in each of our four residual-clause cases, see *James*, 550 U. S., at 202; *Begay*, 553 U. S., at 141; *Chambers*, 555 U. S., at 125; *Sykes*, 564 U. S., at 7. We decline the dissent's invitation. In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U. S., at 600. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the

facts underlying the prior convictions." *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach. *Id.*, at 602.

C

That brings us to *stare decisis*. This is the first case in which the Court has received briefing and heard argument from the parties about whether the residual clause is void for vagueness. In *James*, however, the Court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion . . . that the residual provision is unconstitutionally vague." 550 U. S., at 210, n. 6. In *Sykes*, the Court again rejected a dissenting opinion's claim of vagueness. 564 U. S., at 15–16.

The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction." *United States* v. *Vann*, 660 F. 3d 771, 787 (CA4 2011) (Agee, J., concurring).

This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, *e. g.*, *United States* v. *Dixon*, 509 U. S. 688, 711 (1993); *Payne*, 501 U. S., at 828–830. But *James* and *Sykes* opined about vagueness without full briefing or argument on that issue—a circumstance that leaves us "less constrained to follow precedent," *Hohn* v. *United States*, 524 U. S. 236, 251 (1998). The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase "serious potential risk"; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime. 550 U. S., at 210, n. 6; 564 U. S., at 15–16. And departing from those decisions does not raise any concerns about upsetting private reliance interests.

Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, *supra*, at 827. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

* * *

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

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

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

In my view, and for the reasons well stated by JUSTICE ALITO in dissent, the residual clause of the Armed Career Criminal Act is not unconstitutionally vague under the categorical approach or a record-based approach. On the assumption that the categorical approach ought to still control, and for the reasons given by JUSTICE THOMAS in Part I of his opinion concurring in the judgment, Johnson's conviction for possession of a short-barreled shotgun does not qualify as a violent felony.

For these reasons, I concur in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Johnson's sentence cannot stand. But rather than use the Fifth Amendment's Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application. As JUSTICE ALITO explains, that decision cannot be reconciled with our precedents concerning the vagueness doctrine. See *post*, at 636–639 (dissenting opinion). But even if it were a closer case under those decisions, I would be wary of holding the residual clause to be unconstitutionally vague. Although I have joined the Court in applying our modern vagueness doctrine in the past, see *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. 239, 253–258 (2012), I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive

due process, a judicially created doctrine lacking any basis in the Constitution.

I

We could have easily disposed of this case without nullifying ACCA's residual clause. Under ordinary principles of statutory interpretation, the crime of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under ACCA. In relevant part, ACCA defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that either

> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B).

The offense of unlawfully possessing a short-barreled shotgun neither satisfies the first clause of this definition nor falls within the enumerated offenses in the second. It therefore can constitute a violent felony only if it falls within ACCA's so-called "residual clause"—*i. e.*, if it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

To determine whether an offense falls within the residual clause, we consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U. S. 192, 208 (2007). The specific crimes listed in § 924(e)(2)(B)(ii)—arson, extortion, burglary, and an offense involving the use of explosives—offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.*, at 208. Those offenses do not provide a high threshold, see *id.*, at 203, 207–208, but the crime in question must still present a "'seri-

ous'"—a "'significant' or 'important'"—risk of physical injury to be deemed a violent felony, *Begay* v. *United States*, 553 U. S. 137, 156 (2008) (ALITO, J., dissenting); accord, *Chambers* v. *United States*, 555 U. S. 122, 128 (2009).

To qualify as serious, the risk of injury generally must be closely related to the offense itself. Our precedents provide useful examples of the close relationship that must exist between the conduct of the offense and the risk presented. In *Sykes* v. *United States*, 564 U. S. 1 (2011), for instance, we held that the offense of intentional vehicular flight constitutes a violent felony because that conduct always triggers a dangerous confrontation, *id.*, at 9–10. As we explained, vehicular flights "by definitional necessity occur when police are present" and are done "in defiance of their instructions . . . with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Id.*, at 10. In *James*, we likewise held that attempted burglary offenses "requir[ing] an overt act directed toward the entry of a structure" are violent felonies because the underlying conduct often results in a dangerous confrontation. 550 U. S., at 204, 206. But we distinguished those crimes from "the more attenuated conduct encompassed by" attempt offenses "that c[an] be satisfied by preparatory conduct that does not pose the same risk of violent confrontation," such as "'possessing burglary tools.'" *Id.*, at 205, 206, and n. 4. At some point, in other words, the risk of injury from the crime may be too attenuated for the conviction to fall within the residual clause, such as when an additional, voluntary act (*e. g.*, the *use* of burglary tools to enter a structure) is necessary to bring about the risk of physical injury to another.

In light of the elements of and reported convictions for the unlawful possession of a short-barreled shotgun, this crime does not "involv[e] conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii). The acts that form the basis of this offense are simply too remote from a risk of physical injury to fall within the residual clause.

Standing alone, the elements of this offense—(1) unlawfully (2) possessing (3) a short-barreled shotgun—do not describe inherently dangerous conduct. As a conceptual matter, "simple possession [of a firearm], even by a felon, takes place in a variety of ways (*e. g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA's enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State* v. *Salyers*, 858 N. W. 2d 156, 157–158 (Minn. 2015). In another, the firearm was retrieved from the trunk of the defendant's car. *State* v. *Ellenberger*, 543 N. W. 2d 673, 674 (Minn. App. 1996). In still another, the weapon was found missing a firing pin. *State* v. *Johnson*, 171 Wis. 2d 175, 178, 491 N. W. 2d 110, 111 (App. 1992). In these instances and others, the offense threatened no one.

The Government's theory for why this crime should nonetheless qualify as a "violent felony" is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are "weapons not typically possessed by law-abiding citizens for lawful purposes," *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), but

are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the *use* of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight—conduct that by itself often or always invites a dangerous confrontation—possession of a short-barreled shotgun poses a threat *only* when an offender decides to engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony. I would reverse the Court of Appeals on that basis.

II

As the foregoing analysis demonstrates, ACCA's residual clause can be applied in a principled manner. One would have thought this proposition well established given that we have already decided four cases addressing this clause. The majority nonetheless concludes that the operation of this provision violates the Fifth Amendment's Due Process Clause.

JUSTICE ALITO shows why that analysis is wrong under our precedents. See *post*, at 636–639 (dissenting opinion). But I have some concerns about our modern vagueness doctrine itself. Whether that doctrine is defensible under the original meaning of "due process of law" is a difficult question I leave for another day, but the doctrine's history should

prompt us at least to examine its constitutional underpinnings more closely before we use it to nullify yet another duly enacted law.

A

We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of "vagueness." The doctrine we have developed is quite sweeping: "A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill* v. *Colorado*, 530 U. S. 703, 732 (2000). Using this framework, we have nullified a wide range of enactments. We have struck down laws ranging from city ordinances, *Papachristou* v. *Jacksonville*, 405 U. S. 156, 165–171 (1972), to Acts of Congress, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89–93 (1921). We have struck down laws whether they are penal, *Lanzetta* v. *New Jersey*, 306 U. S. 451, 452, 458 (1939), or not, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 597–604 (1967).[1] We have struck down laws addressing subjects ranging from abortion, *Colautti* v. *Franklin*, 439 U. S. 379, 390 (1979), and obscenity, *Winters* v. *New York*, 333 U. S. 507, 517–520 (1948), to the minimum wage, *Connally* v. *General Constr. Co.*, 269 U. S. 385, 390–395 (1926), and antitrust, *Cline* v. *Frink Dairy Co.*,

[1] By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "authorizing fines or forfeitures . . . [that] are enforced through civil rather than criminal process." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). A law requiring termination of employment from public institutions, for instance, is not penal. See *Keyishian*, 385 U. S., at 597–604. Nor is a law creating an "obligation to pay taxes." *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 271 (1935). Conversely, a law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 661–669 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

274 U. S. 445, 453–465 (1927). We have even struck down a law using a term that has been used to describe criminal conduct in this country since before the Constitution was ratified. *Chicago* v. *Morales*, 527 U. S. 41, 51 (1999) (invalidating a "loitering" law); see *id.*, at 113, and n. 10 (THOMAS, J., dissenting) (discussing a 1764 Georgia law requiring the apprehension of "all able bodied persons . . . who shall be found loitering").

That we have repeatedly used a doctrine to invalidate laws does not make it legitimate. Cf., *e. g.*, *Dred Scott* v. *Sandford*, 19 How. 393, 450–452 (1857) (stating that an Act of Congress prohibiting slavery in certain Federal Territories violated the substantive due process rights of slaveowners and was therefore void). This Court has a history of wielding doctrines purportedly rooted in "due process of law" to achieve its own policy goals, substantive due process being the poster child. See *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not"). Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.

1

The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.

Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law. This rule of construction—better known today as the rule of lenity—first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses,

though it did not gain broad acceptance until the following century. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749–751 (1935); see also 1 L. Radzinowicz, A History of English Criminal Law and Its Administration From 1750, pp. 10–11 (1948) (noting that some of the following crimes triggered the death penalty: "marking the edges of any current coin of the kingdom," "maliciously cutting any hop-binds growing on poles in any plantation of hops," and "being in the company of gypsies"). Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of "stealing sheep, *or other cattle*," was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence." 1 Commentaries on the Laws of England 88 (1765).[2]

Vague statutes surfaced on this side of the Atlantic as well. Shortly after the First Congress proposed the Bill of Rights, for instance, it passed a law providing "[t]hat every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license," must forfeit the offending goods. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–138. At first glance, punishing the unlicensed possession of "merchandise . . . usually vended to the Indians," *ibid.*, would seem far more likely to "invit[e]

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[2] At the time, the ordinary meaning of the word "cattle" was not limited to cows, but instead encompassed all "[b]easts of pasture; not wild nor domestick." 1 S. Johnson, A Dictionary of the English Language 286 (4th ed. 1773). Parliament responded to the judicial refusal to apply the provision to "cattle" by passing "another statute, 15 Geo. II. c. 34, extending the [law] to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." 1 Blackstone, Commentaries on the Laws of England, at 88.

arbitrary enforcement," *ante,* at 597, than does the residual clause.

But rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly. See, *e. g.*, *United States* v. *Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815) (Washington, J.). In *Sharp*, for instance, several defendants charged with violating an Act rendering it a capital offense for "any seaman" to "make a revolt in [a] ship," Act of Apr. 30, 1790, §8, 1 Stat. 114, objected that "the offence of making a revolt, [wa]s not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon [them]." 27 F. Cas., at 1043. Justice Washington, riding circuit, apparently agreed, observing that the common definitions for the phrase "make a revolt" were "so multifarious, and so different," that he could not "avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature." *Ibid.* Remarking that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid," he refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*

Such analysis does not mean that federal courts believed they had the power to invalidate vague penal laws as unconstitutional. Indeed, there is good evidence that courts at the time understood judicial review to consist "of a refusal to give a statute effect as operative law in resolving a case," a notion quite distinct from our modern practice of "'strik-[ing] down' legislation." Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010). The process of refusing

to apply such laws appeared to occur on a case-by-case basis. For instance, notwithstanding his doubts expressed in *Sharp*, Justice Washington, writing for this Court, later rejected the argument that lower courts could arrest a judgment under the same ship-revolt statute because it "does not define the offence of endeavouring to make a revolt." *United States* v. *Kelly*, 11 Wheat. 417, 418 (1826). The Court explained that "it is . . . competent to the Court to give a judicial definition" of "the offence of endeavouring to make a revolt," and that such definition "consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person." *Id.*, at 418–419. In dealing with statutory indeterminacy, federal courts saw themselves engaged in construction, not judicial review as it is now understood.[3]

2

Although vagueness concerns played a role in the strict construction of penal statutes from early on, there is little

[3] Early American state courts also sometimes refused to apply a law they found completely unintelligible, even outside of the penal context. In one antebellum decision, the Pennsylvania Supreme Court did not even attempt to apply a statute that gave the Pennsylvania state treasurer "'as many votes'" in state bank elections as "'were held by *individuals*'" without providing guidance as to which individuals it was referring. *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (1842). Concluding that it had "seldom, if ever, found the language of legislation so devoid of certainty," the court withdrew the case. *Ibid.*; see also *Drake* v. *Drake*, 15 N. C. 110, 115 (1833) ("Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative"). This practice is distinct from our modern vagueness doctrine, which applies to laws that are intelligible but vague.

indication that anyone before the late 19th century believed that courts had the power under the Due Process Clauses to nullify statutes on that ground. Instead, our modern vagueness doctrine materialized after the rise of substantive due process. Following the ratification of the Fourteenth Amendment, corporations began to use that Amendment's Due Process Clause to challenge state laws that attached penalties to unauthorized commercial conduct. In addition to claiming that these laws violated their substantive due process rights, these litigants began—with some success—to contend that such laws were unconstitutionally indefinite. In one case, a railroad company challenged a Tennessee law authorizing penalties against any railroad that demanded "more than a just and reasonable compensation" or engaged in "unjust and unreasonable discrimination" in setting its rates. *Louisville & Nashville R. Co.* v. *Railroad Comm'n of Tenn.*, 19 F. 679, 690 (CC MD Tenn. 1884) (internal quotation marks omitted). Without specifying the constitutional authority for its holding, the Circuit Court concluded that "[n]o citizen . . . can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation." *Id.*, at 693 (emphasis deleted).

Justice Brewer—widely recognized as "a leading spokesman for 'substantized' due process," Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 627 (1965)—employed similar reasoning while riding circuit, though he did not identify the constitutional source of judicial authority to nullify vague laws. In reviewing an Iowa law authorizing fines against railroads for charging more than a "reasonable and just" rate, Justice Brewer mentioned in dictum that "no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Chicago & N. W. R. Co.* v. *Dey*, 35 F. 866, 876 (CC SD Iowa 1888).

Constitutional vagueness challenges in this Court initially met with some resistance. Although the Court appeared to acknowledge the possibility of unconstitutionally indefinite enactments, it repeatedly rejected vagueness challenges to penal laws addressing railroad rates, *Railroad Comm'n Cases*, 116 U. S. 307, 336–337 (1886), liquor sales, *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, 450–451 (1904), and anticompetitive conduct, *Nash* v. *United States*, 229 U. S. 373, 376–378 (1913); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108–111 (1909).

In 1914, however, the Court nullified a law on vagueness grounds under the Due Process Clause for the first time. In *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216 (1914), a tobacco company brought a Fourteenth Amendment challenge against several Kentucky antitrust laws that had been construed to render unlawful "any combination [made] . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," *id.*, at 221. The company argued that by referring to "real value," the laws provided "no standard of conduct that it is possible to know." *Ibid.* The Court agreed. *Id.*, at 223–224. Although it did not specify in that case which portion of the Fourteenth Amendment served as the basis for its holding, *ibid.*, it explained in a related case that the lack of a knowable standard of conduct in the Kentucky statutes "violated the fundamental principles of justice embraced in the conception of due process of law," *Collins* v. *Kentucky*, 234 U. S. 634, 638 (1914).

3

Since that time, the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process. During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45, 57 (1905), the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activ-

ity.[4] Among the penal laws it found to be impermissibly vague were a state law regulating the production of crude oil, *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 242–243 (1932), a state antitrust law, *Cline*, 274 U. S., at 453–465, a state minimum-wage law, *Connally*, 269 U. S., at 390–395, and a federal price-control statute, *L. Cohen Grocery Co.*, 255 U. S., at 89–93.[5]

Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to "discrete and insular minorities," see *United States* v. *Carolene Products Co.*, 304 U. S. 144,

[4] During this time, the Court would apply its new vagueness doctrine outside of the penal context as well. In *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925), a sugar dealer raised a defense to a breach-of-contract suit that the contracts themselves were unlawful under several provisions of the Lever Act, including one making it "'unlawful for any person . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries,'" *id.*, at 238. Applying *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921), which had held that provision to be unconstitutionally vague, the Court rejected the dealer's argument. 267 U. S., at 238–239. The Court explained that "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Id.*, at 239. That doctrine thus applied to penalties as well as "[a]ny other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it." *Ibid.*

[5] Vagueness challenges to laws regulating speech during this period were less successful. Among the laws the Court found to be sufficiently definite included a state law making it a misdemeanor to publish, among other things, materials "'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice,'" *Fox* v. *Washington*, 236 U. S. 273, 275–277 (1915), a federal statute criminalizing candidate solicitation of contributions for "'any political purpose whatever,'" *United States* v. *Wurzbach*, 280 U. S. 396, 398–399 (1930), and a state prohibition on becoming a member of any organization that advocates using unlawful violence to effect "'any political change,'" *Whitney* v. *California*, 274 U. S. 357, 359–360, 368–369 (1927). But see *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931) (holding state statute punishing the use of any symbol "'of opposition to organized government'" to be impermissibly vague).

153, n. 4 (1938), the target of its vagueness doctrine changed as well. The Court began to use the vagueness doctrine to invalidate noneconomic regulations, such as state statutes penalizing obscenity, *Winters*, 333 U. S., at 517–520, and membership in a gang, *Lanzetta*, 306 U. S., at 458.

Successful vagueness challenges to regulations penalizing commercial conduct, by contrast, largely fell by the wayside. The Court, for instance, upheld a federal regulation punishing the knowing violation of an order instructing drivers transporting dangerous chemicals to "'avoid, so far as practicable, . . . driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,'" *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 338–339, 343 (1952). And notwithstanding its earlier conclusion that an Oklahoma law requiring state employees and contractors to be paid "'not less than the current rate of per diem wages in the locality where the work is performed'" was unconstitutionally vague, *Connally*, *supra*, at 393, the Court found sufficiently definite a federal law prohibiting radio broadcasting companies from attempting to compel by threat or duress a licensee to hire "'persons in excess of the number of employees needed by such licensee to perform actual services,'" *United States* v. *Petrillo*, 332 U. S. 1, 3, 6–7 (1947).

In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role. In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe* v. *Wade*, 410 U. S. 113 (1973), on the theory that laws prohibiting all abortions save for those done "for the purpose of saving the life of the mother" forced abortionists to guess when this exception would apply on penalty of conviction. See B. Schwartz, The Unpublished Opinions of the Burger Court 116–118 (1988) (reprinting first draft of *Roe*). *Roe*, of course, turned out as a substantive due process opinion. See 410 U. S., at 164.

But since then, the Court has repeatedly deployed the vagueness doctrine to nullify even mild regulations of the abortion industry. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 451–452 (1983) (nullifying law requiring "'that the remains of the unborn child [be] disposed of in a humane and sanitary manner'"); *Colautti*, 439 U. S., at 381 (nullifying law mandating abortionists adhere to a prescribed standard of care if "there is 'sufficient reason to believe that the fetus may be viable'").[6]

In one of our most recent decisions nullifying a law on vagueness grounds, substantive due process was again lurking in the background. In *Morales*, a plurality of this Court insisted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," 527 U. S., at 53, a conclusion that colored its analysis that an ordinance prohibiting loitering was unconstitutionally indeterminate, see *id.*, at 55 ("When vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack").

I find this history unsettling. It has long been understood that one of the problems with holding a statute "void for 'indefiniteness'" is that "'indefiniteness' . . . is itself an indefinite concept," *Winters*, *supra*, at 524 (Frankfurter, J., dissenting), and we as a Court have a bad habit of using indefinite concepts—especially ones rooted in "due process"—to invalidate democratically enacted laws.

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[6] All the while, however, the Court has rejected vagueness challenges to laws punishing those on the other side of the abortion debate. When it comes to restricting the speech of abortion opponents, the Court has dismissed concerns about vagueness with the observation that "'we can never expect mathematical certainty from our language,'" *Hill* v. *Colorado*, 530 U. S. 703, 733 (2000), even though such restrictions are arguably "at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades," *id.*, at 774 (KENNEDY, J., dissenting).

B

It is also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law." Our traditional justification for this doctrine has been the need for notice: "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U. S. 285, 304 (2008); accord, *ante*, at 595. Presumably, that justification rests on the view expressed in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), that "due process of law" constrains the legislative branch by guaranteeing "usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," *id.*, at 277. That justification assumes further that providing "a person of ordinary intelligence [with] fair notice of what is prohibited," *Williams*, *supra*, at 304, is one such usage or mode.[7]

[7] As a general matter, we should be cautious about relying on general theories of "fair notice" in our due process jurisprudence, as they have been exploited to achieve particular ends. In *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), for instance, the Court held that the Due Process Clause imposed limits on punitive damages because the Clause guaranteed "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *id.*, at 574. That was true even though "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts," and "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 26–27 (1991) (SCALIA, J., concurring in judgment). Even under the view of the Due Process Clause articulated in *Murray's Lessee*, then, we should not allow nebulous principles to supplant more specific, historically grounded rules. See 499 U. S., at 37–38 (opinion of SCALIA, J.).

To accept the vagueness doctrine as founded in our Constitution, then, one must reject the possibility "that the Due Process Clause requires only that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions," which may be all that the original meaning of this provision demands. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting) (some internal quotation marks omitted); accord, *Turner* v. *Rogers*, 564 U. S. 431, 450 (2011) (THOMAS, J., dissenting). Although *Murray's Lessee* stated the contrary, 18 How., at 276, a number of scholars and jurists have concluded that "considerable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985); see also, *e. g.*, *In re Winship*, 397 U. S. 358, 378–382 (1970) (Black, J., dissenting). Others have disagreed. See, *e. g.*, Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1679 (2012) (arguing that, as originally understood, "the principle of due process" required, among other things, that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review").

I need not choose between these two understandings of "due process of law" in this case. JUSTICE ALITO explains why the majority's decision is wrong even under our precedents. See *post*, at 636–639 (dissenting opinion). And more generally, I adhere to the view that "'[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face,'" *Morales*, 527 U. S., at 112 (THOMAS, J., dissenting), and there is no question that ACCA's residual clause meets that description, see *ante*,

at 602 (agreeing with the Government that "there will be straightforward cases under the residual clause").

* * *

I have no love for our residual clause jurisprudence: As I observed when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a "violent felony" made our attempt to construe the residual clause "'an unnecessary exercise.'" *James*, 550 U. S., at 231 (dissenting opinion). But the Court rejected my argument, choosing instead to begin that unnecessary exercise. I see no principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply. Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one. I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment.

JUSTICE ALITO, dissenting.

The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is

void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.

I

A

Petitioner Samuel Johnson (unlike his famous namesake) has led a life of crime and violence. His presentence investigation report sets out a resume of petty and serious crimes, beginning when he was 12 years old. Johnson's adult record includes convictions for, among other things, robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense.

In 2010, the Federal Bureau of Investigation (FBI) began monitoring Johnson because of his involvement with the National Socialist Movement, a white-supremacist organization suspected of plotting acts of terrorism. In June of that year, Johnson left the group and formed his own radical organization, the Aryan Liberation Movement, which he planned to finance by counterfeiting United States currency. In the course of the Government's investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for" his new organization. 526 Fed. Appx. 708, 709 (CA8 2013) (*per curiam*). He also showed the agents an AK–47 rifle, a semiautomatic rifle, a semiautomatic pistol, and a cache of approximately 1,100 rounds of ammunition. Later, Johnson told an undercover agent: "You know I'd love to assassinate some . . . hoodrats as much as the next guy, but I think we really got to stick with high priority targets." Revised Presentence Investigation Report (PSR) ¶15. Among the top targets that he mentioned were "the Mexican consulate," "progressive bookstores," and individuals he viewed as "liberals." *Id.*, ¶16.

In April 2012, Johnson was arrested, and he was subsequently indicted on four counts of possession of a firearm by a felon and two counts of possession of ammunition by a felon, in violation of 18 U. S. C. §§ 922(g) and 924(e). He pleaded guilty to one of the firearms counts, and the District Court sentenced him to the statutory minimum of 15 years' imprisonment under ACCA, based on his prior felony convictions for robbery, attempted robbery, and illegal possession of a sawed-off shotgun.

B

ACCA provides a mandatory minimum sentence for certain violations of § 922(g), which prohibits the shipment, transportation, or possession of firearms or ammunition by convicted felons, persons previously committed to a mental institution, and certain others. Federal law normally provides a maximum sentence of 10 years' imprisonment for such crimes. See § 924(a)(2). Under ACCA, however, if a defendant convicted under § 922(g) has three prior convictions "for a violent felony or a serious drug offense," the sentencing court must impose a sentence of at least 15 years' imprisonment. § 924(e)(1).

ACCA's definition of a "violent felony" has three parts. First, a felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Second, the Act specifically names four categories of qualifying felonies: burglary, arson, extortion, and offenses involving the use of explosives. See § 924(e)(2)(B)(ii). Third, the Act contains what we have called a "residual clause," which reaches any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.*

The present case concerns the residual clause. The sole question raised in Johnson's certiorari petition was whether possession of a sawed-off shotgun under Minnesota law qualifies as a violent felony under that clause. Although Johnson argued in the lower courts that the residual clause is uncon-

stitutionally vague, he did not renew that argument here. Nevertheless, after oral argument, the Court raised the question of vagueness on its own. The Court now holds that the residual clause is unconstitutionally vague in all its applications. I cannot agree.

II

I begin with *stare decisis*. Eight years ago in *James* v. *United States*, 550 U. S. 192 (2007), JUSTICE SCALIA, the author of today's opinion for the Court, fired an opening shot at the residual clause. In dissent, he suggested that the residual clause is void for vagueness. *Id.*, at 230. The Court held otherwise, explaining that the standard in the residual clause "is not so indefinite as to prevent an ordinary person from understanding" its scope. *Id.*, at 210, n. 6.

Four years later, in *Sykes* v. *United States*, 564 U. S. 1 (2011), JUSTICE SCALIA fired another round. Dissenting once again, he argued that the residual clause is void for vagueness and rehearsed the same basic arguments that the Court now adopts. See *id.*, at 33–35; see also *Derby* v. *United States*, 564 U. S. 1047, 1048–1049 (2011) (SCALIA, J., dissenting from denial of certiorari). As in *James*, the Court rejected his arguments. See *Sykes*, 564 U. S., at 15–16. In fact, JUSTICE SCALIA was the *only* Member of the *Sykes* Court who took the position that the residual clause could not be intelligibly applied to the offense at issue. The opinion of the Court, which five Justices joined, expressly held that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Id.*, at 15 (quoting *Chicago* v. *Morales*, 527 U. S. 41, 58 (1999) (plurality opinion)). JUSTICE THOMAS' concurrence, while disagreeing in part with the Court's interpretation of the residual clause, did not question its constitutionality. See *Sykes*, 564 U. S., at 16–17 (opinion concurring in judgment). And JUSTICE KAGAN's dissent, which JUSTICE GINSBURG joined, argued that a proper application of the provision required a different re-

sult. See *id.*, at 36. Thus, eight Members of the Court found the statute capable of principled application.

It is, of course, true that "[*s*]*tare decisis* is not an inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But neither is it an empty Latin phrase. There must be good reasons for overruling a precedent, and there is none here. Nothing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court's weariness with ACCA cases.

Reprising an argument that JUSTICE SCALIA made to no avail in *Sykes*, *supra*, at 34 (dissenting opinion), the Court reasons that the residual clause must be unconstitutionally vague because we have had trouble settling on an interpretation. See *ante*, at 598. But disagreement about the meaning and application of the clause is not new. We were divided in *James* and in *Sykes* and in our intervening decisions in *Begay* v. *United States*, 553 U. S. 137 (2008), and *Chambers* v. *United States*, 555 U. S. 122 (2009). And that pattern is not unique to ACCA; we have been unable to come to an agreement on many recurring legal questions. The Confrontation Clause is one example that comes readily to mind. See, *e. g.*, *Williams* v. *Illinois*, 567 U. S. 50 (2012); *Bullcoming* v. *New Mexico*, 564 U. S. 647 (2011); *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). Our disagreements about the meaning of that provision do not prove that the Confrontation Clause has no ascertainable meaning. Likewise, our disagreements on the residual clause do not prove that it is unconstitutionally vague.

The Court also points to conflicts in the decisions of the lower courts as proof that the statute is unconstitutional. See *ante*, at 601. The Court overstates the degree of disagreement below. For many crimes, there is no dispute that the residual clause applies. And our certiorari docket provides a skewed picture because the decisions that we are asked to review are usually those involving issues on which there is at least an arguable circuit conflict. But in any

event, it has never been thought that conflicting interpretations of a statute justify judicial elimination of the statute. One of our chief responsibilities is to resolve those disagreements, see this Court's Rule 10, not to strike down the laws that create this work.

The Court may not relish the task of resolving residual clause questions on which the circuits disagree, but the provision has not placed a crushing burden on our docket. In the eight years since *James*, we have decided all of three cases involving the residual clause. See *Begay*, *supra*; *Chambers*, *supra*; *Sykes*, *supra*. Nevertheless, faced with the unappealing prospect of resolving more circuit splits on various residual clause issues, see *ante*, at 601, six Members of the Court have thrown in the towel. That is not responsible.

III

Even if we put *stare decisis* aside, the Court's decision remains indefensible. The residual clause is not unconstitutionally vague.

A

The Fifth Amendment prohibits the enforcement of vague criminal laws, but the threshold for declaring a law void for vagueness is high. "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963). Rather, it is sufficient if a statute sets out an "ascertainable standard." *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). A statute is thus void for vagueness only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U. S. 285, 304 (2008).

The bar is even higher for sentencing provisions. The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a "'person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982) (quoting *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972)). The fear is that vague laws will "'trap the innocent.'" 455 U. S., at 498. These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question. Due process does not require, as Johnson oddly suggests, that a "prospective criminal" be able to calculate the precise penalty that a conviction would bring. Supp. Brief for Petitioner 5; see *Chapman* v. *United States*, 500 U. S. 453, 467–468 (1991) (concluding that a vagueness challenge was "particularly" weak "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").

B

ACCA's residual clause unquestionably provides an ascertainable standard. It defines "violent felony" to include any offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99-page appendix setting out some of these laws. See App. to Supp. Brief for United States; see also *James*, 550 U. S., at 210, n. 6. If all these laws are unconstitutionally vague, today's decision is not a blast from a sawed-off shotgun; it is a nuclear explosion.

Attempting to avoid such devastation, the Court distinguishes these laws primarily on the ground that almost all of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*."

Ante, at 603 (emphasis in original). The Court thus admits that, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Ante*, at 603–604. Its complaint is that the residual clause "requires application of the 'serious potential risk' standard to an *idealized ordinary case of the crime*." *Ante*, at 604 (emphasis added). Thus, according to the Court, ACCA's residual clause is unconstitutionally vague because its standard must be applied to "an idealized ordinary case of the crime" and not, like the vast majority of the laws in the Solicitor General's appendix, to "real-world conduct."

ACCA, however, makes no reference to "an idealized ordinary case of the crime." That requirement was the handiwork of this Court in *Taylor* v. *United States*, 495 U. S. 575 (1990). And as I will show, the residual clause can reasonably be interpreted to refer to "real-world conduct."[1]

C

When a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As one treatise puts it, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 38, p. 247 (2012). This

[1] The Court also says that the residual clause's reference to the enumerated offenses is "confusing." *Ante*, at 603. But this is another argument we rejected in *James* v. *United States*, 550 U. S. 192 (2007), and *Sykes* v. *United States*, 564 U. S. 1 (2011), and it is no more persuasive now. Although the risk level varies among the enumerated offenses, all four categories of offenses involve conduct that presents a serious potential risk of harm to others. If the Court's concern is that some of the enumerated offenses do not seem especially risky, all that means is that the statute "sets a low baseline level for risk." *Id.*, at 18 (THOMAS, J., concurring in judgment).

canon applies fully when considering vagueness challenges. In cases like this one, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 571 (1973); see also *Skilling* v. *United States*, 561 U. S. 358, 403 (2010). Indeed, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.*, at 406 (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895); emphasis deleted); see also *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

The Court all but concedes that the residual clause would be constitutional if it applied to "real-world conduct." Whether that is the *best* interpretation of the residual clause is beside the point. What matters is whether it is a reasonable interpretation of the statute. And it surely is that.

First, this interpretation heeds the pointed distinction that ACCA draws between the "element[s]" of an offense and "conduct." Under § 924(e)(2)(B)(i), a crime qualifies as a "violent felony" if one of its "element[s]" involves "the use, attempted use, or threatened use of physical force against the person of another." But the residual clause, which appears in the very next subsection, § 924(e)(2)(B)(ii), focuses on "conduct"—specifically, "conduct that presents a serious potential risk of physical injury to another." The use of these two different terms in § 924(e) indicates that "conduct" refers to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret "conduct" to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.

Second, as the Court points out, standards like the one in the residual clause almost always appear in laws that call for application by a trier of fact. This strongly suggests that the residual clause calls for the same sort of application.

Third, if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an "idealized ordinary case of the crime," then that is telling evidence that this is not what Congress intended. When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?

D

Not only does the "real-world conduct" interpretation fit the terms of the residual clause, but the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.

In *Taylor*, the question before the Court concerned the meaning of "burglary," one of ACCA's enumerated offenses. The Court gave three reasons for holding that a judge making an ACCA determination should generally look only at the elements of the offense of conviction and not to other things that the defendant did during the commission of the offense. First, the Court thought that ACCA's use of the term "convictions" pointed to the categorical approach. The Court wrote: "Section 924(e)(1) refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U. S., at 600. Second, the Court relied on legislative history, noting that ACCA had previously contained a generic definition of burglary and that "the deletion of [this] definition . . . may have been an inadvertent casualty of a complex drafting process." *Id.*, at 589–590, 601. Third, the Court felt that "the practical difficulties and potential unfairness of a factual approach [were] daunting." *Id.*, at 601.

None of these three grounds dictates that the categorical approach must be used in residual clause cases. The second ground, which concerned the deletion of a generic definition

of burglary, obviously has no application to the residual clause. And the first ground has much less force in residual clause cases. In *Taylor*, the Court reasoned that a defendant has a "conviction" for burglary only if burglary is the offense set out in the judgment of conviction. For instance, if a defendant commits a burglary but pleads guilty, under a plea bargain, to possession of burglar's tools, the *Taylor* Court thought that it would be unnatural to say that the defendant had a *conviction* for burglary. Now consider a case in which a gang member is convicted of illegal possession of a sawed-off shotgun and the evidence shows that he concealed the weapon under his coat, while searching for a rival gang member who had just killed his brother. In that situation, it is not at all unnatural to say that the defendant had a conviction for a crime that "involve[d] *conduct* that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added). At the very least, it would be a reasonable way to describe the defendant's conviction.

The *Taylor* Court's remaining reasons for adopting the categorical approach cannot justify an interpretation that renders the residual clause unconstitutional. While the *Taylor* Court feared that a conduct-specific approach would unduly burden the courts, experience has shown that application of the categorical approach has not always been easy. Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases.

As for the notion that the categorical approach is more forgiving to defendants, there is a strong argument that the opposite is true, at least with respect to the residual clause. Consider two criminal laws: Injury occurs in 10% of cases involving the violation of statute A, but in 90% of cases involving the violation of statute B. Under the categorical approach, a truly dangerous crime under statute A might not qualify as a violent felony, while a crime with no measurable risk of harm under statute B would count against the defend-

ant. Under a conduct-specific inquiry, on the other hand, a defendant's actual conduct would determine whether ACCA's mandatory penalty applies.

It is also significant that the allocation of the burden of proof protects defendants. The prosecution bears the burden of proving that a defendant has convictions that qualify for sentencing under ACCA. If evidentiary deficiencies, poor recordkeeping, or anything else prevents the prosecution from discharging that burden under the conduct-specific approach, a defendant would not receive an ACCA sentence.

Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. See *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct.

The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." *Ante*, at 604. But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law § 38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). It would be strange if we could fulfill that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard

to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear.

E

Even if the categorical approach is used in residual clause cases, however, the clause is still not void for vagueness. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in *all* of its applications." *Hoffman Estates*, 455 U. S., at 494–495 (emphasis added); see also *Chapman*, 500 U. S., at 467.[2]

[2] This rule is simply an application of the broader rule that, except in First Amendment cases, we will hold that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). A void-for-vagueness challenge is a facial challenge. See *Hoffman Estates*, 455 U. S., at 494–495, and nn. 5, 6, 7; *Chicago* v. *Morales*, 527 U. S. 41, 79 (1999) (SCALIA, J., dissenting). Consequently, there is no reason why the no-set-of-circumstances rule should not apply in this context. I assume that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety, but the Court provides no justification for its refusal to apply that rule here. Perhaps the Court has concluded, for some undisclosed reason, that void-for-vagueness claims are different from all other facial challenges not based on the First Amendment. Or perhaps the Court has simply created an ACCA exception.

In concluding that the residual clause is facially void for vagueness, the Court flatly contravenes this rule. The Court admits "that there will be straightforward cases under the residual clause." *Ante*, at 602. But rather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. See *James*, 550 U. S., at 203–209 (attempted burglary); *Sykes*, 564 U. S., at 7–12 (flight from law enforcement in a vehicle). Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example. See, *e. g.*, *Dawson* v. *United States*, 702 F. 3d 347, 351–352 (CA6 2012). Can there be any doubt that "an idealized ordinary case of th[is] crime" "involves conduct that presents a serious potential risk of physical injury to another"? How about attempted arson,[3] attempted kidnapping,[4] solicitation to commit aggravated assault,[5] possession of a loaded weapon with the intent to use it unlawfully against another person,[6] possession of a weapon in prison,[7] or compelling a person to act as a prostitute?[8] Is there much doubt that those offenses "involve conduct that presents a serious potential risk of physical injury to another"?

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[3] *United States* v. *Rainey*, 362 F. 3d 733, 735–736 (CA11) (*per curiam*), cert. denied, 541 U. S. 1081 (2004).

[4] *United States* v. *Kaplansky*, 42 F. 3d 320, 323–324 (CA6 1994) (en banc).

[5] *United States* v. *Benton*, 639 F. 3d 723, 731–732 (CA6), cert. denied, 565 U. S. 1044 (2011).

[6] *United States* v. *Lynch*, 518 F. 3d 164, 172–173 (CA2 2008), cert. denied, 555 U. S. 1177 (2009).

[7] *United States* v. *Boyce*, 633 F. 3d 708, 711–712 (CA8 2011), cert. denied, 565 U. S. 1116 (2012).

[8] *United States* v. *Brown*, 273 F. 3d 747, 749–751 (CA7 2001).

Transforming vagueness doctrine, the Court claims that we have never actually *held* that a statute may be voided for vagueness only when it is vague in all its applications. But that is simply wrong. In *Hoffman Estates*, we reversed a Seventh Circuit decision that voided an ordinance prohibiting the sale of certain items. See 455 U. S., at 491. The Seventh Circuit struck down the ordinance because it was "unclear in *some* of its applications," but we reversed and emphasized that a law is void for vagueness "only if [it] is impermissibly vague in all of its applications." *Id.*, at 494–495; see also *id.*, at 495, n. 7 (collecting cases). Applying that principle, we held that the "facial challenge [wa]s unavailing" because "at least some of the items sold . . . [we]re covered" by the ordinance. *Id.*, at 500. These statements were not dicta. They were the holding of the case. Yet the Court does not even mention this binding precedent.

Instead, the Court says that the facts of two *earlier* cases support a broader application of the vagueness doctrine. See *ante*, at 602–603. That, too, is incorrect. Neither case remotely suggested that mere overbreadth is enough for facial invalidation under the Fifth Amendment.

In *Coates* v. *Cincinnati*, 402 U. S. 611, 612 (1971), we addressed an ordinance that restricted free assembly and association rights by prohibiting "annoying" conduct. Our analysis turned in large part on those First Amendment concerns. In fact, we specifically explained that the "vice of the ordinance lies not alone in its violation of the due process standard of vagueness." *Id.*, at 615. In the present case, by contrast, no First Amendment rights are at issue. Thus, *Coates* cannot support the Court's rejection of our repeated statements that "vagueness challenges to statutes which *do not involve First Amendment freedoms* must be examined in light of the facts . . . at hand." *Mazurie*, *supra*, at 550 (emphasis added).

Likewise, *L. Cohen Grocery Co.*, 255 U. S. 81, proves precisely the opposite of what the Court claims. In that case,

we struck down a statute prohibiting "'unjust or unreasonable rate[s]'" because it provided no "ascertainable standard of guilt" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.*, at 89. The clear import of this language is that the law at issue was impermissibly vague in all applications. And in the years since, we have never adopted the majority's contradictory interpretation. On the contrary, we have characterized the case as involving a statute that could "not constitutionally be applied to any set of facts." *United States* v. *Powell*, 423 U. S. 87, 92 (1975). Thus, our holdings and our dicta prohibit the Court's expansion of the vagueness doctrine. The Constitution does not allow us to hold a statute void for vagueness unless it is vague in all its applications.

IV

Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.

A

The categorical approach requires us to determine whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James*, 550 U. S., at 208. This is an "inherently probabilistic" determination that considers the circumstances and conduct that ordinarily attend the offense. *Id.*, at 207. The mere fact that a crime *could* be committed without a risk of physical harm does not exclude it from the statute's reach. See *id.*, at 207–208. Instead, the residual clause speaks of "potential risk[s]," § 924(e)(2)(B)(ii), a term suggesting "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty," *id.*, at 207–208.

Under these principles, unlawful possession of a sawed-off shotgun qualifies as a violent felony. As we recognized in *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), sawed-off shotguns are "not typically possessed by law-abiding citizens for lawful purposes." Instead, they are uniquely attractive to violent criminals. Much easier to conceal than long-barreled shotguns used for hunting and other lawful purposes, short-barreled shotguns can be hidden under a coat, tucked into a bag, or stowed under a car seat. And like a handgun, they can be fired with one hand—except to more lethal effect. These weapons thus combine the deadly characteristics of conventional shotguns with the more convenient handling of handguns. Unlike those common firearms, however, they are not typically possessed for lawful purposes. And when a person illegally possesses a sawed-off shotgun during the commission of a crime, the risk of violence is seriously increased. The ordinary case of unlawful possession of a sawed-off shotgun therefore "presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

Congress' treatment of sawed-off shotguns confirms this judgment. As the Government's initial brief colorfully recounts, sawed-off shotguns were a weapon of choice for gangsters and bank robbers during the Prohibition Era. See Brief for United States 4.[9] In response, Congress enacted the National Firearms Act of 1934, which required

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[9] Al Capone's south-side Chicago henchmen used sawed-off shotguns when they executed their rivals from Bugs Moran's north-side gang during the infamous Saint Valentine's Day Massacre of 1929. See 7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N. Y. Times, Feb. 15, 1929, p. A1. Wild Bill Rooney was gunned down in Chicago by a "sawed-off shotgun [that] was pointed through a rear window" of a passing automobile. Union Boss Slain by Gang in Chicago, N. Y. Times, Mar. 20, 1931, p. 52. And when the infamous outlaws Bonnie and Clyde were killed by the police in 1934, Clyde was found "clutching a sawed-off shotgun in one hand." Barrow and Woman Are Slain by Police in Louisiana Trap, N. Y. Times, May 24, 1934, p. A1.

individuals possessing certain especially dangerous weapons—including sawed-off shotguns—to register with the Federal Government and pay a special tax. 26 U. S. C. §§ 5845(a)(1)–(2). The Act was passed on the understanding that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a . . . sawed-off shotgun." H. R. Rep. No. 1780, 73d Cong., 2d Sess., 1 (1934). As amended, the Act imposes strict registration requirements for any individual wishing to possess a covered shotgun, see, *e. g.*, §§ 5822, 5841(b), and illegal possession of such a weapon is punishable by imprisonment for up to 10 years. See §§ 5861(b)–(d), 5871. It is telling that this penalty exceeds that prescribed by federal law for quintessential violent felonies.[10] It thus seems perfectly clear that Congress has long regarded the illegal possession of a sawed-off shotgun as a crime that poses a serious risk of harm to others.

The majority of States agree. The Government informs the Court, and Johnson does not dispute, that 28 States have followed Congress' lead by making it a crime to possess an unregistered sawed-off shotgun, and 11 other States and the District of Columbia prohibit private possession of sawed-off shotguns entirely. See Brief for United States 8–9 (collecting statutes). Minnesota, where petitioner was convicted, has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State* v. *Ellenberger*, 543 N. W. 2d 673, 676 (Minn.

[10] See, *e. g.*, 18 U. S. C. § 111(a) (physical assault on federal officer punishable by not more than eight years' imprisonment); § 113(a)(7) (assault within maritime or territorial jurisdiction resulting in substantial bodily injury to an individual under the age of 16 punishable by up to five years' imprisonment); § 117(a) ("assault, sexual abuse, or serious violent felony against a spouse or intimate partner" by a habitual offender within maritime or territorial jurisdiction punishable by up to five years' imprisonment, except in cases of "substantial bodily injury").

App. 1996) (internal quotation marks omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime—a public parking lot—significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of

serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

Syllabus

OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH

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

No. 14–556. Argued April 28, 2015—Decided June 26, 2015*

Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in the petitioners' favor, but the Sixth Circuit consolidated the cases and reversed.

Held: The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of State. Pp. 656–681.

(a) Before turning to the governing principles and precedents, it is appropriate to note the history of the subject now before the Court. Pp. 656–663.

(1) The history of marriage as a union between two persons of the opposite sex marks the beginning of these cases. To the respondents, it would demean a timeless institution if marriage were extended to same-sex couples. But the petitioners, far from seeking to devalue marriage, seek it for themselves because of their respect—and need—for its privileges and responsibilities, as illustrated by the petitioners' own experiences. Pp. 656–659.

(2) The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution. Changed understandings of marriage are characteristic of

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*Together with No. 14–562, *Tanco et al.* v. *Haslam, Governor of Tennessee, et al.*, No. 14–571, *DeBoer et al.* v. *Snyder, Governor of Michigan, et al.*, and No. 14–574, *Bourke et al.* v. *Beshear, Governor of Kentucky*, also on certiorari to the same court.

a Nation where new dimensions of freedom become apparent to new generations.

This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the 20th century, many States condemned same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law. In 2013, this Court overruled its 1986 decision in *Bowers* v. *Hardwick*, 478 U. S. 186, which upheld a Georgia law that criminalized certain homosexual acts, concluding laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575. In 2012, the federal Defense of Marriage Act was also struck down. *United States* v. *Windsor*, 570 U. S. 744. Numerous same-sex marriage cases reaching the federal courts and state supreme courts have added to the dialogue. Pp. 659–663.

(b) The Fourteenth Amendment requires a State to license a marriage between two people of the same sex. Pp. 663–680.

(1) The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453; *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these tenets, the Court has long held the right to marry is protected by the Constitution. For example, *Loving* v. *Virginia*, 388 U. S. 1, 12, invalidated bans on interracial unions, and *Turner* v. *Safley*, 482 U. S. 78, 95, held that prisoners could not be denied the right to marry. To be sure, these cases presumed a relationship involving opposite-sex partners, as did *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding that the exclusion of same-sex couples from marriage did not present a substantial federal question. But other, more instructive precedents have expressed broader principles. See, *e. g.*, *Lawrence*, *supra*, at 574. In assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long

protected. See, *e. g.*, *Eisenstadt*, *supra*, at 453–454. This analysis compels the conclusion that same-sex couples may exercise the right to marry. Pp. 663–665.

(2) Four principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12. Decisions about marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. This is true for all persons, whatever their sexual orientation.

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The intimate association protected by this right was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception, 381 U. S., at 485, and was acknowledged in *Turner*, *supra*, at 95. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense. See *Lawrence*, *supra*, at 567.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See, *e. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at 772. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

Finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order. See *Maynard* v. *Hill*, 125 U. S. 190, 211. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to

marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. Pp. 665–671.

(3) The right of same-sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection. The Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other. This dynamic is reflected in *Loving*, where the Court invoked both the Equal Protection Clause and the Due Process Clause; and in *Zablocki* v. *Redhail*, 434 U. S. 374, where the Court invalidated a law barring fathers delinquent on child-support payments from marrying. Indeed, recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged, this Court has invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage, see, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455, 460–461, and confirmed the relation between liberty and equality, see, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 120–121.

The Court has acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See *Lawrence*, *supra*, at 575. This dynamic also applies to same-sex marriage. The challenged laws burden the liberty of same-sex couples, and they abridge central precepts of equality. The marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians. Pp. 671–675.

(4) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry. *Baker* v. *Nelson* is overruled. The state laws challenged by the petitioners in these cases are held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Pp. 675–676.

Syllabus

(5) There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right. *Bowers*, in effect, upheld state action that denied gays and lesbians a fundamental right. Though it was eventually repudiated, men and women suffered pain and humiliation in the interim, and the effects of these injuries no doubt lingered long after *Bowers* was overruled. A ruling against same-sex couples would have the same effect and would be unjustified under the Fourteenth Amendment. The petitioners' stories show the urgency of the issue they present to the Court, which has a duty to address these claims and answer these questions. The respondents' argument that allowing same-sex couples to wed will harm marriage as an institution rests on a counterintuitive view of opposite-sex couples' decisions about marriage and parenthood. Finally, the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Pp. 676–680.

(c) The Fourteenth Amendment requires States to recognize same-sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. Pp. 680–681.

772 F. 3d 388, reversed.

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 SCALIA and THOMAS, JJ., joined, *post*, p. 686. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 713. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 721. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 736.

Mary L. Bonauto argued the cause for petitioners in all cases on Question 1. With her on the briefs in No. 14–571 were *Carole M. Stanyar*, *Robert A. Sedler*, *Kenneth M. Mogill*, and *Dana M. Nessel*.

Counsel

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* on Question 1 urging reversal. With him on the brief were *Acting Associate Attorney General Delery*, *Acting Assistant Attorneys General Gupta* and *Mizer*, *Deputy Solicitor General Gershengorn*, *Deputy Assistant Attorneys General Brinkmann*, *Friel*, and *Karlan*, *Eric J. Feigin*, *Diana K. Flynn*, *Douglas N. Letter*, *Sharon M. McGowan*, *Michael Jay Singer*, *Robert A. Koch*, *Abby C. Wright*, and *Jeffrey E. Sandberg*.

John J. Bursch, Special Assistant Attorney General of Michigan, argued the cause for respondents in all cases on Question 1. With him on the briefs in No. 14–571 were *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Ann Sherman*, Assistant Solicitor General.

Douglas Hallward-Driemeier argued the cause for petitioners in all cases on Question 2. With him on the briefs in No. 14–562 were *Shannon P. Minter*, *David C. Codell*, *Christopher F. Stoll*, *Amy Whelan*, *Abby R. Rubenfeld*, *Phillip F. Cramer*, *John L. Farringer*, *Maureen T. Holland*, and *Regina M. Lambert*. *Alphonse A. Gerhardstein*, *Jennifer L. Branch*, *Jacklyn Gonzales Martin*, *Susan L. Sommer*, *Omar Gonzalez-Pagan*, *James D. Esseks*, *Steven R. Shapiro*, *Joshua A. Block*, *Chase B. Strangio*, *Ria Tabacco Mar*, *Louise Melling*, *Jon W. Davidson*, *Paul D. Castillo*, *Camilla B. Taylor*, and *Ellen Essig* filed briefs for petitioners in No. 14–556 on Question 2.

Joseph F. Whalen, Associate Solicitor General of Tennessee, argued the cause for respondents in all cases on Question 2. With him on the briefs in No. 14–562 were *Herbert H. Slatery III*, Attorney General of Tennessee, *Martha A. Campbell* and *Kevin G. Steiling*, Deputy Attorneys General, and *Alexander S. Rieger*, Assistant Attorney General. *Michael DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor, and *Stephen P. Carney* and *Peter T. Reed*,

Deputy Solicitors, filed a brief for respondent in No. 14–556 on Question 2.

Daniel J. Canon, *Laura Landenwich*, *Shannon Fauver*, *Dawn Elliott*, *Messrs. Esseks*, *Shapiro*, *Block*, and *Strangio*, *Leslie Cooper*, *Ms. Melling*, *Jeffrey L. Fisher*, *Brian Wolfman*, and *William E. Sharp* filed briefs for petitioners in No. 14–574 on both questions.

Leigh Gross Latherow, *William H. Jones, Jr.*, and *Gregory L. Monge* filed a brief for respondent in No. 14–574 on both questions.†

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†Briefs of *amici curiae* urging reversal in all cases were filed for the State of Hawaii by *Russell A. Suzuki*, Attorney General, *Girard D. Lau*, Solicitor General, *Kimberly T. Guidry*, First Deputy Solicitor General, and *Robert T. Nakatsuji*, Deputy Solicitor General; for the Commonwealth of Massachusetts et al. by *Maura Healey*, Attorney General, and *Jonathan B. Miller*, *Genevieve C. Nadeau*, and *Amanda R. Mangaser*, Assistant Attorneys 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, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Joseph A. Foster* of New Hampshire, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Kathleen G. Kane* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the State of Minnesota by *Lori Swanson*, Attorney General, *Alan I. Gilbert*, Solicitor General, and *Jacob Campion*, Assistant Attorney General; for the Commonwealth of Virginia by *Mark R. Herring*, Attorney General, *Stuart A. Raphael*, Solicitor General, *Cynthia E. Hudson*, Chief Deputy Attorney General, *Trevor S. Cox*, Deputy Solicitor General, *Cynthia V. Bailey*, Deputy Attorney General, *Allyson K. Tysinger*, Senior Assistant Attorney General, and *Carly L. Rush*, Assistant Attorney General; for The Alliance: State Advocates for Women's Rights and Gender Equality by *Kathleen M. O'Sullivan*; for the American Academy of Matrimonial Lawyers et al. by *Diana Raimi* and *Brian C. Vertz*; for the American Federation of Labor and Congress of Industrial Organizations et al. by *Alice O'Brien*, *Jason Walta*, *Lynn K. Rhinehart*, *H. Craig Becker*, *Judith A. Scott*, *Nicole G. Berner*, and *Patrick J. Szymanski*; for the American Humanist Association et al. by *Elizabeth L. Hileman*, *David A. Niose*, and *Edward Tabash*; for the American Psychological Association et al. by

JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow per-

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Paul M. Smith, *Nathalie F. P. Gilfoyle*, and *Aaron M. Panner*; for the American Public Health Association et al. by *Boris Bershteyn*, *Sheree R. Kanner*, *Kenneth Y. Choe*, and *Daniel Bruner*; for the American Sociological Association by *Carmine D. Boccuzzi, Jr.*; for Americans United for Separation of Church and State by *Charles A. Rothfeld*, *Miriam R. Nemetz*, *Richard B. Katskee*, *Ayesha N. Khan*, *Alex J. Luchenitser*, and *Hannah Y. S. Chanoine*; for the Anti-Defamation League et al. by *Gregory E. Ostfeld*, *James P. Madigan*, *Steven M. Freeman*, *Hilarie Bass*, *Elliot H. Scherker*, and *Brigid F. Cech Samole*; for Bay Area Lawyers for Individual Freedom et al. by *Jerome C. Roth* and *Amelia L. B. Sargent*; for BiLaw by *Kyle C. Velte*, *Naomi Mezey*, *Ann Tweedy*, and *Diana Adams*; for the California Council of Churches et al. by *Eric Alan Isaacson* and *Stacey Marie Kaplan*; for the Campaign for Southern Equality et al. by *Cristina Alonso*, *Sylvia H. Walbolt*, *Meghann K. Burke*, *W. O. Brazil III*, *S. Luke Largess*, *Jacob H. Sussman*, *John W. Gresham*, and *Robert B. McDuff*; for the Cato Institute by *William N. Eskridge, Jr.*, and *Ilya Shapiro*; for the Cleveland Choral Arts Association Inc., aka The North Coast Men's Chorus, by *Harlan D. Karp* and *Tina R. Haddad*; for the Columbia Law School Sexuality and Gender Law Clinic by *Suzanne B. Goldberg* and *Henry P. Monaghan*; for Conflict of Law Scholars by *Robert A. Long* and *Tobias Barrington Wolff, pro se*; for Conflict of Laws and Family Law Professors by *Sean M. SeLegue*, *Trenton H. Norris*, *Marjory A. Gentry*, *John S. Throckmorton*, and *Joanna L. Grossman*; for the Constitutional Accountability Center for *Douglas T. Kendall*, *Elizabeth B. Wydra*, *David H. Gans*, and *Judith E. Schaeffer*; for Equality Ohio et al. by *Alan B. Morrison*; for the Experiential Learning Lab at New York University School of Law by *Peggy Cooper Davis* and *Aderson Bellegarde François*; for the Family Equality Council et al. by *Katherine Keating* and *William J. Hibsher*; for Family Law Scholars by *E. Joshua Rosenkranz* and *Joan Heifetz Hollinger, pro se*; for Freedom to Marry by *Walter Dellinger* and *Anton Metlitsky*; for Garden State Equality by *Lawrence S. Lustberg* and *Joseph A. Pace*; for GLMA: Health Professionals Advancing LGBT Equality et al. by *Nicholas M. O'Donnell* and *Hector Vargas*; for Historians of Marriage et al. by *Pratik A. Shah* and *Jessica M. Weisel*; for Howard University School of Law Civil Rights Clinic by *Mr. François* and *Benjamin G. Shatz*; for the Human Rights Campaign et al. by *Roberta A. Kaplan*, *Andrew J. Ehrlich*, *Jaren Janghorbani*, and *Dale Carpenter*; for Human Rights Watch et al. by *Richard L. Levine*, *Robert T. Vlasis III*, and *Anna*

sons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

M. Pohl; for Indiana University by *Jon Laramore*, *D. Lucetta Pope*, *Jane Dall Wilson*, and *Daniel E. Pulliam*; for the Institute for Justice by *William H. Mellor*, *Dana Berliner*, *Jeffrey T. Rowes*, and *Robert J. McNamara*; for Langley Hill Friends Meeting by *J. E. McNeil*; for Law Enforcement Officers et al. by *Hunter T. Carter* and *Matthew S. Trokenheim*; for Legal Services NYC by *Owen C. Pell*; for LGBT Student Organizations at Undergraduate, Graduate, and Professional Schools by *Andrew Melzer* and *Deborah Marcuse*; for the Liberty Education Forum by *Craig Engle*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*, *Rachel M. Kleinman*, and *Marshall W. Taylor*; for the National Family Civil Rights Center by *Douglas J. Callahan*; for the National Women's Law Center et al. by *Emily J. Martin*, *Marcia D. Greenberger*, *Nan D. Hunter*, *Barbara B. Brown*, *Stephen B. Kinnard*, and *Jennifer S. Baldocchi*; for Marriage Equality USA by *Martin N. Buchanan*; for the Mattachine Society of Washington, D. C., by *Paul M. Thompson*, *Lisa A. Linsky*, *Melissa Nott Davis*, *Michael R. Huttenlocher*, and *Mary D. Hallerman*; for the Organization of American Historians by *Catherine E. Stetson* and *Mary Helen Wimberly*; for Outserve-Servicemembers Legal Defense Network et al. by *Abbe David Lowell* and *Christopher D. Man*; for PFLAG, Inc., by *Andrew J. Davis* and *Jiyun Cameron Lee*; for the President of the House of Deputies of the Episcopal Church et al. by *Jeffrey S. Trachtman*, *Norman C. Simon*, *Jason M. Moff*, and *Kurt M. Denk*; for Scholars of the Constitutional Rights of Children by *Catherine E. Smith*; for Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders et al. by *Jonathan Jacob Nadler*; for Survivors of Sexual Orientation Change Therapies by *Sanford Jay Rosen*, *Gay Crosthwait Grunfeld*, and *Benjamin Bien-Kahn*; for Carlos A. Ball et al. by *Paul J. Hall*; for Ashutosh Bhagwat et al. by *Lori Alvino McGill* and *Diane M. Soubly*; for Stephen Clark by *Joseph P. Lombardo* and *Ilya Somin*; for Gary J. Gates by *J. Scott Ballenger* and *Melissa Arbus Sherry*; for Harold Hongju Koh et al. by *Ruth N. Borenstein* and *Marc A. Hearron*; for Lawrence J. Korb et al. by *Carter G. Phillips*, *Joseph R. Guerra*, and *Eamon P. Joyce*; for Douglas Laycock et al. by *Mr. Laycock*, *pro se*; for Kenneth B. Mehlman et al. by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Dina B. Mishra*, *Sean R. Gallagher*, and *Bennett L. Cohen*; for John K. Olson by

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one

G. Eric Brunstad, Jr., *Dennis H. Hranitzky*, and *Kate M. O'Keeffe*; for Kristen M. Perry et al. by *Theodore B. Olson*, *Matthew D. McGill*, *Amir C. Tayrani*, *Chantale Fiebig*, *David Boise*, *Joshua I. Schiller*, *Theodore J. Boutrous, Jr.*, *Theane Evangelis*, *Enrique A. Monagas*, *Charles B. Lustig*, and *Andrew M. Hendrick*; for Laurence H. Tribe et al. by *Christopher J. Wright* and *Timothy J. Simeone*; for 92 Plaintiffs in Marriage Cases in Alabama et al. by *Richard D. Bernsetein*, *Wesley R. Powell*, and *Mary J. Eaton*; for 156 Elected Officials and Former Officeholders by *Gregory L. Diskant*, *Travis J. Tu*, and *Jonah M. Knobler*; for 167 Members of the U. S. House of Representatives et al. by *Joseph F. Tringali* and *Heather C. Sawyer*; for 226 U. S. Mayors et al. by *Michael N. Feuer*, *Blithe Smith Bock*, *Lisa S. Berger*, *Dennis Herrera*, *Ronald P. Flynn*, *Christine Van Aken*, and *Mollie M. Lee*; and for 379 Employers et al. by *Susan Baker Manning*, *Michael L. Whitlock*, and *John A. Polito*.

William C. Hubbard, *David A. O'Neil*, and *Steven S. Michaels* filed a brief for the American Bar Association as *amicus curiae* urging reversal in Nos. 14–571 and 14–574.

Briefs of *amici curiae* urging reversal in No. 14–556 were filed for the County of Cuyahoga, Ohio, by *Majeed G. Makhlouf*, *Awatef Assad*, and *Doron M. Kalir*; for the Donaldson Adoption Institute et al. by *Aaron M. Tidman*, *A. W. Phinney III*, and *Jonathan A. Shapiro*; and for Chris Kluwe et al. by *John A. Dragseth* and *Timothy R. Holbrook*.

Michael L. Pitt filed a brief for Lisa Brown as *amicus curiae* urging reversal in No. 14–571.

Briefs of *amici curiae* urging affirmance in all cases were filed for the State of Alabama by *Luther Strange*, Attorney General, *Andrew L. Brasher*, Solicitor General, *David A. Cortman*, *James A. Campbell*, *David Austin R. Nimocks*, and *Douglas G. Wardlow*; for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General, *S. Kyle Duncan*, Special Assistant Attorney General, *Sean D. Reyes*, Attorney General of Utah, *Parker Douglas*, Utah Federal Solicitor, and *Ken Paxton*, Attorney General of Texas, and by the Attorneys General for their respective States as follows: *Craig W. Richards* of Alaska, *Mark Brnovic* of Arizona, *Leslie Rutledge* of Arkansas, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Marty J. Jackley* of South Dakota, and *Patrick Morissey* of West Virginia; for the State of South

man and one woman. See, *e. g.*, Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev. Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are

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Carolina by *Alan Wilson*, Attorney General, *Robert D. Cook*, Solicitor General, *Brendan McDonald* and *Ian Weschler*, Assistant Attorneys General, and *J. Emory Smith, Jr.*, Deputy Solicitor General; for Agudath Israel of America by *Larry Loigman*; for the American College of Pediatricians et al. by *David C. Walker*; for Catholic Answers by *Charles S. LiMandri*; for CatholicVote.org Education Fund by *Patrick T. Gillen*; for the Committee for Justice by *Meir Katz* and *Curt Levey*; for Concerned Women for America by *Steven W. Fitschen*; for the Family Research Council by *Paul Benjamin Linton* and *Christopher M. Gacek*; for the Family Trust Foundation of Kentucky, Inc., by *Stanton L. Cave*; for the Foundation for Moral Law by *John A. Eidsmoe*; for Judicial Watch, Inc., by *James F. Peterson* and *Meredith L. Di Liberto*; for the Institute for Marriage and Public Policy et al. by *Teresa Stanton Collett*; for the International Conference of Evangelical Endorsers by *Arthur A. Schulcz, Sr.*; for Leaders of the 2012 Republican National Convention Committee on the Platform et al. by *James Bopp, Jr.*, and *Michael P. Laffey*; for Liberty Scholars et al. by *David R. Upham*; for the Lighted Candle Society by *George M. Weaver* and *John L. Harmer*; for Major Religious Organizations by *Alexander Dushku, R. Shawn Gunnarson*, and *Carl H. Esbeck*; for Mike Huckabee Policy Solutions et al. by *Jeffrey S. Wittenbrink*; for the National Coalition of Black Pastors et al. by *Richard Thompson, Erin Mersino*, and *William R. Wagner*; for the North Carolina Values Coalition et al. by *Deborah J. Dewart*; for Organizations and Scholars of Gender-Diverse Parenting by *Edward H. Trent* and *Cecilia M. Wood*; for Organizations that Promote Biological Parenting by *Timothy Tardibono*; for the Parents and Friends of Ex-Gays & Gays by *Dean R. Broyles*; for ProtectMarriage.com–Yes on 8 et al. by *Andrew P. Pugno*; for Public Advocate of the United States et al. by *William J. Olson, Herbert W. Titus, Jeremiah L. Morgan, Kerry L. Morgan, J. Mark Brewer*, and *Mark J. Fitzgibbons*; for the Public Affairs Campaign et al. by *John C. Eastman* and *Anthony T. Caso*; for Religious Organizations et al. by *Kelly J. Shackelford, Jeffrey C. Mateer*, and *Hiram S. Sasser III*; for the Ruth Institute et al. by *Sharee S. Langenstein*; for Same-Sex Attracted Men and Their Wives by *Darrin K. Johns*; for Scholars of Fertility and Marriage by *James R. Tate*; for Scholars of History and Related Disciplines by *Charles J. Cooper, Howard C. Nielson, Jr.*, and *Howard N. Slugh*; for Scholars of Originalism by *William C. Duncan*; for Scholars of the Welfare of Women, Children, and

deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Underprivileged Populations by *Messrs. Eastman* and *Caso*, and *Lynne Marie Kohm*; for the Southeastern Legal Foundation by *Shannon Lee Goessling*; for the Texas Eagle Forum et al. by *Andrew L. Schlafly*; for Texas Values by *David Lill*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr., Jeffrey Hunter Moon, Michael F. Moses*, and *Hillary E. Byrnes*; for Wyoming Legislators et al. by *Herbert K. Doby* and *Nathaniel S. Hibben*; for Ryan T. Anderson by *Michael F. Smith*; for Heather Barwick et al. by *David Boyle*; for Robert J. Bentley, Governor of Alabama, by *Algert S. Agricola, Jr.*, and *David B. Byrne, Jr.*; for David Boyle, by *Mr. Boyle, pro se*; for Theodore Coates by *Mr. Coates, pro se*; for Jason Feliciano et al. by *Sandra F. Gilbert*; for Lary S. Larson by *Sean J. Coletti*; for Richard A. Lawrence by *Mr. Lawrence, pro se*; for Algirdas M. Liepas, by *Mr. Liepas, pro se*; for Robert Oscar Lopez et al. by *Mr. Boyle*; for Earl M. Maltz et al. by *Herbert G. Grey*; for C. L. "Butch" Otter, Governor of Idaho, by *Gene C. Schaerr* and *Thomas C. Perry*; for Judith Reisman et al. by *Mathew D. Stave, Anita L. Stave, Horatio G. Mihet*, and *Mary E. McAlister*; for David A. Robinson by *Mr. Robinson, pro se*; for Jon Simmons by *Kevin E. Green*; for Dawn Stefanowicz et al. by *Mr. Boyle*; for 47 Scholars by *Robert P. George*; for 54 International and Comparative Law Experts from 27 Countries et al. by *Lynn D. Wardle, W. Cole Durham, Jr.*, and *Robert T. Smith*; for 57 Members of U. S. Congress by *D. John Sauer*; and for 100 Scholars of Marriage by *Gene C. Schaerr*.

Briefs of *amici curiae* urging affirmance in No. 14–571 were filed for American Family Association-Michigan by *Stephen M. Crampton, Thomas L. Brejcha*, and *Mr. Gillen*; and for the Michigan Catholic Conference by *James Walsh* and *Thomas J. Rheaume, Jr.*

Ronald D. Ray and *Richard L. Masters* filed a brief for 106 Members of the Kentucky General Assembly as *amici curiae* urging affirmance in No. 14–574.

Briefs of *amici curiae* were filed in all cases for Citizens United for the Individual Freedom to Define Marriage by *D'Arcy Winston Straub*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the General Conference of Seventh-day Adventists et al. by *Eric C. Rassbach, Hannah C. Smith, Asma T. Uddin, Todd McFarland*, and *Andrew G. Schultz*; for the Leadership Conference on Civil and Human Rights et al. by *Matthew M. Hoffman, Abigail Hemani, Wade J. Hender-*

The petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra*. The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer* v. *Snyder*, 772 F. 3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U. S. 1118 (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who

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son, *Lisa M. Bornstein*, and *Joshua M. Daniels*; for Tri Valley Law, P. C., by *Marc A. Greendorfer*; for W. Burlette Carter by *Ms. Carter, pro se*; for Mae Kuykendall et al. by *Ms. Kuykendall, pro se*; for Dr. Paul McHugh by *Gerard V. Bradley*; and for Daniel N. Robinson by *Kevin T. Snider*.

find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point.

Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits

only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man

and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally Cott, *supra*; Coontz, *supra*; H. Hartog, Man and Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and wide-

spread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late-20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U. S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court over-

ruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U. S. 558, 575.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr* v. *Lewin*, 74 Haw. 530, 852 P. 2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U. S. C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States* v. *Windsor*, 570 U. S. 744 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at 764.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on

principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection* v. *Bruning*, 455 F. 3d 859, 864–868 (CA8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State-by-State Supp. (2015).

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–149 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 484–486 (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced

to any formula." *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki* v. *Redhail*, 434 U. S. 374, 384 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner* v. *Safley*, 482 U. S. 78, 95 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e. g.*, *M. L. B.* v. *S. L. J.*, 519 U. S. 102, 116 (1996); *Cleveland Bd. of Ed.* v. *LaFleur*,

414 U. S. 632, 639–640 (1974); *Griswold*, *supra*, at 486; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker* v. *Nelson*, 409 U. S. 810, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e. g.*, *Lawrence*, 539 U. S., at 574; *Turner*, *supra*, at 95; *Zablocki*, *supra*, at 384; *Loving*, *supra*, at 12; *Griswold*, *supra*, at 486. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e. g.*, *Eisenstadt*, *supra*, at 453–454; *Poe*, *supra*, at 542–553 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki*, *supra*, at 384 (observing *Loving* held "the right to marry is of fundamental impor-

tance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*, *supra*, at 574. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki*, *supra*, at 386.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge*, 440 Mass., at 322, 798 N. E. 2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor*, 570 U. S., at 772. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving*, *supra*, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*, which held the Constitution protects the right of married couples to use contraception. 381 U. S., at 485. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U. S., at 95–96. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at 763. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925);

Meyer, 262 U. S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U. S., at 384 (quoting *Meyer*, *supra*, at 399). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at 772. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at 772.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1900).

In *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been "'a great public institution, giving character to our whole civil polity.'" *Id.*, at 213. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general

free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor*, 570 U. S., at 765. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is

now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.*, at 789–792 (BREYER, J., concurring in judgments).

That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving*, 388 U. S., at 12; *Lawrence*, 539 U. S., at 566–567.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how

constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the *imprimatur* of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M. L. B.*, 519 U. S., at 120–121; *id.*, at 128–129 (KENNEDY, J., concurring in judgment); *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving*, the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treat-

ment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U. S., at 12. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U. S., at 383. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 660, invidious sex-based classifications in marriage remained

common through the mid-20th century. See App. to Brief for Appellant in *Reed* v. *Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." Ga. Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142 (1980); *Califano* v. *Westcott*, 443 U. S. 76 (1979); *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M. L. B.* v. *S. L. J.*, the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U. S., at 119–124. In *Eisenstadt* v. *Baird*, the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U. S., at 446–454. And in *Skinner* v. *Oklahoma ex rel. Williamson*, the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U. S., at 538–543.

In *Lawrence*, the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the

legal treatment of gays and lesbians. See 539 U. S., at 575. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.*, at 578.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e. g.*, *Zablocki*, *supra*, at 383–388; *Skinner*, 316 U. S., at 541.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker* v. *Nelson* must be and now is overruled, and the state laws challenged by the petitioners in these cases are now held invalid to the extent they exclude

same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

IV

There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. The respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. In its ruling on the cases now before this Court, the majority opinion for the Court of Appeals made a cogent argument that it would be appropriate for the respondents' States to await further public discussion and political measures before licensing same-sex marriages. See 772 F. 3d, at 409.

Yet there has been far more deliberation than this argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question. This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic

principle in *Schuette* v. *BAMN*, 572 U. S. 291 (2014), noting the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Id.*, at 312. Indeed, it is most often through democracy that liberty is preserved and protected in our lives. But as *Schuette* also said, "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." *Id.*, at 311. Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. *Id.*, at 313. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Ibid.* It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law crimi-

nalizing same-sex intimacy. See 478 U. S., at 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U. S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.

A ruling against same-sex couples would have the same effect—and, like *Bowers*, would be unjustified under the Fourteenth Amendment. The petitioners' stories make clear the urgency of the issue they present to the Court. James Obergefell now asks whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon. Ijpe DeKoe and Thomas Kostura now ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage. Properly presented with the petitioners' cases, the Court has a duty to address these claims and answer these questions.

Indeed, faced with a disagreement among the Courts of Appeals—a disagreement that caused impermissible geographic variation in the meaning of federal law—the Court granted review to determine whether same-sex couples may

exercise the right to marry. Were the Court to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact. Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See *Kitchen* v. *Herbert*, 755 F. 3d 1193, 1223 (CA10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the princi-

ples that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

V

These cases also present the question whether the Constitution requires States to recognize same-sex marriages validly performed out of State. As made clear by the case of Obergefell and Arthur, and by that of DeKoe and Kostura, the recognition bans inflict substantial and continuing harm on same-sex couples.

Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complications" in the law of domestic relations. *Williams* v. *North Carolina*, 317 U. S. 287, 299 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.

As counsel for the respondents acknowledged at argument, if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to

recognize those marriages performed elsewhere are undermined. See Tr. of Oral Arg. on Question 2, p. 44. The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

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

It is so ordered.

APPENDIXES

A

State and Federal Judicial Decisions Addressing Same-Sex Marriage

United States Courts of Appeals Decisions

Adams v. *Howerton*, 673 F. 2d 1036 (CA9 1982)
Smelt v. *County of Orange*, 447 F. 3d 673 (CA9 2006)

Citizens for Equal Protection v. *Bruning*, 455 F. 3d 859 (CA8 2006)

Windsor v. *United States*, 699 F. 3d 169 (CA2 2012)

Massachusetts v. *Department of Health and Human Services*, 682 F. 3d 1 (CA1 2012)

Perry v. *Brown*, 671 F. 3d 1052 (CA9 2012)

Latta v. *Otter*, 771 F. 3d 456 (CA9 2014)

Baskin v. *Bogan*, 766 F. 3d 648 (CA7 2014)

Bishop v. *Smith*, 760 F. 3d 1070 (CA10 2014)

Bostic v. *Schaefer*, 760 F. 3d 352 (CA4 2014)

Kitchen v. *Herbert*, 755 F. 3d 1193 (CA10 2014)

DeBoer v. *Snyder*, 772 F. 3d 388 (CA6 2014)

Latta v. *Otter*, 779 F. 3d 902 (CA9 2015) (O'Scannlain, J., dissenting from the denial of rehearing en banc)

United States District Court Decisions

Adams v. *Howerton*, 486 F. Supp. 1119 (CD Cal. 1980)

Citizens for Equal Protection, Inc. v. *Bruning*, 290 F. Supp. 2d 1004 (Neb. 2003)

Citizens for Equal Protection, Inc. v. *Bruning*, 368 F. Supp. 2d 980 (Neb. 2005)

Wilson v. *Ake*, 354 F. Supp. 2d 1298 (MD Fla. 2005)

Smelt v. *County of Orange*, 374 F. Supp. 2d 861 (CD Cal. 2005)

Bishop v. *Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (ND Okla. 2006)

Massachusetts v. *Department of Health and Human Services*, 698 F. Supp. 2d 234 (Mass. 2010)

Gill v. *Office of Personnel Management*, 699 F. Supp. 2d 374 (Mass. 2010)

Perry v. *Schwarzenegger*, 704 F. Supp. 2d 921 (ND Cal. 2010)

Dragovich v. *Department of Treasury*, 764 F. Supp. 2d 1178 (ND Cal. 2011)

Golinski v. *Office of Personnel Management*, 824 F. Supp. 2d 968 (ND Cal. 2012)

Dragovich v. *Department of Treasury*, 872 F. Supp. 2d 944 (ND Cal. 2012)

Windsor v. *United States*, 833 F. Supp. 2d 394 (SDNY 2012)

Pedersen v. *Office of Personnel Management*, 881 F. Supp. 2d 294 (Conn. 2012)

Jackson v. *Abercrombie*, 884 F. Supp. 2d 1065 (Haw. 2012)

Sevcik v. *Sandoval*, 911 F. Supp. 2d 996 (Nev. 2012)

Merritt v. *Attorney General*, 2013 WL 6044329 (MD La., Nov. 14, 2013)

Gray v. *Orr*, 4 F. Supp. 3d 984 (ND Ill. 2013)

Lee v. *Orr*, 2013 WL 6490577 (ND Ill., Dec. 10, 2013)

Kitchen v. *Herbert*, 961 F. Supp. 2d 1181 (Utah 2013)

Obergefell v. *Wymyslo*, 962 F. Supp. 2d 968 (SD Ohio 2013)

Bishop v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252 (ND Okla. 2014)

Bourke v. *Beshear*, 996 F. Supp. 2d 542 (WD Ky. 2014)

Lee v. *Orr*, 2014 WL 683680 (ND Ill., Feb. 21, 2014)

Bostic v. *Rainey*, 970 F. Supp. 2d 456 (ED Va. 2014)

De Leon v. *Perry*, 975 F. Supp. 2d 632 (WD Tex. 2014)

Tanco v. *Haslam*, 7 F. Supp. 3d 759 (MD Tenn. 2014)

DeBoer v. *Snyder*, 973 F. Supp. 2d 757 (ED Mich. 2014)

Henry v. *Himes*, 14 F. Supp. 3d 1036 (SD Ohio 2014)

Latta v. *Otter*, 19 F. Supp. 3d 1054 (Idaho 2014)

Geiger v. *Kitzhaber*, 994 F. Supp. 2d 1128 (Ore. 2014)

Evans v. *Utah*, 21 F. Supp. 3d 1192 (Utah 2014)

Whitewood v. *Wolf*, 992 F. Supp. 2d 410 (MD Pa. 2014)

Wolf v. *Walker*, 986 F. Supp. 2d 982 (WD Wis. 2014)

Baskin v. *Bogan*, 12 F. Supp. 3d 1144 (SD Ind. 2014)

Love v. *Beshear*, 989 F. Supp. 2d 536 (WD Ky. 2014)

Burns v. *Hickenlooper*, 2014 WL 3634834 (Colo., July 23, 2014)

Bowling v. *Pence*, 39 F. Supp. 3d 1025 (SD Ind. 2014)

Brenner v. *Scott*, 999 F. Supp. 2d 1278 (ND Fla. 2014)

Robicheaux v. *Caldwell*, 2 F. Supp. 3d 910 (ED La. 2014)

General Synod of the United Church of Christ v. *Resinger*, 12 F. Supp. 3d 790 (WDNC 2014)
Hamby v. *Parnell*, 56 F. Supp. 3d 1056 (Alaska 2014)
Fisher-Borne v. *Smith*, 14 F. Supp. 3d 695 (MDNC 2014)
Majors v. *Horne*, 14 F. Supp. 3d 1313 (Ariz. 2014)
Connolly v. *Jeanes*, 73 F. Supp. 3d 1094 (Ariz. 2014)
Guzzo v. *Mead*, 2014 WL 5317797 (Wyo., Oct. 17, 2014)
Conde-Vidal v. *Garcia-Padilla*, 54 F. Supp. 3d 157 (PR 2014)
Marie v. *Moser*, 65 F. Supp. 3d 1175 (Kan. 2014)
Lawson v. *Kelly*, 58 F. Supp. 3d 923 (WD Mo. 2014)
McGee v. *Cole*, 66 F. Supp. 3d 747 (SD W. Va. 2014)
Condon v. *Haley*, 21 F. Supp. 3d 572 (SC 2014)
Bradacs v. *Haley*, 58 F. Supp. 3d 514 (SC 2014)
Rolando v. *Fox*, 23 F. Supp. 3d 1227 (Mont. 2014)
Jernigan v. *Crane*, 64 F. Supp. 3d 1260 (ED Ark. 2014)
Campaign for Southern Equality v. *Bryant*, 64 F. Supp. 3d 906 (SD Miss. 2014)
Inniss v. *Aderhold*, 80 F. Supp. 3d 1335 (ND Ga. 2015)
Rosenbrahn v. *Daugaard*, 61 F. Supp. 3d 862 (SD 2015)
Caspar v. *Snyder*, 77 F. Supp. 3d 616 (ED Mich. 2015)
Searcy v. *Strange*, 81 F. Supp. 3d 1285 (SD Ala. 2015)
Strawser v. *Strange*, 44 F. Supp. 3d 1206 (SD Ala. 2015)
Waters v. *Ricketts*, 48 F. Supp. 3d 1271 (Neb. 2015)

State Highest Court Decisions

Baker v. *Nelson*, 291 Minn. 310, 191 N. W. 2d 185 (1971)
Jones v. *Hallahan*, 501 S. W. 2d 588 (Ky. 1973)
Baehr v. *Lewin*, 74 Haw. 530, 852 P. 2d 44 (1993)
Dean v. *District of Columbia*, 653 A. 2d 307 (D. C. 1995)
Baker v. *State*, 170 Vt. 194, 744 A. 2d 864 (1999)
Brause v. *State*, 21 P. 3d 357 (Alaska 2001) (ripeness)
Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)
In re Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N. E. 2d 565 (2004)

Li v. *State*, 338 Ore. 376, 110 P. 3d 91 (2005)
Cote-Whitacre v. *Department of Public Health*, 446 Mass. 350, 844 N. E. 2d 623 (2006)
Lewis v. *Harris*, 188 N. J. 415, 908 A. 2d 196 (2006)
Andersen v. *King County*, 158 Wash. 2d 1, 138 P. 3d 963 (2006)
Hernandez v. *Robles*, 7 N. Y. 3d 338, 855 N. E. 2d 1 (2006)
Conaway v. *Deane*, 401 Md. 219, 932 A. 2d 571 (2007)
In re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384 (2008)
Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)
Strauss v. *Horton*, 46 Cal. 4th 364, 207 P. 3d 48 (2009)
Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)
Griego v. *Oliver*, 2014–NMSC–003, 316 P. 3d 865 (2013)
Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)
Ex parte State ex rel. Alabama Policy Inst., 200 So. 3d 495 (Ala. 2015)

B

State Legislation and Judicial Decisions Legalizing Same-Sex Marriage

Legislation

Del. Code Ann., Tit. 13, § 129 (Cum. Supp. 2014)
D. C. Act No. 18–248, 57 D. C. Reg. 27 (2010)
Haw. Rev. Stat. § 572–1 (2006 and 2013 Cum. Supp.)
Ill. Pub. Act No. 98–597
Me. Rev. Stat. Ann., Tit. 19, § 650–A (Cum. Supp. 2014)
2012 Md. Laws p. 9
2013 Minn. Laws p. 404
2009 N. H. Laws p. 60
2011 N. Y. Laws p. 749
2013 R. I. Laws p. 7
2009 Vt. Acts & Resolves p. 33
2012 Wash. Sess. Laws p. 199

Judicial Decisions

Goodridge v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003)

Kerrigan v. *Commissioner of Public Health*, 289 Conn. 135, 957 A. 2d 407 (2008)

Varnum v. *Brien*, 763 N. W. 2d 862 (Iowa 2009)

Griego v. *Oliver*, 2014–NMSC–003, 316 P. 3d 865 (2013)

Garden State Equality v. *Dow*, 216 N. J. 314, 79 A. 3d 1036 (2013)

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization deleted).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand mar-

riage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 664, 676. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the

Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 672 I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 657, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. 565, 577 (2014).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 657. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ibid.*; Tr. of Oral Arg. on Question 1, p. 12

(petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. 744, 763 (2013).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct

sexual relations within marriage rather than without. As one prominent scholar put it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." *Ante*, at 659–660. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§ 78–79, pp. 39–40 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at 767 (quoting *In re Burrus*, 136 U. S. 586, 593–594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one

doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885), which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888). We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978).

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given

way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving*, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure." *Ante*, at 660. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 659.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972).

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its

State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor Gen-

eral of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 665. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45. Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 656, 667. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993). The theory is that some liberties are "so rooted in the traditions

and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986) (address at Stanford University) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that

when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.*, at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the ques-

tion whether statutes embodying them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963); see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a superlegislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Our precedents have required that implied fundamental rights be "objectively,

deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e. g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009); *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987); *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57, 96–101 (2000) (KENNEDY, J., dissenting) (consulting "'[o]ur Nation's history, legal traditions, and practices'" and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 671. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante*, at 664, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,'

whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 657, 658, 659, 681. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987); *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification.

In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 730–731, n. 5 (THOMAS, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 665.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at 808 (ALITO, J., dissenting) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 665. Although not entirely clear, this reference seems to corre-

spond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.*, at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003), which struck down a Texas statute criminalizing homosexual sodomy. *Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante*, at 681. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961). As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that

courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 35–37 (1973); *post*, at 728–732 (THOMAS, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 671 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. No-

body could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45. The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 652. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 665. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor." *Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 664. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 672. Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 677. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to

implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown* v. *Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14–4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 666, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 668, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 675, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Mar-

ried Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: The States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 679. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Jus-

tice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 664. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 673. Absent from this portion of the opinion, how-

ever, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

> "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 672.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 675. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009). In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the an-

cillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 660–661, 663.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs

in these cases alone. *Ante*, at 663, 676. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 671–672. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 661. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. 291, 313 (2014).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly

reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post,* at 714 (SCALIA, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on

this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 679. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar

questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 672. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ibid.* The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 670, 672, 675, 678. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 741–742 (ALITO, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted. *Ante*, at 671.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for

the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join THE CHIEF JUSTICE's opinion in full. I write separately to call attention to this Court's threat to American democracy.

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest

extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

I

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to.[1] Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.[2]

The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws "impairing the Obligation of Contracts,"[3] denying "Full Faith and Credit" to the "public Acts" of other States,[4] prohibiting the free exercise of religion,[5] abridging the free-

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[1] Brief for Respondents in No. 14–571, p. 14.

[2] Accord, *Schuette* v. *BAMN*, 572 U. S. 291, 311 (2014) (plurality opinion).

[3] U. S. Const., Art. I, § 10.

[4] Art. IV, § 1.

[5] Amdt. 1.

dom of speech,[6] infringing the right to keep and bear arms,[7] authorizing unreasonable searches and seizures,[8] and so forth. Aside from these limitations, those powers "reserved to the States respectively, or to the people"[9] can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?

Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):

> "[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States."[10]
>
> "[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[11]

But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice

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[6] *Ibid.*

[7] Amdt. 2.

[8] Amdt. 4.

[9] Amdt. 10.

[10] *United States* v. *Windsor*, 570 U. S. 744, 766 (2013) (internal quotation marks omitted).

[11] *Id.*, at 767.

that remained both universal and uncontroversial in the years after ratification.[12] We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter *what* it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its "reasoned judgment," thinks the Fourteenth Amendment ought to protect.[13] That is so because "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . ."[14] One would think that sentence would continue: " . . . and therefore they provided for a means by which the People could amend the Constitution," or perhaps " . . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation." But no. What logically follows, in the majority's judge-empowering estimation, is: "and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[15] The "we," needless to say, is the nine of us. "History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."[16] Thus,

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[12] See *Town of Greece* v. *Galloway*, 572 U. S. 565, 576–577 (2014).
[13] *Ante*, at 664.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*

rather than focusing on *the People's* understanding of "liberty"—at the time of ratification or even today—the majority focuses on four "principles and traditions" that, *in the majority's view*, prohibit States from defining marriage as an institution consisting of one man and one woman.[17]

This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers[18] who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans[19]), or even a Protestant of any denomination. The strikingly unrepresenta-

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[17] *Ante*, at 665–669.

[18] The predominant attitude of tall-building lawyers with respect to the questions presented in these cases is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners. See Brief for American Bar Association as *Amicus Curiae* in Nos. 14–571 and 14–574, pp. 1–5.

[19] See Pew Research Center, America's Changing Religious Landscape 4 (May 12, 2015).

tive character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not.* And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.

II

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003.[20] They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every

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[20] *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941 (2003).

nation in history until 15 years ago,[21] cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.[22] Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[23] (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24] (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty

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[21] *Windsor*, 570 U. S., at 808 (ALITO, J., dissenting).

[22] If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.

[23] *Ante*, at 666.

[24] *Ante*, at 671–672.

[never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right."[25] (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two Clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

* * *

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments."[26] With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

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[25] *Ante*, at 672.

[26] The Federalist No. 78, pp. 522, 523 (J. Cooke ed. 1961) (A. Hamilton).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty. Yet the majority invokes our Constitution in the name of a "liberty" that the Framers would not have recognized, to the detriment of the liberty they sought to protect. Along the way, it rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic. I cannot agree with it.

I

The majority's decision today will require States to issue marriage licenses to same-sex couples and to recognize same-sex marriages entered in other States largely based on a constitutional provision guaranteeing "due process" before a person is deprived of his "life, liberty, or property." I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. *McDonald* v. *Chicago*, 561 U. S. 742, 811–812 (2010) (opinion concurring in part and concurring in judgment). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, § 1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental right[s]'" protected by that document. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 953, 964 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in

part) (quoting *Griswold* v. *Connecticut*, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)).

By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority. Petitioners argue that by enshrining the traditional definition of marriage in their State Constitutions through voter-approved amendments, the States have put the issue "beyond the reach of the normal democratic process." Brief for Petitioners in No. 14–562, p. 54. But the result petitioners seek is far less democratic. They ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation. That a "bare majority" of this Court, *ante*, at 677, is able to grant this wish, wiping out with a stroke of the keyboard the results of the political process in over 30 States, based on a provision that guarantees only "due process" is but further evidence of the danger of substantive due process.[1]

II

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. To invoke the protection of the Due Process Clause at all—whether under a theory of "substantive" or "procedural" due process—a party must first identify a deprivation of "life, liberty, or property." The majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

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[1] The majority states that the right it believes is "part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Ante*, at 672. Despite the "synergy" it finds "between th[ese] two protections," *ante*, at 673, the majority clearly uses equal protection only to shore up its substantive due process analysis, an analysis both based on an imaginary constitutional protection and revisionist view of our history and tradition.

A

1

As used in the Due Process Clauses, "liberty" most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 W. Blackstone, Commentaries on the Laws of England 130 (1769) (Blackstone). That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta. See *Davidson* v. *New Orleans*, 96 U. S. 97, 101–102 (1878). Chapter 39 of the original Magna Carta provided, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A. Howard, Magna Carta: Text and Commentary 43 (1964). Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land." 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797). In his influential commentary on the provision many years later, Sir Edward Coke interpreted the words "by the law of the land" to mean the same thing as "by due proces of the common law." *Id.*, at 50.

After Magna Carta became subject to renewed interest in the 17th century, see, *e. g.*, *ibid.*, William Blackstone referred to this provision as protecting the "absolute rights of every Englishman." 1 Blackstone 123. And he formulated those

absolute rights as "the right of personal security," which included the right to life; "the right of personal liberty"; and "the right of private property." *Id.*, at 125. He defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." *Id.*, at 125, 130.[2]

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property."[3] State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly

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[2] The seeds of this articulation can also be found in Henry Care's influential treatise, English Liberties. First published in America in 1721, it described the "three things, which the Law of *England* . . . principally regards and taketh Care of," as "*Life*, *Liberty* and *Estate*," and described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment. The Habeas Corpus Act, comment., in English Liberties, or the Free-born Subject's Inheritance 185 (H. Care comp. 5th ed. 1721). Though he used the word "Liberties" by itself more broadly, see, *e. g.*, *id.*, at 7, 34, 56, 58, 60, he used "Liberty" in a narrow sense when placed alongside the words "Life" or "Estate," see, *e. g.*, *id.*, at 185.

[3] Maryland, North Carolina, and South Carolina adopted the phrase "life, liberty, or property" in provisions otherwise tracking Magna Carta: "That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Md. Const., Declaration of Rights, Art. XXI (1776), in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1688 (F. Thorpe ed. 1909); see also S. C. Const., Art. XLI (1778), in 6 *id.*, at 3257; N. C. Const., Declaration of Rights, Art. XII (1776), in 5 *id.*, at 2788. Massachusetts and New Hampshire did the same, albeit with some alterations to Magna Carta's framework: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Mass. Const., pt. I, Art. XII (1780), in 3 *id.*, at 1891; see also N. H. Const., pt. I, Art. XV (1784), in 4 *id.*, at 2455.

construed the word "liberty" to refer only to freedom from physical restraint. See Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–445 (1926). Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint. Cf. *id.*, at 444–445.

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. See Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365, 382 (1890). When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." See *id.*, at 375. And that usage avoids rendering superfluous those protections for "life" and "property."

If the Fifth Amendment uses "liberty" in this narrow sense, then the Fourteenth Amendment likely does as well. See *Hurtado* v. *California*, 110 U. S. 516, 534–535 (1884). Indeed, this Court has previously commented, "The conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment [as was used in the Fifth Amendment], it was used in the same sense and with no greater extent." *Ibid.* And this Court's earliest Fourteenth Amendment decisions appear to interpret the Clause as using "liberty" to mean freedom from physical restraint. In *Munn* v. *Illinois*, 94 U. S. 113 (1877), for example, the Court recognized the relationship between the two Due Process Clauses and Magna Carta, see *id.*, at 123–124, and implicitly rejected the dissent's argument that "'liberty'"

encompassed "something more . . . than mere freedom from physical restraint or the bounds of a prison," *id.*, at 142 (Field, J., dissenting). That the Court appears to have lost its way in more recent years does not justify deviating from the original meaning of the Clauses.

2

Even assuming that the "liberty" in those Clauses encompasses something more than freedom from physical restraint, it would not include the types of rights claimed by the majority. In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited "[i]n pamphlet after pamphlet" by American writers. B. Bailyn, The Ideological Origins of the American Revolution 27 (1967). Locke described men as existing in a state of nature, possessed of the "perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." J. Locke, Second Treatise of Civil Government, § 4, p. 4 (J. Gough ed. 1947) (Locke). Because that state of nature left men insecure in their persons and property, they entered civil society, trading a portion of their natural liberty for an increase in their security. See *id.*, § 97, at 49. Upon consenting to that order, men obtained civil liberty, or the freedom "to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." *Id.*, § 22, at 13.[4]

[4] Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one thinks fit, without any restraint

This philosophy permeated the 18th-century political scene in America. A 1756 editorial in the Boston Gazette, for example, declared that "Liberty in the *State of Nature*" was the "inherent natural Right" "of each Man" "to make a free Use of his Reason and Understanding, and to chuse that Action which he thinks he can give the best Account of," but that, "in Society, every Man parts with a Small Share of his *natural* Liberty, or lodges it in the publick Stock, that he may possess the Remainder without Controul." Boston Gazette and Country Journal, No. 58, May 10, 1756, p. 1. Similar sentiments were expressed in public speeches, sermons, and letters of the time. See 1 C. Hyneman & D. Lutz, American Political Writing During the Founding Era 1760–1805, pp. 100, 308, 385 (1983).

The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government. See Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918–919 (1993). As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom *from*, not freedom *to*, freedom from a number

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or control, unless by the law of nature," and described civil liberty as that "which leaves the subject entire master of his own conduct," except as "restrained by human laws." 1 Blackstone 121–122. And in a "treatise routinely cited by the Founders," *Zivotofsky* v. *Kerry*, *ante*, at 36 (THOMAS, J., concurring in judgment in part and dissenting in part), Thomas Rutherforth wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754). Rutherforth explained that "[t]he only restraint, which a mans right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God," and that "[w]hatever right those of our own species may have . . . to restrain [those actions] within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them." *Id.*, at 147–148.

of social and political evils, including arbitrary government power." J. Reid, The Concept of Liberty in the Age of the American Revolution 56 (1988). Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the *absence of restraint*." R. Hey, Observations on the Nature of Civil Liberty and the Principles of Government § 13, p. 8 (1776) (Hey). When the colonists described laws that would infringe their liberties, they discussed laws that would prohibit individuals "from walking in the streets and highways on certain saints days, or from being abroad after a certain time in the evening, or . . . restrain [them] from working up and manufacturing materials of [their] own growth." Downer, A Discourse at the Dedication of the Tree of Liberty, in 1 Hyneman, *supra*, at 101. Each of those examples involved freedoms that existed outside of government.

B

Whether we define "liberty" as locomotion or freedom from governmental action more broadly, petitioners have in no way been deprived of it.

Petitioners cannot claim, under the most plausible definition of "liberty," that they have been imprisoned or physically restrained by the States for participating in same-sex relationships. To the contrary, they have been able to cohabitate and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.

Nor, under the broader definition, can they claim that the States have restricted their ability to go about their daily lives as they would be able to absent governmental restrictions. Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relation-

ships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. Nor have the States prevented petitioners from approximating a number of incidents of marriage through private legal means, such as wills, trusts, and powers of attorney.

Instead, the States have refused to grant them governmental entitlements. Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because of* the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms. And they want to receive various monetary benefits, including reduced inheritance taxes upon the death of a spouse, compensation if a spouse dies as a result of a work-related injury, or loss of consortium damages in tort suits. But receiving governmental recognition and benefits has nothing to do with any understanding of "liberty" that the Framers would have recognized.

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it. As Locke had explained many years earlier, "The first society was between man and wife, which gave beginning to that between parents and children." Locke § 77, at 39; see also J. Wilson, Lectures on Law, in 2 Collected Works of James Wilson 1068 (K. Hall and M. Hall

eds. 2007) (concluding "that to the institution of marriage the true origin of society must be traced"). Petitioners misunderstand the institution of marriage when they say that it would "mean little" absent governmental recognition. Brief for Petitioners in No. 14–556, p. 33.

Petitioners' misconception of liberty carries over into their discussion of our precedents identifying a right to marry, not one of which has expanded the concept of "liberty" beyond the concept of negative liberty. Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving* v. *Virginia*, 388 U. S. 1 (1967), for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia, *id.*, at 2–3.[5] They were each sentenced to a year

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[5] The suggestion of petitioners and their *amici* that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate. "America's earliest laws against interracial sex and marriage were spawned by slavery." P. Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America 19 (2009). For instance, Maryland's 1664 law prohibiting marriages between "'freeborne English women'" and "'Negro Sla[v]es'" was passed as part of the very act that authorized lifelong slavery in the colony. *Id.*, at 19–20. Virginia's antimiscegenation laws likewise were passed in a 1691 resolution entitled "An act for suppressing outlying Slaves." Act of Apr. 1691, Ch. XVI, 3 Va. Stat. 86 (W. Hening ed. 1823) (reprint 1969) (italics deleted). "It was not until the Civil War threw the future of slavery into doubt that lawyers, legislators, and judges began to develop the elaborate justifications that signified the emergence of miscegenation law and made restrictions on interracial marriage the foundation of post-Civil War white supremacy." Pascoe, *supra*, at 27–28.

Laws defining marriage as between one man and one woman do not share this sordid history. The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history. Brief for Scholars of History and Related Disciplines as *Amici Curiae* 1. It arose not out of a desire to shore up an invidious institution like slavery, but out of a desire "to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world." *Id.*, at 8. And it has existed in civilizations containing all manner of views on homosexual-

of imprisonment, suspended for a term of 25 years on the condition that they not reenter the Commonwealth together during that time. *Id.*, at 3.[6] In a similar vein, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), involved a man who was prohibited, on pain of criminal penalty, from "marry[ing] in Wisconsin or elsewhere" because of his outstanding child-support obligations, *id.*, at 387; see *id.*, at 377–378. And *Turner* v. *Safley*, 482 U. S. 78 (1987), involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons, *id.*, at 82. In *none* of those cases were individuals denied solely governmental recognition and benefits associated with marriage.

In a concession to petitioners' misconception of liberty, the majority characterizes petitioners' suit as a quest to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Ante*, at 652. But "liberty" is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to governmental benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment. The majority's "better informed understanding of how constitutional imperatives define . . . liberty," *ante*, at 671–672—better informed, we must assume, than that of the people who rati-

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ity. See Brief for Ryan T. Anderson as *Amicus Curiae* 11–12 (explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time).

[6] The prohibition extended so far as to forbid even religious ceremonies, thus raising a serious question under the First Amendment's Free Exercise Clause, as at least one *amicus* brief at the time pointed out. Brief for John J. Russell et al. as *Amici Curiae* in *Loving* v. *Virginia*, O. T. 1966, No. 395, pp. 12–16.

fied the Fourteenth Amendment—runs headlong into the reality that our Constitution is a "collection of 'Thou shalt nots,'" *Reid* v. *Covert*, 354 U. S. 1, 9 (1957) (plurality opinion), not "Thou shalt provides."

III

The majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty.

A

The majority apparently disregards the political process as a protection for liberty. Although men, in forming a civil society, "give up all the power necessary to the ends for which they unite into society, to the majority of the community," Locke § 99, at 49, they reserve the authority to exercise natural liberty within the bounds of laws established by that society, *id.*, § 22, at 13; see also Hey §§ 52, 54, at 30–32. To protect that liberty from arbitrary interference, they establish a process by which that society can adopt and enforce its laws. In our country, that process is primarily representative government at the state level, with the Federal Constitution serving as a backstop for that process. As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. This is no less true when some residents disagree with the result; indeed, it seems difficult to imagine *any* law on which all residents of a State would agree. See Locke § 98, at 49 (suggesting that society would cease to function if it required unanimous consent to laws). What matters is that the process established by those who created the society has been honored.

That process has been honored here. The definition of marriage has been the subject of heated debate in the States. Legislatures have repeatedly taken up the matter on behalf of the People, and 35 States have put the question to the

People themselves. In 32 of those 35 States, the People have opted to retain the traditional definition of marriage. Brief for Respondents in No. 14–571, pp. 1a–7a. That petitioners disagree with the result of that process does not make it any less legitimate. Their civil liberty has been vindicated.

B

Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.

The history of religious liberty in our country is familiar: Many of the earliest immigrants to America came seeking freedom to practice their religion without restraint. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422–1425 (1990). When they arrived, they created their own havens for religious practice. *Ibid.* Many of these havens were initially homogenous communities with established religions. *Ibid.* By the 1780's, however, "America was in the wake of a great religious revival" marked by a move toward free exercise of religion. *Id.*, at 1437. Every State save Connecticut adopted protections for religious freedom in their State Constitutions by 1789, *id.*, at 1455, and, of course, the First Amendment enshrined protection for the free exercise of religion in the U. S. Constitution. But that protection was far from the last word on religious liberty in this country, as the Federal Government and the States have reaffirmed their commitment to religious liberty by codifying protections for religious practice. See, *e. g.*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*; Conn. Gen. Stat. § 52–571b (2015).

Numerous *amici*—even some not supporting the States—have cautioned the Court that its decision here will "have unavoidable and wide-ranging implications for religious liberty." Brief for General Conference of Seventh-day Adventists et al. as *Amici Curiae* 5. In our society, marriage

is not simply a governmental institution; it is a religious institution as well. *Id.*, at 7. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.

The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph, *ante*, at 679–680. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Ibid.* Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[7]

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court's constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short circuits that process, with potentially ruinous consequences for religious liberty.

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[7] Concerns about threats to religious liberty in this context are not unfounded. During the heyday of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. Va. Code Ann. § 20–60 (1960).

IV

Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. *Ante,* at 656, 666, 678, 681.[8] The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

The majority's musings are thus deeply misguided, but at least those musings can have no effect on the dignity of the persons the majority demeans. Its mischaracterization of the arguments presented by the States and their *amici* can

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[8] The majority also suggests that marriage confers "nobility" on individuals. *Ante,* at 656. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.

have no effect on the dignity of those litigants. Its rejection of laws preserving the traditional definition of marriage can have no effect on the dignity of the people who voted for them. Its invalidation of those laws can have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage. And its disdain for the understandings of liberty and dignity upon which this Nation was founded can have no effect on the dignity of Americans who continue to believe in them.

* * *

Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

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

Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.[1] The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.

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[1] I use the phrase "recognize marriage" as shorthand for issuing marriage licenses and conferring those special benefits and obligations provided under state law for married persons.

I

The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.

To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States* v. *Windsor*, 570 U. S. 744, 808 (2013) (ALITO, J., dissenting). Indeed:

> "In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. See *Goodridge* v. *Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941. Nor is the right to same-sex marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.
>
> "What [those arguing in favor of a constitutional right to same-sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have

cause for both caution and humility." *Id.*, at 808–809 (footnote omitted).

For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

II

Attempting to circumvent the problem presented by the newness of the right found in these cases, the majority claims that the issue is the right to equal treatment. Noting that marriage is a fundamental right, the majority argues that a State has no valid reason for denying that right to same-sex couples. This reasoning is dependent upon a particular understanding of the purpose of civil marriage. Although the Court expresses the point in loftier terms, its argument is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need. And by benefiting persons who choose to wed, marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens. It is for these reasons, the argument goes, that States encourage and formalize marriage, confer special benefits on married persons, and also impose some special obligations. This understanding of the States' reasons for recognizing marriage enables the majority to argue that same-sex marriage serves the States' objectives in the same way as opposite-sex marriage.

This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.

Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry. Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are reasonable secular grounds for restricting marriage to opposite-sex couples.

If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed. Today, for instance, more than 40% of all children in this country are born to unmarried women.[2] This development undoubtedly is both a cause and a result of changes in our society's understanding of marriage.

While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to

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[2] See, *e. g.*, Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, J. Martin, B. Hamilton, M. Osterman, S. Curtin, & T. Matthews, Births: Final Data for 2013, 64 National Vital Statistics Reports, No. 1, p. 2 (Jan. 15, 2015), online at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf (all Internet materials as visited June 24, 2015, and available in Clerk of Court's case file); cf. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics (NCHS), S. Ventura, Changing Patterns of Nonmarital Childbearing in the United States, NCHS Data Brief, No. 18 (May 2009), online at http://www.cdc.gov/nchs/data/databrief/db18.pdf.

marriage's further decay. It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.

As I wrote in *Windsor*:

> "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.
>
> "We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. Others think that recognition of same-sex marriage will fortify a now-shaky institution.
>
> "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Con-

stitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials." 570 U. S., at 809–810 (dissenting opinion) (citations and footnotes omitted).

III

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. *E. g.*, *ante*, at 664–666. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.

Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 679–680. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. If the issue of same-sex marriage had been left to the people of the States, it is likely that some States would recognize same-sex marriage and others would not. It is also possible that some States would tie recognition to protection for conscience rights. The major-

ity today makes that impossible. By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends.

Syllabus

MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

No. 14–46. Argued March 25, 2015—Decided June 29, 2015

The Clean Air Act directs the Environmental Protection Agency to regulate emissions of hazardous air pollutants from certain stationary sources (such as refineries and factories). 42 U. S. C. § 7412. The Agency may regulate power plants under this program only if it concludes that "regulation is appropriate and necessary" after studying hazards to public health posed by power-plant emissions. § 7412(n)(1)(A). Here, EPA found power-plant regulation "appropriate" because the plants' emissions pose risks to public health and the environment and because controls capable of reducing these emissions were available. It found regulation "necessary" because the imposition of other Clean Air Act requirements did not eliminate those risks. The Agency refused to consider cost when making its decision. It estimated, however, that the cost of its regulations to power plants would be $9.6 billion a year, but the quantifiable benefits from the resulting reduction in hazardous-air-pollutant emissions would be $4 to $6 million a year. Petitioners (including 23 States) sought review of EPA's rule in the D. C. Circuit, which upheld the Agency's refusal to consider costs in its decision to regulate.

Held: EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. Pp. 750–760.

(a) Agency action is unlawful if it does not rest "'on a consideration of the relevant factors.'" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43. Even under the deferential standard of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, which directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers, *id.*, at 842–843, EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a

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*Together with No. 14–47, *Utility Air Regulatory Group* v. *Environmental Protection Agency et al.*, and No. 14–49, *National Mining Assn.* v. *Environmental Protection Agency et al.*, also on certiorari to the same court.

factor relevant to the appropriateness of regulating power plants. Pp. 750–751.

(b) "Appropriate and necessary" is a capacious phrase. Read naturally against the backdrop of established administrative law, this phrase plainly encompasses cost. It is not rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. Statutory context supports this reading. Section 7412(n)(1) required EPA to conduct three studies, including one that reflects concern about cost, see § 7412(n)(1)(B); and the Agency agrees that the term "appropriate and necessary" must be interpreted in light of all three studies. Pp. 751–754.

(c) EPA's counterarguments are unpersuasive. That other Clean Air Act provisions expressly mention cost only shows that § 7412(n)(1)(A)'s broad reference to appropriateness encompasses *multiple* relevant factors, one of which is cost. Similarly, the modest principle of *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457—when the Clean Air Act expressly directs EPA to regulate on the basis of a discrete factor that does not include cost, the Act should not be read as implicitly allowing consideration of cost anyway—has no bearing on these cases. Furthermore, the possibility of considering cost at a later stage, when deciding *how much* to regulate power plants, does not establish its irrelevance at *this* stage. And although the Clean Air Act makes cost irrelevant to the initial decision to regulate sources other than power plants, the whole point of having a separate provision for power plants was to treat power plants *differently*. Pp. 754–757.

(d) EPA must consider cost—including cost of compliance—before deciding whether regulation is appropriate and necessary. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost. Pp. 757–760.

748 F. 3d 1222, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 760. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 764.

Aaron D. Lindstrom, Solicitor General of Michigan, argued the cause for state petitioners. With him on the briefs for petitioners in No. 14–46 were *Bill Schuette*, Attorney General, *Neil D. Gordon*, Assistant Attorney General, and the Attorneys General and their officials for their respective States as follows: *Luther Strange*, Attorney General of Ala-

bama, *Michael C. Geraghty*, Attorney General of Alaska, *Steven E. Mulder*, Assistant Attorney General, *Mark Brnovich*, Attorney General of Arizona, *James T. Skardon*, Assistant Attorney General, *Leslie Ruthledge*, Attorney General of Arkansas, *Lawrence G. Wasden*, Attorney General of Idaho, *Gregory F. Zoeller*, Attorney General of Indiana, *Valerie Tachtiris*, Deputy Attorney General, *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Jack Conway*, Attorney General of Kentucky, *Jim Hood*, Attorney General of Mississippi, *Harold E. Pizzetta III*, Assistant Attorney General, *Chris Koster*, Attorney General of Missouri, *James R. Layton*, Solicitor General, *Doug Peterson*, Attorney General of Nebraska, *Dave Bydalek*, Chief Deputy Attorney General, *Blake Johnson*, Assistant Attorney General, *Wayne Stenehjem*, Attorney General of North Dakota, *Margaret I. Olson*, Assistant Attorney General, *Michael DeWine*, Attorney General of Ohio, *E. Scott Pruitt*, Attorney General of Oklahoma, *Patrick Wyrick*, Solicitor General, *P. Clayton Eubanks*, Deputy Solicitor General, *Alan Wilson*, Attorney General of South Carolina, *Robert D. Cook*, Solicitor General, *James Emory Smith, Jr.*, Deputy Attorney General, *Ken Paxton*, Attorney General of Texas, *Charles E. Roy*, First Assistant Attorney General, *James E. Davis*, Deputy Attorney General, *Jon Niermann*, *Mark Walters*, and *Mary E. Smith*, Assistant Attorneys General, *Sean D. Reyes*, Attorney General of Utah, *Patrick Morrisey*, Attorney General of West Virginia, *Peter K. Michael*, Attorney General of Wyoming, and *Michael J. McGrady* and *Jeremiah I. Williamson*, Senior Assistant Attorneys General.

F. William Brownell argued the cause for industry petitioners and respondents in support of petitioners. With him on the briefs in No. 14–47 were *Henry V. Nickel*, *Lee B. Zeugin*, *Elizabeth L. Horner*, *Leslie Sue Ritts*, *Bart E. Cassidy*, *Katherine L. Vaccaro*, *Michael Nasi*, *Dennis Lane*, and *Eric Groten*. *Peter S. Glaser* and *Carroll W. McGuffey III* filed briefs for petitioner in No. 14–49.

Counsel

Solicitor General Verrilli argued the cause for the federal respondents in all cases. With him on the brief were *Assistant Attorney General Cruden*, *Deputy Solicitor General Stewart*, *Roman Martinez*, and *Sonja L. Rodman*.

Paul M. Smith argued the cause for industry respondents in all cases. With him on the brief for respondent Calpine Corporation et al. were *Matthew E. Price*, *Erica L. Ross*, *Brendan K. Collins*, *Robert B. McKinstry, Jr.*, and *Lorene L. Boudreau*. *Maura Healey*, Attorney General of Massachusetts, filed a brief for state and local respondents in all cases. With her on the brief were *Melissa Hoffer* and *Tracy L. Triplett*, Assistant Attorneys General, *George A. Nilson*, *Zachary W. Carter*, and 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, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *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, and *William H. Sorrell* of Vermont. *Sean H. Donahue*, *David T. Goldberg*, *Sanjay Narayan*, *James S. Pew*, *Neil E. Gormley*, *Vickie L. Patton*, *Graham McCahan*, *John Suttles*, and *Ann Brewster Weeks* filed a brief for respondent American Academy of Pediatrics et al. in all cases.*

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*Briefs of *amici curiae* urging reversal were filed in all cases for the Cato Institute by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America et al. by *Sandra P. Franco*, *Bryan M. Killian*, *David B. Salmons*, *Kate Comerford Todd*, *Sheldon Gilbert*, *Quentin Riegel*, *Karen R. Harned*, *Elizabeth Milito*, *Amy C. Chai*, and *Thomas J. Ward*; and for Murray Energy Corp. by *J. Van Carson*, *Geoffrey K. Barnes*, *Wendlene M. Lavey*, and *John D. Lazzarentti*.

Briefs of *amici curiae* urging affirmance were filed in all cases for the American Thoracic Society by *Adam Babich*; for the Constitutional Ac-

JUSTICE SCALIA delivered the opinion of the Court.

The Clean Air Act directs the Environmental Protection Agency to regulate emissions of hazardous air pollutants from power plants if the Agency finds regulation "appropriate and necessary." We must decide whether it was reasonable for EPA to refuse to consider cost when making this finding.

I

The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories) and moving sources (such as cars and airplanes). 69 Stat. 322, as amended, 42 U. S. C. §§ 7401–7671q. One of these is the National Emissions Standards for Hazardous Air Pollutants Program—the hazardous-air-pollutants program, for short. Established in its current form by the Clean Air Act Amendments of 1990, 104 Stat. 2531, this program targets for regulation stationary-source emissions of more than 180 specified "hazardous air pollutants." § 7412(b).

For stationary sources in general, the applicability of the program depends in part on how much pollution the source emits. A source that emits more than 10 tons of a single pollutant or more than 25 tons of a combination of pollutants per year is called a major source. § 7412(a)(1). EPA is required to regulate all major sources under the program.

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countability Center by *Douglas T. Kendall* and *Elizabeth B. Wydra*; for Emission Control Companies by *Erik S. Jaffe*; for Experts in Air Pollution Control and Air Quality Regulation by *Elizabeth J. Hubertz*; for Health Scientists by *Alan B. Morrison*; for the Institute for Policy Integrity at New York University School of Law by *Richard L. Revesz*, *Denise A. Grab*, *Jayni Foley Hein*, and *Jason A. Schwartz*; for the National Congress of American Indians et al. by *Kevin Lyskowski*, *Jared A. Goldstein*, *Riyaz Kanji*, *Phil Katzen*, *John Sledd*, *Richard A. Guest*, *Howard Bichler*, and *Colette Routel*; and for the Union of Concerned Scientists by *Wendy B. Jacobs* and *Shaun A. Goho*.

Laurence H. Tribe, *Tristan L. Duncan*, and *Jonathan S. Massey* filed a brief in all cases for the Peabody Energy Corp. as *amicus curiae*.

§ 7412(c)(1)–(2). A source whose emissions do not cross the just-mentioned thresholds is called an area source. § 7412(a)(2). The Agency is required to regulate an area source under the program if it "presents a threat of adverse effects to human health or the environment . . . warranting regulation." § 7412(c)(3).

At the same time, Congress established a unique procedure to determine the applicability of the program to fossil-fuel-fired power plants. The Act refers to these plants as electric utility steam generating units, but we will simply call them power plants. Quite apart from the hazardous-air-pollutants program, the Clean Air Act Amendments of 1990 subjected power plants to various regulatory requirements. The parties agree that these requirements were expected to have the collateral effect of reducing power plants' emissions of hazardous air pollutants, although the extent of the reduction was unclear. Congress directed the Agency to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants] after imposition of the requirements of this chapter." § 7412(n)(1)(A). If the Agency "finds . . . regulation is appropriate and necessary after considering the results of the study," it "shall regulate [power plants] under [§ 7412]." *Ibid.* EPA has interpreted the Act to mean that power plants become subject to regulation on the same terms as ordinary major and area sources, see 77 Fed. Reg. 9330 (2012), and we assume without deciding that it was correct to do so.

And what are those terms? EPA must first divide sources covered by the program into categories and subcategories in accordance with statutory criteria. § 7412(c)(1). For each category or subcategory, the Agency must promulgate certain minimum emission regulations, known as floor standards. § 7412(d)(1), (3). The statute generally calibrates the floor standards to reflect the emissions limitations already achieved by the best-performing 12% of sources

within the category or subcategory. § 7412(d)(3). In some circumstances, the Agency may also impose more stringent emission regulations, known as beyond-the-floor standards. The statute expressly requires the Agency to consider cost (alongside other specified factors) when imposing beyond-the-floor standards. § 7412(d)(2).

EPA completed the study required by § 7412(n)(1)(A) in 1998, 65 Fed. Reg. 79826 (2000), and concluded that regulation of coal- and oil-fired power plants was "appropriate and necessary" in 2000, *id.*, at 79830. In 2012, it reaffirmed the appropriate-and-necessary finding, divided power plants into subcategories, and promulgated floor standards. The Agency found regulation "appropriate" because (1) power plants' emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions. 77 Fed. Reg. 9363. It found regulation "necessary" because the imposition of the Act's other requirements did not eliminate these risks. *Ibid.* EPA concluded that "costs should not be considered" when deciding whether power plants should be regulated under § 7412. *Id.*, at 9326.

In accordance with Executive Order, the Agency issued a "Regulatory Impact Analysis" alongside its regulation. This analysis estimated that the regulation would force power plants to bear costs of $9.6 billion per year. *Id.*, at 9306. The Agency could not fully quantify the benefits of reducing power plants' emissions of hazardous air pollutants; to the extent it could, it estimated that these benefits were worth $4 to $6 million per year. *Ibid.* The costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants. The Agency continued that its regulations would have ancillary benefits—including cutting power plants' emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous-air-pollutants program. Although the Agency's appropriate-

and-necessary finding did not rest on these ancillary effects, *id.*, at 9320, the regulatory impact analysis took them into account, increasing the Agency's estimate of the quantifiable benefits of its regulation to $37 to $90 billion per year, *id.*, at 9306. EPA concedes that the regulatory impact analysis "played no role" in its appropriate-and-necessary finding. Brief for Federal Respondents 14.

Petitioners (who include 23 States) sought review of EPA's rule in the Court of Appeals for the D. C. Circuit. As relevant here, they challenged the Agency's refusal to consider cost when deciding whether to regulate power plants. The Court of Appeals upheld the Agency's decision not to consider cost, with Judge Kavanaugh concurring in part and dissenting in part. *White Stallion Energy Center, LLC* v. *EPA*, 748 F. 3d 1222 (2014) (*per curiam*). We granted certiorari. 574 U. S. 1021 (2014).

II

Federal administrative agencies are required to engage in "reasoned decisionmaking." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Ibid.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *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).

EPA's decision to regulate power plants under § 7412 allowed the Agency to reduce power plants' emissions of hazardous air pollutants and thus to improve public health and the environment. But the decision also ultimately cost power plants, according to the Agency's own estimate, nearly $10 billion a year. EPA refused to consider whether the costs of its decision outweighed the benefits. The Agency

gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate.

EPA's disregard of cost rested on its interpretation of § 7412(n)(1)(A), which, to repeat, directs the Agency to regulate power plants if it "finds such regulation is appropriate and necessary." The Agency accepts that it *could* have interpreted this provision to mean that cost is relevant to the decision to add power plants to the program. Tr. of Oral Arg. 44. But it chose to read the statute to mean that cost makes no difference to the initial decision to regulate. See 76 Fed. Reg. 24988 (2011) ("We further interpret the term 'appropriate' to not allow for the consideration of costs"); 77 Fed. Reg. 9327 ("Cost does not have to be read into the definition of 'appropriate' ").

We review this interpretation under the standard set out in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. *Id.*, at 842–843. Even under this deferential standard, however, "agencies must operate within the bounds of reasonable interpretation." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 321 (2014) (internal quotation marks omitted). EPA strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.

A

The Clean Air Act treats power plants differently from other sources for purposes of the hazardous-air-pollutants program. Elsewhere in § 7412, Congress established cabined criteria for EPA to apply when deciding whether to include sources in the program. It required the Agency to regulate sources whose emissions exceed specified numerical thresholds (major sources). It also required the Agency to regulate sources whose emissions fall short of these thresholds (area sources) if they "presen[t] a threat of adverse ef-

fects to human health or the environment . . . warranting regulation." § 7412(c)(3). In stark contrast, Congress instructed EPA to add power plants to the program if (but only if) the Agency finds regulation "appropriate and necessary." § 7412(n)(1)(A). One does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." 748 F. 3d, at 1266 (opinion of Kavanaugh, J.). Although this term leaves agencies with flexibility, an agency may not "entirely fai[l] to consider an important aspect of the problem" when deciding whether regulation is appropriate. *State Farm*, *supra*, at 43.

Read naturally in the present context, the phrase "appropriate and necessary" requires at least some attention to cost. One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, "cost" includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate. See Tr. of Oral Arg. 70. No regulation is "appropriate" if it does significantly more harm than good.

There are undoubtedly settings in which the phrase "appropriate and necessary" does not encompass cost. But this is not one of them. Section 7412(n)(1)(A) directs EPA to determine whether "*regulation* is appropriate and necessary." (Emphasis added.) Agencies have long treated cost

as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 233 (2009) (BREYER, J., concurring in part and dissenting in part). Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.

Statutory context reinforces the relevance of cost. The procedures governing power plants that we consider today appear in § 7412(n)(1), which bears the caption "Electric utility steam generating units." In subparagraph (A), the part of the law that has occupied our attention so far, Congress required EPA to study the hazards to public health posed by power plants and to determine whether regulation is appropriate and necessary. But in subparagraphs (B) and (C), Congress called for two additional studies. One of them, a study into mercury emissions from power plants and other sources, must consider "the health and environmental effects of such emissions, technologies which are available to control such emissions, *and the costs of such technologies*." § 7412(n)(1)(B) (emphasis added). This directive to EPA to study cost is a further indication of the relevance of cost to the decision to regulate.

In an effort to minimize this express reference to cost, EPA now argues that § 7412(n)(1)(A) requires it to consider only the study mandated by that provision, not the separate mercury study, before deciding whether to regulate power plants. But when adopting the regulations before us, the Agency insisted that the provisions concerning all three

studies "provide a framework for [EPA's] determination of whether to regulate [power plants]." 76 Fed. Reg. 24987. It therefore decided "to interpret the scope of the appropriate and necessary finding *in the context of all three studies*." 77 Fed. Reg. 9325 (emphasis added). For example:

- EPA considered environmental effects relevant to the appropriate-and-necessary finding. It deemed the mercury study's reference to this factor "direct evidence that Congress was concerned with environmental effects." 76 Fed. Reg. 24987.
- EPA considered availability of controls relevant to the appropriate-and-necessary finding. It thought that doing so was "consistent with" the mercury study's reference to availability of controls. *Id.*, at 24989.
- EPA concluded that regulation of power plants would be appropriate and necessary even if a single pollutant emitted by them posed a hazard to health or the environment. It believed that "Congress' focus" on a single pollutant in the mercury study "support[ed]" this interpretation. *Ibid.*

EPA has not explained why § 7412(n)(1)(B)'s reference to "environmental effects . . . and . . . costs" provides "direct evidence that Congress was concerned with environmental effects," but not "direct evidence" that it was concerned with cost. *Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.

B

EPA identifies a handful of reasons to interpret § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate. We find those reasons unpersuasive.

EPA points out that other parts of the Clean Air Act expressly mention cost, while § 7412(n)(1)(A) does not. But

this observation shows only that § 7412(n)(1)(A)'s broad reference to appropriateness encompasses *multiple* relevant factors (which include but are not limited to cost); other provisions' specific references to cost encompass just cost. It is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants. (By way of analogy, the Fourth Amendment's Reasonableness Clause requires searches to be "[r]easonable," while its Warrant Clause requires warrants to be supported by "probable cause." Nobody would argue that, by expressly making level of suspicion relevant to the validity of a warrant, the Fourth Amendment implicitly makes level of suspicion categorically *irrelevant* to the reasonableness of a search. To the contrary, all would agree that the expansive word "reasonable" encompasses degree of suspicion alongside other relevant circumstances.) Other parts of the Clean Air Act also expressly mention environmental effects, while § 7412(n)(1)(A) does not. Yet that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants.

Along similar lines, EPA seeks support in this Court's decision in *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001). There, the Court addressed a provision of the Clean Air Act requiring EPA to set ambient air quality standards at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U. S. C. § 7409(b). Read naturally, that discrete criterion does not encompass cost; it encompasses health and safety. The Court refused to read that provision as carrying with it an implicit authorization to consider cost, in part because authority to consider cost had "elsewhere, and so often, been expressly granted." 531 U. S., at 467. *American Trucking* thus establishes the modest principle that where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost, the Act normally should not be read

as implicitly allowing the Agency to consider cost anyway. That principle has no application here. "Appropriate and necessary" is a far more comprehensive criterion than "requisite to protect the public health"; read fairly and in context, as we have explained, the term plainly subsumes consideration of cost.

Turning to the mechanics of the hazardous-air-pollutants program, EPA argues that it need not consider cost when first deciding *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them. The question before us, however, is the meaning of the "appropriate and necessary" standard that governs the initial decision to regulate. And as we have discussed, context establishes that this expansive standard encompasses cost. Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage. In addition, once the Agency decides to regulate power plants, it must promulgate certain minimum or floor standards no matter the cost (here, nearly $10 billion a year); the Agency may consider cost only when imposing regulations *beyond* these minimum standards. By EPA's logic, someone could decide whether it is "appropriate" to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system.

EPA argues that the Clean Air Act makes cost irrelevant to the initial decision to regulate sources other than power plants. The Agency claims that it is reasonable to interpret § 7412(n)(1)(A) in a way that "harmonizes" the program's treatment of power plants with its treatment of other sources. This line of reasoning overlooks the whole point of having a separate provision about power plants: treating power plants *differently* from other stationary sources. Congress crafted narrow standards for EPA to apply when deciding whether to regulate other sources; in general, these standards concern the volume of pollution emitted by the

source, § 7412(c)(1), and the threat posed by the source "to human health or the environment," § 7412(c)(3). But Congress wrote the provision before us more expansively, directing the Agency to regulate power plants if "appropriate and necessary." "That congressional election settles this case. [The Agency's] preference for symmetry cannot trump an asymmetrical statute." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 296 (2011).

EPA persists that Congress treated power plants differently from other sources because of uncertainty about whether regulation of power plants would still be needed after the application of the rest of the Act's requirements. That is undoubtedly *one* of the reasons Congress treated power plants differently; hence § 7412(n)(1)(A)'s requirement to study hazards posed by power plants' emissions "after imposition of the requirements of [the rest of the Act]." But if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains "necessary," not whether regulation is "appropriate *and* necessary." In any event, EPA stated when it adopted the rule that "Congress did not limit [the] appropriate and necessary inquiry to [the study mentioned in § 7412(n)(1)(A)]." 77 Fed. Reg. 9325. The Agency instead decided that the appropriate-and-necessary finding should be understood in light of all three studies required by § 7412(n)(1), and as we have discussed, one of those three studies reflects concern about cost.

C

The dissent does not embrace EPA's far-reaching claim that Congress made costs altogether irrelevant to the decision to regulate power plants. Instead, it maintains that EPA need not "explicitly analyze costs" before deeming regulation appropriate, because other features of the regulatory program will on their own ensure the cost-effectiveness

of regulation. *Post*, at 764 (opinion of KAGAN, J.). This line of reasoning contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943). When it deemed regulation of power plants appropriate, EPA said that cost was *irrelevant* to that determination—not that cost-benefit analysis would be deferred until later. Much *less* did it say (what the dissent now concludes) that the consideration of cost at subsequent stages will ensure that the costs are not disproportionate to the benefits. What it said is that cost is irrelevant to the decision to regulate.

That is enough to decide these cases. But for what it is worth, the dissent vastly overstates the influence of cost at later stages of the regulatory process. For example, the dissent claims that the floor standards—which the Act calibrates to reflect emissions limitations already achieved by the best-performing sources in the industry—reflect cost considerations, because the best-performing power plants "must have considered costs in arriving at their emissions outputs." *Post*, at 772. EPA did not rely on this argument, and it is not obvious that it is correct. Because power plants are regulated under other federal and state laws, the best-performing power plants' emissions limitations might reflect cost-blind regulation rather than cost-conscious decisions. Similarly, the dissent suggests that EPA may consider cost when dividing sources into categories and subcategories. *Post*, at 773–774. Yet according to EPA, "it is *not* appropriate to premise subcategorization on costs." 77 Fed. Reg. 9395 (emphasis added). That statement presumably explains the dissent's carefully worded observation that EPA considered "technological, geographic, and other factors" when drawing categories, *post*, at 775, n. 4, which factors were in turn "related to costs" in some way, *post*, at 773. Attenuated connections such as these hardly support the assertion that EPA's

regulatory process featured "exhaustive consideration of costs," *post*, at 764.

All in all, the dissent has at most shown that some elements of the regulatory scheme mitigate cost in limited ways; it has not shown that these elements ensure cost-effectiveness. If (to take a hypothetical example) regulating power plants would yield $5 million in benefits, the prospect of mitigating cost from $11 billion to $10 billion at later stages of the program would not by itself make regulation appropriate. In all events, we need not pursue these points, because EPA did not say that the parts of the regulatory program mentioned by the dissent prevent the imposition of costs far in excess of benefits. "[EPA's] action must be measured by what [it] did, not by what it might have done." *Chenery*, *supra*, at 93–94.

D

Our reasoning so far establishes that it was unreasonable for EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.

Some of the respondents supporting EPA ask us to uphold EPA's action because the accompanying regulatory impact analysis shows that, once the rule's ancillary benefits are considered, benefits plainly outweigh costs. The dissent similarly relies on these ancillary benefits when insisting that "the outcome here [was] a rule whose benefits exceed its costs." *Post*, at 777. As we have just explained, however,

we may uphold agency action only upon the grounds on which the agency acted. Even if the Agency *could* have considered ancillary benefits when deciding whether regulation is appropriate and necessary—a point we need not address—it plainly did not do so here. In the Agency's own words, the administrative record "utterly refutes [the] assertion that [ancillary benefits] form the basis for the appropriate and necessary finding." 77 Fed. Reg. 9323. The Government concedes, moreover, that "EPA did not rely on the [regulatory impact analysis] when deciding to regulate power plants," and that "[e]ven if EPA had considered costs, it would not necessarily have adopted . . . the approach set forth in [that analysis]." Brief for Federal Respondents 53–54.

* * *

We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. We reverse the judgment of the Court of Appeals for the D. C. Circuit and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Environmental Protection Agency (EPA) asks the Court to defer to its interpretation of the phrase "appropriate and necessary" in § 112(n)(1)(A) of the Clean Air Act, 42 U. S. C. § 7412. JUSTICE SCALIA's opinion for the Court demonstrates why EPA's interpretation deserves no deference under our precedents. I write separately to note that its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

Chevron deference is premised on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996). We most often describe Congress' supposed choice to leave matters to agency discretion as an allocation of interpretive authority. See, *e. g.*, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 983 (2005) (referring to the agency as "the authoritative interpreter (within the limits of reason) of [ambiguous] statutes"). But we sometimes treat that discretion as though it were a form of legislative power. See, *e. g.*, *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001) (noting that the agency "speak[s] with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law" even when "'Congress did not actually have an intent' as to a particular result"). Either way, *Chevron* deference raises serious separation-of-powers questions.

As I have explained elsewhere, "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015) (opinion concurring in judgment). Interpreting federal statutes—including ambiguous ones administered by an agency—"calls for that exercise of independent judgment." *Id.*, at 122. *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is "the best reading of an ambiguous statute" in favor of an agency's construction. *Brand X*, *supra*, at 983. It thus wrests from Courts the ultimate interpretative authority to "say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), and hands it over to the Executive. See *Brand*

X, *supra*, at 983 (noting that the judicial construction of an ambiguous statute is "not authoritative"). Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies. U. S. Const., Art. III, § 1.

In reality, as the Court illustrates in the course of dismantling EPA's interpretation of § 112(n)(1)(A), agencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. See, *e. g.*, *ante*, at 754–755. Instead, as *Chevron* itself acknowledged, they are engaged in the "'formulation of policy.'" 467 U. S., at 843. Statutory ambiguity thus becomes an implicit delegation of rulemaking authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.

Although acknowledging this fact might allow us to escape the jaws of Article III's Vesting Clause, it runs headlong into the teeth of Article I's, which vests "[a]ll legislative Powers herein granted" in Congress. U. S. Const., Art. I, § 1. For if we give the "force of law" to agency pronouncements on matters of private conduct as to which "'Congress did not actually have an intent,'" *Mead*, *supra*, at 229, we permit a body other than Congress to perform a function that requires an exercise of the legislative power. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 88–89 (2015) (THOMAS, J., concurring in judgment).

These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference. What EPA claims for itself here is not the power to make political judgments in implementing Congress' policies, nor even the power to make tradeoffs between competing policy goals set by Congress, *American Railroads*, *supra*, at 87–88 (opinion of THOMAS, J.) (collecting cases involving statutes that dele-

gated this legislative authority). It is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue. Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? We are told that the breadth of the word 'appropriate' authorizes EPA to decide for itself how to answer that question. Compare 77 Fed. Reg. 9327 (2012) ("[N]othing about the definition [of 'appropriate'] *compels* a consideration of costs" (emphasis added)) with Tr. of Oral Arg. 42 ("[T]he phrase appropriate and necessary doesn't, by its terms, *preclude* the EPA from considering cost" (emphasis added)).[1]

Perhaps there is some unique historical justification for deferring to federal agencies, see *Mead*, *supra*, at 243 (SCALIA, J., dissenting), but these cases reveal how paltry an effort we have made to understand it or to confine ourselves to its boundaries. Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.[2] As in other areas of our jurisprudence concerning administrative agencies, see, *e. g.*, *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 170–174 (2015) (THOMAS, J., dissenting), we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider

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[1] I can think of no name for such power other than "legislative power." Had we deferred to EPA's interpretation in these cases, then, we might have violated another constitutional command by abdicating our check on the political branches—namely, our duty to enforce the rule of law through an exercise of the judicial power. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 124–126 (2015) (THOMAS, J., concurring in judgment).

[2] This is not the first time an agency has exploited our practice of deferring to agency interpretations of statutes. See, *e. g.*, *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, *ante*, at 550–553 (THOMAS, J., dissenting).

that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.

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

The Environmental Protection Agency placed emissions limits on coal and oil power plants following a lengthy regulatory process during which the Agency carefully considered costs. At the outset, EPA determined that regulating plants' emissions of hazardous air pollutants is "appropriate and necessary" given the harm they cause, and explained that it would take costs into account in developing suitable emissions standards. Next, EPA divided power plants into groups based on technological and other characteristics bearing significantly on their cost structures. It required plants in each group to match the emissions levels already achieved by the best-performing members of the same group—benchmarks necessarily reflecting those plants' own cost analyses. EPA then adopted a host of measures designed to make compliance with its proposed emissions limits less costly for plants that needed to catch up with their cleaner peers. And with only one narrow exception, EPA decided not to impose any more stringent standards (beyond what some plants had already achieved on their own) because it found that doing so would not be cost-effective. After all that, EPA conducted a formal cost-benefit study which found that the quantifiable benefits of its regulation would exceed the costs up to nine times over—by as much as $80 billion each year. Those benefits include as many as 11,000 fewer premature deaths annually, along with a far greater number of avoided illnesses.

Despite that exhaustive consideration of costs, the Court strikes down EPA's rule on the ground that the Agency "unreasonably . . . deemed cost irrelevant." *Ante*, at 760. On the majority's theory, the rule is invalid because EPA did not explicitly analyze costs at the very first stage of the reg-

ulatory process, when making its "appropriate and necessary" finding. And that is so even though EPA later took costs into account again and again and . . . so on. The majority thinks entirely immaterial, and so entirely ignores, all the subsequent times and ways EPA considered costs in deciding what any regulation would look like.

That is a peculiarly blinkered way for a court to assess the lawfulness of an agency's rulemaking. I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if "[t]he Agency gave cost no thought *at all*." *Ante*, at 750–751 (emphasis in original). But that is just not what happened here. Over more than a decade, EPA took costs into account at multiple stages and through multiple means as it set emissions limits for power plants. And when making its initial "appropriate and necessary" finding, EPA knew it would do exactly that—knew it would thoroughly consider the cost-effectiveness of emissions standards later on. That context matters. The Agency acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter—and given that the emissions limits finally issued would depend crucially on those accountings. Indeed, EPA could not have measured costs at the process's initial stage with any accuracy. And the regulatory path EPA chose parallels the one it has trod in setting emissions limits, at Congress's explicit direction, for every other source of hazardous air pollutants over two decades. The majority's decision that EPA cannot take the same approach here—its micromanagement of EPA's rulemaking, based on little more than the word "appropriate"—runs counter to Congress's allocation of authority between the Agency and the courts. Because EPA reasonably found that it was "appropriate" to decline to analyze costs at a single stage of a regulatory proceeding otherwise imbued with cost concerns, I respectfully dissent.

I

A

The Clean Air Act Amendments of 1990, as the majority describes, obligate EPA to regulate emissions of mercury and other hazardous air pollutants from stationary sources discharging those substances in large quantities. See *ante*, at 747–748. For most industries, the statute prescribes the same multi-step regulatory process. At the initial stage, EPA must decide whether to regulate a source, based solely on the quantity of pollutants it emits and their health and environmental effects. See 42 U. S. C. §§ 7412(a)(1), (a)(2), (c)(1), (c)(3); *ante*, at 747–748. Costs enter the equation after that, affecting the emissions limits that the eventual regulation will require. Under the statute, EPA must divide sources into categories and subcategories and then set "floor standards" that reflect the average emissions level already achieved by the best-performing 12% of sources within each group. See § 7412(d)(3); *ante*, at 748. Every 12% floor has cost concerns built right into it because the top sources, as successful actors in a market economy, have had to consider costs in choosing their own emissions levels. Moreover, in establishing categories and subcategories at this first stage, EPA can (significantly) raise or lower the costs of regulation for each source, because different classification schemes will alter the group—and so the emissions level—that the source has to match.[1] Once the floor is set, EPA has to decide whether to impose any stricter ("beyond-the-floor") standards, "taking into consideration," among other things, "the cost of achieving such emissions reduction." § 7412(d)(2); see

[1] Consider it this way: Floor standards equal the top 12% of something, but until you know the something, you can't know what it will take to attain that level. To take a prosaic example, the strongest 12% of NFL players can lift a lot more weight than the strongest 12% of human beings generally. To match the former, you will have to spend many more hours in the gym than to match the latter—and you will probably still come up short. So everything depends on the comparison group.

ante, at 749. Finally, by virtue of a longstanding Executive Order applying to significant rules issued under the Clean Air Act (as well as other statutes), the Agency must systematically assess the regulation's costs and benefits. See Exec. Order No. 12866, 58 Fed. Reg. 51735, 51738, 51741 (1993) (applying to all rules with an annual economic effect of at least $100 million).

Congress modified that regulatory scheme for power plants. It did so because the 1990 amendments established a separate program to control power plant emissions contributing to acid rain, and many thought that just by complying with those requirements, plants might reduce their emissions of hazardous air pollutants to acceptable levels. See *ante*, at 748. That prospect counseled a "wait and see" approach, under which EPA would give the Act's acid rain provisions a chance to achieve that side benefit before imposing any further regulation. Accordingly, Congress instructed EPA to "perform a study of the hazards to public health reasonably anticipated" to result from power plants' emissions after the 1990 amendments had taken effect. § 7412(n)(1)(A). And Congress provided that EPA "shall regulate" those emissions only if the Agency "finds such regulation is appropriate and necessary after considering the results of the [public health] study." *Ibid.* Upon making such a finding, however, EPA is to regulate power plants as it does every other stationary source: first, by categorizing plants and setting floor standards for the different groups; then by deciding whether to regulate beyond the floors; and finally, by conducting the cost-benefit analysis required by Executive Order.

EPA completed the mandated health study in 1998, and the results gave much cause for concern. The Agency concluded that implementation of the acid rain provisions had failed to curb power plants' emissions of hazardous air pollutants. Indeed, EPA found, coal plants were on track to increase those emissions by as much as 30% over the next dec-

ade. See 1 EPA, Study of Hazardous Air Pollutant Emissions From Electric Utility Steam Generating Units—Final Report to Congress, p. ES–25 (1998). And EPA determined, focusing especially on mercury, that the substances released from power plants cause substantial health harms. Noting that those plants are "the largest [non-natural] source of mercury emissions," *id.*, § 1.2.5.1, at 1–7, EPA found that children of mothers exposed to high doses of mercury during pregnancy "have exhibited a variety of developmental neurological abnormalities," including delayed walking and talking, altered muscles, and cerebral palsy. *Id.*, § 7.2.2, at 7–17 to 7–18; see also 7 EPA, Mercury Study Report to Congress, p. 6–31 (1997) (Mercury Study) (estimating that 7% of women of childbearing age are exposed to mercury in amounts exceeding a safe level).

Informed by its public health study and additional data, EPA found in 2000 that it is "appropriate and necessary" to regulate power plants' emissions of mercury and other hazardous air pollutants. 65 Fed. Reg. 79830.[2] Pulling apart those two adjectives, the Agency first stated that such regulation is "appropriate" because those pollutants "present[ ] significant hazards to public health and the environment" and because "a number of control options" can "effectively reduce" their emission. *Ibid.* EPA then determined that regulation is "necessary" because other parts of the 1990 amendments—most notably, the acid rain provisions—"will not adequately address" those hazards. *Ibid.* In less bureaucratic terms, EPA decided that it made sense to kick off the regulatory process given that power plants' emissions pose a serious health problem, that solutions to the problem are available, and that the problem will remain unless action is taken.

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[2] EPA reaffirmed its "appropriate and necessary" finding in 2011 and 2012 when it issued a proposed rule and a final rule. See 76 Fed. Reg. 24980 (2011) ("The Agency's appropriate and necessary finding was correct in 2000, and it remains correct today"); accord, 77 Fed. Reg. 9310–9311 (2012).

B

If the regulatory process ended as well as started there, I would agree with the majority's conclusion that EPA failed to adequately consider costs. Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing "a standard-setting process that ignore[s] economic considerations." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 670 (1980) (Powell, J., concurring in part and concurring in judgment). At a minimum, that is because such a process would "threaten[ ] to impose massive costs far in excess of any benefit." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 234 (2009) (BREYER, J., concurring in part and dissenting in part). And accounting for costs is particularly important "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.*, at 233; see *ante*, at 753. As the Court notes, that does not require an agency to conduct a formal cost-benefit analysis of every administrative action. See *ante*, at 759. But (absent contrary indication from Congress) an agency must take costs into account in some manner before imposing significant regulatory burdens.

That proposition, however, does not decide the issue before us because the "appropriate and necessary" finding was only the beginning. At that stage, EPA knew that a lengthy rulemaking process lay ahead of it; the determination of emissions limits was still years away. And the Agency, in making its kick-off finding, explicitly noted that consideration of costs would follow: "As a part of developing a regulation" that would impose those limits, "the effectiveness and costs of controls will be examined." 65 Fed. Reg. 79830. Likewise, EPA explained that, in the course of writing its regulation, it would explore regulatory approaches "allowing for least-cost solutions." *Id.*, at 79830–79831. That means

the Agency, when making its "appropriate and necessary" finding, did not decline to consider costs as part of the regulatory process. Rather, it declined to consider costs at a single stage of that process, knowing that they would come in later on.

The only issue in these cases, then, is whether EPA acted reasonably in structuring its regulatory process in that way—in making its "appropriate and necessary finding" based on pollution's harmful effects and channeling cost considerations to phases of the rulemaking in which emission levels are actually set. Said otherwise, the question is not whether EPA can reasonably find it "appropriate" to regulate without thinking about costs, full stop. It cannot, and it did not. Rather, the question is whether EPA can reasonably find it "appropriate" to trigger the regulatory process based on harms (and technological feasibility) alone, given that costs will come into play, in multiple ways and at multiple stages, before any emission limit goes into effect.

In considering that question, the very nature of the word "appropriate" matters. "[T]he word 'appropriate,'" this Court has recognized, "is inherently context dependent": Giving it content requires paying attention to the surrounding circumstances. *Sossamon* v. *Texas*, 563 U. S. 277, 286 (2011). (That is true, too, of the word "necessary," although the majority spends less time on it. See *Armour & Co.* v. *Wantock*, 323 U. S. 126, 129–130 (1944) ("[T]he word 'necessary' . . . has always been recognized as a word to be harmonized with its context").) And here that means considering the place of the "appropriate and necessary" finding in the broader regulatory scheme—as a triggering mechanism that gets a complex rulemaking going. The interpretive task is thus at odds with the majority's insistence on staring fixedly "at *this* stage." *Ante*, at 756 (emphasis in original). The task instead demands taking account of the entire regulatory process in thinking about what is "appropriate" in its first phase. The statutory language, in other words, is a direc-

tive to remove one's blinders and view things whole—to consider what it is fitting to do at the threshold stage given what will happen at every other.

And that instruction is primarily given to EPA, not to courts: Judges may interfere only if the Agency's way of ordering its regulatory process is unreasonable—*i. e.*, something Congress would never have allowed. The question here, as in our seminal case directing courts to defer to agency interpretations of their own statutes, arises "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 863 (1984). EPA's experience and expertise in that arena—and courts' lack of those attributes—demand that judicial review proceed with caution and care. The majority actually phrases this principle well, though honors it only in the breach: Within wide bounds, it is "up to the Agency to decide . . . how to account for cost." *Ante*, at 759. That judges might have made different regulatory choices—might have considered costs in different ways at different times—will not suffice to overturn EPA's action where Congress, as here, chose not to speak directly to those matters, but to leave them to the Agency to decide.

All of that means our decision here properly rests on something the majority thinks irrelevant: an understanding of the full regulatory process relating to power plants and of EPA's reasons for considering costs only after making its initial "appropriate and necessary" finding. I therefore turn to those issues, to demonstrate the simple point that should resolve these cases: that EPA, in regulating power plants' emissions of hazardous air pollutants, accounted for costs in a reasonable way.

II

A

In the years after its "appropriate and necessary" finding, EPA made good on its promise to account for costs "[a]s a

part of developing a regulation." 65 Fed. Reg. 79830; see *supra*, at 769. For more than a decade, as EPA deliberated on and then set emissions limits, costs came into the calculus at nearly every turn. Reflecting that consideration, EPA's final rule noted that steps taken during the regulatory process had focused on "flexib[ility] and cost-effective[ness]" and had succeeded in making "the rule less costly and compliance more readily manageable." 77 Fed. Reg. 9306, 9376. And the regulation concluded that "the benefits of th[e] rule" to public health and the environment "far outweigh the costs." *Id.*, at 9306.

Consistent with the statutory framework, EPA initially calculated floor standards: emissions levels of the best-performing 12% of power plants in a given category or subcategory. The majority misperceives this part of the rulemaking process. It insists that EPA "must promulgate certain . . . floor standards no matter the cost." *Ante*, at 756. But that ignores two crucial features of the top-12% limits: first, the way in which any such standard intrinsically accounts for costs, and second, the way in which the Agency's categorization decisions yield different standards for plants with different cost structures.

The initial point is a fact of life in a market economy: Costs necessarily play a role in any standard that uses power plants' existing emissions levels as a benchmark. After all, the best-performing 12% of power plants must have considered costs in arriving at their emissions outputs; that is how profit-seeking enterprises make decisions. And in doing so, they must have selected achievable levels; else, they would have gone out of business. (The same would be true even if other regulations influenced some of those choices, as the majority casually speculates. See *ante*, at 758.) Indeed, this automatic accounting for costs is why Congress adopted a market-leader-based standard. As the Senate Report accompanying the 1990 amendments explained: "Cost considerations are reflected in the selection of emissions limitations

which have been achieved in practice (rather than those which are merely theoretical) by sources of a similar type or character." S. Rep. No. 101–228, pp. 168–169 (1989). Of course, such a standard remains technology-forcing: It requires laggards in the industry to catch up with frontrunners, sometimes at significant expense. But the benchmark is, by definition, one that some power plants have achieved economically. And when EPA made its "appropriate and necessary" finding, it knew that fact—knew that the consequence of doing so was to generate floor standards with cost considerations baked right in.

Still more, EPA recognized that in making categorization decisions, it could take account of multiple factors related to costs of compliance—and so avoid impracticable regulatory burdens. Suppose, to use a simple example, that curbing emissions is more technologically difficult—and therefore more costly—for plants burning coal than for plants burning oil. EPA can then place those two types of plants in different categories, so that coal plants need only match other coal plants rather than having to incur the added costs of meeting the top oil plants' levels. Now multiply and complexify that example many times over. As the Agency noted when making its "appropriate and necessary" finding, EPA "build[s] flexibility" into the regulatory regime by "bas[ing] subcategorization on . . . the size of a facility; the type of fuel used at the facility; and the plant type," and also "may consider other relevant factors such as geographic conditions." 65 Fed. Reg. 79830; see S. Rep. No. 101–228, at 166 (listing similar factors and noting that "[t]he proper definition of categories . . . will assure maximum protection of public health and the environment while minimizing costs imposed on the regulated community"). Using that classification tool, EPA can ensure that plants have to attain only the emissions levels previously achieved by peers facing comparable cost constraints, so as to further protect plants from unrealistic floor standards.

And that is exactly what EPA did over the course of its rulemaking process, insisting on apples-to-apples comparisons that bring floor standards within reach of diverse kinds of power plants. Even in making its "appropriate and necessary" finding, the Agency announced it would divide plants into the two categories mentioned above: "coal-fired" and "oil-fired." 65 Fed. Reg. 79830.[3] Then, as the rulemaking progressed, EPA went further. Noting that different technologies significantly affect the ease of attaining a given emissions level, the Agency's proposed rule subdivided those two classes into five: plants designed to burn high-rank coal; plants designed to burn low-rank virgin coal; plants that run on a technology termed integrated gasification combined cycle; liquid oil units; and solid oil units. See 76 Fed. Reg. 25036–25037. EPA explained that by subcategorizing in that way, it had spared many plants the need to "retrofit[ ]," "redesign[ ]," or make other "extensive changes" to their facilities. *Id.*, at 25036. And in its final rule, EPA further refined its groupings in ways that eased compliance. Most notably, the Agency established a separate subcategory, and attendant (less stringent) floor, for plants in Hawaii, Puerto Rico, Guam, and the Virgin Islands on the ground that plants in those places have "minimal control over the quality of available fuel[ ] and disproportionately high operational and maintenance costs." 77 Fed. Reg. 9401.[4]

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[3] EPA also determined at that stage that it is "not appropriate or necessary" to regulate natural gas plants' emissions of hazardous air pollutants because they have only "negligible" impacts. 65 Fed. Reg. 79831. That decision meant that other plants would not have to match their cleaner natural gas counterparts, thus making the floor standards EPA established that much less costly to achieve.

[4] The majority insists on disregarding how EPA's categorization decisions made floor standards less costly for various power plants to achieve, citing the Agency's statement that "it is not appropriate to premise subcategorization on costs." 77 Fed. Reg. 9395 (quoted *ante*, at 758). But that misunderstands EPA's point. It is quite true that EPA did not consider costs separate and apart from all other factors in crafting categories and subcategories. See S. Rep. No. 101–228, p. 166 (1989) (noting that

Even after establishing multiple floor standards that factored in costs, EPA adopted additional "compliance options" to "minimize costs" associated with attaining a given floor—just as its "appropriate and necessary" finding explicitly contemplated. *Id.*, at 9306; 76 Fed. Reg. 25057; see 65 Fed. Reg. 79830. For example, the Agency calculated each floor as both an "input-based" standard (based on emissions per unit of energy *used*) and an "output-based" standard (based on emissions per unit of useful energy *produced*), and allowed plants to choose which standard they would meet. That option, EPA explained, can "result in . . . reduced compliance costs." 76 Fed. Reg. 25063. Similarly, EPA allowed plants to meet a given 12% floor by averaging emissions across all units at the same site, instead of having to meet the floor at each unit. Some plants, EPA understood, would find such averaging a "less costly alternative." 77 Fed. Reg. 9385. Yet again: EPA permitted "limited use" plants—those primarily burning natural gas but sometimes switching to oil—to comply with the final rule by meeting qualitative "work practice standards" rather than numeric emissions limits. *Id.*, at 9400–9401. EPA explained that it would be "econom-

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EPA may not make classifications decisions "based wholly on economic grounds"); 77 Fed. Reg. 9395 (citing Senate Report). That approach could have subverted the statutory scheme: To use an extreme example, it would have allowed EPA, citing costs of compliance, to place the top few plants in one category, the next few in another category, the third in a third, and all the way down the line, thereby insulating every plant from having to make an appreciable effort to catch up with cleaner facilities. But in setting up categories and subcategories, EPA did consider technological, geographic, and other factors directly relevant to the costs that diverse power plants would bear in trying to attain a given emissions level. (For some reason, the majority calls this a "carefully worded observation," *ante*, at 758, but it is nothing other than the fact of the matter.) The Agency's categorization decisions (among several other measures, see *supra*, at 772–773; *infra* this page and 776) thus refute the majority's suggestion, see *ante*, at 756, that the "appropriate and necessary" finding automatically generates floor standards with no relation to cost. To the contrary, the Agency used its categorization authority to establish different floor standards for different types of plants with different cost structures.

ically impracticable" for those plants to demonstrate compliance through emissions testing, and that an alternative standard, focused on their adoption of pollution control techniques, would allow them to both reduce emissions and avoid "extra cost." *Id.*, at 9401. And the list goes on. See, *e. g.*, *id.*, at 9409–9410 (allowing extra year for plants to comply with emissions limits where "source-specific construction, permitting, or labor, procurement or resource challenges" arise); *id.*, at 9417 (describing additional "compliance options").

With all that cost-consideration under its belt, EPA next assessed whether to set beyond-the-floor standards, and here too, as it knew it would, the Agency took costs into account. For the vast majority of coal and oil plants, EPA decided that beyond-the-floor standards would not be "reasonable after considering costs." *Id.*, at 9331. The Agency set such a standard for only a single kind of plant, and only after determining that the technology needed to meet the more lenient limit would also achieve the more stringent one. See *id.*, at 9393; 76 Fed. Reg. 25046–25047. Otherwise, EPA determined, the market-leader-based standards were enough.

Finally, as required by Executive Order and as anticipated at the time of the "appropriate and necessary" finding, EPA conducted a formal cost-benefit analysis of its new emissions standards and incorporated those findings into its proposed and final rules. See *id.*, at 25072–25078; 77 Fed. Reg. 9305–9306, 9424–9432. That analysis estimated that the regulation's yearly costs would come in at under $10 billion, while its annual measureable benefits would total many times more—between $37 and $90 billion. See *id.*, at 9305–9306; *ante*, at 749–750. On the costs side, EPA acknowledged that plants' compliance with the rule would likely cause electricity prices to rise by about 3%, but projected that those prices would remain lower than they had been as recently as 2010. See 77 Fed. Reg. 9413–9414. EPA also thought the rule's impact on jobs would be about a wash, with jobs lost at some

high-emitting plants but gained both at cleaner plants and in the pollution control industry. See *ibid.* On the benefits side, EPA noted that it could not quantify many of the health gains that would result from reduced mercury exposure. See *id.*, at 9306. But even putting those aside, the rule's annual benefits would include between 4,200 and 11,000 fewer premature deaths from respiratory and cardiovascular causes, 3,100 fewer emergency room visits for asthmatic children, 4,700 fewer non-fatal heart attacks, and 540,000 fewer days of lost work. See *id.*, at 9429.

Those concrete findings matter to these cases—which, after all, turn on whether EPA reasonably took costs into account in regulating plants' emissions of hazardous air pollutants. The majority insists that it may ignore EPA's cost-benefit analysis because "EPA did not rely on" it when issuing the initial "appropriate and necessary" finding. *Ante*, at 760 (quoting Solicitor General); see also *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87, 93–94 (1943). At one level, that description is true—indeed, a simple function of chronology: The kick-off finding preceded the cost-benefit analysis by years and so could not have taken its conclusions into account. But more fundamentally, the majority's account is off, because EPA knew when it made that finding that it would consider costs at every subsequent stage, culminating in a formal cost-benefit study. And EPA knew that, absent unusual circumstances, the rule would need to pass that cost-benefit review in order to issue. See Exec. Order No. 12866, 58 Fed. Reg. 51736 ("Each agency shall . . . adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"). The reasonableness of the Agency's decision to consider only the harms of emissions at the threshold stage must be evaluated in that broader context. And in thinking about that issue, it is well to remember the outcome here: a rule whose benefits exceed its costs by three to nine times. In making its "appropriate and necessary" finding, EPA had committed to assessing and

mitigating costs throughout the rest of its rulemaking; if nothing else, the findings of the Agency's cost-benefit analysis—making clear that the final emissions standards were cost-effective—show that EPA did just that.

B

Suppose you were in charge of designing a regulatory process. The subject matter—an industry's emissions of hazardous material—was highly complex, involving multivarious factors demanding years of study. Would you necessarily try to do everything at once? Or might you try to break down this lengthy and complicated process into discrete stages? And might you consider different factors, in different ways, at each of those junctures? I think you might. You know that everything must get done in the end—every relevant factor considered. But you tend to think that "in the end" does not mean "in the beginning." And you structure your rulemaking process accordingly, starting with a threshold determination that does not mirror your end-stage analysis. Would that be at least (which is all it must be) a "reasonable policy choice"? *Chevron*, 467 U. S., at 845.

That is the question presented here, and it nearly answers itself. Setting emissions levels for hazardous air pollutants is necessarily a lengthy and complicated process, demanding analysis of many considerations over many years. Costs are a key factor in that process: As I have said, sensible regulation requires careful scrutiny of the burdens that potential rules impose. See *supra*, at 769. But in ordering its regulatory process, EPA knew it would have the opportunity to consider costs in one after another of that rulemaking's stages—in setting the level of floor standards, in providing a range of options for plants to meet them, in deciding whether or where to require limits beyond the floor, and in finally completing a formal cost-benefit analysis. See 65 Fed. Reg. 79830–79831; *supra*, at 771–777. Given that context, EPA rea-

sonably decided that it was "appropriate"—once again, the only statutory requirement relevant here—to trigger the regulatory process based on the twin findings that the emissions in question cause profound health and environmental harms and that available pollution control technologies can reduce those emissions. By making that decision, EPA did no more than commit itself to developing a realistic and cost-effective regulation—a rule that would take account of every relevant factor, costs and benefits alike. And indeed, particular features of the statutory scheme here indicate that EPA's policy choice was not just a minimally reasonable option but an eminently reasonable one.

To start, that decision brought EPA's regulation of power plants into sync with its regulation of every other significant source of hazardous pollutants under the Clean Air Act. For all those types of sources (totaling over 100), the Act instructs EPA to make the threshold decision to regulate based solely on the quantity and effects of pollutants discharged; costs enter the picture afterward, when the Agency takes up the task of actually establishing emissions limits. See *supra*, at 766–767. Industry after industry, year after year, EPA has followed that approach to standard-setting, just as Congress contemplated. See, *e. g.*, 58 Fed. Reg. 49354 (1993) (dry cleaning facilities); 59 Fed. Reg. 64303 (1994) (gasoline distributors); 60 Fed. Reg. 45948 (1995) (aerospace manufacturers). And apparently with considerable success. At any rate, neither those challenging this rule nor the Court remotely suggests that these regulatory regimes have done "significantly more harm than good." *Ante*, at 752. So when making its "appropriate and necessary" finding for power plants, EPA had good reason to continue in the same vein. See, *e. g.*, *Entergy*, 556 U. S., at 236 (opinion of BREYER, J.) (noting that the reasonableness of an agency's approach to considering costs rests in part on whether that tack has met "with apparent success in the past"). And that is exactly how EPA explained its choice.

Stating that it would consider the "costs of controls" when "developing a regulation," the Agency noted that such an "approach has helped build flexibility in meeting environmental objectives in the past," thereby preventing the imposition of disproportionate costs. 65 Fed. Reg. 79830. Indeed, as EPA further commented in issuing its rule, it would seem "inequitable to impose a regulatory regime on every industry in America and then to exempt one category" after finding it represented "a significant part of the air toxics problem." 77 Fed. Reg. 9322 (quoting 136 Cong. Rec. 36062 (1990) (statement of Sen. Durenberger)).

The majority's attempt to answer this point founders on even its own statement of facts. The majority objects that "the whole point of having a separate provision about power plants" is to "treat[ ] power plants *differently* from other stationary sources." *Ante*, at 756 (emphasis in original). But turn back about 10 pages, and read what the majority says about *why* Congress treated power plants differently: because, as all parties agree, separate regulatory requirements involving acid rain "were expected to have the collateral effect of reducing power plants' emissions of hazardous air pollutants, although the extent of the reduction was unclear." *Ante*, at 748; see *supra*, at 767. For that reason alone (the majority does not offer any other), Congress diverted EPA from its usual regulatory path, instructing the Agency, as a preliminary matter, to complete and consider a study about the residual harms to public health arising from those emissions. See *ante*, at 748; *supra*, at 767. But once EPA found in its study that the acid rain provisions would not significantly affect power plants' emissions of hazardous pollutants, any rationale for treating power plants differently from other sources discharging the same substances went up in smoke. See 65 Fed. Reg. 79830. At that point, the Agency would have had far more explaining to do if, rather than following a well-tested model, it had devised a new scheme of regulation for power plants only.

Still more, EPA could not have accurately assessed costs at the time of its "appropriate and necessary" finding. See 8 Mercury Study, at 6–2 (noting the "many uncertainties" in any early-stage analysis of pollution control costs). Under the statutory scheme, that finding comes before—years before—the Agency designs emissions standards. And until EPA knows what standards it will establish, it cannot know what costs they will impose. Nor can those standards even be reasonably guesstimated at such an early stage. Consider what it takes to set floor standards alone. First, EPA must divide power plants into categories and subcategories; as explained earlier, those classification decisions significantly affect what floors are established. See *supra*, at 766, and n. 1, 773–774. And then, EPA must figure out the average emissions level already achieved by the top 12% in each class so as to set the new standards. None of that can realistically be accomplished in advance of the Agency's regulatory process: Indeed, those steps are the very stuff of the rulemaking. Similarly, until EPA knows what "compliance options" it will develop, it cannot know how they will mitigate the costs plants must incur to meet the floor standards. See *supra*, at 775–776. And again, deciding on those options takes substantial time. So there is good reason for different considerations to go into the threshold finding than into the final rule. Simply put, calculating costs before starting to write a regulation would put the cart before the horse.

III

The central flaw of the majority opinion is that it ignores everything but one thing EPA did. It forgets that EPA's "appropriate and necessary" finding was only a first step which got the rest of the regulatory process rolling. It narrows its field of vision to that finding in isolation, with barely a glance at all the ways in which EPA later took costs into account. See *supra*, at 772–773 (in establishing floor standards); *supra*, at 775–776 (in adopting compliance options);

supra, at 776 (in deciding whether to regulate beyond the floor); *supra*, at 776–777 (in conducting a formal cost-benefit analysis as a final check). In sum, the majority disregards how consideration of costs infused the regulatory process, resulting not only in EPA's adoption of mitigation measures, *ante*, at 759, but also in EPA's crafting of emissions standards that succeed in producing benefits many times their price.

That mistake accounts for the majority's primary argument that the word "appropriate," as used in § 7412(n)(1)(A), demands consideration of costs. See *ante*, at 751–752. As I have noted, that would be true if the "appropriate and necessary" finding were the only step before imposing regulations on power plants. See *supra*, at 769–770. But, as should be more than clear by now, it was just the first of many: Under the Clean Air Act, a long road lay ahead in which the Agency would have more—and far better—opportunities to evaluate the costs of diverse emissions standards on power plants, just as it did on all other sources. See *supra*, at 766–767, 769–770, 771–777. EPA well understood that fact: "We evaluate the terms 'appropriate' and 'necessary,' " it explained, in light of their "statutory context." 76 Fed. Reg. 24986. And EPA structured its regulatory process accordingly, with consideration of costs coming (multiple times) after the threshold finding. The only way the majority can cast that choice as unreasonable, given the deference this Court owes to such agency decisions, is to blind itself to the broader rulemaking scheme.

The same fault inheres in the majority's secondary argument that EPA engaged in an "interpretive gerrymander[ ]" by considering environmental effects but not costs in making its "appropriate and necessary" finding. *Ante*, at 753–754. The majority notes—quite rightly—that Congress called for EPA to examine both subjects in a study of mercury emissions from all sources (separate from the study relating to power plants' emissions alone). See *ante*, at 753. And the majority states—again, rightly—that Congress's demand for that

study "provides direct evidence that Congress was concerned with [both] environmental effects [and] cost." *Ante*, at 754 (internal quotation marks omitted). But nothing follows from that fact, because EPA too was concerned with both. True enough, EPA assessed the two at different times: environmental harms (along with health harms) at the threshold, costs afterward. But that was for the very reasons earlier described: because EPA wanted to treat power plants like other sources and because it thought harms, but not costs, could be accurately measured at that early stage. See *supra*, at 779–781. Congress's simple request for a study of mercury emissions in no way conflicts with that choice of when and how to consider both harms and costs. Once more, the majority perceives a conflict only because it takes so partial a view of the regulatory process.

And the identical blind spot causes the majority's sports-car metaphor to run off the road. The majority likens EPA to a hypothetical driver who decides that "it is 'appropriate' to buy a Ferrari without thinking about cost, because he plans to think about cost later when deciding whether to upgrade the sound system." *Ante*, at 756. The comparison is witty but wholly inapt. To begin with, emissions limits are not a luxury good: They are a safety measure, designed to curtail the significant health and environmental harms caused by power plants spewing hazardous pollutants. And more: EPA knows from past experience and expertise alike that it will have the opportunity to purchase that good in a cost-effective way. A better analogy might be to a car owner who decides without first checking prices that it is "appropriate and necessary" to replace her worn-out brake-pads, aware from prior experience that she has ample time to comparison-shop and bring that purchase within her budget. Faced with a serious hazard and an available remedy, EPA moved forward like that sensible car owner, with a promise that it would, and well-grounded confidence that it could, take costs into account down the line.

That about does it for the majority's opinion, save for its final appeal to *Chenery*—and *Chenery* cannot save its holding. See *ante*, at 759. Of course a court may not uphold agency action on grounds different from those the agency gave. See *Chenery*, 318 U. S., at 87. But equally, a court may not strike down agency action without considering the reasons the agency gave. *Id.*, at 95. And that is what the majority does. Indeed, it is difficult to know what agency document the majority is reading. It denies that "EPA said . . . that cost-benefit analysis would be deferred until later." *Ante*, at 758. But EPA said exactly that: The "costs of controls," the Agency promised, "will be examined" as "a part of developing a regulation." 65 Fed. Reg. 79830. Tellingly, these words appear nowhere in the majority's opinion. But what are they other than a statement that cost concerns, contra the majority, are *not* "irrelevant," *ante*, at 758 (without citation)—that they are simply going to come in later?

And for good measure, EPA added still extra explanation. In its "appropriate and necessary" finding, the Agency committed to exploring "least-cost solutions" in "developing a standard for utilities." 65 Fed. Reg. 79830. The Agency explained that such an approach—particularly mentioning the use of averaging and subcategorization—had offered "opportunit[ies] for lower cost solutions" and "helped build flexibility in meeting environmental objectives in the past." *Ibid.*; see *supra*, at 769–770, 779. Then, in issuing its proposed and final rules, EPA affirmed that it had done just what it said. EPA recognized that standard-setting must "allow the industry to make practical investment decisions that minimize costs." 76 Fed. Reg. 25057. Accordingly, the Agency said, it had "provid[ed] flexibility and compliance options" so as to make the rule "less costly" for regulated parties. 77 Fed. Reg. 9306. EPA added that it had rejected beyond-the-floor standards for almost all power plants because they would not be "reasonable after considering costs." *Id.*, at 9331. And it showed the results of a formal analysis finding that

the rule's costs paled in comparison to its benefits. In sum, EPA concluded, it had made the final standards "cost-efficient." *Id.*, at 9434. What more would the majority have EPA say?

IV

Costs matter in regulation. But when Congress does not say how to take costs into account, agencies have broad discretion to make that judgment. Accord, *ante*, at 759 (noting that it is "up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost"). Far more than courts, agencies have the expertise and experience necessary to design regulatory processes suited to "a technical and complex arena." *Chevron*, 467 U. S., at 863. And in any event, Congress has entrusted such matters to them, not to us.

EPA exercised that authority reasonably and responsibly in setting emissions standards for power plants. The Agency treated those plants just as it had more than 100 other industrial sources of hazardous air pollutants, at Congress's direction and with significant success. It made a threshold finding that regulation was "appropriate and necessary" based on the harm caused by power plants' emissions and the availability of technology to reduce them. In making that finding, EPA knew that when it decided what a regulation would look like—what emissions standards the rule would actually set—the Agency would consider costs. Indeed, EPA expressly promised to do so. And it fulfilled that promise. The Agency took account of costs in setting floor standards as well as in thinking about beyond-the-floor standards. It used its full kit of tools to minimize the expense of complying with its proposed emissions limits. It capped the regulatory process with a formal analysis demonstrating that the benefits of its rule would exceed the costs many times over. In sum, EPA considered costs all over the regulatory process, except in making its threshold finding—when it could not have measured them accurately anyway.

That approach is wholly consonant with the statutory scheme. Its adoption was "up to the Agency to decide." *Ante*, at 759.

The majority arrives at a different conclusion only by disregarding most of EPA's regulatory process. It insists that EPA must consider costs—when EPA did just that, over and over and over again. It concedes the importance of "context" in determining what the "appropriate and necessary" standard means, see *ante*, at 752, 756—and then ignores every aspect of the rulemaking context in which that standard plays a part. The result is a decision that deprives the Agency of the latitude Congress gave it to design an emissions-setting process sensibly accounting for costs and benefits alike. And the result is a decision that deprives the American public of the pollution control measures that the responsible Agency, acting well within its delegated authority, found would save many, many lives. I respectfully dissent.

Syllabus

ARIZONA STATE LEGISLATURE *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL.

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

No. 13–1314. Argued March 2, 2015—Decided June 29, 2015

Under Arizona's Constitution, the electorate shares lawmaking authority on equal footing with the Arizona Legislature. The voters may adopt laws and constitutional amendments by ballot initiative, and they may approve or disapprove, by referendum, measures passed by the Legislature. Ariz. Const., Art. IV, pt. 1, § 1. "Any law which may be enacted by the Legislature . . . may be enacted by the people under the Initiative." Art. XXII, § 14.

In 2000, Arizona voters adopted Proposition 106, an initiative aimed at the problem of gerrymandering. Proposition 106 amended Arizona's Constitution, removing redistricting authority from the Arizona Legislature and vesting it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts. The Arizona Legislature challenged the map the AIRC adopted in 2012 for congressional districts, arguing that the AIRC and its map violated the "Elections Clause" of the U. S. Constitution, which provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Because "Legislature" means the State's representative assembly, the Arizona Legislature contended, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. A three-judge District Court held that the Arizona Legislature had standing to sue, but rejected its complaint on the merits.

Held:

1. The Arizona Legislature has standing to bring this suit. In claiming that Proposition 106 stripped it of its alleged constitutional prerogative to engage in redistricting and that its injury would be remedied by a court order enjoining the proposition's enforcement, the Legislature has shown injury "that is 'concrete and particularized' and 'actual or imminent,'" *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64, "fairly traceable to the challenged action," and "redressable by a favorable ruling," *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409. Spe-

cifically, Proposition 106, together with the Arizona Constitution's ban on efforts by the Arizona Legislature to undermine the purposes of an initiative, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan. *Raines* v. *Byrd*, 521 U. S. 811, 823–824. Pp. 799–804.

2. The Elections Clause and 2 U. S. C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts. Pp. 804–824.

(a) Redistricting is a legislative function to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 567, and the Governor's veto, *Smiley* v. *Holm*, 285 U. S. 355, 369. While exercise of the initiative was not at issue in this Court's prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking. Pp. 805–809.

(b) Title 2 U. S. C. § 2a(c)—which provides that, "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," it must follow federally prescribed redistricting procedures—permits redistricting in accord with Arizona's initiative. From 1862 through 1901, apportionment Acts required a State to follow federal procedures unless "the [state] legislature" drew district lines. In 1911, Congress, recognizing that States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, replaced the reference to redistricting by the state "legislature" with a reference to redistricting of a State "in the manner provided by the laws thereof." § 4, 37 Stat. 14. The Act's legislative history "leaves no . . . doubt," *Hildebrant*, 241 U. S., at 568, that the change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437. "If they include [the] initiative, it is included." *Id.*, at 3508. Congress used virtually identical language in enacting § 2a(c) in 1941. This provision also accords full respect to the redistricting procedures adopted by the States. Thus, so long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure in its Constitution—the resulting redistricting plan becomes the presumptively governing map.

Though four of § 2a(c)'s five default redistricting procedures—operative only when a State is not "redistricted in the manner provided by [state] law"—have become obsolete as a result of this Court's decisions embracing the one-person, one-vote principle, this infirmity does not bear on the question whether a State has been "redistricted in the manner provided by [state] law." Pp. 809–813.

Syllabus

(c) The Elections Clause permits the people of Arizona to provide for redistricting by independent commission. The history and purpose of the Clause weigh heavily against precluding the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such preclusion would also run up against the Constitution's animating principle that the people themselves are the originating source of all the powers of government. Pp. 813–823.

(1) The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation. See *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 8. Ratification arguments in support of congressional oversight focused on potential abuses by state politicians, but the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. Pp. 814–816.

(2) There is no suggestion that the Election Clause, by specifying "the Legislature thereof," required assignment of congressional-redistricting authority to the State's representative body. It is characteristic of the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government. See, *e. g.*, *Alden* v. *Maine*, 527 U. S. 706, 752. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460. Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority, Ariz. Const., Art. IV. The Elections Clause should not be read to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. And reading the Clause to permit the use of the initiative to control state and local elections but not federal elections would "deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, p. 376 (Hamilton). Pp. 816–819.

(3) The Framers may not have imagined the modern initiative process in which the people's legislative power is coextensive with the state legislature's authority, but the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. It would thus be perverse to interpret "Legislature" in the Elections Clause to exclude lawmaking by the people, particularly when such lawmaking is intended to advance the pros-

pect that Members of Congress will in fact be "chosen . . . by the People of the several States." Art. I, § 2. Pp. 819–821.

(4) Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would not just stymie attempts to curb gerrymandering. It would also cast doubt on numerous other time, place, and manner regulations governing federal elections that States have adopted by the initiative method. As well, it could endanger election provisions in state constitutions adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature." Pp. 822–823.

997 F. Supp. 2d 1047, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 824. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined., *post*, p. 854. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 859.

Paul D. Clement argued the cause for appellant. With him on the briefs were *George W. Hicks, Jr.*, *Peter A. Gentala*, *Lesli M. H. Sorensen*, *Gregrey G. Jernigan*, and *Joshua W. Carden.*

Eric J. Feigin argued the cause for the United States as *amicus curiae* urging vacatur and remand. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorneys General Branda* and *Gupta*, *Deputy Solicitor General Gershengorn*, *Michael S. Raab*, *Tovah R. Calderon*, *Daniel Tenny*, and *Bonnie I. Robin-Vergeer.*

Seth P. Waxman argued the cause for appellees. With him on the brief were *Paul R. Q. Wolfson*, *Jason D. Hirsch*, *Mary O'Grady*, *Joseph N. Roth*, *Joseph A. Kanefield*, and *Brunn W. Roysden III.**

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*Briefs of *amici curiae* urging reversal were filed for the Coolidge-Reagan Foundation by *Michael T. Morley* and *Dan Backer*; and for the National Conference of State Legislatures by *Mark A. Packman.*

Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah G. Purcell*, Solicitor General, and *Rebecca Ripoli Glasgow* and *Jay D. Geck*, Deputy Solicitors General, and by the Attorneys General for

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns an endeavor by Arizona voters to address the problem of partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.[1] "[P]artisan gerrymanders," this Court has recognized, "[are incompatible] with democratic principles." *Vieth* v. *Jubelirer*, 541 U. S. 267, 292 (2004) (plurality opinion); *id.*, at 316 (KENNEDY, J., concurring in judgment). Even so, the Court in *Vieth* did not grant relief on the plaintiffs' partisan gerrymander claim.

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their respective States as follows: *Kamala D. Harris* of California, *Cynthia H. Coffman* of Colorado, *George Jepson* of Connecticut, *Russell A. Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Maura Healey* of Massachusetts, *Jim Hood* of Mississippi, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, and *Mark R. Herring* of Virginia; for the Brennan Center for Justice at N. Y. U. School of Law by *Wendy Weiser*, *Michael Li*, and *Brent Ferguson*; for the California Citizens Redistricting Commission by *Marian M. Johnston*; for the Campaign Legal Center et al. by *Paul M. Smith*, *Jessica Ring Amunson*, *J. Gerald Hebert*, *Sean J. Young*, *Steven R. Shapiro*, *Matthew Coles*, *Dale E. Ho*, *Julie Ebenstein*, *Arthur N. Eisenberg*, and *Lloyd Leonard*; for former California Governor George Deukmejian et al. by *Theodore B. Olson*, *Amir C. Tayrani*, *Scott G. Stewart*, *Steven A. Merksamer*, *Marguerite Mary Leoni*, and *Christopher E. Skinnell*; for former Governor Jim Edgar et al. by *Tacy F. Flint*, *Carter G. Phillips*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*; for the League of Women Voters of Arizona et al. by *Joseph R. Palmore*, *Deanne E. Maynard*, *Timothy M. Hogan*, and *Andrew S. Gordon*; for Members of Congress by *John P. Elwood* and *Jeremy C. Marwell*; for Scholars and Historians of Congressional Redistricting by *Justin Levitt* and *Andrew J. Ehrlich*; for State and Local Elected Officials by *H. Rodgin Cohen* and *Richard C. Pepperman II*; for Thomas Mann et al. by *Ira M. Feinberg* and *Jaclyn L. DiLauro*; for Nathaniel Persily et al. by *Mr. Persily, pro se*; and for Jack N. Rakove et al. by *Charles A. Rothfeld*.

[1] The term "gerrymander" is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander. See E. Griffith, The Rise and Development of the Gerrymander 16–19 (Arno ed. 1974).

The plurality held the matter nonjusticiable. *Id.*, at 281. JUSTICE KENNEDY found no standard workable in that case, but left open the possibility that a suitable standard might be identified in later litigation. *Id.*, at 317.

In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." App. 50. Proposition 106 amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission, the Arizona Independent Redistricting Commission (AIRC or Commission). After the 2010 census, as after the 2000 census, the AIRC adopted redistricting maps for congressional as well as state legislative districts.

The Arizona Legislature challenged the map the Commission adopted in January 2012 for congressional districts. Recognizing that the voters could control redistricting for state legislators, Brief for Appellant 42, 47; Tr. of Oral Arg. 3–4, the Arizona Legislature sued the AIRC in federal court seeking a declaration that the Commission and its map for congressional districts violated the "Elections Clause" of the U. S. Constitution. That Clause, critical to the resolution of this case, provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." Art. I, § 4, cl. 1.

The Arizona Legislature's complaint alleged that "[t]he word 'Legislature' in the Elections Clause means [specifically and only] the representative body which makes the laws of the people," App. 21, ¶37; so read, the Legislature urges, the Clause precludes resort to an independent commission, created by initiative, to accomplish redistricting. The AIRC responded that, for Elections Clause purposes, "the Legisla-

ture" is not confined to the elected representatives; rather, the term encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.

A three-judge District Court held, unanimously, that the Arizona Legislature had standing to sue; dividing two to one, the Court rejected the Legislature's complaint on the merits. We postponed jurisdiction and instructed the parties to address two questions: (1) Does the Arizona Legislature have standing to bring this suit? (2) Do the Elections Clause of the United States Constitution and 2 U. S. C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? 573 U. S. 990 (2014).

We now affirm the District Court's judgment. We hold, first, that the Arizona Legislature, having lost authority to draw congressional districts, has standing to contest the constitutionality of Proposition 106. Next, we hold that lawmaking power in Arizona includes the initiative process, and that both §2a(c) and the Elections Clause permit use of the AIRC in congressional districting in the same way the Commission is used in districting for Arizona's own Legislature.

I

A

Direct lawmaking by the people was "virtually unknown when the Constitution of 1787 was drafted." Donovan & Bowler, An Overview of Direct Democracy in the American States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998). There were obvious precursors or analogues to the direct lawmaking operative today in several States, notably, New England's townhall meetings and the submission of early state constitutions to the people for ratification. See Lowell, The Referendum in the United States, in The Initiative, Referendum and Recall 126, 127 (W. Munro ed. 1912) (hereinafter IRR); W. Dodd, The Revision and

Amendment of State Constitutions 64–67 (1910).[2] But it was not until the turn of the 20th century, as part of the Progressive agenda of the era, that direct lawmaking by the electorate gained a foothold, largely in Western States. See generally Persily, The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11 (1997).

The two main "agencies of direct legislation" are the initiative and the referendum. Munro, Introductory, in IRR 8. The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." D. Magleby, Direct Legislation 1 (1984). While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls." *Ibid.* "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission." Johnson, Direct Legislation as an Ally of Representative Government, in IRR 139, 142.

In 1898, South Dakota took the pathmarking step of affirming in its Constitution the people's power "directly [to] control the making of all ordinary laws" by initiative and referendum. Introductory, *id.*, at 9. In 1902, Oregon became the first State to adopt the initiative as a means, not only to enact ordinary laws, but also to amend the State's Constitution. J. Dinan, The American State Constitutional

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[2] The Massachusetts Constitution of 1780 is illustrative of the understanding that the people's authority could trump the state legislature's. Framed by a separate convention, it was submitted to the people for ratification. That occurred after the legislature attempted to promulgate a Constitution it had written, an endeavor that drew opposition from many Massachusetts towns. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 96–101 (1996); G. Wood, The Creation of the American Republic, 1776–1787, pp. 339–341 (1969).

Tradition 62 (2006). By 1920, the people in 19 States had reserved for themselves the power to initiate ordinary lawmaking, and, in 13 States, the power to initiate amendments to the State's Constitution. *Id.*, at 62, and n. 132, 94, and n. 151. Those numbers increased to 21 and 18, respectively, by the close of the 20th century. *Ibid.*[3]

B

For the delegates to Arizona's constitutional convention, direct lawmaking was a "principal issu[e]." J. Leshy, The Arizona State Constitution 8–9 (2d ed. 2013) (hereinafter Leshy). By a margin of more than three to one, the people of Arizona ratified the State's Constitution, which included, among lawmaking means, initiative and referendum provisions. *Id.*, at 14–16, 22. In the runup to Arizona's admission to the Union in 1912, those provisions generated no controversy. *Id.*, at 22.

In particular, the Arizona Constitution "establishes the electorate [of Arizona] as a coordinate source of legislation" on equal footing with the representative legislative body. *Queen Creek Land & Cattle Corp.* v. *Yavapai Cty. Bd. of Supervisors*, 108 Ariz. 449, 451, 501 P. 2d 391, 393 (1972); *Cave Creek Unified School Dist.* v. *Ducey*, 233 Ariz. 1, 4, 308 P. 3d 1152, 1155 (2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks omitted)). The initiative, housed under the article of the Arizona Constitution concerning the

[3] The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118, 137, 151 (1912) (rejecting challenge to referendum mounted under Article IV, § 4's undertaking by the United States to "guarantee to every State in th[e] Union a Republican Form of Government"). But see *New York* v. *United States*, 505 U. S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.").

"Legislative Department" and the section defining the State's "legislative authority," reserves for the people "the power to propose laws and amendments to the constitution." Art. IV, pt. 1, § 1. The Arizona Constitution further states that "[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Art. XXII, § 14. Accordingly, "[g]eneral references to the power of the 'legislature' " in the Arizona Constitution "include the people's right (specified in Article IV, part 1) to bypass their elected representatives and make laws directly through the initiative." Leshy xxii.

C

Proposition 106, vesting redistricting authority in the AIRC, was adopted by citizen initiative in 2000 against a "background of recurring redistricting turmoil" in Arizona. Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1831 (2012). Redistricting plans adopted by the Arizona Legislature sparked controversy in every redistricting cycle since the 1970's, and several of those plans were rejected by a federal court or refused preclearance by the Department of Justice under the Voting Rights Act of 1965. See *id.*, at 1830–1832.[4]

Aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections," App. 50, Proposition 106 amended the Arizona Constitution to remove congressional-redistricting authority from the state

[4] From Arizona's admission to the Union in 1912 to 1940, no congressional districting occurred because Arizona had only one Member of Congress. K. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983, p. 3 (1982) (Table 1). Court-ordered congressional districting plans were in place from 1966 to 1970, and from 1982 through 2000. See *Klahr* v. *Williams*, 313 F. Supp. 148 (Ariz. 1970); *Goddard* v. *Babbitt*, 536 F. Supp. 538 (Ariz. 1982); *Arizonans for Fair Representation* v. *Symington*, 828 F. Supp. 684 (Ariz. 1992); Norrander & Wendland, Redistricting in Arizona, in Reapportionment and Redistricting in the West 177, 178–179 (G. Moncrief ed. 2011).

legislature, lodging that authority, instead, in a new entity, the AIRC. Ariz. Const., Art. IV, pt. 2, §1, ¶¶3–23. The AIRC convenes after each census, establishes final district boundaries, and certifies the new districts to the Arizona Secretary of State. ¶¶16–17. The Legislature may submit nonbinding recommendations to the AIRC, ¶16, and is required to make necessary appropriations for its operation, ¶18. The highest ranking officer and minority leader of each chamber of the Legislature each select one member of the AIRC from a list compiled by Arizona's Commission on Appellate Court Appointments. ¶¶4–7. The four appointed members of the AIRC then choose, from the same list, the fifth member, who chairs the Commission. ¶8. A Commission's tenure is confined to one redistricting cycle; each member's time in office "expire[s] upon the appointment of the first member of the next redistricting commission." ¶23.

Holders of, or candidates for, public office may not serve on the AIRC, except candidates for or members of a school board. ¶3. No more than two members of the Commission may be members of the same political party, *ibid.*, and the presiding fifth member cannot be registered with any party already represented on the Commission, ¶8. Subject to the concurrence of two-thirds of the Arizona Senate, AIRC members may be removed by the Arizona Governor for gross misconduct, substantial neglect of duty, or inability to discharge the duties of office. ¶10.[5]

[5] In the current climate of heightened partisanship, the AIRC has encountered interference with its operations. In particular, its dependence on the Arizona Legislature for funding, and the removal provision have proved problematic. In 2011, when the AIRC proposed boundaries the majority party did not like, the Governor of Arizona attempted to remove the Commission's independent chair. Her attempt was stopped by the Arizona Supreme Court. See Cain, Redistricting Commissions: A Better Political Buffer? 121 Yale L. J. 1808, 1835–1836 (2012) (citing *Mathis* v. *Brewer*, No. CV–11–0313–SA (Ariz. 2011)); *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012).

Several other States, as a means to curtail partisan gerrymandering, have also provided for the participation of commissions in redistricting. Some States, in common with Arizona, have given nonpartisan or bipartisan commissions binding authority over redistricting.[6] The California Redistricting Commission, established by popular initiative, develops redistricting plans which can be halted by public referendum.[7] Still other States have given commissions an auxiliary role, advising the legislatures on redistricting,[8] or serving as a "backup" in the event the State's representative body fails to complete redistricting.[9] Studies report that nonpartisan and bipartisan commissions generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge. See Miller & Grofman, Redistricting Commissions in the Western United States, 3 U. C. Irvine L. Rev. 637, 661, 663–664, 666 (2013).

D

On January 17, 2012, the AIRC approved final congressional and state legislative maps based on the 2010 census. See Arizona Independent Redistricting, Final Maps, http://azredistricting.org/Maps/Final-Maps/default.asp (all Internet materials as visited June 25, 2015, and included in Clerk of Court's case file). Less than five months later, on June 6, 2012, the Arizona Legislature filed suit in the United States District Court for the District of Arizona, naming as defendants the AIRC, its five members, and the Arizona Secretary of State. The Legislature sought both a declaration

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[6] See Haw. Const., Art. IV, § 2, and Haw. Rev. Stat. §§ 25–1 to 25–9 (2009 and 2013 Cum. Supp.); Idaho Const., Art. III, § 2; Mont. Const., Art. V, § 14; N. J. Const., Art. II, § 2; Wash. Const., Art. II, § 43.

[7] See Cal. Const., Art. XXI, § 2; Cal. Govt. Code Ann. §§ 8251–8253.6 (West Supp. 2015).

[8] See Iowa Code §§ 42.1–42.6 (2013); Ohio Rev. Code Ann. § 103.51 (Lexis 2014); Me. Const., Art. IV, pt. 3, § 1–A.

[9] See Conn. Const., Art. III, § 6; Ind. Code § 3–3–2–2 (2014).

that Proposition 106 and congressional maps adopted by the AIRC are unconstitutional, and, as affirmative relief, an injunction against use of AIRC maps for any congressional election after the 2012 general election.

A three-judge District Court, convened pursuant to 28 U. S. C. § 2284(a), unanimously denied a motion by the AIRC to dismiss the suit for lack of standing. The Arizona Legislature, the court determined, had "demonstrated that its loss of redistricting power constitute[d] a [sufficiently] concrete injury." 997 F. Supp. 2d 1047, 1050 (2014). On the merits, dividing two to one, the District Court granted the AIRC's motion to dismiss the complaint for failure to state a claim. Decisions of this Court, the majority concluded, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.*, at 1054. As the "lawmaking power" in Arizona "plainly includes the power to enact laws through initiative," the District Court held, the "Elections Clause permits [Arizona's] establishment and use" of the Commission. *Id.*, at 1056. Judge Rosenblatt dissented in part. Proposition 106, in his view, unconstitutionally denied "the Legislature" of Arizona the "ability to have any outcome-defining effect on the congressional redistricting process." *Id.*, at 1058.

We postponed jurisdiction, and now affirm.

II

We turn first to the threshold question: Does the Arizona Legislature have standing to bring this suit? Trained on "whether the plaintiff is [a] proper party to bring [a particular lawsuit,]" standing is "[o]ne element" of the Constitution's case-or-controversy limitation on federal judicial authority, expressed in Article III of the Constitution. *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997). "To qualify as a party with standing to litigate," the Arizona Legislature "must show, first and foremost," injury in the form of " 'invasion of a le-

gally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). The Legislature's injury also must be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 409 (2013) (internal quotation marks omitted).

The Arizona Legislature maintains that the Elections Clause vests in it "primary responsibility" for redistricting. Brief for Appellant 51, 53. To exercise that responsibility, the Legislature urges, it must have at least the opportunity to engage (or decline to engage) in redistricting before the State may involve other actors in the redistricting process. See *id.*, at 51–53. Proposition 106, which gives the AIRC binding authority over redistricting, regardless of the Legislature's action or inaction, strips the Legislature of its alleged prerogative to initiate redistricting. That asserted deprivation would be remedied by a court order enjoining the enforcement of Proposition 106. Although we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts, see *infra*, at 813–824, one must not "confus[e] weakness on the merits with absence of Article III standing." *Davis* v. *United States*, 564 U. S. 229, 249, n. 10 (2011); see *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975) (standing "often turns on the nature and source of the claim asserted," but it "in no way depends on the merits" of the claim).

The AIRC argues that the Legislature's alleged injury is insufficiently concrete to meet the standing requirement absent some "specific legislative act that would have taken effect but for Proposition 106." Brief for Appellees 20. The United States, as *amicus curiae*, urges that even more is needed: The Legislature's injury will remain speculative, the United States contends, unless and until the Arizona Secretary of State refuses to implement a competing redistricting

plan passed by the Legislature. Brief for United States 14–17. In our view, the Arizona Legislature's suit is not premature, nor is its alleged injury too "conjectural" or "hypothetical" to establish standing. *Defenders of Wildlife*, 504 U. S., at 560 (internal quotation marks omitted).

Two prescriptions of Arizona's Constitution would render the Legislature's passage of a competing plan and submission of that plan to the Secretary of State unavailing. Indeed, those actions would directly and immediately conflict with the regime Arizona's Constitution establishes. Cf. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 944, n. 2 (1982) (failure to apply for permit which "would not have been granted" under existing law did not deprive plaintiffs of standing to challenge permitting regime). First, the Arizona Constitution instructs that the Legislature "shall not have the power to adopt any measure that supersedes [an initiative], in whole or in part, . . . unless the superseding measure furthers the purposes" of the initiative. Art. IV, pt. 1, § 1(14). Any redistricting map passed by the Legislature in an effort to supersede the AIRC's map surely would not "furthe[r] the purposes" of Proposition 106. Second, once the AIRC certifies its redistricting plan to the Secretary of State, Arizona's Constitution requires the Secretary to implement that plan and no other. See Art. IV, pt. 2, § 1(17); *Arizona Minority Coalition for Fair Redistricting* v. *Arizona Independent Redistricting Comm'n*, 211 Ariz. 337, 351, 121 P. 3d 843, 857 (App. 2005) (*per curiam*) ("Once the Commission certifies [its] maps, the secretary of state must use them in conducting the next election."). To establish standing, the Legislature need not violate the Arizona Constitution and show that the Secretary of State would similarly disregard the State's fundamental instrument of government.

Raines v. *Byrd*, 521 U. S. 811 (1997), does not aid AIRC's argument that there is no standing here. In *Raines*, this Court held that six *individual Members* of Congress lacked

standing to challenge the Line Item Veto Act. *Id.*, at 813–814, 829–830 (holding specifically and only that "individual members of Congress [lack] Article III standing"). The Act, which gave the President authority to cancel certain spending and tax benefit measures after signing them into law, allegedly diluted the efficacy of the Congressmembers' votes. *Id.*, at 815–817. The "institutional injury" at issue, we reasoned, scarcely zeroed in on any individual Member. *Id.*, at 821. "[W]idely dispersed," the alleged injury "necessarily [impacted] all Members of Congress and both Houses . . . equally." *Id.*, at 829, 821. None of the plaintiffs, therefore, could tenably claim a "personal stake" in the suit. *Id.*, at 830.

In concluding that the individual Members lacked standing, the Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress." *Id.*, at 829. "[I]ndeed," the Court observed, "both houses actively oppose[d] their suit." *Ibid.* Having failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain. The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers, App. 26–27, 46. That "different . . . circumstanc[e]," 521 U. S., at 830, was not *sub judice* in *Raines*.[10]

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[10] *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), featured in JUSTICE SCALIA's dissent, *post*, at 856–857, bears little resemblance to this case. There, the Court unanimously found that Massachusetts lacked standing to sue the Secretary of the Treasury on a claim that a federal grant program exceeded Congress' Article I powers and thus violated the Tenth Amendment. 262 U. S., at 480. If suing on its own behalf, the Court reasoned, Massachusetts' claim involved no "quasi-sovereign rights actually invaded or threatened." *Id.*, at 485. As *parens patriae*, the Court stated: "[I]t is no part of [Massachusetts'] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Id.*, at 485–486. As astutely observed, moreover: "The cases on the standing of states to sue the federal government seem to depend

Closer to the mark is this Court's decision in *Coleman* v. *Miller*, 307 U. S. 433 (1939). There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." *Id.*, at 446.[11] We held they had standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment. *Ibid.* *Coleman*, as we later explained in *Raines*, stood "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U. S., at 823.[12] Our conclusion that the Arizona Legislature has standing fits that bill.

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on the kind of claim that the state advances. The decisions . . . are hard to reconcile." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 263–266 (6th ed. 2009) (comparing *Mellon* with *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966) (rejecting on the merits the claim that the Voting Rights Act of 1965 invaded reserved powers of the States to determine voter qualifications and regulate elections), *Nebraska* v. *Wyoming*, 515 U. S. 1, 20 (1995) (recognizing that Wyoming could bring suit to vindicate the State's "quasi-sovereign" interests in the physical environment within its domain (emphasis deleted; internal quotation marks omitted)), and *Massachusetts* v. *EPA*, 549 U. S. 497, 520 (2007) (maintaining that Massachusetts "is entitled to special solicitude in our standing analysis")).

[11] *Coleman* concerned the proposed Child Labor Amendment, which provided that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age." 307 U. S., at 435, n. 1 (internal quotation marks omitted).

[12] The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U. S. 811, 819–820 (1997).

Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, see *supra*, at 801, would "completely nullif[y]" any vote by the Legislature, now or "in the future," purporting to adopt a redistricting plan, *Raines*, 521 U. S., at 823–824.[13]

This dispute, in short, "will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982).[14] Accordingly, we proceed to the merits.[15]

III

On the merits, we instructed the parties to address this question: Do the Elections Clause of the United States Constitution and 2 U. S. C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts? The Elections Clause is set out at the start of this opinion, *supra*, at 792. Section 2a(c) provides:

> "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Repre-

[13] In an endeavor to wish away *Coleman*, JUSTICE SCALIA, in dissent, suggests the case may have been "a 4-to-4 standoff." *Post*, at 858. He overlooks that Chief Justice Hughes' opinion, announced by Justice Stone, was styled "Opinion of the Court." 307 U. S., at 435. Describing *Coleman*, the Court wrote in *Raines*: "By a vote of 5–4, we held that [the 20 Kansas Senators who voted against ratification of a proposed federal constitutional amendment] had standing." 521 U. S., at 822. For opinions recognizing the precedential weight of *Coleman*, see *Baker* v. *Carr*, 369 U. S. 186, 208 (1962); *United States* v. *Windsor*, 570 U. S. 744, 805–806 (2013) (ALITO, J., dissenting).

[14] Curiously, JUSTICE SCALIA, dissenting on standing, berates the Court for "treading upon the powers of state legislatures." *Post*, at 859. He forgets that the party invoking federal-court jurisdiction in this case, and inviting our review, is the Arizona State Legislature.

[15] JUSTICE THOMAS, on the way to deciding that the Arizona Legislature lacks standing, first addresses the merits. In so doing, he overlooks that, in the cases he features, it was entirely immaterial whether the law involved was adopted by a representative body or by the people, through exercise of the initiative.

> sentatives to which such State is entitled under such apportionment shall be elected in the following manner: [setting out five federally prescribed redistricting procedures]."

Before focusing directly on the statute and constitutional prescriptions in point, we summarize this Court's precedent relating to appropriate state decisionmakers for redistricting purposes. Three decisions compose the relevant case law: *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565 (1916); *Hawke* v. *Smith (No. 1)*, 253 U. S. 221 (1920); and *Smiley* v. *Holm*, 285 U. S. 355 (1932).

A

Davis v. *Hildebrant* involved an amendment to the Constitution of Ohio vesting in the people the right, exercisable by referendum, to approve or disapprove by popular vote any law enacted by the State's legislature. A 1915 Act redistricting the State for the purpose of congressional elections had been submitted to a popular vote, resulting in disapproval of the legislature's measure. State election officials asked the State's Supreme Court to declare the referendum void. That court rejected the request, holding that the referendum authorized by Ohio's Constitution "was a part of the legislative power of the State," and "nothing in [federal statutory law] or in [the Elections Clause] operated to the contrary." 241 U. S., at 567. This Court affirmed the Ohio Supreme Court's judgment. In upholding the state court's decision, we recognized that the referendum was "part of the legislative power" in Ohio, *ibid.*, legitimately exercised by the people to disapprove the legislation creating congressional districts. For redistricting purposes, *Hildebrant* thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people. See *id.*, at 569 (Elections Clause does not bar "treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws").

Hawke v. *Smith* involved the Eighteenth Amendment to the Federal Constitution. Ohio's Legislature had ratified the Amendment, and a referendum on that ratification was at issue. Reversing the Ohio Supreme Court's decision upholding the referendum, we held that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." 253 U. S., at 229. Instead, Article V governing ratification had lodged in "the legislatures of three-fourths of the several States" sole authority to assent to a proposed amendment. *Id.,* at 226. The Court contrasted the ratifying function, exercisable exclusively by a State's legislature, with "the ordinary business of legislation." *Id.,* at 229. *Davis* v. *Hildebrant*, the Court explained, involved the enactment of legislation, *i. e.*, a redistricting plan, and properly held that "the referendum [was] part of the legislative authority of the State for [that] purpose." 253 U. S., at 230.

Smiley v. *Holm* raised the question whether legislation purporting to redistrict Minnesota for congressional elections was subject to the Governor's veto. The Minnesota Supreme Court had held that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. We reversed that determination and held, for the purpose at hand, Minnesota's legislative authority includes not just the two Houses of the legislature; it includes, in addition, a make-or-break role for the Governor. In holding that the Governor's veto counted, we distinguished instances in which the Constitution calls upon state legislatures to exercise a function other than lawmaking. State legislatures, we pointed out, performed an "electoral" function "in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment,"[16] a "ratifying" function for "proposed amendments to the Constitution under Article V,"

[16] The Seventeenth Amendment provided for election of Senators "by the people" of each State.

as explained in *Hawke* v. *Smith*, and a "consenting" function "in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17." 285 U. S., at 365–366.

In contrast to those other functions, we observed, redistricting "involves lawmaking in its essential features and most important aspect." *Id.*, at 366. Lawmaking, we further noted, ordinarily "must be in accordance with the method which the State has prescribed for legislative enactments." *Id.*, at 367. In Minnesota, the State's Constitution had made the Governor "part of the legislative process." *Id.*, at 369. And the Elections Clause, we explained, respected the State's choice to include the Governor in that process, although the Governor could play no part when the Constitution assigned to "the Legislature" a ratifying, electoral, or consenting function. Nothing in the Elections Clause, we said, "attempt[ed] to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted." *Id.*, at 368.

THE CHIEF JUSTICE, in dissent, features, indeed trumpets repeatedly, the pre-Seventeenth Amendment regime in which Senators were "chosen [in each State] by the Legislature thereof." Art. I, § 3; see *post*, at 824–825, 831–832, 842. If we are right, he asks, why did popular election proponents resort to the amending process instead of simply interpreting "the Legislature" to mean "the people"? *Post*, at 824. *Smiley*, as just indicated, answers that question. Article I, § 3, gave state legislatures "a function different from that of lawgiver," 285 U. S., at 365; it made each of them "an electoral body" charged to perform that function to the exclusion of other participants, *ibid.* So too, of the ratifying function. As we explained in *Hawke*, "the power to legislate in the enactment of the laws of a State is derived from the people of the State." 253 U. S., at 230. Ratification, however, "has its source in the Federal Constitution" and is not "an act

of legislation within the proper sense of the word." *Id.*, at 229–230.

Constantly resisted by THE CHIEF JUSTICE, but well understood in opinions that speak for the Court: "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932) (citing *Smiley*, 285 U. S. 355). Thus "the Legislature" comprises the referendum and the Governor's veto in the context of regulating congressional elections. *Hildebrant*, see *supra*, at 805; *Smiley*, see *supra*, at 806–807. In the context of ratifying constitutional amendments, in contrast, "the Legislature" has a different identity, one that excludes the referendum and the Governor's veto. *Hawke*, see *supra*, at 806.[17]

In sum, our precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto. The exercise of the initiative, we acknowledge, was not at issue in our prior decisions. But as developed below, we see no constitutional bar-

[17] The list of constitutional provisions in which the word "legislature" appears, appended to THE CHIEF JUSTICE's opinion, *post*, at 850–854, is illustrative of the variety of functions state legislatures can be called upon to exercise. For example, Article I, § 2, cl. 1, superseded by the Seventeenth Amendment, assigned an "electoral" function. See *Smiley* v. *Holm*, 285 U. S. 355, 365 (1932). Article I, § 3, cl. 2, assigns an "appointive" function. Article I, § 8, cl. 17, assigns a "consenting" function, see *Smiley*, 285 U. S., at 366, as does Article IV, § 3, cl. 1. "[R]atifying" functions are assigned in Article V, Amdt. 18, § 3, Amdt. 20, § 6, and Amdt. 22, § 2. See *Hawke* v. *Smith (No. 1)*, 253 U. S. 221, 229 (1920). But Article I, § 4, cl. 1, unquestionably calls for the exercise of lawmaking authority. That authority can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves. See *infra*, at 813–824.

rier to a State's empowerment of its people by embracing that form of lawmaking.

B

We take up next the statute the Court asked the parties to address, 2 U. S. C. § 2a(c), a measure modeled on the Reapportionment Act Congress passed in 1911, Act of Aug. 8 (1911 Act), ch. 5, § 4, 37 Stat. 14. Section 2a(c), we hold, permits use of a commission to adopt Arizona's congressional districts. See *supra*, at 804.[18]

From 1862 through 1901, the decennial congressional apportionment Acts provided that a State would be required to follow federally prescribed procedures for redistricting unless "the legislature" of the State drew district lines. *E. g.*, Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734. In drafting the 1911 Act, Congress focused on the fact that several States had supplemented the representative legislature mode of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislation by the electorate). 47 Cong. Rec. 3508 (statement of Sen. Burton); see *supra*, at 793–795. To accommodate that development, the 1911 Act eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the Act's default procedures for redistricting "until such State shall be redistricted *in the manner provided by the laws thereof*." Ch. 5, § 4, 37 Stat. 14 (emphasis added).[19]

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[18] The AIRC referenced § 2a(c) in briefing below, see Motion to Dismiss 8–9, and Response to Plaintiff's Motion for Preliminary Injunction 12–14, in No. 12–1211 (D Ariz.), and in its motion to dismiss or affirm in this Court, see Motion to Dismiss or Affirm 28–31.

[19] The 1911 Act also required States to comply with certain federally prescribed districting rules—namely, that Representatives be elected "by districts composed of a contiguous and compact territory, and containing

Some Members of Congress questioned whether the language change was needed. In their view, existing apportionment legislation (referring to redistricting by a State's "legislature") "suffic[ed] to allow, whatever the law of the State may be, the people of that State to control [redistricting]." 47 Cong. Rec. 3507 (statement of Sen. Shively); cf. *Shiel* v. *Thayer*, Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 351 (1861) (view of House Committee of Elections Member Dawes that Article I, § 4's reference to "the Legislature" meant simply the "constituted authorities, through whom [the State] choose[s] to speak," prime among them, the State's Constitution, "which rises above . . . all legislative action"). Others anticipated that retaining the reference to "the legislature" would "condem[n] . . . any [redistricting] legislation by referendum or by initiative." 47 Cong. Rec. 3436 (statement of Sen. Burton). In any event, proponents of the change maintained, "[i]n view of the very serious evils arising from gerrymanders," Congress should not "take any chances in [the] matter." *Id.*, at 3508 (same). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States," they urged, required Congress "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.*, at 3436; see *id.*, at 3508 (statement of Sen. Works).

As this Court observed in *Hildebrant*, "the legislative history of th[e] [1911 Act] leaves no room for doubt [about why]

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as nearly as practicable an equal number of inhabitants," and that the districts "be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative." Act of Aug. 8, 1911, ch. 5, §§ 3–4, 37 Stat. 14. When a State's apportionment of Representatives remained constant, the Act directed the State to continue using its pre-existing districts "until [the] State shall be redistricted as herein prescribed." See § 4, *ibid.* The 1911 Act did not address redistricting in the event a State's apportionment of Representatives decreased, likely because no State faced a decrease following the 1910 census.

the prior words were stricken out and the new words inserted." 241 U. S., at 568. The change was made to safeguard to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. 3437 (statement of Sen. Burton). The 1911 Act, in short, left the question of redistricting "to the laws and methods of the States. If they include initiative, it is included." *Id.*, at 3508.

While the 1911 Act applied only to reapportionment following the 1910 census, see *Wood* v. *Broom*, 287 U. S. 1, 6–7 (1932), Congress used virtually identical language when it enacted § 2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761–762. Section 2a(c) sets forth congressional-redistricting procedures operative only if the State, "after any apportionment," had not redistricted "in the manner provided by the law thereof." The 1941 provision, like the 1911 Act, thus accorded full respect to the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the presumptively governing map.[20]

The Arizona Legislature characterizes § 2a(c) as an "obscure provision, narrowed by subsequent developments to the brink of irrelevance." Brief for Appellant 56. True, four of the five default redistricting procedures—operative only when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch* v. *Smith*, 538 U. S. 254, 273–274 (2003) (plurality opinion). Concretely, the default

[20] Because a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

procedures specified in § 2a(c)(1)–(4) contemplate that a State would continue to use pre-existing districts following a new census. The one-person, one-vote principle announced in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), however, would bar those procedures, except in the "unlikely" event that "the decennial census makes no districting change constitutionally necessary," *Branch*, 538 U. S., at 273 (plurality opinion).

Constitutional infirmity in § 2a(c)(1)–(4)'s default procedures, however, does not bear on the question whether a State has been "redistricted in the manner provided by [state] law."[21] As just observed, Congress expressly directed that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature, court decree (see *id.*, at 274), or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives.[22]

There can be no dispute that Congress itself may draw a State's congressional-district boundaries. See *Vieth*, 541 U. S., at 275 (plurality opinion) (stating that the Elections Clause "permit[s] Congress to 'make or alter' " the "districts for federal elections"). The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State "Legislature[s]," precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under

[21] The plurality in *Branch* v. *Smith*, 538 U. S. 254, 273 (2003), considered the question whether § 2a(c) had been repealed by implication and stated, "where what it prescribes is constitutional," the provision "continues to apply."

[22] THE CHIEF JUSTICE, in dissent, insists that § 2a(c) and its precursor, the 1911 Act, have nothing to do with this case. *Post*, at 842–844, 846. Undeniably, however, it was the very purpose of the measures to recognize the legislative authority each State has to determine its own redistricting regime.

its plenary authority to "make or alter" the State's plan. See Brief for Appellant 56–57; Reply Brief 17. In other words, the Arizona Legislature regards § 2a(c) as a futile exercise. The Congresses that passed § 2a(c) and its forerunner, the 1911 Act, did not share that wooden interpretation of the Clause, nor do we. Any uncertainty about the import of § 2a(c), however, is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative, see *infra* this page and 814–824, leaving no arguable conflict between § 2a(c) and the first part of the Clause.

C

In accord with the District Court, see *supra*, at 799, we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission. To restate the key question in this case, the issue centrally debated by the parties: Absent congressional authorization, does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts? The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.

We note, preliminarily, that dictionaries, even those in circulation during the founding era, capaciously define the word "legislature." Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." 2 A Dictionary of the English Language (1st ed. 1755); *ibid.* (6th ed. 1785); *ibid.* (10th ed. 1792); *ibid.* (12th ed. 1802). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." 2 A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. Compendious Dictionary of the English Language 174 (1806). And Nathan Bailey

similarly defined "legislature" as "the Authority of making Laws, or Power which makes them." An Universal Etymological English Dictionary (20th ed. 1763).[23]

As to the "power that makes laws" in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do. See Ariz. Const., Art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). See also *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."). As well in Arizona, the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do. See Tr. of Oral Arg. 15–16 (answering the Court's question, may the Arizona Legislature itself establish a commission to attend to redistricting, counsel for appellant responded yes, state legislatures may delegate their authority to a commission, subject to their prerogative to reclaim the authority for themselves).

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The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override

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[23] Illustrative of an embracive comprehension of the word "legislature," Charles Pinckney explained at South Carolina's ratifying convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." 4 Debates on the Federal Constitution 328 (J. Elliot 2d ed. 1863). Participants in the debates over the Elections Clause used the word "legislature" interchangeably with "state" and "state government." See Brief for Brennan Center for Justice at N. Y. U. School of Law as *Amicus Curiae* 6–7.

state election rules, not to restrict the way States enact legislation. As this Court explained in *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013), the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id.*, at 8 (citing The Federalist No. 59, pp. 362–363 (C. Rossiter ed. 1961) (A. Hamilton)).

The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention 241 (M. Farrand rev. 1966). Madison spoke in response to a motion by South Carolina's delegates to strike out the federal power. Those delegates so moved because South Carolina's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. See J. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 223–224 (1996). The problem Madison identified has hardly lessened over time. Conflict of interest is inherent when "legislators dra[w] district lines that they ultimately have to run in." Cain, 121 Yale L. J., at 1817.

Arguments in support of congressional control under the Elections Clause were reiterated in the public debate over ratification. Theophilus Parsons, a delegate at the Massachusetts ratifying convention, warned that "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the states into districts for the election of representatives." Debate in Massachusetts Ratifying Convention (16–17, 21 Jan. 1788), in 2 The Founders' Constitution 256 (P. Kurland & R. Lerner eds. 1987). Timothy Pickering of Massachusetts similarly urged that the Clause was necessary because "the State gov-

ernments *may* abuse their power, and regulate . . . elections in such manner as would be highly inconvenient to the people." Letter to Charles Tillinghast (24 Dec. 1787), in *id.*, at 253. He described the Clause as a way to "ensure to the *people* their rights of election." *Ibid.*

While attention focused on potential abuses by state-level politicians, and the consequent need for congressional oversight, the legislative processes by which the States could exercise their initiating role in regulating congressional elections occasioned no debate. That is hardly surprising. Recall that when the Constitution was composed in Philadelphia and later ratified, the people's legislative prerogatives—the initiative and the referendum—were not yet in our democracy's arsenal. See *supra*, at 793–795. The Elections Clause, however, is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands.[24]

2

The Arizona Legislature maintains that, by specifying "the Legislature thereof," the Elections Clause renders the State's representative body the sole "component of state government authorized to prescribe . . . regulations . . . for congressional redistricting." Brief for Appellant 30. THE CHIEF JUSTICE, in dissent, agrees. But it is characteristic of our federal system that States retain autonomy to establish their own governmental processes. See *Alden* v.

[24] THE CHIEF JUSTICE, in dissent, cites *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995), as an important precedent we overlook. *Post*, at 847. There, we held that state-imposed term limits on candidates for the House and Senate violated the Clauses of the Constitution setting forth qualifications for membership in Congress, Art. I, § 2, cl. 2, and Art. I, § 3, cl. 3. We did so for a reason entirely harmonious with today's decision. Adding state-imposed limits to the qualifications set forth in the Constitution, the Court wrote, would be "contrary to the 'fundamental principle of our representative democracy,' . . . that 'the people should choose whom they please to govern them.'" 514 U. S., at 783 (quoting *Powell* v. *McCormack*, 395 U. S. 486, 547 (1969)).

Maine, 527 U. S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance."); The Federalist No. 43, at 275 (J. Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so."). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority. See Ariz. Const., Art. IV; *supra*, at 795–796.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U. S. 160, 171 (2009); see *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' " *Bond* v. *United States*, 564 U. S. 211, 221 (2011) (quoting *Gregory*, 501 U. S., at 458).

We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on

the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution. See *Shiel*, H. R. Misc. Doc. No. 57, at 349–352 (concluding that Oregon's Constitution prevailed over any conflicting legislative measure setting the date for a congressional election).

THE CHIEF JUSTICE, in dissent, maintains that, under the Elections Clause, the state legislature can trump any initiative-introduced constitutional provision regulating federal elections. He extracts support for this position from *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866). See *post*, at 837–839. There, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in other locations. One candidate would win if the State Constitution's requirement controlled; his opponent would prevail under the Michigan Legislature's prescription. The House Elections Committee, in a divided vote, ruled that, under the Elections Clause, the Michigan Legislature had the paramount power.

As the minority report in *Baldwin* pointed out, however, the Supreme Court of Michigan had reached the opposite conclusion, holding, as courts generally do, that state legislation in direct conflict with the State's Constitution is void. *Baldwin*, H. R. Misc. Doc. No. 152, at 50. The *Baldwin* majority's ruling, furthermore, appears in tension with the Election Committee's unanimous decision in *Shiel* just five years earlier. (The Committee, we repeat, "ha[d] no doubt that the constitution of the State ha[d] fixed, beyond the control of the legislature, the time for holding [a congressional] election." *Shiel*, H. R. Misc. Doc. No. 57, at 351.) Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in *Baldwin* belonged to the same political party as all but one member of the House Committee majority responsible for the decision. See U. S. House of Re-

presentatives Congress Profiles: 39th Congress (1865-1867), http://history.house.gov/Congressional-Overview/Profiles/39th/; Biographical Directory of the United States Congress: Trowbridge, Rowland Ebenezer (1821–1881). Cf. Cain, 121 Yale L. J., at 1817 (identifying legislative conflict of interest as the problem independent redistricting commissions aimed to check). In short, *Baldwin* is not a disposition that should attract this Court's reliance.

We add, furthermore, that the Arizona Legislature does not question, nor could it, employment of the initiative to control state and local elections. In considering whether Article I, § 4, really says "No" to similar control of federal elections, we have looked to, and borrow from, Alexander Hamilton's counsel: "[I]t would have been hardly advisable . . . to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government" held at the same times and places, and in the same manner. The Federalist No. 61, at 376. The Elections Clause is not sensibly read to subject States to that deprivation.[25]

3

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 227.

[25] A State may choose to regulate state and national elections differently, which is its prerogative under the Clause. *E. g.*, Ind. Code § 3–3–2–2 (creating backup commission for congressional but not state legislative districts).

The people's ultimate sovereignty had been expressed by John Locke in 1690, a near century before the Constitution's formation:

> "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security." Two Treatises of Government § 149, p. 385 (P. Laslett ed. 1964).

Our Declaration of Independence, ¶2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." U. S. Const., Preamble. As this Court stated, quoting Hamilton: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell* v. *McCormack*, 395 U. S. 486, 540–541 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). In this light, it would be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be "chosen . . . by the People of the several States," Art. I, § 2. See Cain, 121 Yale L. J., at 1817.

THE CHIEF JUSTICE, in dissent, suggests that independent commissions established by initiative are a high-minded experiment that has failed. *Post*, at 848–849. For this assessment, THE CHIEF JUSTICE cites a three-judge Federal

District Court opinion, *Harris* v. *Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). That opinion, he asserts, "detail[s] the partisanship that has affected the Commission." *Post*, at 848. No careful reader could so conclude.

The report of the decision in *Harris* comprises a *per curiam* opinion, an opinion concurring in the judgment by Judge Silver, and a dissenting opinion by Judge Wake. The *per curiam* opinion found "in favor of the Commission." 993 F. Supp. 2d, at 1080. Deviations from the one-person, one-vote principle, the *per curiam* opinion explained at length, were "small" and, in the main, could not be attributed to partisanship. *Ibid.* While partisanship "may have played some role," the *per curiam* opinion stated, deviations were "predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act." *Id.*, at 1060. Judge Silver, although she joined the *per curiam* opinion, made clear at the very outset of that opinion her finding that "partisanship did not play a role." *Id.*, at 1046, n. 1. In her concurring opinion, she repeated her finding that the evidence did not show partisanship at work, *id.*, at 1087; instead, she found, the evidence "[was] overwhelming [that] the final map was a product of the commissioners's consideration of appropriate redistricting criteria." *Id.*, at 1088. To describe *Harris* as a decision criticizing the Commission for pervasive partisanship, *post*, at 848–849, THE CHIEF JUSTICE could rely only upon the dissenting opinion, which expressed views the majority roundly rejected.

Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." Cain, 121 Yale L. J., at 1808. But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." *Ibid.* They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.

4

Banning lawmaking by initiative to direct a State's method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party's advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

The people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the "Times, Places and Manner" of holding federal elections. Art. I, § 4. For example, the people of California provided for permanent voter registration, specifying that "no amendment by the Legislature shall provide for a general biennial or other periodic reregistration of voters." Cal. Elec. Code Ann. § 2123 (West 2003). The people of Ohio banned ballots providing for straight-ticket voting along party lines. Ohio Const., Art. V, § 2a. The people of Oregon shortened the deadline for voter registration to 20 days prior to an election. Ore. Const., Art. II, § 2. None of those measures permit the state legislatures to override the people's prescriptions. The Arizona Legislature's theory—that the lead role in regulating federal elections cannot be wrested from "the Legislature," and vested in commissions initiated by the people—would endanger all of them.

The list of endangered state elections laws, were we to sustain the position of the Arizona Legislature, would not stop with popular initiatives. Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by "the Legislature."[26]

[26] See App. to Brief for Appellees 11a–29a (collecting state constitutional provisions governing elections). States' constitutional conventions are not simply past history predating the first election of state legislatures. Louisiana, for example, held the most recent of its 12 constitutional conventions in 1992. J. Dinan, The American State Constitutional Tradition

Core aspects of the electoral process regulated by state constitutions include voting by "ballot" or "secret ballot,"[27] voter registration,[28] absentee voting,[29] vote counting,[30] and victory thresholds.[31] Again, the States' legislatures had no hand in making these laws and may not alter or amend them.

The importance of direct democracy as a means to control election regulations extends beyond the particular statutes and constitutional provisions installed by the people rather than the States' legislatures. The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures. See Persily & Anderson, Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1006–1008 (2005) (describing cases in which "indirect pressure of the initiative process . . . was sufficient to spur [state] legislature[s] to action"). Turning the coin, the legislature's responsiveness to the people its members represent is hardly heightened when the representative body can be confident that what it does will not be overturned or modified by the voters themselves.

8–9 (2006) (Table 1–1). The State's provision for voting by "secret ballot" may be traced to the constitutional convention held by the State in 1812, see La. Const., Art. VI, § 13, but was most recently reenacted at the State's 1974 constitutional convention, see Art. XI, § 2.

[27] Madison called the decision "[w]hether the electors should vote by ballot or vivâ voce" a quintessential subject of regulation under the Elections Clause. 2 Records of the Federal Convention 240–241 (M. Farrand rev. 1966).

[28] Miss. Const., Art. XII, § 249; N. C. Const., Art. VI, § 3; Va. Const., Art. II, § 2; W. Va. Const., Art. IV, § 12; Wash. Const., Art. VI, § 7.

[29] *E. g.*, Haw. Const., Art. II, § 4; La. Const., Art XI, § 2; N. D. Const., Art. II, § 1; Pa. Const., Art. VII, § 14.

[30] *E. g.*, Ark. Const., Art. III, § 11 (ballots unlawfully not counted in the first instance must be counted after election); La. Const., Art XI, § 2 (all ballots must be counted publicly).

[31] *E. g.*, Ariz. Const., Art. VII, § 7 (setting plurality of votes as the standard for victory in all elections, excluding runoffs); Mont. Const., Art. IV, § 5 (same); Ore. Const., Art. II, § 16 (same).

* * *

Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes. But the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes. Article I, § 4, stems from a different view. Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–405 (1819). So comprehended, the Clause doubly empowers the people. They may control the State's lawmaking processes in the first instance, as Arizona voters have done, and they may seek Congress' correction of regulations prescribed by state legislatures.

The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." The Federalist No. 57, at 352 (J. Madison). In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005). The Elections Clause does not hinder that endeavor.

For the reasons stated, the judgment of the United States District Court for the District of Arizona is

Affirmed.

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

Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from "the Legislature" of each State, Art. I, § 3, to "the people thereof." The Amendment resulted from an arduous, decades-long campaign in which reformers across the coun-

try worked hard to garner approval from Congress and three-quarters of the States.

What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"? The Court today performs just such a magic trick with the Elections Clause. Art. I, § 4. That Clause vests congressional redistricting authority in "the Legislature" of each State. An Arizona ballot initiative transferred that authority from "the Legislature" to an "Independent Redistricting Commission." The majority approves this deliberate constitutional evasion by doing what the proponents of the Seventeenth Amendment dared not: revising "the Legislature" to mean "the people."

The Court's position has no basis in the text, structure, or history of the Constitution, and it contradicts precedents from both Congress and this Court. The Constitution contains seventeen provisions referring to the "Legislature" of a State, many of which cannot possibly be read to mean "the people." See Appendix, *infra*. Indeed, several provisions expressly distinguish "the Legislature" from "the People." See Art. I, § 2; Amdt. 17. This Court has accordingly defined "the Legislature" in the Elections Clause as "*the representative body* which ma[kes] the laws of the people." *Smiley* v. *Holm*, 285 U. S. 355, 365 (1932) (quoting *Hawke* v. *Smith (No. 1)*, 253 U. S. 221, 227 (1920); emphasis added).

The majority largely ignores this evidence, relying instead on disconnected observations about direct democracy, a contorted interpretation of an irrelevant statute, and naked appeals to public policy. Nowhere does the majority explain how a constitutional provision that vests redistricting authority in "the Legislature" permits a State to wholly exclude "the Legislature" from redistricting. Arizona's Commission might be a noble endeavor—although it does not seem so "independent" in practice—but the "fact that a given law or procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *INS* v.

Chadha, 462 U. S. 919, 944 (1983). No matter how concerned we may be about partisanship in redistricting, this Court has no power to gerrymander the Constitution. I respectfully dissent.

I

The majority begins by discussing policy. I begin with the Constitution. The Elections Clause provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives. And that duty "shall" be carried out "in each State by the Legislature thereof."

In Arizona, however, redistricting is not carried out by the legislature. Instead, as the result of a ballot initiative, an unelected body called the Independent Redistricting Commission draws the lines. See *ante*, at 796–797. The key question in the case is whether the Commission can conduct congressional districting consistent with the directive that such authority be exercised "by the Legislature."

The majority concedes that the unelected Commission is not "the Legislature" of Arizona. The Court contends instead that the people of Arizona as a whole constitute "the Legislature" for purposes of the Elections Clause, and that they may delegate the congressional districting authority conferred by that Clause to the Commission. *Ante*, at 814. The majority provides no support for the delegation part of its theory, and I am not sure whether the majority's analysis is correct on that issue. But even giving the Court the ben-

efit of the doubt in that regard, the Commission is still unconstitutional. Both the Constitution and our cases make clear that "the Legislature" in the Elections Clause is the representative body which makes the laws of the people.

A

The majority devotes much of its analysis to establishing that the people of Arizona may exercise lawmaking power under their State Constitution. See *ante*, at 795–796, 814, 816–817. Nobody doubts that. This case is governed, however, by the Federal Constitution. The States do not, in the majority's words, "retain autonomy to establish their own governmental processes," *ante*, at 816, if those "processes" violate the United States Constitution. In a conflict between the Arizona Constitution and the Elections Clause, the State Constitution must give way. Art. VI, cl. 2; *Cook* v. *Gralike*, 531 U. S. 510, 523 (2001). The majority opinion therefore largely misses the point.

The relevant question in this case is how to define "the Legislature" under the Elections Clause. The majority opinion does not seriously turn to that question until page 813, and even then it fails to provide a coherent answer. The Court seems to conclude, based largely on its understanding of the "history and purpose" of the Elections Clause, *ante*, at 813, that "the Legislature" encompasses any entity in a State that exercises legislative power. That circular definition lacks any basis in the text of the Constitution or any other relevant legal source.

The majority's textual analysis consists, in its entirety, of one paragraph citing founding era dictionaries. The majority points to various dictionaries that follow Samuel Johnson's definition of "legislature" as the "power that makes laws." *Ibid.* (internal quotation marks omitted). The notion that this definition corresponds to the entire population of a State is strained to begin with, and largely discredited by the majority's own admission that "[d]irect lawmaking by

the people was virtually unknown when the Constitution of 1787 was drafted." *Ante*, at 793 (internal quotation marks omitted); see *ante*, at 816. Moreover, Dr. Johnson's first example of the usage of "legislature" is this: "Without the concurrent consent of all three parts of the legislature, no law is or can be made." 2 A Dictionary of the English Language (1st ed. 1755) (emphasis deleted). Johnson borrowed that sentence from Matthew Hale, who defined the "Three Parts of the Legislature" of England as the King and the two houses of Parliament. History of the Common Law of England 2 (1713). (The contrary notion that the people as a whole make the laws would have cost you your head in England in 1713.) Thus, even under the majority's preferred definition, "the Legislature" referred to an institutional body of representatives, not the people at large.

Any ambiguity about the meaning of "the Legislature" is removed by other founding era sources. "[E]very state constitution from the Founding Era that used the term legislature defined it as a distinct multimember entity comprised of representatives." Morley, The Intratextual Independent "Legislature" and the Elections Clause, 109 Nw. U. L. Rev. Online 131, 147, and n. 101 (2015) (citing eleven State Constitutions). The Federalist Papers are replete with references to "legislatures" that can only be understood as referring to representative institutions. *E. g.*, The Federalist No. 27, pp. 174–175 (C. Rossiter ed. 1961) (A. Hamilton) (describing "the State legislatures" as "select bodies of men"); *id.*, No. 60, at 368 (contrasting "the State legislatures" with "the people"). Noah Webster's heralded American Dictionary of the English Language defines "legislature" as "[t]he body of men in a state or kingdom, invested with power to make and repeal laws." 2 An American Dictionary of the English Language (1828). It continues, "The legislatures of most of the states in America . . . consist of two houses or branches." *Ibid.* (emphasis deleted).

I could go on, but the Court has said this before. As we put it nearly a century ago, "Legislature" was "not a term of uncertain meaning when incorporated into the Constitution." *Hawke*, 253 U. S., at 227. "What it meant when adopted it still means for the purpose of interpretation." *Ibid.* "A Legislature" is "the representative body which ma[kes] the laws of the people." *Ibid.*; see *Smiley*, 285 U. S., at 365 (relying on this definition); *Colorado Gen. Assembly* v. *Salazar*, 541 U. S. 1093, 1095 (2004) (Rehnquist, C. J., dissenting from denial of certiorari) (same).

B

The unambiguous meaning of "the Legislature" in the Elections Clause as a representative body is confirmed by other provisions of the Constitution that use the same term in the same way. When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself. Our precedents new and old have employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole. See, *e. g.*, *NLRB* v. *Noel Canning*, 573 U. S. 513, 536–537 (2014); *id.*, at 599 (SCALIA, J., concurring in judgment); *McCulloch* v. *Maryland*, 4 Wheat. 316, 414–415 (1819); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 328–330 (1816); Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999).

The Constitution includes seventeen provisions referring to a State's "Legislature." See Appendix, *infra*. Every one of those references is consistent with the understanding of a legislature as a representative body. More importantly, many of them are only consistent with an institutional legislature—and flatly incompatible with the majority's reading of "the Legislature" to refer to the people as a whole.

Start with the Constitution's first use of the term: "The House of Representatives shall be composed of Members

chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Art. I, § 2, cl. 1. This reference to a "Branch of the State Legislature" can only be referring to an institutional body, and the explicit juxtaposition of "the State Legislature" with "the People of the several States" forecloses the majority's proposed reading.

The next Section of Article I describes how to fill vacancies in the United States Senate: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." § 3, cl. 2.[1] The references to "the Recess of the Legislature of any State" and "the next Meeting of the Legislature" are only consistent with an institutional legislature, and make no sense under the majority's reading. The people as a whole (schoolchildren and a few unnamed others excepted) do not take a "Recess."

The list goes on. Article IV provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." § 4. It is perhaps conceivable that all the people of a State could be "convened"—although this would seem difficult during an "Invasion" or outbreak of "domestic Violence"—but the only natural reading of the Clause is that "the Executive" may submit a federal application when "the Legislature" as a representative body cannot be convened.

Article VI provides that the "Senators and Representatives before mentioned, and the Members of the several

[1] This provision was modified by the Seventeenth Amendment.

State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Cl. 3. Unless the majority is prepared to make all the people of every State swear an "Oath or Affirmation, to support this Constitution," this provision can only refer to the "several State Legislatures" in their institutional capacity.

Each of these provisions offers strong structural indications about what "the Legislature" must mean. But the most powerful evidence of all comes from the Seventeenth Amendment. Under the original Constitution, Senators were "chosen by the Legislature" of each State, Art. I, § 3, cl. 1, while Members of the House of Representatives were chosen "by the People," Art. I, § 2, cl. 1. That distinction was critical to the Framers. As James Madison explained, the Senate would "derive its powers from the States," while the House would "derive its powers from the people of America." The Federalist No. 39, at 244. George Mason believed that the power of state legislatures to select Senators would "be a reasonable guard" against "the Danger . . . that the national, will swallow up the State Legislatures." 1 Records of the Federal Convention of 1787, p. 160 (M. Farrand ed. 1911). Not everyone agreed. James Wilson proposed allowing the people to elect Senators directly. His proposal was rejected ten to one. Debates in the Federal Convention of 1787, S. Doc. No. 404, 57th Cong., 1st Sess., 8 (1902).

Before long, reformers took up Wilson's mantle and launched a protracted campaign to amend the Constitution. That effort began in 1826, when Representative Henry Storrs of New York proposed—but then set aside—a constitutional amendment transferring the power to elect Senators from the state legislatures to the people. 2 Cong. Deb. 1348–1349. Over the next three-quarters of a century, no fewer than 188 joint resolutions proposing similar reforms were introduced in both Houses of Congress. 1 W. Hall, The

History and Effect of the Seventeenth Amendment 183–184 (1936).

At no point in this process did anyone suggest that a constitutional amendment was unnecessary because "Legislature" could simply be interpreted to mean "people." See *Hawke*, 253 U. S., at 228 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."). In fact, as the decades rolled by without an amendment, 28 of the 45 States settled for the next best thing by holding a popular vote on candidates for Senate, then pressuring state legislators into choosing the winner. See, *e. g.*, Abstract of Laws Relating to the Election of United States Senators, S. Doc. No. 393, 59th Cong., 2d Sess. (1907). All agreed that cutting the state legislature out of senatorial selection entirely would require nothing less than to "Strike out" the original words in the Constitution and "insert, 'elected by the people'" in its place. Cong. Globe, 31st Cong., 1st Sess., 88 (1849) (proposal of Sen. Jeremiah Clemens).

Yet that is precisely what the majority does to the Elections Clause today—amending the text not through the process provided by Article V, but by judicial decision. The majority's revision renders the Seventeenth Amendment an 86-year waste of time, and singles out the Elections Clause as the only one of the Constitution's seventeen provisions referring to "the Legislature" that departs from the ordinary meaning of the term.

The Commission had no answer to this point. See Tr. of Oral Arg. 42 (JUSTICE ALITO: "Is there any other provision where legislature means anything other than the conventional meaning?" Appellee: "I don't know the answer to that question.").

The Court's response is not much better. The majority observes that "the Legislature" of a State may perform dif-

ferent functions under different provisions of the Constitution. Under Article I, § 3, for example, "the Legislature" performed an "electoral" function by choosing Senators. The "Legislature" plays a "consenting" function under Article I, § 8, and Article IV, § 3; a "ratifying" function under Article V; and a "lawmaking" function under the Elections Clause. *Ante*, at 808–809, and n. 17. All true. The majority, however, leaps from the premise that "the Legislature" performs different *functions* under different provisions to the conclusion that "the Legislature" assumes different *identities* under different provisions.

As a matter of ordinary language and common sense, however, a difference in function does not imply a difference in meaning. A car, for example, generally serves a transportation function. But it can also fulfill a storage function. At a tailgate party or a drive-in movie, it may play an entertainment function. In the absence of vacancies at the roadside motel, it could provide a lodging function. To a neighbor with a dead battery, it offers an electricity generation function. And yet, a person describing a "car" engaged in any of these varied functions would undoubtedly be referring to the same thing.

The Constitution itself confirms this point. Articles I and II assign many different functions to the Senate: a lawmaking function, an impeachment trial function, a treaty ratification function, an appointee confirmation function, an officer selection function, a qualification judging function, and a recordkeeping function. Art. I, § 1; § 3, cls. 5, 6; § 5, cls. 1, 3; § 7, cl. 2; Art. II, § 2, cl. 2. Yet the identity of the Senate remains the same as it discharges these various functions.

Similarly, the House of Representatives performs different functions, including lawmaking, impeachment, and resolving Presidential elections in which no candidate wins a majority in the Electoral College. Art. I, § 1; § 2, cl. 5; § 7, cl. 2; Amdt. 12. The President is assigned not only executive functions, Art. II, but also legislative functions, such as approving or vetoing bills, convening both Houses of Congress, and recom-

mending measures for their consideration, Art. I, § 7, cl. 2; Art. II, § 3. Courts not only exercise a judicial function, Art. III, § 1, but may also perform an appointment function, Art. II, § 2, cl. 2. And so on. Neither the majority nor the Commission points to a single instance in which the identity of these actors changes as they exercise different functions.

The majority attempts to draw support from precedent, but our cases only further undermine its position. In *Hawke*, this Court considered the meaning of "the Legislatur[e]" in Article V, which outlines the process for ratifying constitutional amendments. The Court concluded that "Legislature" meant "the representative body which ma[kes] the laws of the people." 253 U. S., at 227. The Court then explained that "[t]he term is often used in the Constitution *with this evident meaning.*" *Ibid.* (emphasis added). The Court proceeded to list other constitutional provisions that assign different functions to the "Legislature," just as the majority does today. *Id.*, at 227–228; see *ante*, at 808, n. 17.

Unlike the majority today, however, the Court in *Hawke* never hinted that the meaning of "Legislature" varied across those different provisions because they assigned different functions. To the contrary, the Court drew inferences from the Seventeenth Amendment and its predecessor, Article I, § 3—in which "the Legislature" played an *electoral* function—to define the "Legislature" in Article V, which assigned it a *ratification* function. See 253 U. S., at 228. The Court concluded that "Legislature" refers to a representative body, whatever its function. As the Court put it, "There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose." *Ibid.* (citing Art. I, § 2).

Smiley, the leading precedent on the meaning of "the Legislature" in the Elections Clause, reaffirmed the definition announced in *Hawke*. In *Smiley*, the petitioner argued—as the Commission does here—that "the Legislature" referred not just to "the two houses of the legislature" but to "the entire legislative power of the state . . . however exercised." Brief for Petitioner, O. T. 1931, No. 617, p. 22 (internal quotation marks omitted). The Court did not respond by holding, as the majority today suggests, that "'the Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections," or that "'the Legislature' has a different identity" in the Elections Clause than it does in Article V. *Ante*, at 808. Instead, the Court in *Smiley* said this:

> "Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* . . . the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.'" 285 U. S., at 365 (quoting *Hawke*, 253 U. S., at 227).

Remarkably, the majority refuses to even acknowledge the definition of "the Legislature" adopted in both *Smiley* and *Hawke*, and instead embraces the interpretation that this Court unanimously rejected more than 80 years ago.[2]

C

The history of the Elections Clause further supports the conclusion that "the Legislature" is a representative body.

[2] The only hint of support the majority can glean from precedent is a passing reference in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932), a case about how to interpret "trade or commerce" in the Sherman Act. See *ante*, at 808. And even that selected snippet describes the "legislature" as a "body." 286 U. S., at 434.

The first known draft of the Clause to appear at the Constitutional Convention provided that "Each state shall prescribe the time and manner of holding elections." 1 Debates on the Federal Constitution 146 (J. Elliot ed. 1836). After revision by the Committee of Detail, the Clause included the important limitation at issue here: "The times and places, and the manner, of holding the elections of the members of each house, shall be prescribed *by the legislature of each state*; but their provisions concerning them may, at any time, be altered *by the legislature of the United States*." *Id.*, at 225 (emphasis added). The insertion of "the legislature" indicates that the Framers thought carefully about which entity within the State was to perform congressional districting. And the parallel between "the legislature of each state" and "the legislature of the United States" further suggests that they meant "the legislature" as a representative body.

As the majority explains, the debate over the ratification of the Elections Clause centered on its second part, which empowers Congress to "make or alter" regulations prescribed by "the Legislature" of a State. See *ante*, at 814–816. Importantly for our purposes, however, both sides in this debate "recognized the distinction between the state legislature and the people themselves." *Brown* v. *Secretary of State of Florida*, 668 F. 3d 1271, 1275–1276, n. 4 (CA11 2012).

The Anti-Federalists, for example, supported vesting election regulation power solely in state legislatures because state "legislatures were more numerous *bodies*, usually *elected annually*, and thus more likely to be in sympathy with the interests *of the people*." Natelson, The Original Scope of the Congressional Power To Regulate Elections, 13 U. Pa. J. Const. L. 1, 31 (2010) (citing sources from ratification debates; emphasis added). Alexander Hamilton and others responded by raising the specter of state legislatures—which he described as "local administrations"—deciding to "annihilate" the Federal Government by "neglecting to provide for

the choice of persons to administer its affairs." The Federalist No. 59, at 363. As the majority acknowledges, the distinction between "the Legislature" and the people "occasioned no debate." *Ante*, at 816. That is because everybody understood what "the Legislature" meant.

The majority contends that its counterintuitive reading of "the Legislature" is necessary to advance the "animating principle" of popular sovereignty. *Ante*, at 813. But the ratification of the Constitution was the ultimate act of popular sovereignty, and the people who ratified the Elections Clause did so knowing that it assigned authority to "the Legislature" as a representative body. The Elections Clause was not, as the majority suggests, an all-purpose "safeguard against manipulation of electoral rules by politicians." *Ante*, at 815. Like most provisions of the Constitution, the Elections Clause reflected a compromise—a pragmatic recognition that the grand project of forging a Union required everyone to accept some things they did not like. See The Federalist No. 59, at 364 (describing the power allocated to state legislatures as "an evil which could not have been avoided"). This Court has no power to upset such a compromise simply because we now think that it should have been struck differently. As we explained almost a century ago, "[t]he framers of the Constitution might have adopted a different method," but it "is not the function of courts . . . to alter the method which the Constitution has fixed." *Hawke*, 253 U. S., at 227.

D

In addition to text, structure, and history, several precedents interpreting the Elections Clause further reinforce that "the Legislature" refers to a representative body.

The first precedent comes not from this Court, but from Congress. Acting under its authority to serve as "the Judge of the Elections, Returns and Qualifications of its own Members," Art. I, § 5, cl. 1, the House of Representatives in 1866 confronted a dispute about who should be seated as the Con-

gressman from the Fifth District of Michigan. At a popular convention, Michigan voters had amended the State Constitution to require votes to be cast within a resident's township or ward. The Michigan Legislature, however, passed a law permitting soldiers to vote in alternative locations. If only the local votes counted, one candidate (Baldwin) would win; if the outside votes were included, the other candidate (Trowbridge) would be entitled to the seat. See *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46–47 (1866).

The House Elections Committee explained that the Elections Clause conferred power on "the Legislature" of Michigan to prescribe election regulations. "But," the Committee asked, "what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country?" *Id.*, at 47. The Committee decided, and the full House agreed, that "the Legislature" in the Elections Clause was the "legislature *eo nomine*"—the legislature *by that name*, a representative body. *Ibid.* That conclusion followed both from the known meaning of "the Legislature" at the time of the framing and the many other uses of the word in the Constitution that would not be compatible with a popular convention. Thus, "[w]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount." *Id.*, at 46; see *California Democratic Party* v. *Jones*, 530 U. S. 567, 603, and n. 11 (2000) (Stevens, J., dissenting) (relying on *Baldwin* for its conclusion that "the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State' ").

The majority draws attention to the minority report in *Baldwin*. *Ante*, at 818. Under the present circumstances, I take some comfort in the Court's willingness to consider

dissenting views. Still, the minority report does not diminish the force of *Baldwin*. The report cites a Michigan Supreme Court precedent that allegedly reached a contrary result, but that case turned entirely on state constitutional questions arising from a state election—not federal constitutional questions arising from a federal election. See *People ex rel. Twitchell* v. *Blodgett*, 13 Mich. 127 (1865). The majority also contends that *Baldwin* "appears in tension with" an earlier House Elections Committee precedent. *Ante*, at 818. By its own terms, however, that earlier precedent did not involve a conflict between a state legislative act and a state constitutional provision. See *Shiel* v. *Thayer*, 1 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 57, 38th Cong., 2d Sess., 350 (1861) ("the two branches of the legislature differed upon the question . . . and so the bill never became a law"). In any event, to the degree that the two precedents are inconsistent, the later decision in *Baldwin* should govern.[3]

The next relevant precedent is this Court's decision in *McPherson* v. *Blacker*, 146 U. S. 1 (1892). That case involved a constitutional provision with considerable similarity to the Elections Clause, the Presidential Electors Clause of Article II: "Each State shall appoint, in such Manner *as the Legislature thereof* may direct, a Number of Electors . . . ." § 1, cl. 2 (emphasis added). The question was whether the state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts. The Court upheld the law and emphasized that the plain text of the Presidential Electors Clause vests the power to determine the manner of appointment in "the Legislature" of the State. That power, the Court explained,

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[3] The majority's suggestion that *Baldwin* should be dismissed as an act of partisanship appears to have no basis, unless one is willing to regard as tainted every decision in favor of a candidate from the same party as a majority of the Elections Committee. *Ante*, at 818–819.

"*can neither be taken away nor abdicated.*" 146 U. S., at 35 (emphasis added; internal quotation marks omitted).

Against that backdrop, the Court decided two cases regarding the meaning of "the Legislature" in the Elections Clause. In *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565 (1916), the Ohio Legislature passed a congressional redistricting law. Under the Ohio Constitution, voters held a referendum on the law and rejected it. A supporter of the law sued on behalf of the State, contending that the referendum "was not and could not be a part of the legislative authority of the State and therefore could have no influence on . . . the law creating congressional districts" under the Elections Clause. *Id.*, at 567.

This Court rejected the challenger's constitutional argument as a nonjusticiable claim that the referendum "causes a State . . . to be not republican" in violation of the Guarantee Clause of the Constitution. *Id.*, at 569 (citing Art. IV, § 4). The Court also rejected an argument that Ohio's use of the referendum violated a federal statute, and held that Congress had the power to pass that statute under the Elections Clause. *Id.*, at 568–569. *Hildebrant* in no way suggested that the state legislature could be displaced from the redistricting process, and *Hildebrant* certainly did not hold—as the majority today contends—that "the word ['Legislature' in the Elections Clause] encompassed a veto power lodged in the people." *Ante*, at 805. *Hildebrant* simply approved a State's decision to employ a referendum *in addition to* redistricting by the legislature. See 241 U. S., at 569. The result of the decision was to send *the Ohio Legislature* back to the drawing board to do the redistricting.

In *Smiley*, the Minnesota Legislature passed a law adopting new congressional districts, and the Governor exercised his veto power under the State Constitution. As noted above, the Minnesota secretary of state defended the veto on the ground that "the Legislature" in the Elections Clause referred not just to "the two houses of the legislature" but

to "the entire legislative power of the state . . . however exercised." This Court rejected that argument, reiterating that the term "Legislature" meant "the representative body which made the laws of the people." 285 U. S., at 365 (quoting *Hawke*, 253 U. S., at 227). The Court nevertheless went on to hold that the Elections Clause did not prevent a State from applying the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature. 285 U. S., at 373. As in *Hildebrant*, the legislature was not displaced, nor was it redefined; it just had to start on a new redistricting plan.

The majority initially describes *Hildebrant* and *Smiley* as holding that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." *Ante*, at 808. That description is true, so far as it goes. But it hardly supports the result the majority reaches here. There is a critical difference between allowing a State to *supplement* the legislature's role in the legislative process and permitting the State to *supplant* the legislature altogether. See *Salazar*, 541 U. S., at 1095 (Rehnquist, C. J., dissenting from denial of certiorari) ("to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself"). Nothing in *Hildebrant*, *Smiley*, or any other precedent supports the majority's conclusion that imposing some constraints on the legislature justifies deposing it entirely.

* * *

The constitutional text, structure, history, and precedent establish a straightforward rule: Under the Elections Clause, "the Legislature" is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, but may not be cut out of that process. Put simply, the state legislature need not be

exclusive in congressional districting, but neither may it be excluded.

The majority's contrary understanding requires it to accept a definition of "the Legislature" that contradicts the term's plain meaning, creates discord with the Seventeenth Amendment and the Constitution's many other uses of the term, makes nonsense of the drafting and ratification of the Elections Clause, and breaks with the relevant precedents. In short, the effect of the majority's decision is to erase the words "by the Legislature thereof" from the Elections Clause. That is a judicial error of the most basic order. "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803).

II

The Court also issues an alternative holding that a federal statute, 2 U. S. C. § 2a(c), permits Arizona to vest redistricting authority in the Commission. *Ante*, at 809–813. The majority does not contend that this statutory holding resolves the constitutional question presented, see *ante*, at 813, so its reading of Section 2a(c) is largely beside the point. With respect, its statutory argument is also hard to take seriously. Section 2a(c) does not apply to this case. And even if it did, it would likely be unconstitutional.[4]

A

Section 2a(c) establishes a number of default rules that govern the States' manner of electing representatives "[u]ntil a State is redistricted in the manner provided by the law thereof." Section 2a(c) is therefore "inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict" the State. *Branch* v. *Smith*, 538 U. S.

[4] Not surprisingly, Section 2a(c) was barely raised below and was not addressed by the District Court. See *ante*, at 809, n. 18.

254, 275 (2003) (plurality opinion); see *id.*, at 298–300 (O'Connor, J., concurring in part and dissenting in part). Here, the Commission *has* redistricted the State "in the manner provided by the law thereof." So by its terms, Section 2a(c) does not come into play in this case.

The majority spends several pages discussing Section 2a(c), but it conspicuously declines to say that the statute actually applies to this case.[5] The majority notes that the pre-1911 versions of Section 2a(c) applied only until "the legislature" redistricted the State, while the post-1911 versions applied only until the State is redistricted "in the manner provided by the law thereof." The majority also describes in detail the legislative history that accompanied the 1911 amendment. But if Section 2a(c) does not apply, its legislative history is doubly irrelevant.

The majority seems to suggest that Section 2a(c) somehow indicates federal approval for the district lines that the Commission has drawn. See *ante*, at 812. But the statute does nothing of the sort. Section 2a(c) explains what rules apply "[u]ntil a State is redistricted"; it says nothing about what rules apply *after* a State is redistricted. And it certainly does not say that the State's redistricting plan will by some alchemy become federal law. No legislative drafter remotely familiar with the English language would say that a State had to follow default rules "[u]ntil [it] is redistricted in the manner provided by the law thereof," when what he meant was "any redistricting plan that the State adopts shall become federal law." And if the drafter was doing something as significant as transforming state law into federal law, he presumably would have taken care to make that dramatic step "unmistakably clear." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) (internal quotation marks omitted). Tellingly, our most recent case on the meaning of Section

[5] The majority is prepared to say that Section 2a(c) has more than "nothing to do with this case." *Ante*, at 812, n. 22. Not exactly a ringing endorsement.

2a(c) seems not to have even considered the majority's position. See *Branch*, 538 U. S. 254.

Indeed, the majority does not even seem persuaded by its own argument. The majority quickly cautions, in discussing Section 2a(c), that "a State is required to comply with the Federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map." *Ante*, at 811, n. 20. The majority therefore concludes that "nothing in § 2a(c) affects a challenge to a state district map on the ground that it violates one or more of those federal requirements." *Ibid.* But here the Arizona Legislature has challenged "a state district map on the ground that it violates one . . . of those federal requirements"—the Elections Clause. If we take the majority at its word, nothing in Section 2a(c) should affect that challenge.

B

Not only is the majority's reading of Section 2a(c) implausible as a matter of statutory interpretation, it would also likely violate the Constitution in multiple ways.

First, the majority's reading of Section 2a(c) as a statute approving the lines drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections; the second part of the Clause gives Congress the power to "make or alter such Regulations." There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations. In essence, the majority's proposed reading permits Congress to use the second part of the Elections Clause to nullify the first. Yet this Court has expressly held that "Congress ha[s] no power to alter Article I, section 4 [the Elections Clause]." *Smiley*, 285 U. S., at 372; see also *Clinton* v. *City of New York*, 524 U. S. 417

(1998) (Congress may not circumvent Article I constraints on its lawmaking power); *Chadha*, 462 U. S. 919 (same).

Second, the majority's interpretation of Section 2a(c) would create a serious delegation problem. As a general matter, Congress may pass statutes that delegate some discretion to those who administer the laws. It is a well-accepted principle, however, that Congress may not delegate authority to one actor when the Constitution vests that authority in another actor. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001). The majority's reading of Section 2a(c) contradicts that rule by allowing Congress to delegate federal redistricting authority to a state entity other than the one in which the Elections Clause vests that authority: "the Legislature."

Third, the majority's interpretation conflicts with our most recent Elections Clause precedent, *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1 (2013). There we explained that when Congress legislates under the Elections Clause, it "*necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.*, at 14. That is so because "the power the Elections Clause confers [on Congress] is none other than the power to pre-empt." *Ibid.* Put differently, "*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that." *Ibid.*, n. 6. Under the majority's interpretation of Section 2a(c), however, Congress has done the opposite of preempting or displacing state law—it has *adopted* state law.

Normally, when "a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). The multiple serious constitutional doubts raised by the majority's interpretation of Section 2a(c)—in addition to the sheer weakness of its

reading as a textual matter—provide more than enough reason to reject the majority's construction. Section 2a(c) does not apply to this case.

III

Justice Jackson once wrote that the Constitution speaks in "majestic generalities." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 639 (1943). In many places it does, and so we have cases expounding on "freedom of speech" and "unreasonable searches and seizures." Amdts. 1, 4. Yet the Constitution also speaks in some places with elegant specificity. A Member of the House of Representatives must be 25 years old. Art. I, § 2, cl. 2. Every State gets two Senators. Art. I, § 3, cl. 1. And the times, places, and manner of holding elections for those federal representatives "shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1.

For the reasons I have explained, there is no real doubt about what "the Legislature" means. The Framers of the Constitution were "practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina* v. *United States*, 199 U. S. 437, 449 (1905). We ought to give effect to the words they used.

The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. See *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004); *ante*, at 791. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law's virtues as a policy innovation cannot redeem its inconsistency with the Constitution. "Failure of political will does not justify unconstitutional remedies." *Clinton*, 524 U. S., at 449 (KENNEDY, J., concurring); see *Stern* v. *Marshall*, 564

U. S. 462 (2011); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010); *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Chadha*, 462 U. S. 919; *Myers* v. *United States*, 272 U. S. 52 (1926).

Indeed, the Court has enforced the text of the Constitution to invalidate state laws with policy objectives reminiscent of this one. Two of our precedents held that States could not use their constitutions to impose term limits on their federal representatives in violation of the United States Constitution. *Cook*, 531 U S. 510; *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779 (1995). The people of the States that enacted these reforms surely viewed them as measures that would "place the lead rein in the people's hands." *Ante*, at 816. Yet the Court refused to accept "that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Term Limits*, 514 U. S., at 831. The majority approves just such an evasion of the Constitution today.[6]

The Court also overstates the effects of enforcing the plain meaning of the Constitution in this case. There is no dispute that Arizona may continue to use its Commission to draw lines for state legislative elections. The representatives chosen in those elections will then be responsible for congressional redistricting as members of the state legislature, so the work of the Commission will continue to influence Arizona's federal representation.

Moreover, reading the Elections Clause to require the involvement of the legislature will not affect most other re-

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[6] *Term Limits* was of course not decided on the abstract principle that "the people should choose whom they please to govern them." *Ante*, at 816, n. 24 (quoting 514 U. S., at 783). If that were the rule, the people could choose a 20-year-old Congressman, a 25-year-old Senator, or a foreign President. But see Art. I, § 2, cl. 2; § 3, cl. 3; Art. II, § 1, cl. 5. *Term Limits* instead relied on analysis of the text, structure, and history of the Constitution—all factors that cut strongly against the majority's position today.

districting commissions. As the majority notes, many States have commissions that play an "auxiliary role" in congressional redistricting. *Ante*, at 798, and nn. 8–9. But in these States, unlike in Arizona, the legislature retains primary authority over congressional redistricting. See Brief for National Conference of State Legislatures as *Amicus Curiae* 3–17.

The majority also points to a scattered array of election-related laws and constitutional provisions enacted via popular lawmaking that it claims would be "endangered" by interpreting the Elections Clause to mean what it says. *Ante*, at 822. Reviewing the constitutionality of these farflung provisions is well outside the scope of this case. Suffice it to say that none of them purports to do what the Arizona Constitution does here: set up an unelected, unaccountable institution that permanently and totally displaces the legislature from the redistricting process. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U. S. 654, 699 (1988) (SCALIA, J., dissenting).

Absent from the majority's portrayal of the high motives that inspired the Arizona Commission is any discussion of how it has actually functioned. The facts described in a recent opinion by a three-judge District Court detail the partisanship that has affected the Commission on issues ranging from staffing decisions to drawing the district lines. See *Harris* v. *Arizona Independent Redistricting Comm'n*, 993 F. Supp. 2d 1042 (Ariz. 2014). The *per curiam* opinion explained that "partisanship played some role in the design of the map," that "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts," and that the Commission retained a mapping consultant that "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." *Id.*, at 1046, 1047, 1053. The hiring of the mapping consultant provoked sufficient controversy that the Governor of Arizona, sup-

ported by two-thirds of the Arizona Senate, attempted to remove the chairwoman of the Commission for "substantial neglect of duty and gross misconduct in office." *Id.*, at 1057; see *Arizona Independent Redistricting Comm'n* v. *Brewer*, 229 Ariz. 347, 275 P. 3d 1267 (2012) (explaining the removal and concluding that the Governor exceeded her authority under the Arizona Constitution).

Judge Silver's separate opinion noted that "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." 993 F. Supp. 2d, at 1083. Judge Wake's separate opinion described the Commission's "systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality districts" as "old-fashioned partisan malapportionment." *Id.*, at 1091, 1108. In his words, the "Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason." *Id.*, at 1092.

The District Court concluded by a two-to-one margin that this partisanship did not rise to the level of a constitutional violation. The case is pending on appeal before this Court, and I take no position on the merits question. But a finding that the partisanship in the redistricting plan did not violate the Constitution hardly proves that the Commission is operating free of partisan influence—and certainly not that it complies with the Elections Clause.

* * *

The people of Arizona have concerns about the process of congressional redistricting in their State. For better or worse, the Elections Clause of the Constitution does not allow them to address those concerns by displacing their legislature. But it does allow them to seek relief from Congress, which can make or alter the regulations prescribed by the legislature. And the Constitution gives them another means of change. They can follow the lead of the reformers

who won passage of the Seventeenth Amendment. Indeed, several constitutional amendments over the past century have involved modifications of the electoral process. Amdts. 19, 22, 24, 26. Unfortunately, today's decision will only discourage this democratic method of change. Why go through the hassle of writing a new provision into the Constitution when it is so much easier to write an old one out?

I respectfully dissent.

APPENDIX

"LEGISLATURE" IN THE CONSTITUTION

Art. I, § 2, cl. 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

Art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." (Modified by Amdt. 17.)

Art. I, § 3, cl. 2: "Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." (Modified by Amdt. 17.)

Art. I, § 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be pre-

scribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Art. I, § 8, cl. 17: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

Art. II, § 1, cl. 2: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

Art. V: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for

proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Art. VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amdt. 14, § 2: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Modified by Amdts. 19, 26.)

Amdt. 14, § 3: "No person shall be a Senator or Representative in Congress, or elector of President and Vice President,

or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

Amdt. 17, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Amdt. 17, cl. 2: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Amdt. 18, § 3: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." (Superseded by Amdt. 21.)

Amdt. 20, § 6: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

Amdt. 22, § 2: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution

by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I do not believe that the question the Court answers is properly before us. Disputes between governmental branches or departments regarding the allocation of political power do not in my view constitute "cases" or "controversies" committed to our resolution by Art. III, § 2, of the Constitution.

What those who framed and ratified the Constitution had in mind when they entrusted the "judicial Power" to a separate and coequal branch of the Federal Government was the judicial power they were familiar with—that traditionally exercised by English and American courts. The "cases" and "controversies" that those courts entertained did not include suits between units of government regarding their legitimate powers. The job of the courts was, in Chief Justice Marshall's words, "solely, to decide on the rights of individuals," *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803). Tocqueville considered this one reason the new democracy could safely confer upon courts the immense power to hold legislation unconstitutional:

> "[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. . . .
>
> "I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could only attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. . . . But

> the American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice." 1 A. de Tocqueville, Democracy in America 102–103 (P. Bradley ed. 1948).

That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable "realistic appreciation of the consequences of judicial action," *ante*, at 804. To the contrary. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U. S. 737, 752 (1984). It keeps us minding our own business.

We consult history and judicial tradition to determine whether a given "'disput[e is] appropriately resolved through the judicial process.'" *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (internal quotation marks omitted). What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers. Nearly every separation-of-powers case presents questions like the ones in this case. But we have *never* passed on a separation-of-powers question raised directly by a governmental subunit's complaint. We have *always* resolved those questions in the context of a private lawsuit in which the claim or defense depends on the constitutional validity of action by one of the governmental subunits that has caused a private party concrete harm. That is why, for example, it took this Court over 50 years to rule upon the constitutionality of the Tenure of Office Act, passed in 1867. If the law of standing had been otherwise, "presumably President Wilson, or Presidents Grant and Cleveland before him, would . . .

have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress." *Raines* v. *Byrd*, 521 U. S. 811, 828 (1997).

We do not have to look far back in the United States Reports to find other separation-of-powers cases which, if the Arizona Legislature's theory of standing is correct, took an awfully circuitous route to get here. In *Zivotofsky* v. *Kerry*, *ante*, p. 1, the President could have sued for an injunction against Congress's attempted "direct usurpation" of his constitutionally-conferred authority to pronounce on foreign relations. Or in *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665 (2015), a Federal District Judge could have sought a declaratory judgment that a bankruptcy court's adjudicating a *Stern* claim improperly usurped his constitutionally-conferred authority to decide cases and controversies. Or in *NLRB* v. *Noel Canning*, 573 U. S. 513 (2014), the Senate could have sued the President, claiming a direct usurpation of its prerogative to advise on and consent to Presidential appointments. Each of these cases involved the allocation of power to one or more branches of a government; and we surely would have dismissed suits arising in the hypothesized fashions.

We have affirmatively rejected arguments for jurisdiction in cases like this one. For example, in *Raines*, 521 U. S., at 829–830, we refused to allow Members of Congress to challenge the Line Item Veto Act, which they claimed " 'unconstitutionally expand[ed] the President's power' " and " 'alter[ed] the constitutional balance of powers between the Legislative and Executive Branches.' " *Id.*, at 816. In *Massachusetts* v. *Mellon*, 262 U. S. 447, 479–480 (1923), we refused to allow a State to pursue its claim that a conditional congressional appropriation "constitute[d] an effective means of inducing the States to yield a portion of their sovereign rights." (And *Mellon* involved a contention that *one* government infringed upon *another* government's power—far closer to the

traditional party-versus-party lawsuit than is an intragovernmental dispute.) We put it plainly: "In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States," *id.*, at 483—and because the State could not show a discrete harm except the alleged usurpation of its powers, we refused to allow the State's appeal.

The sole precedent the Court relies upon is *Coleman* v. *Miller*, 307 U. S. 433 (1939). *Coleman* can be distinguished from the present case as readily as it was distinguished in *Raines*. In *Raines*, the accurate-in-fact (but inconsequential-in-principle) distinction was that the Senators in *Coleman* had their votes nullified, whereas the Members of Congress claimed that their votes could merely be rendered ineffective by a Presidential line-item veto. *Raines*, *supra*, at 823–824. In the present case we could make the accurate-in-fact distinction that in *Coleman* individual legislators were found to have standing, whereas here it is the governmental body, the Arizona Legislature, that seeks to bring suit. But the reality is that the supposed holding of *Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes.

Coleman was a peculiar case that may well stand for nothing. The opinion discussing and finding standing, and going on to affirm the Kansas Supreme Court, was written by Chief Justice Hughes and announced by Justice Stone. Justice Frankfurter, joined by three other Justices, held there was no standing, and would have dismissed the petition (leaving the judgment of the Kansas Supreme Court in place). Justice Butler, joined by Justice McReynolds, dissented (neither joining Hughes's opinion nor separately discussing standing) and would have reversed the Kansas Supreme Court.

That adds up to two votes to affirm on the merits, two to reverse on the merits (without discussing standing) and four

to dismiss for lack of standing. Justice Stanley Reed, who was on the Court and apparently participated in the case, is not mentioned in any of the opinions recorded in the United States Reports. So, in order to find *Coleman* a binding precedent on standing, rather than a 4-to-4 standoff, one must assume that Justice Reed voted with Hughes. There is some reason to make that assumption: The four Justices rejecting standing went on to discuss the merits, because "the ruling of the Court just announced removes from the case the question of petitioners' standing to sue." 307 U. S., at 456 (Black, J., concurring). But then again, if nine Justices participated, how could it be that on one of the two issues in the case the Court was "equally divided and therefore . . . expresse[d] no opinion"? *Id.*, at 447.

A pretty shaky foundation for a significant precedential ruling. Besides that, the two dissenters' mere assumption of standing—neither saying anything about the subject nor joining Hughes's opinion on the point—produces (if you assume Reed joined Hughes) a majority for standing but no majority opinion explaining why. And even under the most generous assumptions, since the Court's judgment on the issue it resolved rested on the ground that that issue presented a political question—which is itself a rejection of jurisdiction, *Zivotofsky* v. *Clinton*, 566 U. S. 189, 194 (2012)—*Coleman*'s discussion of the additional jurisdictional issue of standing was quite superfluous and arguably nothing but dictum. The peculiar decision in *Coleman* should be charitably ignored.

The Court asserts, quoting *Raines*, 521 U. S., at 819–820, that the Court's standing analysis has been "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Ante*, at 803, n. 12. The cases cited to support this dictum fail to do so; they are merely cases where a determination of unconstitutionality is avoided by applying what there is no reason to believe is anything other than *normal*

standing requirements. It seems to me utterly implausible that the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the President, and not when they were treading upon the powers of state legislatures and executives. Quite to the contrary, I think they would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments.

I would dismiss this case for want of jurisdiction.

* * *

Normally, having arrived at that conclusion, I would express no opinion on the merits unless my vote was necessary to enable the Court to produce a judgment. In the present case, however, the majority's resolution of the merits question ("legislature" means "the people") is so outrageously wrong, so utterly devoid of textual or historic support, so flatly in contradiction of prior Supreme Court cases, so obviously the willful product of hostility to districting by state legislatures, that I cannot avoid adding my vote to the devastating dissent of the Chief Justice.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Reading today's opinion, one would think the Court is a great defender of direct democracy in the States. As it reads "the Legislature" out of the Times, Places and Manner Clause, U. S. Const., Art. I, § 4, the majority offers a paean to the ballot initiative. It speaks in glowing terms of the "characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Ante*, at 816. And it urges "[d]eference to state lawmaking" so that States may perform their vital function as "'laboratories'" of democracy. *Ante*, at 817.

These sentiments are difficult to accept. The conduct of the Court in so many other cases reveals a different attitude toward the States in general and ballot initiatives in particu-

lar. Just last week, in the antithesis of deference to state lawmaking through direct democracy, the Court cast aside state laws across the country—many of which were enacted through ballot initiative—that reflected the traditional definition of marriage. See *Obergefell* v. *Hodges*, *ante*, p. 644.

This Court's tradition of disdain for state ballot initiatives goes back quite a while. Two decades ago, it held unconstitutional an Arkansas ballot initiative imposing term limits on that State's Members of Congress, finding "little significance" in the fact that such term limits were adopted by popular referendum. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 822, n. 32 (1995). One year later, it held unconstitutional a ballot initiative that would have prevented the enactment of laws under which "'homosexual, lesbian or bisexual orientation, conduct, practices or relationships [would] constitute or otherwise be the basis of . . . any minority status, quota preferences, protected status or claim of discrimination.'" *Romer* v. *Evans*, 517 U. S. 620, 624 (1996). The Court neither gave deference to state lawmaking nor said anything about the virtues of direct democracy. It instead declared that the result of the ballot initiative was an aberration—that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id.*, at 633. But if "constitutional tradition" is the measuring stick, then it is hard to understand how the Court condones a redistricting practice that was unheard of for nearly 200 years after the ratification of the Constitution and that conflicts with the express constitutional command that election laws "be prescribed in each State by the Legislature thereof," Art. I, § 4.

The Court's lack of respect for ballot initiatives is evident not only in what it has done, but in what it has failed to do. Just this Term, the Court repeatedly refused to review cases in which the Courts of Appeals had set aside state laws passed through ballot initiative. See, *e. g.*, *County of Maricopa* v. *Lopez-Valenzuela*, 575 U. S. 1044 (2015) (THOMAS, J., dissenting from denial of certiorari) (state constitutional

amendment denying bail for illegal aliens arrested in certain circumstances); *Herbert* v. *Kitchen*, 574 U. S. 874 (2014) (state constitutional amendment retaining traditional definition of marriage); *Smith* v. *Bishop*, 574 U. S. 875 (2014) (same); *Rainey* v. *Bostic*, 574 U. S. 875 (2014) (same); *Walker* v. *Wolf*, 574 U. S. 876 (2014) (same). It did so despite warnings that its indifference to such cases would "only embolden the lower courts to reject state laws on questionable constitutional grounds." *Lopez-Valenzuela*, *supra*, at 1045. And it refused to grant a stay pending appeal of a decision purporting to require the State of Alabama to issue marriage licenses to same-sex couples, even though Alabama's licensing laws had not been challenged in that case. See *Strange* v. *Searcy*, 574 U. S. 1145 (2015) (THOMAS, J., dissenting from denial of application for stay). In each decision, the cheers for direct democracy were conspicuously absent.

Sometimes disapproval of ballot initiatives has been even more blatant. Just last Term, one dissenting opinion castigated the product of a state ballot initiative as "stymieing the right of racial minorities to participate in the political process." *Schuette* v. *BAMN*, 572 U. S. 291, 337–338 (2014) (SOTOMAYOR, J., joined by GINSBURG, J., dissenting). It did not hail the ballot initiative as the result of a "State's empowerment of its people," *ante*, at 809, nor offer any deference to state lawmaking. Instead, it complained that "the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process . . . ." *Schuette*, 572 U. S., at 340. And it criticized state ballot initiatives as biased against racial minorities because such minorities "face an especially uphill battle" in seeking the passage of such initiatives. *Id.*, at 356. How quickly the tune has changed.

And how striking that it changed here. The ballot initiative in this case, unlike those that the Court has previously treated so dismissively, was unusually democracy reducing. It did not ask the people to approve a particular redistricting

plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future. The Court's characterization of this as direct democracy at its best is rather like praising a plebiscite in a "banana republic" that installs a strongman as President for Life. And wrapping the analysis in a cloak of federalism does little to conceal the flaws in the Court's reasoning.

I would dispense with the faux federalism and would instead treat the States in an evenhanded manner. That means applying the Constitution as written. Although the straightforward text of Article I, § 4, prohibits redistricting by an unelected, independent commission, Article III limits our power to deciding cases or controversies. Because I agree with JUSTICE SCALIA that the Arizona Legislature lacks Article III standing to assert an institutional injury against another entity of state government, I would dismiss its suit. I respectfully dissent.

Syllabus

GLOSSIP ET AL. *v.* GROSS ET AL.

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

No. 14–7955. Argued April 29, 2015—Decided June 29, 2015

Because capital punishment is constitutional, there must be a constitutional means of carrying it out. After Oklahoma adopted lethal injection as its method of execution, it settled on a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce a state of unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. In *Baze* v. *Rees*, 553 U. S. 35, the Court held that this protocol does not violate the Eighth Amendment's prohibition against cruel and unusual punishments. Anti-death-penalty advocates then pressured pharmaceutical companies to prevent sodium thiopental (and, later, another barbiturate called pentobarbital) from being used in executions. Unable to obtain either sodium thiopental or pentobarbital, Oklahoma decided to use a 500-milligram dose of midazolam, a sedative, as the first drug in its three-drug protocol.

Oklahoma death row inmates filed a 42 U. S. C. § 1983 action claiming that the use of midazolam violates the Eighth Amendment. Four of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a three-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain. The Tenth Circuit affirmed.

Held: Petitioners have failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment. Pp. 876–893.

(a) To obtain a preliminary injunction, petitioners must establish, among other things, a likelihood of success on the merits of their claim. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20. To succeed on an Eighth Amendment method-of-execution claim, a prisoner must establish that the method creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known

and available alternatives. *Baze*, *supra*, at 61 (plurality opinion). Pp. 876–878.

(b) Petitioners failed to establish that any risk of harm was substantial when compared to a known and available alternative method of execution. Petitioners have suggested that Oklahoma could execute them using sodium thiopental or pentobarbital, but the District Court did not commit a clear error when it found that those drugs are unavailable to the State. Petitioners argue that the Eighth Amendment does not require them to identify such an alternative, but their argument is inconsistent with the controlling opinion in *Baze*, which imposed a requirement that the Court now follows. Petitioners also argue that the requirement to identify an alternative is inconsistent with the Court's pre-*Baze* decision in *Hill* v. *McDonough*, 547 U. S. 573, but they misread that decision. *Hill* concerned a question of civil procedure, not a substantive Eighth Amendment question. That case held that § 1983 alone does not require an inmate asserting a method-of-execution claim to plead an acceptable alternative. *Baze*, on the other hand, made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. Pp. 878–881.

(c) The District Court did not commit clear error when it found that midazolam is likely to render a person unable to feel pain associated with administration of the paralytic agent and potassium chloride. Pp. 881–893.

(1) Several initial considerations bear emphasis. First, the District Court's factual findings are reviewed under the deferential "clear error" standard. Second, petitioners have the burden of persuasion on the question whether midazolam is effective. Third, the fact that numerous courts have concluded that midazolam is likely to render an inmate insensate to pain during execution heightens the deference owed to the District Court's findings. Finally, challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts, which should not embroil themselves in ongoing scientific controversies beyond their expertise. *Baze*, *supra*, at 51. Pp. 881–882.

(2) The State's expert presented persuasive testimony that a 500-milligram dose of midazolam would make it a virtual certainty that an inmate will not feel pain associated with the second and third drugs, and petitioners' experts acknowledged that they had no contrary scientific proof. Expert testimony presented by both sides lends support to the District Court's conclusion. Evidence suggested that a 500-milligram dose of midazolam will induce a coma, and even one of petitioners' experts agreed that as the dose of midazolam increases, it is expected to produce a lack of response to pain. It is not dispositive that midazolam is not recommended or approved for use as the sole

anesthetic during painful surgery. First, the 500-milligram dose at issue here is many times higher than a normal therapeutic dose. Second, the fact that a low dose of midazolam is not the best drug for maintaining unconsciousness says little about whether a 500-milligram dose is constitutionally adequate to conduct an execution. Finally, the District Court did not err in concluding that the safeguards adopted by Oklahoma to ensure proper administration of midazolam serve to minimize any risk that the drug will not operate as intended. Pp. 882–886.

(3) Petitioners' speculative evidence regarding midazolam's "ceiling effect" does not establish that the District Court's findings were clearly erroneous. The mere fact that midazolam has a ceiling above which an increase in dosage produces no effect cannot be dispositive, and petitioners provided little probative evidence on the relevant question, *i. e.*, whether midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain caused by the second and third drugs. Petitioners attempt to deflect attention from their failure of proof on this point by criticizing the testimony of the State's expert. They emphasize an apparent conflict between the State's expert and their own expert regarding the biological process that produces midazolam's ceiling effect. But even if petitioners' expert is correct regarding that biological process, it is largely beside the point. What matters for present purposes is the dosage at which the ceiling effect kicks in, not the biological process that produces the effect. Pp. 887–890.

(4) Petitioners' remaining arguments—that an expert report presented in the District Court should have been rejected because it referenced unreliable sources and contained an alleged mathematical error, that only four States have used midazolam in an execution, and that difficulties during two recent executions suggest that midazolam is ineffective—all lack merit. Pp. 890–893.

776 F. 3d 721, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 893. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 899. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 908. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 949.

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Patrick R. Wyrick, Solicitor General of Oklahoma, argued the cause for respondents. With him on the brief were *E. Scott Pruitt*, Attorney General, *Mithun Mansinghani*, Deputy Solicitor General, *John D. Hadden*, *Jeb Joseph*, and *Aaron Stewart*, Assistant Attorneys General, *Jared Haines*, Assistant Solicitor General, and *David B. Rivkin, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the Advocates for Human Rights by *Amy Bergquist* and *Nicole M. Moen*; for former State Attorneys General by *Matthew S. Hellman*, *Erica L. Ross*, and *Virginia E. Sloan*; for the Innocence Project by *James C. Dugan* and *Barry C. Scheck*; for the Louis Stein Center for Law and Ethics at Fordham University School of Law by *Faith E. Gay*, *Marc L. Greenwald*, and *Bruce A. Green*; for the National Association of Criminal Defense Lawyers by *Gia L. Cincone* and *Barbara E. Bergman*; and for the National Catholic Reporter by *Robert P. LoBue*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *Andrew L. Brasher*, Solicitor General, and *Megan A. Kirkpatrick*, Deputy Solicitor General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *James D. "Buddy" Caldwell* of Louisiana, *Adam Paul Laxalt* of Nevada, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for the State of Florida by *Pamela Jo Bondi*, Attorney General of Florida, *Allen Winsor*, Solicitor General, *Osvaldo Vazquez*, Deputy Solicitor General, *Carolyn M. Snurkowski*, Associate Deputy Attorney General, *Scott Browne*, Assistant Attorney General, and *Candance M. Sabella*, Chief Assistant Attorney General; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* were filed for the National Consensus Project et al. by *G. Ben Cohen* and *Cecelia Trenticosta*; for The Rutherford Institute by *Anand Agneshwar* and *John W. Whitehead*; and for Sixteen Professors of Pharmacology by *James K. Stronski*, *Harry P. Cohen*, and *Chiemi D. Suzuki*.

JUSTICE ALITO delivered the opinion of the Court.

Prisoners sentenced to death in the State of Oklahoma filed an action in federal court under Rev. Stat. § 1979, 42 U. S. C. § 1983, contending that the method of execution now used by the State violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argue that midazolam, the first drug employed in the State's current three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied four prisoners' application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Court of Appeals for the Tenth Circuit affirmed and accepted the District Court's finding of fact regarding midazolam's efficacy.

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. See *Baze* v. *Rees*, 553 U. S. 35, 61 (2008) (plurality opinion). Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

I

A

The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights. In that era, death sentences were usually carried out by hanging. The Death Penalty in America: Current Controversies 4 (H. Bedau ed. 1997). Hanging remained the standard method of execution through much of the 19th century, but that began to change in the century's later years. See *Baze*, *supra*, at 41–42. In the 1880's, the Legislature of the State of New York appointed a commission to find " 'the most humane and practical method known to modern science of

carrying into effect the sentence of death in capital cases.'" *In re Kemmler*, 136 U. S. 436, 444 (1890). The commission recommended electrocution, and in 1888, the legislature enacted a law providing for this method of execution. *Id.*, at 444–445. In subsequent years, other States followed New York's lead in the "'belief that electrocution is less painful and more humane than hanging.'" *Baze*, *supra*, at 42 (quoting *Malloy* v. *South Carolina*, 237 U. S. 180, 185 (1915)).

In 1921, the Nevada Legislature adopted another new method of execution, lethal gas, after concluding that this was "the most humane manner known to modern science." *State* v. *Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923). The Nevada Supreme Court rejected the argument that the use of lethal gas was unconstitutional, *id.*, at 435–437, 211 P., at 681–682, and other States followed Nevada's lead, see, *e. g.*, Ariz. Const., Art. XXII, § 22 (1933); 1937 Cal. Stats. ch. 172, § 1; 1933 Colo. Sess. Laws ch. 61, § 1; 1955 Md. Laws ch. 625, § 1, p. 1017; 1937 Mo. Laws p. 222, § 1. Nevertheless, hanging and the firing squad were retained in some States, see, *e. g.*, 1961 Del. Laws ch. 309, § 2 (hanging); 1935 Kan. Sess. Laws ch. 155, § 1 (hanging); Utah Code Crim. Proc. § 105–37–16 (1933) (hanging or firing squad), and electrocution remained the predominant method of execution until the 9-year hiatus in executions that ended with our judgment in *Gregg* v. *Georgia*, 428 U. S. 153 (1976). See *Baze*, *supra*, at 42.

After *Gregg* reaffirmed that the death penalty does not violate the Constitution, some States once again sought a more humane way to carry out death sentences. They eventually adopted lethal injection, which today is "by far the most prevalent method of execution in the United States." *Baze*, *supra*, at 42. Oklahoma adopted lethal injection in 1977, see 1977 Okla. Sess. Laws p. 89, and it eventually settled on a protocol that called for the use of three drugs: (1) sodium thiopental, "a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection," (2) a paralytic agent, which "inhibits all muscular-skeletal movements and, by par-

alyzing the diaphragm, stops respiration," and (3) potassium chloride, which "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest." *Baze*, *supra*, at 44; see also Brief for Respondents 9. By 2008, at least 30 of the 36 States that used lethal injection employed that particular three-drug protocol. 553 U. S., at 44.

While methods of execution have changed over the years, "[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Id.*, at 48. In *Wilkerson* v. *Utah*, 99 U. S. 130, 134–135 (1879), the Court upheld a sentence of death by firing squad. In *In re Kemmler*, *supra*, at 447–449, the Court rejected a challenge to the use of the electric chair. And the Court did not retreat from that holding even when presented with a case in which a State's initial attempt to execute a prisoner by electrocution was unsuccessful. *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463–464 (1947) (plurality opinion). Most recently, in *Baze*, *supra*, seven Justices agreed that the three-drug protocol just discussed does not violate the Eighth Amendment.

Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Id.*, at 47. And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. *Ibid.* After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.

B

Baze cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practi-

cal obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug. After suspending domestic production in 2009, the company planned to resume production in Italy. Koppel, Execution Drug Halt Raises Ire of Doctors, Wall Street Journal, Jan. 25, 2011, p. A6. Activists then pressured both the company and the Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country. Bonner, Letter From Europe: Drug Company in Cross Hairs of Death Penalty Opponents, N. Y. Times, Mar. 30, 2011; Koppel, Drug Halt Hinders Executions in the U. S., Wall Street Journal, Jan. 22, 2011, p. A1. That effort proved successful, and in January 2011, the company announced that it would exit the sodium thiopental market entirely. See Hospira, Press Release, Hospira Statement Regarding Pentothal™ (sodium thiopental) Market Exit (Jan. 21, 2011).

After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate. In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital. See Reuters, Chicago Tribune, New Drug Mix Used in Oklahoma Execution, Dec. 17, 2010, p. 41. That execution occurred without incident, and States gradually shifted to pentobarbital as their supplies of sodium thiopental ran out. It is reported that pentobarbital was used in all of the 43 executions carried out in 2012. Death Penalty Information Center, Execution List 2012, online at www.deathpenaltyinfo.org/execution-list-2012 (all Internet materials as visited June 26, 2015, and available in Clerk of Court's case file). Petitioners concede that pentobarbital, like sodium thiopental, can "reliably induce and maintain a comalike state that renders a

person insensate to pain" caused by administration of the second and third drugs in the protocol. Brief for Petitioners 2. And courts across the country have held that the use of pentobarbital in executions does not violate the Eighth Amendment. See, *e. g.*, *Jackson* v. *Danberg*, 656 F. 3d 157 (CA3 2011); *Beaty* v. *Brewer*, 649 F. 3d 1071 (CA9 2011); *DeYoung* v. *Owens*, 646 F. 3d 1319 (CA11 2011); *Pavatt* v. *Jones*, 627 F. 3d 1336 (CA10 2010).

Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions. See Bonner, *supra*. That manufacturer opposed the death penalty and took steps to block the shipment of pentobarbital for use in executions in the United States. Stein, New Obstacle to Death Penalty in U. S., Washington Post, July 3, 2011, p. A4. Oklahoma eventually became unable to acquire the drug through any means. The District Court below found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma. App. 67–68.

C

Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs. In October 2013, Florida became the first State to substitute midazolam for pentobarbital as part of a three-drug lethal injection protocol. Fernandez, Executions Stall as States Seek Different Drugs, N. Y. Times, Nov. 9, 2013, p. A1. To date, Florida has conducted 11 executions using that protocol, which calls for midazolam followed by a paralytic agent and potassium chloride. See Brief for State of Florida as *Amicus Curiae* 2–3; *Chavez* v. *Florida SP Warden*, 742 F. 3d 1267, 1269 (CA11 2014). In 2014, Oklahoma also substituted midazolam for pentobarbital as part of its three-drug protocol. Oklahoma has already used this three-drug protocol twice: to execute Clayton Lockett in April 2014 and Charles Warner in Janu-

ary 2015. (Warner was one of the four inmates who moved for a preliminary injunction in this case.)

The Lockett execution caused Oklahoma to implement new safety precautions as part of its lethal injection protocol. When Oklahoma executed Lockett, its protocol called for the administration of 100 milligrams of midazolam, as compared to the 500 milligrams that are currently required. On the morning of his execution, Lockett cut himself twice at "'the bend of the elbow.'" App. 50. That evening, the execution team spent nearly an hour making at least one dozen attempts to establish intravenous (IV) access to Lockett's cardiovascular system, including at his arms and elsewhere on his body. The team eventually believed that it had established intravenous access through Lockett's right femoral vein, and it covered the injection access point with a sheet, in part to preserve Lockett's dignity during the execution. After the team administered the midazolam and a physician determined that Lockett was unconscious, the team next administered the paralytic agent (vecuronium bromide) and most of the potassium chloride. Lockett began to move and speak, at which point the physician lifted the sheet and determined that the IV had "infiltrated," which means that "the IV fluid, rather than entering Lockett's blood stream, had leaked into the tissue surrounding the IV access point." *Warner* v. *Gross*, 776 F. 3d 721, 725 (CA10 2015) (case below). The execution team stopped administering the remaining potassium chloride and terminated the execution about 33 minutes after the midazolam was first injected. About 10 minutes later, Lockett was pronounced dead.

An investigation into the Lockett execution concluded that "the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs." App. 398. The investigation, which took five months to complete, recommended several changes to Oklahoma's execution protocol, and Oklahoma adopted a new protocol with an effective date of September 30, 2014. That

protocol allows the Oklahoma Department of Corrections to choose among four different drug combinations. The option that Oklahoma plans to use to execute petitioners calls for the administration of 500 milligrams of midazolam followed by a paralytic agent and potassium chloride.[1] The paralytic agent may be pancuronium bromide, vecuronium bromide, or rocuronium bromide, three drugs that, all agree, are functionally equivalent for purposes of this case. The protocol also includes procedural safeguards to help ensure that an inmate remains insensate to any pain caused by the administration of the paralytic agent and potassium chloride. Those safeguards include: (1) the insertion of both a primary and backup IV catheter, (2) procedures to confirm the viability of the IV site, (3) the option to postpone an execution if viable IV sites cannot be established within an hour, (4) a mandatory pause between administration of the first and second drugs, (5) numerous procedures for monitoring the offender's consciousness, including the use of an electrocardiograph and direct observation, and (6) detailed provisions with respect to the training and preparation of the execution team. In January of this year, Oklahoma executed Warner using these revised procedures and the combination of midazolam, a paralytic agent, and potassium chloride.

II

A

In June 2014, after Oklahoma switched from pentobarbital to midazolam and executed Lockett, 21 Oklahoma death row inmates filed an action under 42 U. S. C. §1983 challenging the State's new lethal injection protocol. The complaint alleged that Oklahoma's use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment.

[1] The three other drug combinations that Oklahoma may administer are: (1) a single dose of pentobarbital, (2) a single dose of sodium thiopental, and (3) a dose of midazolam followed by a dose of hydromorphone.

In November 2014, four of those plaintiffs—Richard Glossip, Benjamin Cole, John Grant, and Warner—filed a motion for a preliminary injunction. All four men had been convicted of murder and sentenced to death by Oklahoma juries. Glossip hired Justin Sneed to kill his employer, Barry Van Treese. Sneed entered a room where Van Treese was sleeping and beat him to death with a baseball bat. See *Glossip* v. *State*, 2007 OK CR 12, 157 P. 3d 143, 147–149. Cole murdered his 9-month-old daughter after she would not stop crying. Cole bent her body backwards until he snapped her spine in half. After the child died, Cole played video games. See *Cole* v. *State*, 2007 OK CR 27, 164 P. 3d 1089, 1092–1093. Grant, while serving terms of imprisonment totaling 130 years, killed Gay Carter, a prison food service supervisor, by pulling her into a mop closet and stabbing her numerous times with a shank. See *Grant* v. *State*, 2002 OK CR 36, 58 P. 3d 783, 789. Warner anally raped and murdered an 11-month-old girl. The child's injuries included two skull fractures, internal brain injuries, two fractures to her jaw, a lacerated liver, and a bruised spleen and lungs. See *Warner* v. *State*, 2006 OK CR 40, 144 P. 3d 838, 856–857.

The Oklahoma Court of Criminal Appeals affirmed the murder conviction and death sentence of each offender. Each of the men then unsuccessfully sought both state post-conviction and federal habeas corpus relief. Having exhausted the avenues for challenging their convictions and sentences, they moved for a preliminary injunction against Oklahoma's lethal injection protocol.

B

In December 2014, after discovery, the District Court held a 3-day evidentiary hearing on the preliminary injunction motion. The District Court heard testimony from 17 witnesses and reviewed numerous exhibits. Dr. David Lubarsky, an anesthesiologist, and Dr. Larry Sasich, a doctor of pharmacy, provided expert testimony about midazolam for

petitioners, and Dr. Roswell Evans, a doctor of pharmacy, provided expert testimony for respondents.

After reviewing the evidence, the District Court issued an oral ruling denying the motion for a preliminary injunction. The District Court first rejected petitioners' challenge under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), to the testimony of Dr. Evans. It concluded that Dr. Evans, the Dean of Auburn University's School of Pharmacy, was well qualified to testify about midazolam's properties and that he offered reliable testimony. The District Court then held that petitioners failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment. The court provided two independent reasons for this conclusion. First, the court held that petitioners failed to identify a known and available method of execution that presented a substantially less severe risk of pain than the method that the State proposed to use. Second, the court found that petitioners failed to prove that Oklahoma's protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' amounting to 'an objectively intolerable risk of harm.'" App. 96 (quoting *Baze*, 553 U. S., at 50). The court emphasized that the Oklahoma protocol featured numerous safeguards, including the establishment of two IV access sites, confirmation of the viability of those sites, and monitoring of the offender's level of consciousness throughout the procedure.

The District Court supported its decision with findings of fact about midazolam. It found that a 500-milligram dose of midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. Indeed, it found that a 500-milligram dose alone would likely cause death by respiratory arrest within 30 minutes or an hour.

The Court of Appeals for the Tenth Circuit affirmed. 776 F. 3d 721. The Court of Appeals explained that our decision in *Baze* requires a plaintiff challenging a lethal injection protocol to demonstrate that the risk of severe pain presented by an execution protocol is substantial "'when compared to the known and available alternatives.'" 776 F. 3d, at 732 (quoting *Baze*, *supra*, at 61). And it agreed with the District Court that petitioners had not identified any such alternative. The Court of Appeals added, however, that this holding was "not outcome-determinative in this case" because petitioners additionally failed to establish that the use of midazolam creates a demonstrated risk of severe pain. 776 F. 3d, at 732. The Court of Appeals found that the District Court did not abuse its discretion by relying on Dr. Evans' testimony, and it concluded that the District Court's factual findings about midazolam were not clearly erroneous. It also held that alleged errors in Dr. Evans' testimony did not render his testimony unreliable or the District Court's findings clearly erroneous.

Oklahoma executed Warner on January 15, 2015, but we subsequently voted to grant review and then stayed the executions of Glossip, Cole, and Grant pending the resolution of this case. 574 U. S. 1133 and 1143 (2015).

III

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). The parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits.

The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." The controlling opin-

ion in *Baze* outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim. *Baze* involved a challenge by Kentucky death row inmates to that State's three-drug lethal injection protocol of sodium thiopental, pancuronium bromide, and potassium chloride. The inmates conceded that the protocol, if properly administered, would result in a humane and constitutional execution because sodium thiopental would render an inmate oblivious to any pain caused by the second and third drugs. 553 U. S., at 49. But they argued that there was an unacceptable risk that sodium thiopental would not be properly administered. *Ibid.* The inmates also maintained that a significant risk of harm could be eliminated if Kentucky adopted a one-drug protocol and additional monitoring by trained personnel. *Id.*, at 51.

The controlling opinion in *Baze* first concluded that prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is "'*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id.*, at 50 (quoting *Helling* v. *McKinney*, 509 U. S. 25, 33, 34–35 (1993)). To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" 553 U. S., at 50 (quoting *Farmer* v. *Brennan*, 511 U. S. 825, 846, and n. 9 (1994)). The controlling opinion also stated that prisoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." 553 U. S., at 51. Instead, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.*, at 52.

The controlling opinion summarized the requirements of an Eighth Amendment method-of-execution claim as follows: "A stay of execution may not be granted on grounds such as

those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives." *Id.*, at 61. The preliminary injunction posture of the present case thus requires petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.

The challenge in *Baze* failed both because the Kentucky inmates did not show that the risks they identified were substantial and imminent, *id.*, at 56, and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk, *id.*, at 57–60. Petitioners' arguments here fail for similar reasons. First, petitioners have not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution. Second, they have failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering. We address each reason in turn.

IV

Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. In their amended complaint, petitioners proffered that the State could use sodium thiopental as part of a single-drug protocol. They have since suggested that it might also be constitutional for Oklahoma to use pentobarbital. But the District Court found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections. The Court of Appeals affirmed that finding, and it is not clearly erroneous. On the contrary, the record shows that

Oklahoma has been unable to procure those drugs despite a good-faith effort to do so.

Petitioners do not seriously contest this factual finding, and they have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. Nor have they shown a risk of pain so great that other acceptable, available methods must be used. Instead, they argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*, 553 U. S., at 61, which imposed a requirement that the Court now follows.[2]

Petitioners contend that the requirement to identify an alternative method of execution contravenes our pre-*Baze* decision in *Hill* v. *McDonough*, 547 U. S. 573 (2006), but they misread that decision. The portion of the opinion in *Hill* on which they rely concerned a question of civil procedure, not a substantive Eighth Amendment question. In *Hill*, the issue was whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983. *Id.*, at 576. We held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence. *Id.*, at 579–580. The United States as *amicus curiae* argued that we should adopt a special pleading requirement to stop inmates from

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[2] JUSTICE SOTOMAYOR's dissent (hereinafter principal dissent), *post*, at 970–971, inexplicably refuses to recognize that THE CHIEF JUSTICE's opinion in *Baze* sets out the holding of the case. In *Baze*, the opinion of THE CHIEF JUSTICE was joined by two other Justices. JUSTICES SCALIA and THOMAS took the broader position that a method of execution is consistent with the Eighth Amendment unless it is deliberately designed to inflict pain. 553 U. S., at 94 (THOMAS, J. concurring in judgment). Thus, as explained in *Marks* v. *United States*, 430 U. S. 188, 193 (1977), THE CHIEF JUSTICE's opinion sets out the holding of the case. It is for this reason that petitioners base their argument on the rule set out in that opinion. See Brief for Petitioners 25, 28.

using § 1983 actions to attack, not just a particular means of execution, but the death penalty itself. To achieve this end, the United States proposed that an inmate asserting a method-of-execution claim should be required to plead an acceptable alternative method of execution. *Id.*, at 582. We rejected that argument because "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Ibid.* *Hill* thus held that § 1983 alone does not impose a heightened pleading requirement. *Baze*, on the other hand, addressed the substantive elements of an Eighth Amendment method-of-execution claim, and it made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. Because petitioners failed to do this, the District Court properly held that they did not establish a likelihood of success on their Eighth Amendment claim.

Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by JUSTICES BREYER and GINSBURG, that the death penalty is categorically unconstitutional. *Post*, at 909 (BREYER, J., dissenting). The principal dissent goes out of its way to suggest that a State would violate the Eighth Amendment if it used one of the methods of execution employed before the advent of lethal injection. *Post,* at 977. And the principal dissent makes this suggestion even though the Court held in *Wilkerson* that this method (the firing squad) is constitutional and even though, in the words of the principal dissent, "there is some reason to think that it is relatively quick and painless." *Post*, at 977. Tellingly silent about the methods of execution most commonly used before States switched to lethal injection (the electric chair and gas chamber), the principal dissent implies that it would be unconstitutional to use a method that "could be

seen as a devolution to a more primitive era." *Ibid.* If States cannot return to any of the "more primitive" methods used in the past and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional. See, *e. g.*, *Baze*, 553 U. S., at 47; *id.*, at 87–88 (SCALIA, J., concurring in judgment); *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); *id.*, at 226 (White, J., concurring in judgment); *Resweber*, 329 U. S., at 464; *In re Kemmler*, 136 U. S., at 447; *Wilkerson*, 99 U. S., at 134–135. We decline to effectively overrule these decisions.

V

We also affirm for a second reason: The District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution. We emphasize four points at the outset of our analysis.

First, we review the District Court's factual findings under the deferential "clear error" standard. This standard does not entitle us to overturn a finding "simply because [we are] convinced that [we] would have decided the case differently." *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985).

Second, petitioners bear the burden of persuasion on this issue. *Baze*, *supra*, at 41. Although petitioners expend great effort attacking peripheral aspects of Dr. Evans' testimony, they make little attempt to prove what is critical, *i. e.*, that the evidence they presented to the District Court establishes that the use of midazolam is sure or very likely to result in needless suffering.

Third, numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from administration of the paralytic agent and potassium chloride.

See, *e. g.*, 776 F. 3d 721 (case below affirming the District Court); *Chavez* v. *Florida SP Warden*, 742 F. 3d 1267 (affirming the District Court); *Banks* v. *State*, 150 So. 3d 797 (Fla. 2014) (affirming the lower court); *Howell* v. *State*, 133 So. 3d 511 (Fla. 2014) (same); *Muhammad* v. *State*, 132 So. 3d 176 (Fla. 2013) (same). (It is noteworthy that one or both of the two key witnesses in this case—Dr. Lubarsky for petitioners and Dr. Evans for respondents—were witnesses in the *Chavez*, *Howell*, and *Muhammad* cases.) "Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easley* v. *Cromartie*, 532 U. S. 234, 242 (2001). Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings. Cf. *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 841 (1996) (explaining that this Court " 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error' " (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949))).

Fourth, challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should not "embroil [themselves] in ongoing scientific controversies beyond their expertise." *Baze*, *supra*, at 51. Accordingly, an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.

A

Petitioners attack the District Court's findings of fact on two main grounds.[3] First, they argue that even if midazo-

[3] Drs. Lubarsky and Sasich, petitioners' key witnesses, both testified that midazolam is inappropriate for a third reason, namely, that it creates a risk of "paradoxical reactions" such as agitation, hyperactivity, and com-

lam is powerful enough to induce unconsciousness, it is too weak to maintain unconsciousness and insensitivity to pain once the second and third drugs are administered. Second, while conceding that the 500-milligram dose of midazolam is much higher than the normal therapeutic dose, they contend that this fact is irrelevant because midazolam has a "ceiling effect"—that is, at a certain point, an increase in the dose administered will not have any greater effect on the inmate. Neither argument succeeds.

The District Court found that midazolam is capable of placing a person "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. This conclusion was not clearly erroneous. Respondents' expert, Dr. Evans, testified that the proper administration of a 500-milligram dose of midazolam would make it "a virtual certainty" that any individual would be "at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from application of the 2nd and 3rd drugs" used in the Oklahoma protocol. *Id.*, at 302; see also *id.*, at 322. And petitioners' experts acknowledged that they had no contrary scientific proof. See *id.*, at 243–244 (Dr. Sasich stating that the ability of midazolam to render a person insensate to the second and third drugs "has not been subjected to scientific testing"); *id.*, at 176 (Dr. Lubarsky stating that "there is no scientific literature addressing the use of midazolam as a manner to administer lethal injections in humans").

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bativeness. App. 175 (expert report of Dr. Lubarsky); *id.*, at 242, 244 (expert report of Dr. Sasich). The District Court found, however, that the frequency with which a paradoxical reaction occurs "is speculative" and that the risk "occurs with the highest frequency in low therapeutic doses." *Id.*, at 78. Indeed, Dr. Sasich conceded that the incidence or risk of paradoxical reactions with midazolam "is unknown" and that reports estimate the risk to vary only "from 1% to above 10%." *Id.*, at 244. Moreover, the mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation. "[T]he Constitution does not demand the avoidance of all risk of pain." *Baze*, 553 U. S., at 47 (plurality opinion).

In an effort to explain this dearth of evidence, Dr. Sasich testified that "[i]t's not my responsibility or the [Food and Drug Administration's] responsibility to prove that the drug doesn't work or is not safe." Tr. of Preliminary Injunction Hearing 357 (Tr.). Instead, he stated, "it's the responsibility of the proponent to show that the drug is safe and effective." *Ibid.* Dr. Sasich confused the standard imposed on a drug manufacturer seeking approval of a therapeutic drug with the standard that must be borne by a party challenging a State's lethal injection protocol. When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain. Here, petitioners' own experts effectively conceded that they lacked evidence to prove their case beyond dispute.

Petitioners attempt to avoid this deficiency by criticizing respondents' expert. They argue that the District Court should not have credited Dr. Evans' testimony because he admitted that his findings were based on "'extrapolat[ions]'" from studies done about much lower therapeutic doses of midazolam. See Brief for Petitioners 34 (citing Tr. 667–668; emphasis deleted). But because a 500-milligram dose is never administered for a therapeutic purpose, extrapolation was reasonable. And the conclusions of petitioners' experts were also based on extrapolations and assumptions. For example, Dr. Lubarsky relied on "extrapolation of the ceiling effect data." App. 177.

Based on the evidence that the parties presented to the District Court, we must affirm. Testimony from both sides supports the District Court's conclusion that midazolam can render a person insensate to pain. Dr. Evans testified that although midazolam is not an analgesic, it can nonetheless "render the person unconscious and 'insensate' during the remainder of the procedure." *Id.*, at 294. In his discussion about the ceiling effect, Dr. Sasich agreed that as the dose of midazolam increases, it is "expected to produce sedation,

amnesia, and finally lack of response to stimuli such as pain (unconsciousness)." *Id.*, at 243. Petitioners argue that midazolam is not powerful enough to keep a person insensate to pain after the administration of the second and third drugs, but Dr. Evans presented creditable testimony to the contrary. See, *e. g.*, Tr. 661 (testifying that a 500-milligram dose of midazolam will induce a coma).[4] Indeed, low doses of midazolam are sufficient to induce unconsciousness and are even sometimes used as the sole relevant drug in certain medical procedures. Dr. Sasich conceded, for example, that midazolam might be used for medical procedures like colonoscopies and gastroscopies. App. 267–268; see also Brief for Respondents 6–8.[5]

Petitioners emphasize that midazolam is not recommended or approved for use as the sole anesthetic during painful surgery, but there are two reasons why this is not dispositive. First, as the District Court found, the 500-milligram dose at issue here "is many times higher than a normal therapeutic dose of midazolam." App. 76. The effect of a small dose of midazolam has minimal probative value about the effect of

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[4] The principal dissent misunderstands the record when it bizarrely suggests that midazolam is about as dangerous as a peanut. *Post*, at 962. Dr. Evans and Dr. Lubarsky agreed that midazolam has caused fatalities in doses as low as 0.04 to 0.07 milligrams per kilogram. App. 217, 294. Even if death from such low doses is a "rare, unfortunate side effec[t]," *post*, at 962, the District Court found that a massive 500-milligram dose—many times higher than the lowest dose reported to have produced death—will likely cause death in under an hour. App. 76–77.

[5] Petitioners' experts also declined to testify that a 500-milligram dose of midazolam is always insufficient to place a person in a coma and render him insensate to pain. Dr. Lubarsky argued only that the 500-milligram dose cannot "reliably" produce a coma. *Id.*, at 228. And when Dr. Sasich was asked whether he could say to a reasonable degree of certainty that a 500-milligram dose of midazolam would not render someone unconscious, he replied that he could not. *Id.*, at 271–272. A product label for midazolam that Dr. Sasich attached to his expert report also acknowledged that an overdose of midazolam can cause a coma. See Expert Report of Larry D. Sasich, in No. 14–6244 (CA10), p. 34.

a 500-milligram dose. Second, the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution. We recognized this point in *Baze*, where we concluded that although the medical standard of care might require the use of a blood pressure cuff and an electrocardiogram during surgeries, this does not mean those procedures are required for an execution to pass Eighth Amendment scrutiny. 553 U. S., at 60.

Oklahoma has also adopted important safeguards to ensure that midazolam is properly administered. The District Court emphasized three requirements in particular: The execution team must secure both a primary and backup IV access site, it must confirm the viability of the IV sites, and it must continuously monitor the offender's level of consciousness. The District Court did not commit clear error in concluding that these safeguards help to minimize any risk that might occur in the event that midazolam does not operate as intended. Indeed, we concluded in *Baze* that many of the safeguards that Oklahoma employs—including the establishment of a primary and backup IV and the presence of personnel to monitor an inmate—help in significantly reducing the risk that an execution protocol will violate the Eighth Amendment. *Id.*, at 55–56. And many other safeguards that Oklahoma has adopted mirror those that the dissent in *Baze* complained were absent from Kentucky's protocol in that case. For example, the dissent argued that because a consciousness check before injection of the second drug "can reduce a risk of dreadful pain," Kentucky's failure to include that step in its procedure was unconstitutional. *Id.*, at 119 (opinion of GINSBURG, J.). The dissent also complained that Kentucky did not monitor the effectiveness of the first drug or pause between injection of the first and second drugs. *Id.*, at 120–121. Oklahoma has accommodated each of those concerns.

B

Petitioners assert that midazolam's "ceiling effect" undermines the District Court's finding about the effectiveness of the huge dose administered in the Oklahoma protocol. Petitioners argue that midazolam has a "ceiling" above which any increase in dosage produces no effect. As a result, they maintain, it is wrong to assume that a 500-milligram dose has a much greater effect than a therapeutic dose of about 5 milligrams. But the mere fact that midazolam has such a ceiling cannot be dispositive. Dr. Sasich testified that "all drugs essentially have a ceiling effect." Tr. 343. The relevant question here is whether midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain caused by the second and third drugs.

Petitioners provided little probative evidence on this point, and the speculative evidence that they did present to the District Court does not come close to establishing that its factual findings were clearly erroneous. Dr. Sasich stated in his expert report that the literature "indicates" that midazolam has a ceiling effect, but he conceded that he "was unable to determine the midazolam dose for a ceiling effect on unconsciousness because there is no literature in which such testing has been done." App. 243–244. Dr. Lubarsky's report was similar, *id.*, at 171–172, and the testimony of petitioners' experts at the hearing was no more compelling. Dr. Sasich frankly admitted that he did a "search to try and determine at what dose of midazolam you would get a ceiling effect," but concluded: "I could not find one." Tr. 344. The closest petitioners came was Dr. Lubarsky's suggestion that the ceiling effect occurs "[p]robably after about . . . 40 to 50 milligrams," but he added that he had not actually done the relevant calculations, and he admitted: "I can't tell you right now" at what dose the ceiling effect occurs. App. 225. We cannot conclude that the District

Court committed clear error in declining to find, based on such speculative evidence, that the ceiling effect negates midazolam's ability to render an inmate insensate to pain caused by the second and third drugs in the protocol.

The principal dissent discusses the ceiling effect at length, but it studiously avoids suggesting that petitioners presented probative evidence about the dose at which the ceiling effect occurs or about whether the effect occurs before a person becomes insensate to pain. The principal dissent avoids these critical issues by suggesting that such evidence is "irrelevant if there is no dose at which the drug can . . . render a person 'insensate to pain.'" *Post*, at 964. But the District Court heard evidence that the drug can render a person insensate to pain, and not just from Dr. Evans: Dr. Sasich (one of petitioners' own experts) testified that higher doses of midazolam are "expected to produce . . . lack of response to stimuli such as pain." App. 243.[6]

In their brief, petitioners attempt to deflect attention from their failure of proof regarding midazolam's ceiling effect by criticizing Dr. Evans' testimony. But it was *petitioners*' burden to establish that midazolam's ceiling occurred at a dosage below the massive 500-milligram dose employed in the Oklahoma protocol and at a point at which the drug failed to render the recipient insensate to pain. They did not meet that burden, and their criticisms do not undermine Dr. Evans' central point, which the District Court credited, that a properly administered 500-milligram dose of midazolam will render the recipient unable to feel pain.

One of petitioners' criticisms of Dr. Evans' testimony is little more than a quibble about the wording chosen by Dr.

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[6] The principal dissent emphasizes Dr. Lubarsky's supposedly contrary testimony, but the District Court was entitled to credit Dr. Evans (and Dr. Sasich) instead of Dr. Lubarsky on this point. And the District Court had strong reasons not to credit Dr. Lubarsky, who even argued that a protocol that includes *sodium thiopental* is "constructed to produce egregious harm and suffering." App. 227.

Evans at one point in his oral testimony. Petitioners' expert, Dr. Lubarsky, stated in his report that midazolam "increases effective binding of [gamma-aminobutyric acid (GABA)] to its receptor to induce unconsciousness."[7] *Id.*, at 172. Dr. Evans' report provided a similar explanation of the way in which midazolam works, see *id.*, at 293–294, and Dr. Lubarsky did not dispute the accuracy of that explanation when he testified at the hearing. Petitioners contend, however, that Dr. Evans erred when he said at the hearing that "[m]idazolam attaches to GABA receptors, *inhibiting GABA*." *Id.*, at 312 (emphasis added). Petitioners contend that this statement was incorrect because "far from *inhibiting* GABA, midazolam *facilitates its binding* to GABA receptors." Brief for Petitioners 38.

In making this argument, petitioners are simply quarrelling with the words that Dr. Evans used during oral testimony in an effort to explain how midazolam works in terms understandable to a layman. Petitioners do not suggest that the discussion of midazolam in Dr. Evans' expert report was inaccurate, and as for Dr. Evans' passing use of the term "inhibiting," Dr. Lubarsky's own expert report states that GABA's "*inhibition* of brain activity is accentuated by midazolam." App. 232 (emphasis added). Dr. Evans' oral use of the word "inhibiting"—particularly in light of his written testimony—does not invalidate the District Court's decision to rely on his testimony.

Petitioners also point to an apparent conflict between Dr. Evans' testimony and a declaration by Dr. Lubarsky (submitted after the District Court ruled) regarding the biological process that produces midazolam's ceiling effect. But even if Dr. Lubarsky's declaration is correct, it is largely beside the point. What matters for present purposes is the dosage at which the ceiling effect kicks in, not the biological process

[7] GABA is "an amino acid that functions as an inhibitory neurotransmitter in the brain and spinal cord." Mosby's Medical Dictionary 782 (7th ed. 2006).

that produces the effect. And Dr. Lubarsky's declaration does not render the District Court's findings clearly erroneous with respect to that critical issue.

C

Petitioners' remaining arguments about midazolam all lack merit. First, we are not persuaded by petitioners' argument that Dr. Evans' testimony should have been rejected because of some of the sources listed in his report. Petitioners criticize two of the "selected references" that Dr. Evans cited in his expert report: the Web site drugs.com and a material safety data sheet (MSDS) about midazolam. Petitioners' argument is more of a *Daubert* challenge to Dr. Evans' testimony than an argument that the District Court's findings were clearly erroneous. The District Court concluded that Dr. Evans was "well-qualified to give the expert testimony that he gave" and that "his testimony was the product of reliable principles and methods reliably applied to the facts of this case." App. 75–76. To the extent that the reliability of Dr. Evans' testimony is even before us, the District Court's conclusion that his testimony was based on reliable sources is reviewed under the deferential "abuse-of-discretion" standard. *General Elec. Co.* v. *Joiner*, 522 U. S. 136, 142–143 (1997). Dr. Evans relied on multiple sources and his own expertise, and his testimony may not be disqualified simply because one source (drugs.com) warns that it "'is not intended for medical advice'" and another (the MSDS) states that its information is provided "'without any warranty, express or implied, regarding its correctness.'" Brief for Petitioners 36. Medical journals that both parties rely upon typically contain similar disclaimers. See, *e. g.*, Anesthesiology, Terms and Conditions of Use, online at http://anesthesiology.pubs.asahq.org/ss/terms.aspx ("None of the information on this Site shall be used to diagnose or treat any health problem or disease"). Dr. Lubarsky—petitioners' own expert—relied on an MSDS to argue that midazolam has a ceiling effect. And petitioners do not identify any

incorrect statements from drugs.com on which Dr. Evans relied. In fact, although Dr. Sasich submitted a declaration to the Court of Appeals criticizing Dr. Evans' reference to drugs.com, that declaration does not identify a single fact from that site's discussion of midazolam that was materially inaccurate.

Second, petitioners argue that Dr. Evans' expert report contained a mathematical error, but we find this argument insignificant. Dr. Evans stated in his expert report that the lowest dose of midazolam resulting in human deaths, according to an MSDS, is 0.071 mg/kg delivered intravenously. App. 294. Dr. Lubarsky agreed with this statement. Specifically, he testified that fatalities have occurred in doses ranging from 0.04 to 0.07 mg/kg, and he stated that Dr. Evans' testimony to that effect was "a true statement" (though he added those fatalities occurred among the elderly). *Id.*, at 217. We do not understand petitioners to dispute the testimony of Dr. Evans and their own expert that 0.071 mg/kg is a potentially fatal dose of midazolam. Instead, they make much of the fact that the MSDS attached to Dr. Evans' report apparently contained a typographical error and reported the lowest toxic dose as 71 mg/kg. That Dr. Evans did not repeat that incorrect figure but instead reported the correct dose supports rather than undermines his testimony. In any event, the alleged error in the MSDS is irrelevant because the District Court expressly stated that it did not rely on the figure in the MSDS. See *id.*, at 75.

Third, petitioners argue that there is no consensus among the States regarding midazolam's efficacy because only four States (Oklahoma, Arizona, Florida, and Ohio) have used midazolam as part of an execution. Petitioners rely on the plurality's statement in *Baze* that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated," and the plurality's emphasis on the fact that 36 States had adopted lethal injection and 30 States used the particular three-drug protocol at issue in that case. 553

U. S., at 53. But while the near-universal use of the particular protocol at issue in *Baze* supported our conclusion that this protocol did not violate the Eighth Amendment, we did not say that the converse was true, *i. e.*, that other protocols or methods of execution are of doubtful constitutionality. That argument, if accepted, would hamper the adoption of new and potentially more humane methods of execution and would prevent States from adapting to changes in the availability of suitable drugs.

Fourth, petitioners argue that difficulties with Oklahoma's execution of Lockett and Arizona's July 2014 execution of Joseph Wood establish that midazolam is sure or very likely to cause serious pain. We are not persuaded. Aside from the Lockett execution, 12 other executions have been conducted using the three-drug protocol at issue here, and those appear to have been conducted without any significant problems. See Brief for Respondents 32; Brief for State of Florida as *Amicus Curiae* 1. Moreover, Lockett was administered only 100 milligrams of midazolam, and Oklahoma's investigation into that execution concluded that the difficulties were due primarily to the execution team's inability to obtain an IV access site. And the Wood execution did not involve the protocol at issue here. Wood did not receive a single dose of 500 milligrams of midazolam; instead, he received fifteen 50-milligram doses over the spanof two hours.[8]

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[8] The principal dissent emphasizes Dr. Lubarsky's testimony that it is irrelevant that Wood was administered the drug over a 2-hour period. *Post*, at 967. But Dr. Evans disagreed and testified that if a 750-milligram dose "was spread out over a long period of time," such as one hour (*i. e.*, half the time at issue in the Wood execution), the drug might not be as effective as if it were administered all at once. Tr. 667. The principal dissent states that this "pronouncement was entirely unsupported," *post*, at 967, n. 6, but it was supported by Dr. Evans' expertise and decades of experience. And it would be unusual for an expert testifying on the stand to punctuate each sentence with citation to a medical journal.

After the Wood execution, Arizona commissioned an independent assessment of its execution protocol and the Wood execution. According to

Brief for Respondents 12, n. 9. And Arizona used a different two-drug protocol that paired midazolam with hydromorphone, a drug that is not at issue in this case. *Ibid.* When all of the circumstances are considered, the Lockett and Wood executions have little probative value for present purposes.

Finally, we find it appropriate to respond to the principal dissent's groundless suggestion that our decision is tantamount to allowing prisoners to be "drawn and quartered, slowly tortured to death, or actually burned at the stake." *Post*, at 974. That is simply not true, and the principal dissent's resort to this outlandish rhetoric reveals the weakness of its legal arguments.

VI

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court, and write to respond to JUSTICE BREYER's plea for judicial abolition of the death penalty.

Welcome to Groundhog Day. The scene is familiar: Petitioners, sentenced to die for the crimes they committed (including, in the case of one petitioner since put to death, raping and murdering an 11-month-old baby), come before this

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that report, the IV team leader, medical examiner, and an independent physician all agreed that the dosage of midazolam "would result in heavy sedation." Ariz. Dept. of Corrections, Assessment and Review of the Ariz. Dept. of Corrections Execution Protocols 46, 48 (Dec. 15, 2014), online at https://corrections.az.gov/sites/default/files/documents/PDFs/arizona_final_report_12_15_14_w_cover.pdf. And far from blaming midazolam for the Wood execution, the report recommended that Arizona replace its two-drug protocol with Oklahoma's three-drug protocol that includes a 500-milligram dose of midazolam as the first drug. *Id.*, at 49.

Court asking us to nullify their sentences as "cruel and unusual" under the Eighth Amendment. They rely on this provision because it is the only provision they *can* rely on. They were charged by a sovereign State with murder. They were afforded counsel and tried before a jury of their peers—tried twice, once to determine whether they were guilty and once to determine whether death was the appropriate sentence. They were duly convicted and sentenced. They were granted the right to appeal and to seek postconviction relief, first in state and then in federal court. And now, acknowledging that their convictions are unassailable, they ask us for clemency, as though clemency were ours to give.

The response is also familiar: A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now*, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life . . . without due process of law." Nevertheless, today JUSTICE BREYER takes on the role of the abolitionists in this long-running drama, arguing that the text of the Constitution and two centuries of history must yield to his "20 years of experience on this Court," and inviting full briefing on the continued permissibility of capital punishment, *post*, at 909 (dissenting opinion).

Historically, the Eighth Amendment was understood to bar only those punishments that added " 'terror, pain, or disgrace' " to an otherwise permissible capital sentence. *Baze*

v. *Rees*, 553 U. S. 35, 96 (2008) (THOMAS, J., concurring in judgment). Rather than bother with this troubling detail, JUSTICE BREYER elects to contort the constitutional text. Redefining "cruel" to mean "unreliable," "arbitrary," or causing "excessive delays," and "unusual" to include a "decline in use," he proceeds to offer up a white paper devoid of any meaningful legal argument.

Even accepting JUSTICE BREYER's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook. He says that the death penalty is cruel because it is unreliable; but it is *convictions*, not *punishments*, that are unreliable. Moreover, the "pressure on police, prosecutors, and jurors to secure a conviction," which he claims increases the risk of wrongful convictions in capital cases, flows from the nature of the crime, not the punishment that follows its commission. *Post*, at 912–913. JUSTICE BREYER acknowledges as much: "[T]he crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure." *Post*, at 912. That same pressure would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases. The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. (Which, again, JUSTICE BREYER acknowledges: "[C]ourts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue," *ibid.*) The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.

JUSTICE BREYER next says that the death penalty is cruel because it is arbitrary. To prove this point, he points to a study of 205 cases that "measured the 'egregiousness' of the murderer's conduct" with "a system of metrics," and then "compared the egregiousness of the conduct of the 9 defend-

ants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases [who were not sentenced to death]," *post*, at 917. If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* "system of metrics." Of course it cannot: Egregiousness is a moral judgment susceptible of few hard-and-fast rules. More importantly, egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant. That is why this Court has required an individualized consideration of all mitigating circumstances, rather than formulaic application of some egregiousness test.

It is because these questions are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial, that cornerstone of Anglo-American judicial procedure. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.

JUSTICE BREYER's third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that "the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates,"

post, at 930, JUSTICE BREYER apparently forgets that one of the plaintiffs *in this very case* was already in prison when he committed the murder that landed him on death row. JUSTICE BREYER further asserts that "whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole," *post*, at 933. My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps JUSTICE BREYER is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose lives have been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

And finally, JUSTICE BREYER speculates that it does not "seem likely" that the death penalty has a "significant" deterrent effect. *Post*, at 931. It seems very likely to me, and there are statistical studies that say so. See, *e. g.*, Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"); Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) ("[E]ach execution results, on average, in eighteen fewer murders" per year); Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 713 (2005) ("All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its 'apparent power and unanimity' "). But we federal judges live in a world apart from the vast majority of Americans.

After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

Of course, this delay is a problem of the Court's own making. As JUSTICE BREYER concedes, for more than 160 years, capital sentences were carried out in an average of two years or less. *Post*, at 925. But by 2014, he tells us, it took an average of 18 years to carry out a death sentence. *Ibid.* What happened in the intervening years? Nothing other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)—a task for which we are eminently ill suited. Indeed, for the past two decades, JUSTICE BREYER has been the Drum Major in this parade. His invocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan. Amplifying the surrealism of his argument, JUSTICE BREYER uses the fact that many States have abandoned capital punishment—have abandoned it *precisely because of* the costs those suspect decisions have imposed—to conclude that it is now "unusual." *Post*, at 938–944. (A caution to the reader: Do not use the creative arithmetic that JUSTICE BREYER employs in counting the number of States that use the death penalty when you prepare your next tax return; outside the world of our Eighth Amendment abolitionist-inspired jurisprudence, it will be regarded as more misrepresentation than math.)

If we were to travel down the path that JUSTICE BREYER sets out for us and once again consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind. JUSTICE BREYER's dissent is the living refutation of *Trop*'s assumption that this Court has the capacity to recognize "evolving standards of decency." Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," *post*, at 909, and has sought to replace the judgments of the People with their own standards of decency.

Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, JUSTICE BREYER does not just reject the death penalty, he rejects the Enlightenment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I agree with the Court that petitioners' Eighth Amendment claim fails. That claim has no foundation in the Eighth Amendment, which prohibits only those "method[s] of execution" that are "deliberately designed to inflict pain." *Baze* v. *Rees*, 553 U. S. 35, 94 (2008) (THOMAS, J., concurring in judgment). Because petitioners make no allegation that Oklahoma adopted its lethal injection protocol "to add ele-

ments of terror, pain, or disgrace to the death penalty," they have no valid claim. *Id.*, at 107. That should have been the end of this case, but our precedents have predictably transformed the federal courts "into boards of inquiry charged with determining the 'best practices' for executions," *id.*, at 101 (internal quotation marks omitted), necessitating the painstaking factual inquiry the Court undertakes today. Although I continue to believe that the broader interpretation of the Eighth Amendment advanced in the plurality opinion in *Baze* is erroneous, I join the Court's opinion in full because it correctly explains why petitioners' claim fails even under that controlling opinion.

I write separately to respond to JUSTICE BREYER's dissent questioning the constitutionality of the death penalty generally. No more need be said about the constitutional arguments on which JUSTICE BREYER relies, as my colleagues and I have elsewhere refuted them.[1] But JUSTICE

[1] Generally: *Baze* v. *Rees*, 553 U. S. 35, 94–97 (2008) (THOMAS, J., concurring in judgment) (explaining that the Cruel and Unusual Punishments Clause does not prohibit the death penalty, but only torturous punishments); *Graham* v. *Collins*, 506 U. S. 461, 488 (1993) (THOMAS, J., concurring); *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed"). On reliability: *Kansas* v. *Marsh*, 548 U. S. 163, 181 (2006) (noting that the death penalty remains constitutional despite imperfections in the criminal justice system); *McGautha* v. *California*, 402 U. S. 183, 221 (1971) ("[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court"). On arbitrariness: *Ring* v. *Arizona*, 536 U. S. 584, 610 (2002) (SCALIA, J., concurring) (explaining that what compelled States to specify " 'aggravating factors' " designed to limit the death penalty to the worst of the worst was this Court's baseless jurisprudence concerning juror discretion); *McCleskey* v. *Kemp*, 481 U. S. 279, 308–312 (1987) (noting that various procedures, including the right to a jury trial, constitute a defendant's protection against arbitrariness in the application of the death penalty). On excessive delays: *Knight* v. *Florida*,

BREYER's assertion, *post*, at 916, that the death penalty in this country has fallen short of the aspiration that capital punishment be reserved for the "worst of the worst" —a notion itself based on an implicit proportionality principle that has long been discredited, see *Harmelin* v. *Michigan*, 501 U. S. 957, 966 (1991) (opinion of SCALIA, J.)—merits further comment. His conclusion is based on an analysis that itself provides a powerful case against enforcing an imaginary constitutional rule against "arbitrariness."

The thrust of JUSTICE BREYER's argument is that empirical studies performed by death penalty abolitionists reveal that the assignment of death sentences does not necessarily correspond to the "egregiousness" of the crimes, but instead appears to be correlated to "arbitrary" factors, such as the locality in which the crime was committed. Relying on these studies to determine the constitutionality of the death penalty fails to respect the values implicit in the Constitution's allocation of decisionmaking in this context. The Donohue study, on which JUSTICE BREYER relies most heavily, measured the "egregiousness" (or "deathworthiness") of murders by asking lawyers to identify the legal grounds for aggravation in each case, and by asking law students to evaluate written summaries of the murders and assign "egregiousness" scores based on a rubric designed to capture and standardize their moral judgments. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973; Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. of Empirical Legal Studies 637, 644–645

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528 U. S. 990 (1999) (THOMAS, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed"); see also *Johnson* v. *Bredesen*, 558 U. S. 1067, 1070 (2009) (THOMAS, J., concurring in denial of certiorari). And on the decline in use of the death penalty: *Atkins* v. *Virginia*, 536 U. S. 304, 345 (2002) (SCALIA, J., dissenting); *Woodson* v. *North Carolina*, 428 U. S. 280, 308–310 (1976) (Rehnquist, J., dissenting).

(2014). This exercise in some ways approximates the function performed by jurors, but there is at least one critical difference: The law students make their moral judgments based on written summaries—they do not sit through hours, days, or weeks of evidence detailing the crime; they do not have an opportunity to assess the credibility of witnesses, to see the remorse of the defendant, to feel the impact of the crime on the victim's family; they do not bear the burden of deciding the fate of another human being; and they are not drawn from the community whose sense of security and justice may have been torn asunder by an act of callous disregard for human life. They are like appellate judges and justices, reviewing only a paper record of each side's case for life or death.

There is a reason the choice between life and death, within legal limits, is left to the jurors and judges who sit through the trial, and not to legal elites (or law students).[2] That reason is memorialized not once, but twice, in our Constitution: Article III guarantees that "[t]he Trial of all Crimes, except in cases of Impeachment, shall be by Jury" and that "such Trial shall be held in the State where the said Crimes shall have been committed." §2, cl. 3. And the Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed." Those provisions ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral

[2] For some, a faith in the jury seems to be correlated to that institution's likelihood of *preventing* imposition of the death penalty. See, *e. g.*, *Ring*, *supra*, at 614 (BREYER, J., concurring in judgment) (arguing that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death"); *Wainwright* v. *Witt*, 469 U. S. 412, 440, n. 1 (1985) (Brennan, J., dissenting) ("However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers").

judgment between life and death than are the products of contemporary American law schools.

It should come as no surprise, then, that the primary explanation a regression analysis revealed for the gap between the egregiousness scores and the actual sentences was not the race or sex of the offender or victim, but the locality in which the crime was committed. Donohue, *supra*, at 640; see also *post*, at 918–919 (BREYER, J., dissenting). What is more surprising is that JUSTICE BREYER considers this factor to be evidence of arbitrariness. See *ibid.* The constitutional provisions just quoted, which place such decisions in the hands of jurors and trial courts located where "the crime shall have been committed," seem deliberately designed to introduce that factor.

In any event, the results of these studies are inherently unreliable because they purport to control for egregiousness by quantifying moral depravity in a process that is itself arbitrary, not to mention dehumanizing. One such study's explanation of how the author assigned "depravity points" to identify the "worst of the worst" murderers proves the point well. McCord, Lightning Still Strikes, 71 Brooklyn L. Rev. 797, 833–834 (2005). Each aggravating factor received a point value based on the "blameworth[iness]" of the action associated with it. *Id.*, at 830. Killing a prison guard, for instance, earned a defendant three "depravity points" because it improved the case for complete incapacitation, while killing a police officer merited only two, because, "considered dispassionately," such acts do "not seem be a *sine qua non* of the worst criminals." *Id.*, at 834–836. (Do not worry, the author reassures us, "many killers of police officers accrue depravity points in other ways that clearly put them among the worst criminals." *Id.*, at 836.) Killing a child under the age of 12 was worth two depravity points, because such an act "seems particularly heartless," but killing someone over the age of 70 earned the murderer only one, for although "[e]lderly victims tug at our hearts," they do so

"less" than children "because the promise of a long life is less." *Id.*, at 836, 838. Killing to make a political statement was worth three depravity points; killing out of racial hatred, only two. *Id.*, at 835, 837. It goes on, but this small sample of the moral judgments on which this study rested shows just how unsuitable this evidence is to serve as a basis for a judicial decision declaring unconstitutional a punishment duly enacted in more than 30 States, and by the Federal Government.

We owe victims more than this sort of pseudoscientific assessment of their lives. It is bad enough to tell a mother that her child's murder is not "worthy" of society's ultimate expression of moral condemnation. But to do so based on cardboard stereotypes or cold mathematical calculations is beyond my comprehension. In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently "blameworthy" to merit a death sentence (even when genuine constitutional errors justified a vacatur of that sentence).[3]

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[3] For his part, JUSTICE BREYER explains that his experience on the Court has shown him "discrepancies for which [he] can find no rational explanations." *Post*, at 922. Why, he asks, did one man receive death for a single-victim murder, while another received life for murdering a young mother and nearly killing her infant? *Ibid.* The outcomes in those two cases may not be morally compelled, but there was certainly a rational explanation for them: The first man, who had previously confessed to another murder, killed a disabled man who had offered him a place to stay for the night. *State* v. *Badgett*, 361 N. C. 234, 239–240, 644 S. E. 2d 206, 209–210 (2007). The killer stabbed his victim's throat and prevented him from seeking medical attention until he bled to death. *Ibid.* The second man expressed remorse for his crimes and claimed to suffer from mental disorders. See Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at http://www.wral.com/news/local/story/109648 (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file); Charbonneau, Jury Finds Andre Edwards Guilty of First-Degree Murder, WRAL, Mar. 23, 2004, online at http://www.wral.com/news/local/story/109563. The other "discrepancies" similarly have "rational" explanations, even if reasonable juries could have reached different results.

A small sample of the applications for a stay of execution that have come before the Court this Term alone proves my point. Mark Christeson was due to be executed in October 2014 for his role in the murder of Susan Brouk and her young children, Adrian and Kyle. After raping Ms. Brouk at gunpoint, he and his accomplice drove the family to a remote pond, where Christeson cut Ms. Brouk's throat with a bone knife. *State* v. *Christeson*, 50 S. W. 3d 251, 257–258 (Mo. 2001). Although bleeding profusely, she stayed alive long enough to tell her children she loved them and to watch as Christeson murdered them—her son, by cutting his throat twice and drowning him; her daughter, by pressing down on her throat until she suffocated. *Ibid.* Christeson and his accomplice then threw Ms. Brouk—alive but barely breathing—into the pond to drown on top of her dead children. *Ibid.* This Court granted him a stay of execution. *Christeson* v. *Roper*, 574 U. S. 968 (2014). Lisa Ann Coleman was not so lucky. She was executed on September 17, 2014, for murdering her girlfriend's son, 9-year-old Davontae Williams, by slowly starving him to death. *Coleman* v. *State*, 2009 WL 4696064, *1 (Tex. Crim. App., Dec. 9, 2009). When he died, Davontae had over 250 distinct injuries—including cigarette burns and ligature marks—on his 36-pound frame. *Id.*, at *2. Infections from untreated wounds contributed to his other cause of death: pneumonia. *Id.*, at *1–*2. And Johnny Shane Kormondy, who met his end on January 15, 2015, did so after he and his two accomplices invaded the home of a married couple, took turns raping the wife and forcing her to perform oral sex at gunpoint—at one point, doing both simultaneously—and then put a bullet in her husband's head during the final rape. *Kormondy* v. *Secretary, Fla. Dept. of Corrections*, 688 F. 3d 1244, 1247–1248 (CA11 2012).

Some of our most "egregious" cases have been those in which we have granted relief based on an unfounded Eighth Amendment claim. For example, we have granted relief in

a number of egregious cases based on this Court's decision in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), exempting certain "mentally retarded" offenders from the death penalty. Last Term, the Court granted relief to a man who kidnaped, beat, raped, and murdered a 21-year-old pregnant newlywed, Karol Hurst, also murdering her unborn child, and then, on the same day, murdered a sheriff's deputy acting in the line of duty. *Hall* v. *Florida*, 572 U. S. 701, 704 (2014). And in *Atkins* itself, the Court granted relief to a man who carjacked Eric Michael Nesbitt, forced him to withdraw money from a bank, drove him to a secluded area, and then shot him multiple times before leaving him to bleed to death. *Atkins* v. *Commonwealth*, 257 Va. 160, 166–167, 510 S. E. 2d 445, 449–450 (1999).

The Court has also misinterpreted the Eighth Amendment to grant relief in egregious cases involving rape. In *Kennedy* v. *Louisiana*, 554 U. S. 407 (2008), the Court granted relief to a man who had been sentenced to death for raping his 8-year-old stepdaughter. The rape was so violent that it "separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure," and tore her "entire perineum . . . from the posterior fourchette to the anus." *Id.*, at 414. The evidence indicated that the petitioner spent *at least* an hour and half attempting to destroy the evidence of his crime before seeking emergency assistance, even as his stepdaughter bled profusely from her injuries. *Id.*, at 415. And in *Coker* v. *Georgia*, 433 U. S. 584 (1977) (plurality opinion), the Court granted relief to a petitioner who had escaped from prison, broken into the home of a young married couple and their newborn, forced the wife to bind her husband, gagged her husband with her underwear, raped her (even after being told that she was recovering from a recent childbirth), and then kidnaped her after threatening her husband, *Coker* v. *State*, 234 Ga. 555, 556–557, 216 S. E. 2d 782, 786–787 (1975). In each case, the Court crafted an Eighth Amendment right to be free

from execution for the crime of rape—whether it be of an adult, *Coker*, 433 U. S., at 592, or a child, *Kennedy*, *supra*, at 413.

The Court's recent decision finding that the Eighth Amendment prohibits the execution of those who committed their crimes as juveniles is no different. See *Roper* v. *Simmons*, 543 U. S. 551 (2005). Although the Court had rejected the claim less than two decades earlier, *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), it decided to revisit the issue for a petitioner who had slain his victim because "he wanted to murder someone" and believed he could "get away with it" because he was a few months shy of his 18th birthday. 543 U. S., at 556. His randomly chosen victim was Shirley Crook, whom he and his friends kidnaped in the middle of the night, bound with duct tape and electrical wire, and threw off a bridge to drown in the river below. *Id.*, at 556–557. The State of Alabama's brief in that case warned the Court that its decision would free from death row a number of killers who had been sentenced for crimes committed as juveniles. Brief for State of Alabama et al. as *Amici Curiae* in *Roper* v. *Simmons*, O. T. 2004, No. 03–633. Mark Duke, for example, murdered his father for refusing to loan him a truck, and his father's girlfriend and her two young daughters because he wanted no witnesses to the crime. *Id.*, at 4. He shot his father and his father's girlfriend pointblank in the face as they pleaded for their lives. *Id.*, at 5–6. He then tracked the girls down in their hiding places and slit their throats, leaving them alive for several minutes as they drowned in their own blood. *Id.*, at 6–7.

Whatever one's views on the permissibility or wisdom of the death penalty, I doubt anyone would disagree that each of these crimes was egregious enough to merit the severest condemnation that society has to offer. The only *constitutional* problem with the fact that these criminals were spared that condemnation, while others were not, is that their amnesty came in the form of unfounded claims. Arbi-

trariness has nothing to do with it.[4] To the extent that we are ill at ease with these disparate outcomes, it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

For the reasons stated in JUSTICE SOTOMAYOR's opinion, I dissent from the Court's holding. But rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

The relevant legal standard is the standard set forth in the Eighth Amendment. The Constitution there forbids the "inflict[ion]" of "cruel and unusual punishments." Amdt. 8. The Court has recognized that a "claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002). Indeed, the Constitution prohibits various gruesome punishments that were common in Blackstone's day. See 4 W. Blackstone, Commentaries on the Laws of England 369–370 (1769) (listing mutilation and dismembering, among other punishments).

Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied

[4] JUSTICE BREYER appears to acknowledge that our decision holding mandatory death penalty schemes unconstitutional, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), may have introduced the problem of arbitrary application. *Post*, at 920–921. I agree that *Woodson* eliminated one reliable legislative response to concerns about arbitrariness. *Graham*, 506 U. S., at 486 (THOMAS, J., concurring). Because that decision was also questionable on constitutional grounds, *id.*, at 486–488, I would be willing to revisit it in a future case.

reliably and not arbitrarily. See *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt* v. *Florida*, 428 U. S. 242, 247 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *Jurek* v. *Texas*, 428 U. S. 262, 268 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); but cf. *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion) (striking down mandatory death penalty); *Roberts* v. *Louisiana*, 428 U. S. 325, 331 (1976) (plurality opinion) (similar). The circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishmen[t]." U. S. Const., Amdt. 8.

I

"Cruel"—Lack of Reliability

This Court has specified that the finality of death creates a "qualitative difference" between the death penalty and other

punishments (including life in prison). *Woodson*, 428 U. S., at 305 (plurality opinion). That "qualitative difference" creates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability. Cf. *Kansas* v. *Marsh*, 548 U. S. 163, 207–211 (2006) (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment).

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed. See, *e. g.*, Liebman, Fatal Injustice: Carlos DeLuna's Execution Shows That a Faster, Cheaper Death Penalty Is a Dangerous Idea, L. A. Times, June 1, 2012, p. A19 (describing results of a 4-year investigation, later published as The Wrong Carlos: Anatomy of a Wrongful Execution (2014), that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent); Grann, Trial by Fire: Did Texas Execute An Innocent Man? The New Yorker, Sept. 7, 2009, p. 42 (describing evidence that Cameron Todd Willingham was convicted, and ultimately executed in 2004, for the apparently motiveless murder of his three children as the result of invalid scientific analysis of the scene of the house fire that killed his children). See also, *e. g.*, Press Release: Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s, Jan. 7, 2011, p. 1 (Colorado Governor granted full and unconditional posthumous pardon to Joe Arridy, a man with an IQ of 46 who was executed in 1936, because, according to the Governor, "an overwhelming body of evidence indicates the 23-year-old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not

in Pueblo at the time of the killing, and an admission of guilt by someone else"); R. Warden, Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions 157–158 (2005) (in 1987, Nebraska Governor Bob Kerrey pardoned William Jackson Marion, who had been executed a century earlier for the murder of John Cameron, a man who later turned up alive; the alleged victim, Cameron, had gone to Mexico to avoid a shotgun wedding).

For another, the evidence that the death penalty has been wrongly *imposed* (whether or not it was carried out), is striking. As of 2002, this Court used the word "disturbing" to describe the number of instances in which individuals had been sentenced to death but later exonerated. At that time, there was evidence of approximately 60 exonerations in capital cases. *Atkins*, 536 U. S., at 320, n. 25; National Registry of Exonerations, online at http://www.law.umich.edu/special/exoneration/Pages/about.aspx (all Internet materials as visited June 25, 2015, and available in Clerk of Court's case file). (I use "exoneration" to refer to relief from *all* legal consequences of a capital conviction through a decision by a prosecutor, a Governor, or a court, after new evidence of the defendant's innocence was discovered.) Since 2002, the number of exonerations in capital cases has risen to 115. *Ibid.*; National Registry of Exonerations, Exonerations in the United States, 1989–2012, pp. 6–7 (2012) (Exonerations 2012 Report) (defining exoneration); accord, Death Penalty Information Center (DPIC), Innocence: List of Those Freed From Death Row, online at http://www.deathpenaltyinfo.org/innocence-and-death-penalty (calculating, under a slightly different definition of exoneration, the number of exonerations since 1973 as 154). Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations. National Registry of Exonerations, Exonerations in 2014, p. 2 (2015).

The stories of three of the men exonerated within the last year are illustrative. DNA evidence showed that Henry Lee McCollum did not commit the rape and murder for which he had been sentenced to death. Katz & Eckholm, DNA Evidence Clears Two Men in 1983 Murder, N. Y. Times, Sept. 3, 2014, p. A1. Last Term, this Court ordered that Anthony Ray Hinton, who had been convicted of murder, receive further hearings in state court; he was exonerated earlier this year because the forensic evidence used against him was flawed. *Hinton* v. *Alabama*, 571 U. S. 263 (2014) (*per curiam*); Blinder, Alabama Man on Death Row for Three Decades Is Freed as State's Case Erodes, N. Y. Times, Apr. 4, 2014, p. A11. And when Glenn Ford, also convicted of murder, was exonerated, the prosecutor admitted that even "[a]t the time this case was tried there was evidence that would have cleared Glenn Ford." Stroud, Lead Prosecutor Apologizes for Role in Sending Man to Death Row, Shreveport Times, Mar. 27, 2015. All three of these men spent 30 years on death row before being exonerated. I return to these examples *infra*. Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue. Exonerations 2012 Report 15–16, and nn. 24–26.

Why is that so? To some degree, it must be because the law that governs capital cases is more complex. To some degree, it must reflect the fact that courts scrutinize capital cases more closely. But, to some degree, it likely also reflects a *greater likelihood of an initial wrongful conviction*. How could that be so? In the view of researchers who have conducted these studies, it could be so because the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police,

prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person. See Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531–533 (2005); Gross & O'Brien, Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases, 5 J. Empirical L. Studies 927, 956–957 (2008) (noting that, in comparing those who were exonerated from death row to other capital defendants who were not so exonerated, the initial police investigations tended to be shorter for those exonerated); see also B. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011) (discussing other common causes of wrongful convictions generally including false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel).

In the case of Cameron Todd Willingham, for example, who (as noted earlier) was executed despite likely innocence, the State Bar of Texas recently filed formal misconduct charges against the lead prosecutor for his actions—actions that may have contributed to Willingham's conviction. Possley, Prosecutor Accused of Misconduct in Death Penalty Case, Washington Post, Mar. 19, 2015, p. A3. And in Glenn Ford's case, the prosecutor admitted that he was partly responsible for Ford's wrongful conviction, issuing a public apology to Ford and explaining that, at the time of Ford's conviction, he was "not as interested in justice as [he] was in winning." Stroud, *supra*.

Other factors may also play a role. One is the practice of death qualification; no one can serve on a capital jury who is not willing to impose the death penalty. See Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. St. L. J. 769, 772–793, 807 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death"); Note, Mandatory Voir Dire Questions in Capital Cases: A Potential

Solution to the Biases of Death Qualification, 10 Roger Williams Univ. L. Rev. 211, 214–223 (2004) (similar).

Another is the more general problem of flawed forensic testimony. See Garrett, *supra*, at 7. The Federal Bureau of Investigation (FBI), for example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed. FBI, National Press Releases, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, Apr. 20, 2015. See also Hsu, FBI Admits Errors at Trials: False Matches on Crime-Scene Hair, Washington Post, Apr. 19, 2015, p. A1 (in the District of Columbia, which does not have the death penalty, five of seven defendants in cases with flawed hair analysis testimony were eventually exonerated).

In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, 111 Proceeding of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%).

Finally, if we expand our definition of "exoneration" (which we limited to errors suggesting the defendant was actually innocent) and thereby also categorize as "erroneous" instances in which courts failed to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. Gelman, Liebman, West, & Kiss, A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical L. Studies 209, 217 (2004).

State courts on direct and postconviction review overturned 47% of the sentences they reviewed. *Id.*, at 232. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases. *Ibid.*

This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime. See Earley, A Pink Cadillac, An IQ of 63, and A Fourteen-Year-Old From South Carolina: Why I Can No Longer Support the Death Penalty, 49 U. Rich. L. Rev. 811, 813 (2015) ("I have come to the conclusion that the death penalty is based on a false utopian premise. That false premise is that we have had, do have, will have 100% accuracy in death penalty convictions and executions"); Earley, I Oversaw 36 Executions. Even Death Penalty Supporters Can Push for Change, Guardian, May 12, 2014 (Earley presided over 36 executions as Virginia attorney general from 1998–2001); but see *ante*, at 895 (SCALIA, J., concurring) (apparently finding no special constitutional problem arising from the fact that the execution of an innocent person is irreversible). Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.

II

"Cruel"—Arbitrariness

The arbitrary imposition of punishment is the antithesis of the rule of law. For that reason, Justice Potter Stewart

(who supplied critical votes for the holdings in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), and *Gregg*) found the death penalty unconstitutional as administered in 1972:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman*, 408 U. S., at 309–310 (concurring opinion).

See also *id.*, at 310 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); *id.*, at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional if "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U. S., at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.); see also *id.*, at 189 ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (similar).

The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called "'the worst of the worst.'" *Kansas* v. *Marsh*, 548 U. S., at 206 (dissenting opinion); see also *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005)

("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (internal quotation marks omitted)); *Kennedy* v. *Louisiana*, 554 U. S. 407, 420 (2008) (citing *Roper*, *supra*, at 568).

Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i. e.*, without the "reasonable consistency" legally necessary to reconcile its use with the Constitution's commands. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012. Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637 (2014). The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. *Id.*, at 641–643. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal. *Id.*, at 641. The study then measured the "egregiousness" of the murderer's conduct in those nine cases, developing a system of metrics designed to do so. *Id.*, at 643–645. It then compared the egregiousness of the conduct of the nine defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases (those in which the defendant, though found guilty of a death-eligible offense, was ultimately not sentenced to death). Application of the studies' metrics made clear that only one of those nine defendants was indeed the "worst of the worst" (or was, at least, within the 15% considered most "egregious"). The remaining eight were not. Their behavior was no worse than

the behavior of at least 33 and as many as *170* other defendants (out of a total pool of 205) who had not been sentenced to death. *Id.*, at 678–679.

Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty. See GAO, Report to the Senate and House Committees on the Judiciary: Death Penalty Sentencing 5 (GAO/GGD–90–57, 1990) (82% of the 28 studies conducted between 1972 and 1990 found that race of victim influences capital murder charge or death sentence, a "finding . . . remarkably consistent across data sets, states, data collection methods, and analytic techniques"); Shatz & Dalton, Challenging the Death Penalty With Statistics: *Furman*, *McCleskey*, and a Single County Case Study, 34 Cardozo L. Rev. 1227, 1245–1251 (2013) (same conclusion drawn from 20 plus studies conducted between 1990 and 2013).

Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference. *Id.*, at 1251–1253 (citing many studies).

Geography also plays an important role in determining who is sentenced to death. See *id.*, at 1253–1256. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012) (hereinafter Smith); see also Donohue, *supra*, at 673 ("[T]he single most important influence from

1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. DPIC, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All 9 (Oct. 2013).

What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decision-making authority, the legal discretion, and ultimately the power of the local prosecutor. See, *e. g.*, Goelzhauser, Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions, 96 Judicature 161, 162–163 (2013); Barnes, Sloss, & Thaman, Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases, 51 Ariz. L. Rev. 305 (2009) (analyzing Missouri); Donohue, *supra*, at 681 (Connecticut); Marceau, Kamin, & Foglia, Death Eligibility in Colorado: Many Are Called, Few Are Chosen, 84 U. Colo. L. Rev. 1069 (2013) (Colorado); Shatz & Dalton, *supra*, at 1260–1261 (Alameda County).

Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences. See, *e. g.*, Smith 258–265 (counties with higher death-sentencing rates tend to have weaker public defense programs); Liebman & Clarke, Minority Practice, Majority's Burden: The Death Penalty Today, 9 Ohio St. J. Crim. L. 255, 274 (2011) (hereinafter Liebman & Clarke) (similar); see generally Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835 (1994).

Still others indicate that the racial composition of and distribution within a county plays an important role. See, *e. g.*,

Levinson, Smith, & Young, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 N. Y. U. L. Rev. 513, 533–536 (2014) (summarizing research on this point); see also Shatz & Dalton, *supra*, at 1275 (describing research finding that death-sentencing rates were lowest in counties with the highest nonwhite population); cf. Cohen & Smith, The Racial Geography of the Federal Death Penalty, 85 Wash. L. Rev. 425 (2010) (arguing that the federal death penalty is sought disproportionately where the federal district, from which the jury will be drawn, has a dramatic racial difference from the county in which the federal crime occurred).

Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference. See *Woodward* v. *Alabama*, 571 U. S. 1045, 1050 (2013) (SOTOMAYOR, J., dissenting from denial of certiorari) (noting that empirical evidence suggests that, when Alabama judges reverse jury recommendations, these "judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures"); *Harris* v. *Alabama*, 513 U. S. 504, 519 (1995) (Stevens, J., dissenting) (similar); Gelman, 1 J. Empirical L. Studies, at 247 (elected state judges are less likely to reverse flawed verdicts in capital cases in small towns than in larger communities).

Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

JUSTICE THOMAS catalogs the tragic details of various capital cases, *ante*, at 904–908, and nn. 3, 4 (concurring opinion), but this misses my point. Every murder is tragic, but unless we return to the mandatory death penalty struck down

in *Woodson*, 428 U. S., at 304–305, the constitutionality of capital punishment rests on its limited application to the worst of the worst, *supra*, at 916–918. And this extensive body of evidence suggests that it is not so limited.

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence. See *Gregg*, 428 U. S., at 195 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met"). But that no longer seems likely.

The Constitution does not prohibit the use of prosecutorial discretion. *Id.*, at 199, and n. 50 (joint opinion of Stewart, Powell, and Stevens, JJ.); *McCleskey* v. *Kemp*, 481 U. S. 279, 307–308, and n. 28, 311–312 (1987). It has not proved possible to increase capital defense funding significantly. Smith, The Supreme Court and the Politics of Death, 94 Va. L. Rev. 283, 355 (2008) ("Capital defenders are notoriously underfunded, particularly in states . . . that lead the nation in executions"); American Bar Assn. (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1, Commentary (rev. ed. Feb. 2003), in 31 Hofstra L. Rev. 913, 985 (2003) ("[C]ompensation of attorneys for death penalty representation remains notoriously inadequate"). And courts cannot easily inquire into judicial motivation. See, *e. g.*, *Harris*, *supra*.

Moreover, racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury's evaluation of mitigating evidence, see *Callins* v. *Collins*, 510 U. S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death"). Nevertheless, it remains the jury's task to make the individualized assessment of whether the defendant's

mitigation evidence entitles him to mercy. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989); *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (opinion of Burger, C. J.); *Woodson*, *supra*, at 304–305 (plurality opinion).

Finally, since this Court held that comparative proportionality review is not constitutionally required, *Pulley* v. *Harris*, 465 U. S. 37 (1984), it seems unlikely that appeals can prevent the arbitrariness I have described. See Kaufman-Osborn, Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State), 79 Wash. L. Rev. 775, 791–792 (2004) (after *Pulley*, many States repealed their statutes requiring comparative proportionality review, and most state high courts "reduced proportionality review to a perfunctory exercise" (internal quotation marks omitted)).

The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years. I see discrepancies for which I can find no rational explanations. Cf. *Godfrey*, 446 U. S., at 433 (plurality opinion) ("There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not"). Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnaped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime. Compare *State* v. *Badgett*, 361 N. C. 234, 644 S. E. 2d 206 (2007), and Pet. for Cert. in *Badgett* v. *North Carolina*, O. T. 2006, No. 07–6156, with Charbonneau, Andre Edwards Sentenced to Life in Prison for 2001 Murder, WRAL, Mar. 26, 2004, online at http://www.wral.com/news/local/story/109648. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another

defendant does not, despite having committed a "triple murder" by killing a young man and his pregnant wife? Compare *Commonwealth* v. *Boxley*, 596 Pa. 620, 948 A. 2d 742 (2008), and Pet. for Cert., O. T. 2008, No. 08–6172, with Shea, Judge Gives Consecutive Life Sentences for Triple Murder, Philadelphia Inquirer, June 29, 2004, p. B5. For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept? See Donohue, Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation From 4686 Murders to One Execution, pp. 128–134 (2013), online at http://works.bepress.com/john_donohue/87. In each instance, the sentences compared were imposed in the same State at about the same time.

The question raised by these examples (and the many more I could give but do not), as well as by the research to which I have referred, is the same question Justice Stewart, Justice Powell, and others raised over the course of several decades: The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?

III

"Cruel"—Excessive Delays

The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution's own

demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U. S., at 568. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall* v. *Florida*, 572 U. S. 701, 724 (2014). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U. S., at 306 (Stewart, J., concurring) (death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson*, 428 U. S., at 305 (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

These procedural necessities take time to implement. And, unless we abandon the procedural requirements that ensure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

A

Consider first the statistics. In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death. DPIC, Execution List 2014, online at http://www.deathpenaltyinfo.org/execution-list-2014 (showing an average delay of 17 years, 7 months). In some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution. Tr. of Oral Arg. in *Hall* v. *Florida*, O. T. 2013, No. 12–10882, p. 46.

The length of the average delay has increased dramatically over the years. In 1960, the average delay between sentencing and execution was two years. See Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment? 29 Seton Hall L. Rev. 147, 181 (1998). Ten years ago (in 2004) the average delay was about 11 years. See Dept. of Justice, Bureau of Justice Statistics (BJS), T. Snell, Capital Punishment, 2013–Statistical Tables 14 (Table 10) (rev. Dec. 2014) (hereinafter BJS 2013 Stats). By last year the average had risen to about 18 years. DPIC, Execution List 2014, *supra*. Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed. BJS 2013 Stats, at 14, 18 (Tables 11 and 15).

I cannot find any reasons to believe the trend will soon be reversed.

B

These lengthy delays create two special constitutional difficulties. See *Johnson* v. *Bredesen*, 558 U. S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari). First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Ibid.*; *Gomez* v. *Fierro*, 519 U. S. 918 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves "constitute cruel and unusual punishment prohibited by the Eighth Amendment"); see also *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (BREYER, J., dissenting from denial of certiorari). Second, lengthy delay undermines the death penalty's penological rationale. *Johnson*, *supra*, at 1069; *Thompson* v. *McNeil*, 556

U. S. 1114, 1115 (2009) (statement of Stevens, J., respecting denial of certiorari).

1

Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011). And it is well documented that such prolonged solitary confinement produces numerous deleterious harms. See, *e. g.*, Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124, 130 (2003) (cataloging studies finding that solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," among many other symptoms); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash U. J. L. & Policy 325, 331 (2006) ("[E]ven a few days of solitary confinement will predictably shift the [brain's] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium"); accord, *In re Medley*, 134 U. S. 160, 167–168 (1890); see also *Davis* v. *Ayala*, *ante*, at 286–289 (KENNEDY, J., concurring).

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Medley*, *supra*, at 172. The Court was there *de-*

scribing a delay of a mere four weeks. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in decades. *Supra*, at 925–926.

Moreover, we must consider death warrants that have been issued and revoked, not once, but repeatedly. See, *e. g.*, Pet. for Cert. in *Suárez Medina* v. *Texas*, O. T. 2001, No. 02–5752, pp. 35–36 (filed Aug. 13, 2002) ("On fourteen separate occasions since Mr. Suárez Medina's death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains"); Lithwick, Cruel but Not Unusual, Slate, Apr. 1, 2011, online at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html (John Thompson had seven death warrants signed before he was exonerated); see also, *e. g.*, WFMZ–TV 69 News, Michael John Parrish's Execution Warrant Signed by Governor Corbett (Aug. 18, 2014), online at http://www.wfmz.com/news/Regional-Poconos-Coal/Local/michael-john-parrishs-execution-warrant-signed-by-governorcorbett/27595356 (former Pennsylvania Governor signed 36 death warrants in his first 3.5 years in office even though Pennsylvania has not carried out an execution since 1999).

Several inmates have come within hours or days of execution before later being exonerated. Willie Manning was *four hours* from his scheduled execution before the Mississippi Supreme Court stayed the execution. See Robertson, With Hours To Go, Execution Is Postponed, N. Y. Times, Apr. 8, 2015, p. A17. Two years later, Manning was exonerated after the evidence against him, including flawed testimony from an FBI hair examiner, was severely undermined. Nave, Why Does the State Still Want To Kill Willie Jerome Manning? Jackson Free Press, Apr. 29, 2015. Nor is Manning an outlier case. See, *e. g.*, Martin, Randall Adams, 61, Dies; Freed With Help of Film, N. Y. Times, June 26, 2011,

p. 24 (Randall Adams: stayed by this Court 3 days before execution; later exonerated); N. Davies, White Lies 231, 292, 298, 399 (1991) (Clarence Lee Brandley: execution stayed twice, once 6 days and once 10 days before; later exonerated); M. Edds, An Expendable Man 93 (2003) (Earl Washington, Jr.: stayed 9 days before execution; later exonerated).

Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. See, *e. g.,* ACLU Report 8; Rountree, Volunteers for Execution: Directions for Further Research Into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of " 'guys who dropped their appeals because of the intolerable conditions' "). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & C. 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

Others have written at great length about the constitutional problems that delays create, and, rather than repeat their facts, arguments, and conclusions, I simply refer to some of their writings. See, *e. g., Johnson*, 558 U. S., at 1069 (statement of Stevens, J.) (delay "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement"); *Furman*, 408 U. S., at 288 (Brennan, J., concurring) ("long wait between the imposition of sentence and the actual infliction of death" is "inevitable" and often "exacts a frightful toll"); *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *People* v. *Anderson*, 6

Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972) (collecting sources) ("[C]ruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out" (footnote omitted)); *District Attorney for Suffolk Dist.* v. *Watson*, 381 Mass. 648, 673, 411 N. E. 2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty unconstitutional under State Constitution in part because "[it] will be carried out only after agonizing months and years of uncertainty"); see also *Riley* v. *Attorney General of Jamaica*, [1983] 1 A. C. 719, 734–735 (P. C. 1982) (Lord Scarman, joined by Lord Brightman, dissenting) ("execution after inordinate delay" would infringe prohibition against "cruel and unusual punishments" in § 10 of the "Bill of Rights of 1689," the precursor to our Eighth Amendment); *Pratt* v. *Attorney Gen. of Jamaica*, [1994] 2 A. C. 1, 4 (P. C. 1993); *id.*, at 32–33 (collecting cases finding inordinate delays unconstitutional or the equivalent); *State* v. *Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.); *Catholic Commission for Justice & Peace in Zimbabwe* v. *Attorney-General*, [1993] 1 Zim. L. R. 242, 282 (inordinate delays unconstitutional); *Soering* v. *United Kingdom*, 11 Eur. Ct. H. R. (ser. A), p. 439 (1989) (extradition of murder suspect to United States would violate the European Convention on Human Rights in light of risk of delay before execution); *United States* v. *Burns*, [2001] 1 S. C. R. 283, 353, ¶123 (similar).

2

The second constitutional difficulty resulting from lengthy delays is that those delays undermine the death penalty's penological rationale, perhaps irreparably so. The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation. Capital punishment by definition does not rehabilitate. It does, of course, incapaci-

tate the offender. But the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates. See *Ring* v. *Arizona*, 536 U. S. 584, 615 (2002) (BREYER, J., concurring in judgment).

Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution. See, *e. g.*, *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.). Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime. Compare *ante*, at 897–898 (SCALIA, J., concurring) (collecting studies finding deterrent effect), with, *e. g.*, Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A Special Report, States With No Death Penalty Share Lower Homicide Rates, N. Y. Times, Sept. 22, 2000, p. A1 (from 1980–2000, homicide rate in death penalty States was 48% to 101% higher than in non-death-penalty States); Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791, 794 (2005) (evaluating existing statistical evidence and concluding that there is "profound uncertainty" about the existence of a deterrent effect).

Recently, the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should "not be used to inform" discussion

about the deterrent value of the death penalty. National Research Council, Deterrence and the Death Penalty 2 (D. Nagin & J. Pepper eds. 2012); accord, *Baze* v. *Rees*, 553 U. S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders").

I recognize that a "lack of evidence" for a proposition does not prove the contrary. See *Ring*, *supra*, at 615 (one might believe the studies "inconclusive"). But suppose that we add to these studies the fact that, today, very few of those sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. DPIC, Execution List 2014. Then, does it still seem likely that the death penalty has a significant deterrent effect?

Consider, for example, what actually happened to the 183 inmates sentenced to death in 1978. As of 2013 (35 years later), 38 (or 21% of them) had been executed; 132 (or 72%) had had their convictions or sentences overturned or commuted; and 7 (or 4%) had died of other (likely natural) causes. Six (or 3%) remained on death row. BJS 2013 Stats, at 19 (Table 16).

The example illustrates a general trend. Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row. *Id.*, at 20 (Table 17); see also Baumgartner & Dietrich, Most Death Penalty Sentences Are Overturned: Here's Why That Matters, Washington Post Blog, Monkey Cage, Mar. 17, 2015 (similar).

Thus an offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration)

can take place. In a word, executions are *rare*. And an individual contemplating a crime but evaluating the potential punishment would know that, in any event, he faces a potential sentence of life without parole.

These facts, when recurring, must have some offsetting effect on a potential perpetrator's fear of a death penalty. And, even if that effect is no more than slight, it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes. See *Furman*, 408 U. S., at 311–312 (White, J., concurring) (It cannot "be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient").

But what about retribution? Retribution is a valid penological goal. I recognize that surviving relatives of victims of a horrendous crime, or perhaps the community itself, may find vindication in an execution. And a community that favors the death penalty has an understandable interest in representing their voices. But see A. Sarat, Mercy on Trial: What It Means To Stop an Execution 130 (2005) (Illinois Governor George Ryan explained his decision to commute all death sentences on the ground that it was "cruel and unusual" for "family members to go through this . . . legal limbo for [20] years").

The relevant question here, however, is whether a "community's sense of retribution" can often find vindication in "a death that comes," if at all, "only several decades after the crime was committed." *Valle* v. *Florida*, 564 U. S. 1067, 1068 (2011) (BREYER, J., dissenting from denial of stay). By then the community is a different group of people. The offenders and the victims' families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims' families will know that, even without a further

death, the offender will serve decades in prison under a sentence of life without parole.

I recognize, of course, that this may not always be the case, and that sometimes the community believes that an execution could provide closure. Nevertheless, the delays and low probability of execution must play some role in any calculation that leads a community to insist on death as retribution. As I have already suggested, they may well attenuate the community's interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty. *Id.*, at 1067. In any event, I believe that whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole (a sentence that every State now permits, see ACLU, A Living Death: Life Without Parole for Nonviolent Offenses 11, and n. 10 (2013)).

Finally, the fact of lengthy delays undermines any effort to justify the death penalty in terms of its prevalence when the Founders wrote the Eighth Amendment. When the Founders wrote the Constitution, there were no 20- or 30-year delays. Execution took place soon after sentencing. See P. Mackey, Hanging in the Balance: The Anti-Capital Punishment Movement in New York State, 1776–1861, p. 17 (1982); T. Jefferson, A Bill for Proportioning Crimes and Punishments (1779), reprinted in The Complete Jefferson 90, 95 (S. Padover ed. 1943); 2 Papers of John Marshall 207–209 (C. Cullen & H. Johnson eds. 1977) (describing petition for commutation based in part on 5-month delay); *Pratt* v. *Attorney Gen. of Jamaica*, [1994] 2 A. C., at 7 (same in United Kingdom) (collecting cases). And, for reasons I shall describe, *infra*, at 935–938, we cannot return to the quick executions in the founding era.

3

The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale. And this Court has said that, if the death penalty

does not fulfill the goals of deterrence or retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment." *Atkins*, 536 U. S., at 319 (quoting *Enmund* v. *Florida*, 458 U. S. 782, 798 (1982); internal quotation marks omitted); see also *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Furman*, *supra*, at 312 (White, J., concurring) (a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment"); *Thompson*, 556 U. S., at 1115 (statement of Stevens, J., respecting denial of certiorari) (similar).

Indeed, Justice Lewis Powell (who provided a crucial vote in *Gregg*) came to much the same conclusion, albeit after his retirement from this Court. Justice Powell had come to the Court convinced that the Federal Constitution did not outlaw the death penalty but rather left the matter up to individual States to determine. *Furman*, *supra*, at 431–432 (Powell, J., dissenting); see also J. Jeffries, Justice Lewis F. Powell, Jr., p. 409 (2001) (describing Powell, during his time on the Court, as a "fervent partisan" of "the constitutionality of capital punishment").

Soon after Justice Powell's retirement, Chief Justice Rehnquist appointed him to chair a committee addressing concerns about delays in capital cases, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (Committee). The Committee presented a report to Congress, and Justice Powell testified that "[d]elay robs the penalty of much of its deterrent value." Habeas Corpus Reform, Hearings before the Senate Committee on the Judiciary, 100th Cong., 1st and 2d Sess., 35 (1989 and 1990). Justice Powell, according to his official biographer, ultimately concluded that capital punishment

> "'serves no useful purpose.' The United States was 'unique among the industrialized nations of the West in maintaining the death penalty,' and it was enforced so rarely that it could not deter. More important, the haggling and delay and seemingly endless litigation in every capital case brought the law itself into disrepute." Jeffries, *supra*, at 452.

In short, the problem of excessive delays led Justice Powell, at least in part, to conclude that the death penalty was unconstitutional.

As I have said, today delays are much worse. When Chief Justice Rehnquist appointed Justice Powell to the Committee, the average delay between sentencing and execution was 7 years and 11 months, compared with 17 years and 7 months today. Compare BJS, L. Greenfeld, Capital Punishment, 1990, p. 11 (Table 12) (Sept. 1991), with *supra*, at 925.

C

One might ask, why can Congress or the States not deal directly with the delay problem? Why can they not take steps to shorten the time between sentence and execution, and thereby mitigate the problems just raised? The answer is that shortening delay is much more difficult than one might think. And that is in part because efforts to do so risk causing procedural harms that also undermine the death penalty's constitutionality.

For one thing, delays have helped to make application of the death penalty more reliable. Recall the case of Henry Lee McCollum, whom DNA evidence exonerated 30 years after his conviction. Katz & Eckholm, N. Y. Times, at A1. If McCollum had been executed earlier, he would not have lived to see the day when DNA evidence exonerated him and implicated another man; that man is already serving a life sentence for a rape and murder that he committed just a few weeks after the murder McCollum was convicted of. *Ibid.*

In fact, this Court had earlier denied review of McCollum's claim over the public dissent of only one Justice. *McCollum* v. *North Carolina*, 512 U. S. 1254 (1994). And yet a full 20 years after the Court denied review, McCollum was exonerated by DNA evidence. There are a significant number of similar cases, some of which I have discussed earlier. See also DPIC, Innocence List (Nathson Fields, 23 years; Paul House, 23 years; Nicholas Yarris, 21 years; Anthony Graves, 16 years; Damon Thibodeaux, 15 years; Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu, all exonerated for the same crime 39 years after their convictions).

In addition to those who are exonerated on the ground that they are innocent, there are other individuals whose sentences or convictions have been overturned for other reasons (as discussed above, state and federal courts found error in 68% of the capital cases they reviewed between 1973 and 1995). See Part I, *supra*. In many of these cases, a court will have found that the individual did not merit the death penalty in a special sense—namely, he failed to receive all the procedural protections that the law requires for the death penalty's application. By eliminating some of these protections, one likely could reduce delay. But which protections should we eliminate? Should we eliminate the trial-related protections we have established for capital defendants: that they be able to present to the sentencing judge or jury all mitigating circumstances, *Lockett* v. *Ohio*, 438 U. S. 586; that the State provide guidance adequate to reserve the application of the death penalty to particularly serious murders, *Gregg*, *supra*; that the State provide adequate counsel and, where warranted, adequate expert assistance, *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Wiggins* v. *Smith*, 539 U. S. 510 (2003); *Ake* v. *Oklahoma*, 470 U. S. 68 (1985); or that a jury must find the aggravating factors necessary to impose the death penalty, *Ring*, 536 U. S. 584; see also *id.*, at 614 (BREYER, J., concurring in judgment)? Should we no longer ensure that the State does not execute those who are seriously intellectually disabled, *Atkins*, 536 U. S. 304?

Should we eliminate the requirement that the manner of execution be constitutional, *Baze*, 553 U. S. 35, or the requirement that the inmate be mentally competent at the time of his execution, *Ford* v. *Wainwright*, 477 U. S. 399 (1986)? Or should we get rid of the criminal protections that all criminal defendants receive—for instance, that defendants claiming violation of constitutional guarantees (say, "due process of law") may seek a writ of habeas corpus in federal courts? See, *e. g., O'Neal* v. *McAninch*, 513 U. S. 432 (1995). My answer to these questions is "surely not." But see *ante*, at 898–899 (SCALIA, J., concurring).

One might, of course, argue that courts, particularly federal courts providing additional layers of review, apply these and other requirements too strictly, and that causes delay. But, it is difficult for judges, as it would be difficult for anyone, *not* to apply legal requirements punctiliously when the consequence of failing to do so may well be death, particularly the death of an innocent person. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) ("[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error"); *Kyles* v. *Whitley*, 514 U. S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case" (internal quotation marks omitted)); *Thompson*, 556 U. S., at 1116 (statement of Stevens, J.) ("Judicial process takes time, but the error rate in capital cases illustrates its necessity").

Moreover, review by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court, see *Hinton* v. *Alabama*, 571 U. S. 263, he may well have been executed rather than exonerated. In my own view, our legal system's complexity, our federal system with its separate state and federal courts, our constitutional guarantees, our commitment to fair procedure, and, above all, a special need for re-

liability and fairness in capital cases, combine to make significant procedural "reform" unlikely in practice to reduce delays to an acceptable level.

And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. See *Knight*, 528 U. S., at 998 (BREYER, J., dissenting from denial of certiorari) (one of the primary causes of the delay is the States' "failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing"). But a death penalty system that minimizes delays would undermine the legal system's efforts to secure reliability and procedural fairness.

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. *Woodson*, 428 U. S., at 305 (plurality opinion); *Hall*, 572 U. S., at 724; *Roper*, 543 U. S., at 568. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose. *Furman*, 408 U. S., at 312 (White, J., concurring); *Gregg*, 428 U. S., at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Atkins*, *supra*, at 319.

IV

"Unusual"—Decline in Use of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the

last two decades, the imposition and implementation of the death penalty have increasingly become unusual. I can illustrate the significant decline in the use of the death penalty in several ways.

An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970's to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Many States having revised their death penalty laws to meet *Furman*'s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. BJS 2013 Stats, at 14, 19 (Tables 11 and 16). But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. See Appendix A, *infra* (showing sentences from 1977–2014). In 1999, 279 persons were sentenced to death. BJS 2013 Stats, at 19 (Table 16). Last year, just 73 persons were sentenced to death. DPIC, The Death Penalty in 2014: Year End Report 1 (2015).

That trend, a significant decline in the last 15 years, also holds true with respect to the number of annual executions. See Appendix B, *infra* (showing executions from 1977–2014). In 1999, 98 people were executed. BJS, Data Collection: National Prisoner Statistics Program (BJS Prisoner Statistics) (available in Clerk of Court's case file). Last year, that number was only 35. DPIC, The Death Penalty in 2014, *supra*, at 1.

Next, one can consider state-level data. Often when deciding whether a punishment practice is, constitutionally speaking, "unusual," this Court has looked to the number of States engaging in that practice. *Atkins*, 536 U. S., at 313–316; *Roper*, *supra*, at 564–566. In this respect, the number of active death penalty States has fallen dramatically. In 1972, when the Court decided *Furman*, the death penalty

was lawful in 41 States. Nine States had abolished it. E. Mandery, A Wild Justice: The Death and Resurrection of Capital Punishment in America 145 (2013). As of today, 19 States have abolished the death penalty (along with the District of Columbia), although some did so prospectively only. See DPIC, States With and Without the Death Penalty, online at http://www.deathpenaltyinfo.org/states-and-without-death-penalty. In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years: Arkansas (last execution 2005); California (2006); Colorado (1997); Kansas (no executions since the death penalty was reinstated in 1976); Montana (2006); Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina (2006); Oregon (1997); Pennsylvania (1999); and Wyoming (1992). DPIC, Executions by State and Year, online at http://www.deathpenaltyinfo.org/node/5741.

Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event. BJS Prisoner Statistics (Delaware, Idaho, Indiana, Kentucky, Louisiana, South Dakota, Tennessee, Utah, Washington). That leaves 11 States in which it is fair to say that capital punishment is not "unusual." And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014. See DPIC, Number of Executions by State and Region Since 1976, online at http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976. Indeed, last year, only seven States conducted an execution. DPIC, Executions by State and Year, *supra*; DPIC, Death Sentences in the United States From 1977 by State and by Year, online at http://www.deathpenaltyinfo.org/

death-sentences-united-states-1977-2008. In other words, in 43 States, no one was executed.

In terms of population, if we ask how many Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%. See Appendix C, *infra*.

At the same time, use of the death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. See *supra*, at 918–920. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. Liebman & Clarke 264–265; cf. *id.*, at 266 (counties with 10% of the Nation's population imposed 43% of its death sentences). By the early 2000's, the death penalty was only actively practiced in a very small number of counties: Between 2004 and 2009, only 35 counties imposed five or more death sentences, *i. e.*, approximately one per year. See Appendix D, *infra* (such counties colored in red) (citing Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015). And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. See Appendix E, *infra*. In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties. Liebman & Clarke 265–266, and n. 47; cf. *ibid.* (counties with less than 5% of the Nation's population carried out over half of its executions from 1976–2007).

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i. e.*, three States, account

for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole. See *Furman*, 408 U. S., at 311 (1972) (White, J., concurring) (executions could be so infrequently carried out that they "would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system . . . when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied").

Moreover, we have said that it "'is not so much the number of these States that is significant, but the consistency of the direction of change.'" *Roper*, 543 U. S., at 566 (quoting *Atkins*, *supra*, at 315) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in *Stanford* v. *Kentucky*, 492 U. S. 361 (1989)). Judged in that way, capital punishment has indeed become unusual. Seven States have abolished the death penalty in the last decade, including (quite recently) Nebraska. DPIC, States With and Without the Death Penalty, *supra*. And several States have come within a single vote of eliminating the death penalty. Seelye, Measure To Repeal Death Penalty Fails by a Single Vote in New Hampshire Senate, N. Y. Times, Apr. 17, 2014, p. A12; Dennison, House Deadlocks on Bill To Abolish Death Penalty in Montana, Billings Gazette, Feb. 23, 2015; see also Offredo, Delaware Senate Passes Death Penalty Repeal Bill, Delaware News Journal, Apr. 3, 2015. Eleven States, as noted earlier, have not executed anyone in eight years. *Supra*, at 941 and this page. And several States have formally stopped executing inmates. See Yardley, Oregon's Governor Says He Will Not Allow Executions, N. Y. Times, Nov. 23, 2011, p. A14 (Ore-

gon); Governor of Colorado, Exec. Order No. D2013–006, May 22, 2013 (Colorado); Lovett, Executions Are Suspended by Governor in Washington, N. Y. Times, Feb. 12, 2014, p. A12 (Washington); Begley, Pennsylvania Stops Using the Death Penalty, Time, Feb. 13, 2015 (Pennsylvania); see also Welsh-Huggins, Associated Press, Ohio Executions Rescheduled, Jan. 30, 2015 (Ohio).

Moreover, the direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. See *Atkins*, 536 U. S., at 315–316; DPIC, States With and Without the Death Penalty. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015). DPIC, Executions by State and Year; BJS, T. Snell, Capital Punishment, 1999, p. 6 (Dec. 2000) (Table 5) (hereinafter BJS 1999 Stats); BJS 2013 Stats, at 19 (Table 16); von Drehle, Bungled Executions, Backlogged Courts, and Three More Reasons the Modern Death Penalty Is a Failed Experiment, Time, June 8, 2015, p. 26. Similarly dramatic declines are present in Virginia, Oklahoma, Missouri, and North Carolina. BJS 1999 Stats, at 6 (Table 5); BJS 2013 Stats, at 19 (Table 16).

These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter. Wilson, Support for Death Penalty Still High, But Down, Washington Post, GovBeat, June 5, 2014, online at www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down; see also ALI, Report of the Council to the Membership on the Matter of the Death Penalty 4 (Apr. 15, 2009) (withdrawing Model Penal Code section on capital punishment from the Code, in part because of doubts that the American Law Institute

could "recommend procedures that would" address concerns about the administration of the death penalty); cf. *Gregg*, 428 U. S., at 193–194 (joint opinion of Stewart, Powell, and Stevens, JJ.) (relying in part on Model Penal Code to conclude that a "carefully drafted statute" can satisfy the arbitrariness concerns expressed in *Furman*).

I rely primarily upon domestic, not foreign, events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is "unusual." Those circumstances are sufficient to warrant our reconsideration of the death penalty's constitutionality. I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. Oakford, UN Vote Against Death Penalty Highlights Global Abolitionist Trend—and Leaves the US Stranded, Vice News, Dec. 19, 2014, online at https://news.vice.com/article/un-vote-against-death-penalty-highlights-global-abolitionist-trend-and-leaves-the-us-stranded. In 2013, only 22 countries in the world carried out an execution. International Commission Against Death Penalty, Review 2013, pp. 2–3. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. *Id.*, at 3. Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). *Id.*, at 2. And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia. Amnesty International, Death Sentences and Executions 2013, p. 3 (2014). (This figure does not include China, which has a large population, but where precise data cannot be obtained. *Id.*, at 2.)

V

I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legis-

latures? The Constitution foresees a country that will make most important decisions democratically. Most nations that have abandoned the death penalty have done so through legislation, not judicial decision. And legislators, unlike judges, are free to take account of matters such as monetary costs, which I do not claim are relevant here. See, *e. g.*, Berman, Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor's Veto, Washington Post Blog, Post Nation, May 27, 2015) (listing cost as one of the reasons why Nebraska legislators recently repealed the death penalty in that State); cf. California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California 10 (June 30, 2008) (death penalty costs California $137 million per year; a comparable system of life imprisonment without parole would cost $11.5 million per year), online at http://www.ccfaj.org/rr-dp-official.html; Dáte, The High Price of Killing Killers, Palm Beach Post, Jan. 4, 2000, p. 1A (cost of each execution is $23 million above cost of life imprisonment without parole in Florida).

The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. See *Marbury* v. *Madison*, 1 Cranch 137,

177 (1803); *Hall*, 572 U. S., at 721 ("That exercise of independent judgment is the Court's judicial duty"). We have made clear that "'[t]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Id.*, at 721 (quoting *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion)); see also *Thompson* v. *Oklahoma*, 487 U. S. 815, 833, n. 40 (1988) (plurality opinion).

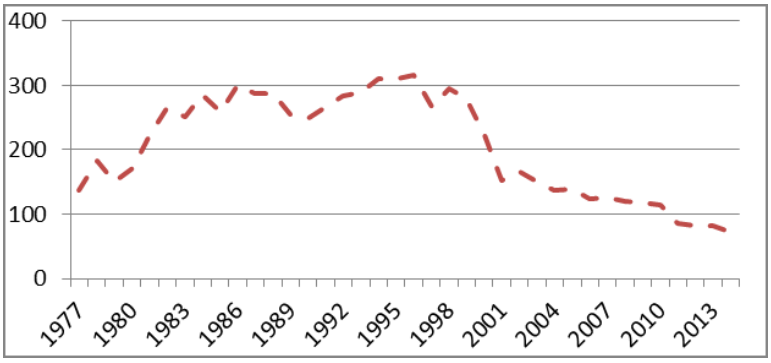
For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.

With respect, I dissent.

APPENDIXES

A

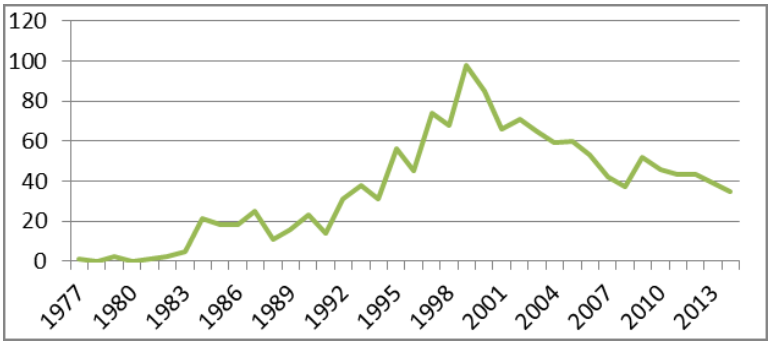
Death Sentences Imposed 1977–2014



Appendix B to opinion of BREYER, J.

B

Executions 1977–2014



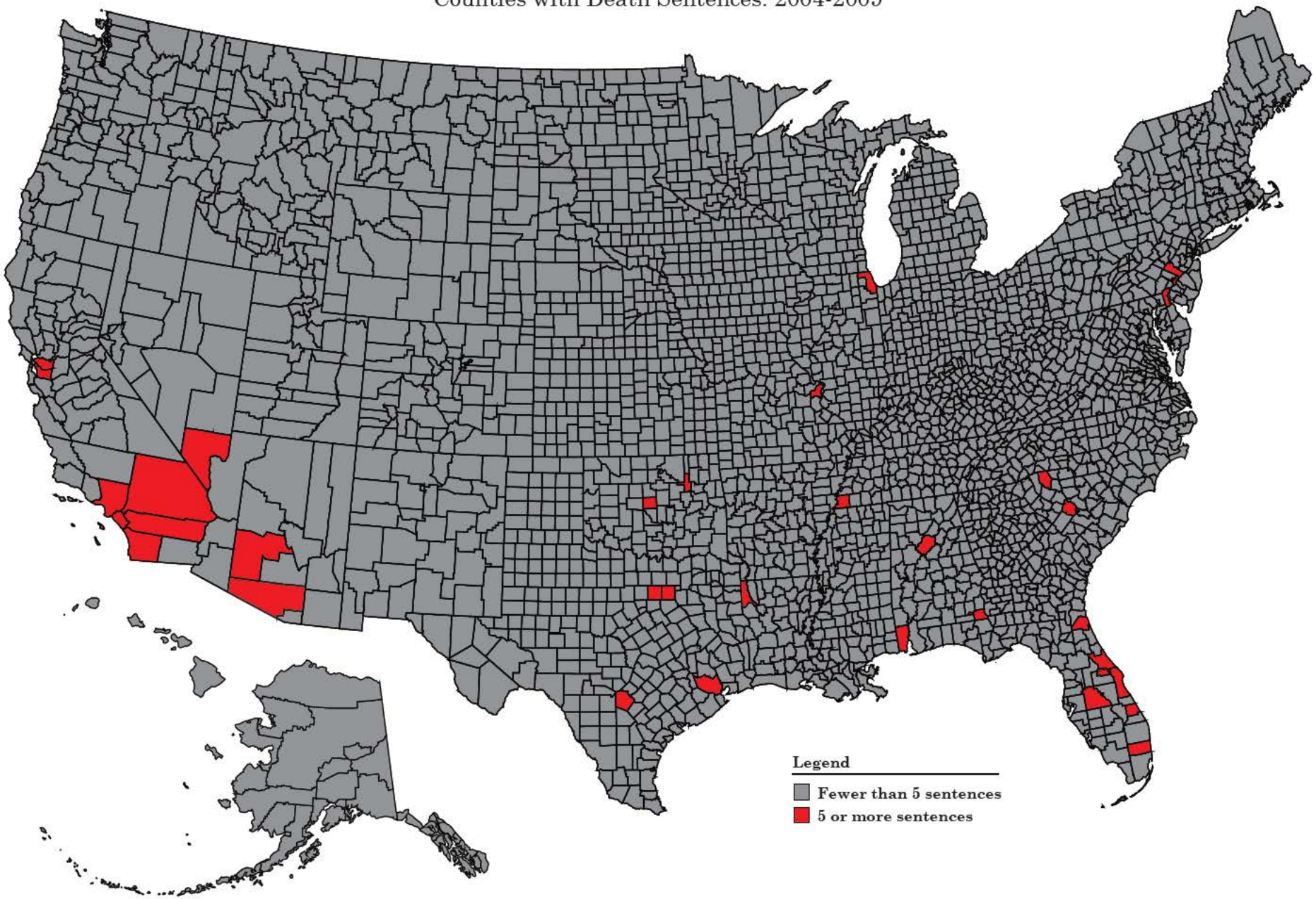
C

Percentage of U. S. population in States that conducted an execution within prior 3 years

Year	Percentage
1994	54%
1995	60%
1996	63%
1997	63%
1998	61%
1999	70%
2000	68%
2001	67%
2002	57%
2003	53%
2004	52%
2005	52%
2006	55%
2007	57%
2008	53%
2009	39%
2010	43%
2011	42%
2012	39%
2013	34%
2014	33%

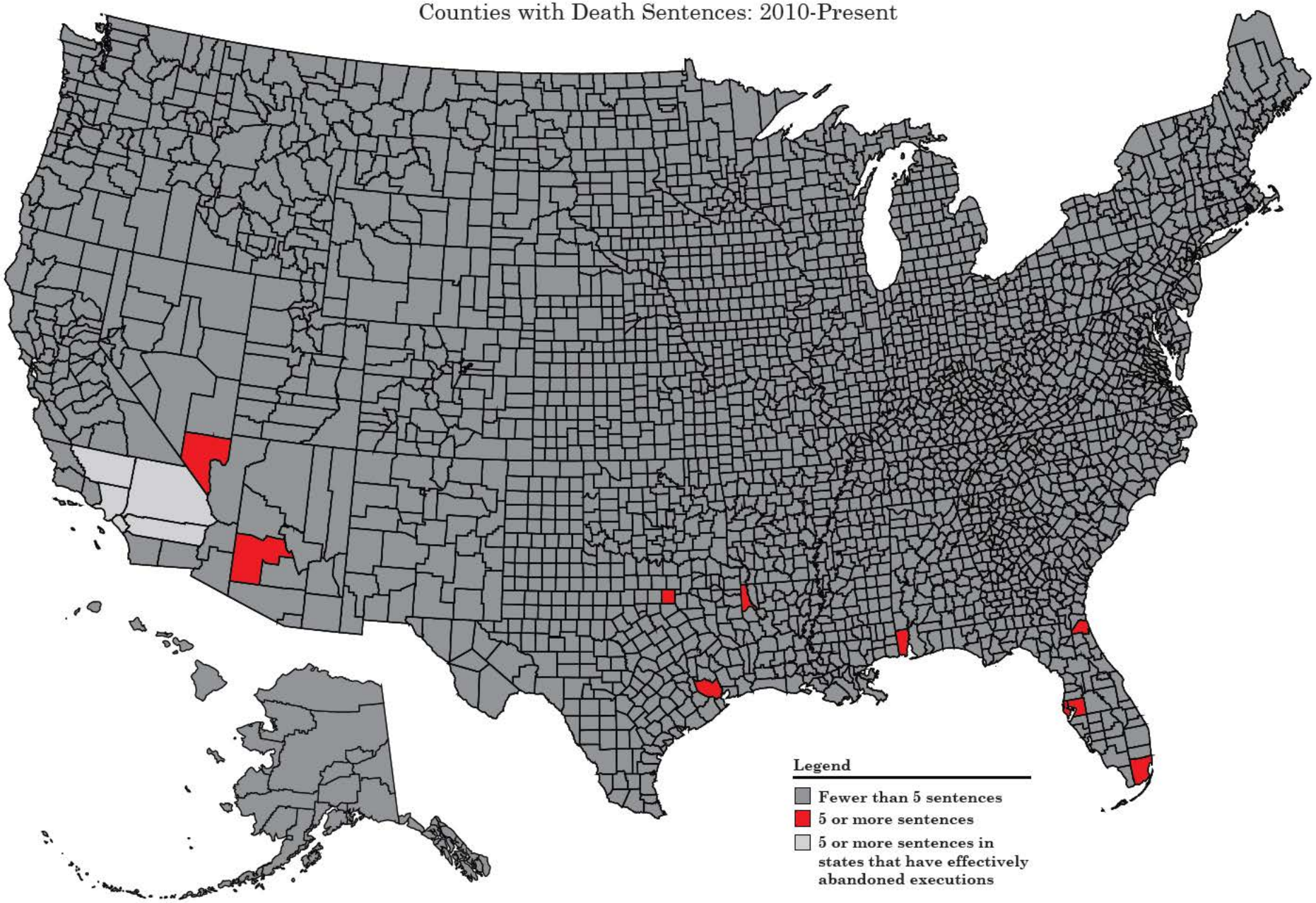
[Appendixes D and E to opinion of BREYER, J., follow this page.]

Counties with Death Sentences: 2004-2009



Source: Ford, The Death Penalty's Last Stand, The Atlantic, Apr. 21, 2015.

Counties with Death Sentences: 2010-Present



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

Petitioners, three inmates on Oklahoma's death row, challenge the constitutionality of the State's lethal injection protocol. The State plans to execute petitioners using three drugs: midazolam, rocuronium bromide, and potassium chloride. The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain. It is thus critical that the first drug, midazolam, do what it is supposed to do, which is to render and keep the inmate unconscious. Petitioners claim that midazolam cannot be expected to perform that function, and they have presented ample evidence showing that the State's planned use of this drug poses substantial, constitutionally intolerable risks.

Nevertheless, the Court today turns aside petitioners' plea that they at least be allowed a stay of execution while they seek to prove midazolam's inadequacy. The Court achieves this result in two ways: first, by deferring to the District Court's decision to credit the scientifically unsupported and implausible testimony of a single expert witness; and second, by faulting petitioners for failing to satisfy the wholly novel requirement of proving the availability of an alternative means for their own executions. On both counts the Court errs. As a result, it leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake.

I

A

The Eighth Amendment succinctly prohibits the infliction of "cruel and unusual punishments." Seven years ago, in *Baze* v. *Rees*, 553 U. S. 35 (2008), the Court addressed the application of this mandate to Kentucky's lethal injection protocol. At that time, Kentucky, like at least 29 of the 35 other States with the death penalty, utilized a series of three drugs to perform executions: (1) sodium thiopental, a "fast-

acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection"; (2) pancuronium bromide, "a paralytic agent that inhibits all muscular-skeletal movements and . . . stops respiration"; and (3) potassium chloride, which "interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest." *Id.*, at 44 (plurality opinion of ROBERTS, C. J.).

In *Baze*, it was undisputed that absent a "proper dose of sodium thiopental," there would be a "substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.*, at 53. That is because, if given to a conscious inmate, pancuronium bromide would leave him or her asphyxiated and unable to demonstrate "any outward sign of distress," while potassium chloride would cause "excruciating pain." *Id.*, at 71 (Stevens, J., concurring in judgment). But the *Baze* petitioners conceded that if administered as intended, Kentucky's method of execution would nevertheless "result in a humane death," *id.*, at 41 (plurality opinion), as the "proper administration" of sodium thiopental "eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride," *id.*, at 49. Based on that premise, the Court ultimately rejected the challenge to Kentucky's protocol, with the plurality opinion concluding that the State's procedures for administering these three drugs ensured there was no "objectively intolerable risk" of severe pain. *Id.*, at 61–62 (internal quotation marks omitted).

B

For many years, Oklahoma performed executions using the same three drugs at issue in *Baze*. After *Baze* was decided, however, the primary producer of sodium thiopental refused to continue permitting the drug to be used in executions. *Ante*, at 869–870. Like a number of other States, Oklahoma

opted to substitute pentobarbital, another barbiturate, in its place. But in March 2014, shortly before two scheduled executions, Oklahoma found itself unable to secure this drug. App. 144.

The State rescheduled the executions for the following month to give it time to locate an alternative anesthetic. In less than a week, a group of officials from the Oklahoma Department of Corrections and the attorney general's office selected midazolam to serve as a replacement for pentobarbital. *Id.*, at 145, 148–149.

Soon thereafter, Oklahoma used midazolam for the first time in its execution of Clayton Lockett. That execution did not go smoothly. Ten minutes after an intravenous (IV) line was set in Lockett's groin area and 100 milligrams of midazolam were administered, an attending physician declared Lockett unconscious. *Id.*, at 392–393. When the paralytic and potassium chloride were administered, however, Lockett awoke. *Ibid.* Various witnesses reported that Lockett began to writhe against his restraints, saying, "[t]his s*** is f***ing with my mind," "something is wrong," and "[t]he drugs aren't working." *Id.*, at 53 (internal quotation marks omitted). State officials ordered the blinds lowered, then halted the execution. *Id.*, at 393, 395. But 10 minutes later—approximately 40 minutes after the execution began—Lockett was pronounced dead. *Id.*, at 395.

The State stayed all future executions while it sought to determine what had gone wrong in Lockett's. Five months later, the State released an investigative report identifying a flaw in the IV line as the principal difficulty: The IV had failed to fully deliver the lethal drugs into Lockett's veins. *Id.*, at 398. An autopsy determined, however, that the concentration of midazolam in Lockett's blood was more than sufficient to render an average person unconscious. *Id.*, at 397, 405.

In response to this report, the State modified its lethal injection protocol. The new protocol contains a number of

procedures designed to guarantee that members of the execution team are able to insert the IV properly, and charges them with ensuring that the inmate is unconscious. *Id.*, at 57–66, 361–369. But the protocol continues to authorize the use of the same three-drug formula used to kill Lockett—though it does increase the intended dose of midazolam from 100 milligrams to 500 milligrams. *Id.*, at 61. The State has indicated that it plans to use this drug combination in all upcoming executions, subject to only an immaterial substitution of paralytic agents. *Ante*, at 872–873.

C

In June 2014, inmates on Oklahoma's death row filed a 42 U. S. C. §1983 suit against respondent prison officials challenging the constitutionality of Oklahoma's method of execution. After the State released its revised execution protocol, the four inmates whose executions were most imminent—Charles Warner, along with petitioners Richard Glossip, John Grant, and Benjamin Cole—moved for a preliminary injunction. They contended, among other things, that the State's intended use of midazolam would violate the Eighth Amendment because, unlike sodium thiopental or pentobarbital, the drug "is incapable of producing a state of unawareness that will be reliably maintained after either of the other two pain-producing drugs . . . is injected." Amended Complaint ¶101.

The District Court held a 3-day evidentiary hearing, at which petitioners relied principally on the testimony of two experts: Dr. David Lubarsky, an anesthesiologist, and Dr. Larry Sasich, a doctor of pharmacy. The State, in turn, based its case on the testimony of Dr. Roswell Evans, also a doctor of pharmacy.

To a great extent, the experts' testimony overlapped. All three experts agreed that midazolam is from a class of sedative drugs known as benzodiazepines (a class that includes Valium and Xanax), and that it has no analgesic—or pain-

relieving—effects. App. 205 (Lubarsky), 260–261 (Sasich), 311 (Evans). They further agreed that while midazolam can be used to render someone unconscious, it is not approved by the Federal Drug Administration (FDA) for use as, and is not in fact used as, a "sole drug to produce and maintain anesthesia in surgical proceedings." *Id.*, at 307, 327 (Evans); see *id.*, at 171 (Lubarsky); *id.*, at 262 (Sasich). Finally, all three experts recognized that midazolam is subject to a ceiling effect, which means that there is a point at which increasing the dose of the drug does not result in any greater effect. *Id.*, at 172 (Lubarsky), 243 (Sasich), 331 (Evans).

The experts' opinions diverged, however, on the crucial questions of how this ceiling effect operates, and whether it will prevent midazolam from keeping a condemned inmate unconscious when the second and third lethal injection drugs are administered. Dr. Lubarsky testified that while benzodiazepines such as midazolam may, like barbiturate drugs such as sodium thiopental and pentobarbital, induce unconsciousness by inhibiting neuron function, they do so in a materially different way. *Id.*, at 207. More specifically, Dr. Lubarsky explained that both barbiturates and benzodiazepines initially cause sedation by facilitating the binding of a naturally occurring chemical called gamma-aminobutyric acid (GABA) with GABA receptors, which then impedes the flow of electrical impulses through the neurons in the central nervous system. *Id.*, at 206. But at higher doses, barbiturates also act as a GABA substitute and mimic its neuron-suppressing effects. *Ibid.* By contrast, benzodiazepines lack this mimicking function, which means their effect is capped at a lower level of sedation. *Ibid.* Critically, according to Dr. Lubarsky, this ceiling on midazolam's sedative effect is reached before full anesthesia can be achieved. *Ibid.* Thus, in his view, while "midazolam unconsciousness is . . . sufficient" for "minor procedure[s]," Tr. of Preliminary Injunction Hearing 132–133 (Tr.), it is incapable of keeping someone "insensate and immobile in the face of [more] nox-

ious stimuli," including the extreme pain and discomfort associated with administration of the second and third drugs in Oklahoma's lethal injection protocol, App. 218. Dr. Sasich endorsed Dr. Lubarsky's description of the ceiling effect, and offered similar reasons for reaching the same conclusion. See *id.*, at 243, 248, 262.

In support of these assertions, both experts cited a variety of evidence. Dr. Lubarsky emphasized, in particular, Arizona's 2014 execution of Joseph Wood, which had been conducted using midazolam and the drug hydromorphone rather than the three-drug cocktail Oklahoma intends to employ.[1] *Id.*, at 176. Despite being administered 750 milligrams of midazolam, Wood had continued breathing and moving for nearly two hours—which, according to Dr. Lubarsky, would not have occurred "during extremely deep levels of anesthesia." *Id.*, at 177. Both experts also cited various scientific articles and textbooks to support their conclusions. For instance, Dr. Lubarsky relied on a study measuring the brain activity of rats that were administered midazolam, which showed that the drug's impact significantly tailed off at higher doses. See Hovinga et al., Pharmacokinetic-EEG Effect Relationship of Midazolam in Aging BN/BiRij Rats, 107 British J. Pharmacology 171, 173, Fig. 2 (1992). He also pointed to a pharmacology textbook that confirmed his description of how benzodiazepines and barbiturates produce their effects, see Stoelting & Hillier 127–128, 140–144, and a survey article concluding that "[m]idazolam cannot be used alone . . . to maintain adequate anesthesia," Reves, Fragen, Vinik, & Greenblatt, Midazolam: Pharmacology and Uses, 62 Anesthesiology 310, 318 (1985) (Reves). For his part, Dr. Sasich referred to a separate survey article, which similarly recognized and described the ceiling effect to which benzodiazepines are subject. See Saari, Uusi-Oukari, Ahonen, &

[1] Hydromorphone is a powerful analgesic similar to morphine or heroin. See R. Stoelting & S. Hillier, Pharmacology & Physiology in Anesthetic Practice 87–88 (4th ed. 2006) (Stoelting & Hillier).

Olkkola, Enhancement of GABAergic Activity: Neuropharmacological Effects of Benzodiazepines and Therapeutic Use in Anesthesiology, 63 Pharmacological Rev. 243, 244, 250 (2011) (Saari).

By contrast, Dr. Evans, the State's expert, asserted that a 500-milligram dose of midazolam would "render the person unconscious and 'insensate' during the remainder of the [execution] procedure." App. 294. He rested this conclusion on two interrelated propositions.

First, observing that a therapeutic dose of midazolam to treat anxiety is less than 5 milligrams for a 70-kilogram adult, Dr. Evans emphasized that Oklahoma's planned administration of 500 milligrams of the drug was "at least 100 times the normal therapeutic dose." *Ibid.* While he acknowledged that "[t]here are no studies that have been done . . . administering that much . . . midazolam . . . to anybody," he noted that deaths had occurred in doses as low as 0.04 to 0.07 milligrams per kilogram (2.8 to 4.9 milligrams for a 70-kilogram adult), and contended that a 500-milligram dose would itself cause death within less than an hour—a conclusion he characterized as "essentially an extrapolation from a toxic effect." *Id.*, at 327; see *id.*, at 308.

Second, in explaining how he reconciled his opinion with the evidence of midazolam's ceiling effect, Dr. Evans testified that while "GABA receptors are found across the entire body," midazolam's ceiling effect is limited to the "spinal cord" and there is "no ceiling effect" at the "higher level of [the] brain." *Id.*, at 311–312. Consequently, in his view, "as you increase the dose of midazolam, it's a linear effect, so you're going to continue to get an impact from higher doses of the drug," *id.*, at 332, until eventually "you're paralyzing the brain," *id.*, at 314. Dr. Evans also understood the chemical source of midazolam's ceiling effect somewhat differently from petitioners' experts. Although he agreed that midazolam produces its effect by "binding to [GABA] receptors," *id.*, at 293, he appeared to believe that midazolam produced

sedation by "inhibiting GABA" from attaching to GABA receptors, not by promoting GABA's sedative effects, *id.*, at 312. Thus, when asked about Dr. Lubarsky's description of the ceiling effect, Dr. Evans characterized the phenomenon as stemming from "the competitive nature of substances trying to attach to GABA receptors." *Id.*, at 313.

Dr. Evans cited no scholarly research in support of his opinions. Instead, he appeared to rely primarily on two sources: the Web site www.drugs.com and a "Material Safety Data Sheet" produced by a midazolam manufacturer. See *id.*, at 303. Both simply contained general information that covered the experts' areas of agreement.

D

The District Court denied petitioners' motion for a preliminary injunction. It began by making a series of factual findings regarding the characteristics of midazolam and its use in Oklahoma's execution protocol. Most relevant here, the District Court found that "[t]he proper administration of 500 milligrams of midazolam . . . would make it a virtual certainty that an individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." *Id.*, at 77. Respecting petitioners' contention that there is a "ceiling effect which prevents an increase in dosage from having a corresponding incremental effect on anesthetic depth," the District Court concluded:

> "Dr. Evans testified persuasively . . . that whatever the ceiling effect of midazolam may be with respect to anesthesia, which takes effect at the spinal cord level, there is no ceiling effect with respect to the ability of a 500 milligram dose of midazolam to effectively paralyze the brain, a phenomenon which is not anesthesia but does have the effect of shutting down respiration and eliminating the individual's awareness of pain." *Id.*, at 78.

Having made these findings, the District Court held that petitioners had shown no likelihood of success on the merits of their Eighth Amendment claim for two independent reasons. First, it determined that petitioners had "failed to establish that proceeding with [their] execution[s] . . . on the basis of the revised protocol presents . . . 'an objectively intolerable risk of harm.'" *Id.*, at 96. Second, the District Court held that petitioners were unlikely to prevail because they had not identified any "'known and available alternative'" means by which they could be executed—a requirement it understood *Baze* to impose. App. 97. The District Court concluded that the State "ha[d] affirmatively shown that sodium thiopental and pentobarbital, the only alternatives to which the [petitioners] have even alluded, are not available to the [State]." *Id.*, at 98.

The Court of Appeals for the Tenth Circuit affirmed. *Warner* v. *Gross*, 776 F. 3d 721 (2015). It, like the District Court, held that petitioners were unlikely to prevail on the merits because they had failed to prove the existence of "'known and available alternatives.'" *Id.*, at 732. "In any event," the court continued, it was unable to conclude that the District Court's factual findings had been clearly erroneous, and thus petitioners had also "failed to establish that the use of midazolam in their executions . . . creates a demonstrated risk of severe pain." *Ibid.*

Petitioners and Charles Warner filed a petition for certiorari and an application to stay their executions. The Court denied the stay application, and Charles Warner was executed on January 15, 2015. See *Warner* v. *Gross*, 574 U. S. 1112 (2015) (SOTOMAYOR, J., dissenting from denial of stay). The Court subsequently granted certiorari and, at the request of the State, stayed petitioners' pending executions.

II

I begin with the second of the Court's two holdings: that the District Court properly found that petitioners did not

demonstrate a likelihood of showing that Oklahoma's execution protocol poses an unconstitutional risk of pain. In reaching this conclusion, the Court sweeps aside substantial evidence showing that, while midazolam may be able to *induce* unconsciousness, it cannot be utilized to *maintain* unconsciousness in the face of agonizing stimuli. Instead, like the District Court, the Court finds comfort in Dr. Evans' wholly unsupported claims that 500 milligrams of midazolam will "paralyz[e] the brain." In so holding, the Court disregards an objectively intolerable risk of severe pain.

A

Like the Court, I would review for clear error the District Court's finding that 500 milligrams of midazolam will render someone sufficiently unconscious "'to resist the noxious stimuli which could occur from the application of the second and third drugs.'" *Ante*, at 883 (quoting App. 77). Unlike the Court, however, I would do so without abdicating our duty to examine critically the factual predicates for the District Court's finding—namely, Dr. Evans' testimony that midazolam has a "ceiling effect" only "at the spinal cord level," and that a "500 milligram dose of midazolam" can therefore "effectively paralyze the brain." *Id.*, at 78. To be sure, as the Court observes, such scientific testimony may at times lie at the boundaries of federal courts' expertise. See *ante*, at 882. But just because a purported expert says something does not make it so. Especially when important constitutional rights are at stake, federal district courts must carefully evaluate the premises and evidence on which scientific conclusions are based, and appellate courts must ensure that the courts below have in fact carefully considered all the evidence presented. Clear error exists "when although there is evidence to support" a finding, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364,

395 (1948). Here, given the numerous flaws in Dr. Evans' testimony, there can be little doubt that the District Court clearly erred in relying on it.

To begin, Dr. Evans identified no scientific literature to support his opinion regarding midazolam's properties at higher-than-normal doses. Apart from a Material Safety Data Sheet that was relevant only insofar as it suggests that a low dose of midazolam may occasionally be toxic, see *ante*, at 891—an issue I discuss further below—Dr. Evans' testimony seems to have been based on the Web site www.drugs.com. The Court may be right that "petitioners do not identify any incorrect statements from drugs.com on which Dr. Evans relied." *Ante*, at 890–891. But that is because there were *no* statements from drugs.com that supported the critically disputed aspects of Dr. Evans' opinion. If anything, the Web site supported petitioners' contentions, as it expressly cautioned that midazolam "[s]hould not be used alone for maintenance of anesthesia," App. H to Pet. for Cert. 6519, and contained no warning that an excessive dose of midazolam could "paralyze the brain," see *id.*, at 6528–6529.

Most importantly, nothing from drugs.com—or, for that matter, any other source in the record—corroborated Dr. Evans' key testimony that midazolam's ceiling effect is limited to the spinal cord and does not pertain to the brain. Indeed, the State appears to have disavowed Dr. Evans' spinal-cord theory, refraining from even mentioning it in its brief despite the fact that the District Court expressly relied on this testimony as the basis for finding that larger doses of midazolam will have greater anesthetic effects. App. 78. The Court likewise assiduously avoids defending this theory.

That is likely because this aspect of Dr. Evans' testimony was not just unsupported, but was directly refuted by the studies and articles cited by Drs. Lubarsky and Sasich. Both of these experts relied on academic texts describing benzodiazepines' ceiling effect and explaining why it prevents these drugs from rendering a person completely in-

sensate. See Stoelting & Hillier 141, 144 (describing midazolam's ceiling effect and contrasting the drug with barbiturates); Saari 244 (observing that "abolishment of perception of environmental stimuli cannot usually be generated"). One study further made clear that the ceiling effect is apparent in the brain. See *id.*, at 250.

These scientific sources also appear to demonstrate that Dr. Evans' spinal-cord theory—*i. e.*, that midazolam's ceiling effect is limited to the spinal cord—was premised on a basic misunderstanding of midazolam's mechanism of action. I say "appear" not because the sources themselves are unclear about how midazolam operates: They plainly state that midazolam functions by promoting GABA's inhibitory effects on the central nervous system. See, *e. g.*, Stoelting & Hillier 140. Instead, I use "appear" because discerning the rationale underlying Dr. Evans' testimony is difficult. His spinal-cord theory might, however, be explained at least in part by his apparent belief that rather than promoting GABA's inhibitory effects, midazolam produces sedation by "compet[ing]" with GABA and thus "inhibit[ing]" GABA's effect. App. 312–313.[2] Regardless, I need not delve too deeply into Dr. Evans' alternative scientific reality. It suffices to say

[2] The Court disputes this characterization of Dr. Evans' testimony, insisting that Dr. Evans accurately described midazolam's properties in the written report he submitted prior to the hearing below, and suggesting that petitioners' experts would have "dispute[d] the accuracy" of this explanation were it in fact wrong. *Ante*, at 889. But Dr. Evans' written report simply said midazolam "produces different levels of central nervous system (CNS) depression through binding to [GABA] receptors." App. 293. That much is true. Only after Drs. Sasich and Lubarsky testified did Dr. Evans further claim that midazolam produced CNS depression by binding to GABA receptors *and thereby preventing GABA itself from binding to those receptors*—which is where he went wrong. The Court's further observation that Dr. Lubarsky also used a variant on the word "inhibiting" in his testimony—in saying that GABA's "'*inhibition* of brain activity is accentuated by midazolam,'" *ante*, at 889 (quoting App. 232)—is completely nonresponsive. "Inhibiting" is a perfectly good word; the problem here is the manner in which Dr. Evans used it in a sentence.

that to the extent that Dr. Evans' testimony was based on his understanding of the source of midazolam's pharmacological properties, that understanding was wrong.

These inconsistencies and inaccuracies go to the very heart of Dr. Evans' expert opinion, as they were the key components of his professed belief that one can extrapolate from what is known about midazolam's effect at low doses to conclude that the drug would "paralyz[e] the brain" at Oklahoma's planned dose. *Id.*, at 314. All three experts recognized that there had been no scientific testing on the use of this amount of midazolam in conjunction with these particular lethal injection drugs. See *ante*, at 883–884; App. 176 (Lubarsky), 243–244 (Sasich), 327 (Evans). For this reason, as the Court correctly observes, "extrapolation was reasonable." *Ante*, at 884. But simply because extrapolation may be reasonable or even required does not mean that every conceivable method of extrapolation can be credited, or that all estimates stemming from purported extrapolation are worthy of belief. Dr. Evans' view was that because 40 milligrams of midazolam could be used to induce unconsciousness, App. 294, and because more drug will generally produce more effect, a significantly larger dose of 500 milligrams would not just induce unconsciousness but allow for its maintenance in the face of extremely painful stimuli, and ultimately even cause death itself. In his words: "[A]s you increase the dose of midazolam, it's a linear effect, so you're going to continue to get an impact from higher doses of the drug." *Id.*, at 332. If, however, there is a ceiling with respect to midazolam's effect on the brain—as petitioners' experts established there is—then such simplistic logic is not viable. In this context, more is not necessarily better, and Dr. Evans was plainly wrong to presume it would be.

If Dr. Evans had any other basis for the "extrapolation" that led him to conclude 500 milligrams of midazolam would "paralyz[e] the brain," *id.*, at 314, it was even further divorced from scientific evidence and logic. Having empha-

sized that midazolam had been known to cause approximately 80 deaths, Dr. Evans asserted that his opinion regarding the efficacy of Oklahoma's planned use of the drug represented "essentially an extrapolation from a *toxic* effect." *Id.*, at 327 (emphasis added); see *id.*, at 308. Thus, Dr. Evans appeared to believe—and again, I say "appeared" because his rationale is not clear—that because midazolam caused *some* deaths, it would necessarily cause complete unconsciousness and then death at especially high doses. But Dr. Evans also thought, and Dr. Lubarsky confirmed, that these midazolam fatalities had occurred at very low doses—well below what any expert said would produce unconsciousness. See *id.*, at 207, 308. These deaths thus seem to represent the rare, unfortunate side effects that one would expect to see with any drug at normal therapeutic doses; they provide no indication of the effect one would expect midazolam to have on the brain at substantially higher doses. Deaths occur with almost any product. One might as well say that because some people occasionally die from eating one peanut, one hundred peanuts would necessarily induce a coma and death in anyone.[3]

In sum, then, Dr. Evans' conclusions were entirely unsupported by any study or third-party source, contradicted by the extrinsic evidence proffered by petitioners, inconsistent with the scientific understanding of midazolam's properties, and apparently premised on basic logical errors. Given

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[3] For all the reasons discussed in Part II–B, *infra*, and contrary to the Court's claim, see *ante*, at 885, n. 4, there are good reasons to doubt that 500 milligrams of midazolam will, in light of the ceiling effect, inevitably kill someone. The closest the record comes to providing support for this contention is the fleeting mention in the FDA-approved product label that one of the possible consequences of midazolam overdosage is coma. See *ibid.*, n. 5. Moreover, even if this amount of the drug could kill some people in "under an hour," *ibid.*, n. 4, that would not necessarily mean that the condemned would be insensate during the approximately 10 minutes it takes for the paralytic and potassium chloride to do their work.

these glaring flaws, the District Court's acceptance of Dr. Evans' claim that 500 milligrams of midazolam would "paralyz[e] the brain" cannot be credited. This is not a case "[w]here there are two permissible views of the evidence," and the District Court chose one; rather, it is one where the trial judge credited "one of two or more witnesses" even though that witness failed to tell "a coherent and facially plausible story that is not contradicted by extrinsic evidence." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–575 (1985). In other words, this is a case in which the District Court clearly erred. See *ibid.*

B

Setting aside the District Court's erroneous factual finding that 500 milligrams of midazolam will necessarily "paralyze the brain," the question is whether the Court is nevertheless correct to hold that petitioners failed to demonstrate that the use of midazolam poses an "objectively intolerable risk" of severe pain. See *Baze*, 553 U. S., at 50 (plurality opinion) (internal quotation marks omitted). I would hold that they made this showing. That is because, in stark contrast to Dr. Evans, petitioners' experts were able to point to objective evidence indicating that midazolam cannot serve as an effective anesthetic that "render[s] a person insensate to pain caused by the second and third [lethal injection] drugs." *Ante*, at 888.

As observed above, these experts cited multiple sources supporting the existence of midazolam's ceiling effect. That evidence alone provides ample reason to doubt midazolam's efficacy. Again, to prevail on their claim, petitioners need only establish an intolerable *risk* of pain, not a certainty. See *Baze*, 553 U. S., at 50. Here, the State is attempting to use midazolam to produce an effect the drug has never previously been demonstrated to produce, and despite studies indicating that at some point increasing the dose will not actually increase the drug's effect. The State is thus pro-

ceeding in the face of a very real risk that the drug will not work in the manner it claims.

Moreover, and perhaps more importantly, the record provides good reason to think this risk is substantial. The Court insists that petitioners failed to provide "probative evidence" as to whether "midazolam's ceiling effect occurs below the level of a 500-milligram dose and at a point at which the drug does not have the effect of rendering a person insensate to pain." *Ante*, at 887. It emphasizes that Dr. Lubarsky was unable to say "at what dose the ceiling effect occurs," and could only estimate that it was "'[p]robably after about . . . 40 to 50 milligrams.'" *Ibid.* (quoting App. 225).

But the precise *dose* at which midazolam reaches its ceiling effect is irrelevant if there is no dose at which the drug can, in the Court's words, render a person "insensate to pain." *Ante*, at 888. On this critical point, Dr. Lubarsky was quite clear.[4] He explained that the drug "does not work to produce" a "lack of consciousness as noxious stimuli are applied" and is "not sufficient to produce a surgical plane of anesthesia in human beings." App. 204. He also noted that

[4] Dr. Sasich, as the Court emphasizes, was perhaps more hesitant to reach definitive conclusions, see *ante*, at 883–885, and n. 5, 887–888, but the statements highlighted by the Court largely reflect his (truthful) observations that no testing has been done at doses of 500 milligrams, and his inability to pinpoint the precise dose at which midazolam's ceiling effect might be reached. Dr. Sasich did not, as the Court suggests, claim that midazolam's ceiling effect would be reached only after a person became fully insensate to pain. *Ante*, at 888. What Dr. Sasich actually said was: "As the dose increases, the benzodiazepines are expected to produce sedation, amnesia, and finally lack of response to stimuli such as pain (unconsciousness)." App. 243. In context, it is clear that Dr. Sasich was simply explaining that a drug like midazolam can be used to *induce* unconsciousness—an issue that was and remains undisputed—not that it could render an inmate sufficiently unconscious to resist all noxious stimuli. Indeed, it was midazolam's possible inability to serve the latter function that led Dr. Sasich to conclude that "it is not an appropriate drug to use when administering a paralytic followed by potassium chloride." *Id.*, at 248.

"[t]he drug would never be used and has never been used as a sole anesthetic to give anesthesia during a surgery," *id.*, at 223, and asserted that "the drug was not approved by the FDA as a sole anesthetic because after the use of fairly large doses that were sufficient to reach the ceiling effect and produce induction of unconsciousness, the patients responded to the surgery," *id.*, at 219. Thus, Dr. Lubarsky may not have been able to identify whether this effect would be reached at 40, 50, or 60 milligrams or some higher threshold, but he could specify that at no level would midazolam reliably keep an inmate unconscious once the second and third drugs were delivered.[5]

These assertions were amply supported by the evidence of the manner in which midazolam is and can be used. All three experts agreed that midazolam is utilized as the sole sedative only in minor procedures. Dr. Evans, for example, acknowledged that while midazolam may be used as the sole drug in some procedures that are not "terribly invasive," even then "you would [generally] see it used in combination with a narcotic." *Id.*, at 307. And though, as the Court observes, Dr. Sasich believed midazolam could be "used for medical procedures like colonoscopies and gastroscopies," *ante*, at 885, he insisted that these procedures were not necessarily painful, and that it would be a "big jump" to conclude that midazolam would be effective to maintain unconscious-

[5] The Court claims that the District Court could have properly disregarded Dr. Lubarsky's testimony because he asserted that a protocol with sodium thiopental would "'produce egregious harm and suffering.'" *Ante*, at 888, n. 6 (quoting App. 227). But Dr. Lubarsky did not testify that, like midazolam, sodium thiopental would not render an inmate fully insensate even if properly administered; rather, he simply observed that he had previously contended that *protocols* using that drug were ineffective. See App. 227. He was presumably referring to an article he coauthored that found many condemned inmates were not being successfully delivered the dose of sodium thiopental necessary to fully anesthetize them. See *Baze* v. *Rees*, 553 U. S. 35, 67 (2008) (ALITO, J., concurring) (discussing this study).

ness throughout an execution. Tr. 369–370. Indeed, the record provides no reason to think that these procedures cause excruciating pain remotely comparable to that produced by the second and third lethal injection drugs Oklahoma intends to use.

As for more painful procedures, the consensus was also clear: Midazolam is not FDA approved for, and is not used as, a sole drug to maintain unconsciousness. See App. 171 (Lubarsky), 262 (Sasich), 327 (Evans). One might infer from the fact that midazolam *is not* used as the sole anesthetic for more serious procedures that it *cannot* be used for them. But drawing such an inference is unnecessary, as petitioners' experts invoked sources expressly stating as much. In particular, Dr. Lubarsky pointed to a survey article that cited four separate authorities and declared that "[m]idazolam cannot be used alone . . . to maintain adequate anesthesia." Reves 318; see also Stoelting & Hillier 145 (explaining that midazolam is used for "induction of anesthesia," and that, "*[i]n combination with other drugs*, [it] may be used for maintenance of anesthesia" (emphasis added)).

This evidence was alone sufficient, but if one wanted further support for these conclusions it was provided by the Lockett and Wood executions. The procedural flaws that marred the Lockett execution created the conditions for an unintended (and grotesque) experiment on midazolam's efficacy. Due to problems with the IV line, Lockett was not fully paralyzed after the second and third drugs were administered. He had, however, been administered more than enough midazolam to "render an average person unconscious," as the District Court found. App. 57. When Lockett awoke and began to writhe and speak, he demonstrated the critical difference between midazolam's ability to render an inmate unconscious and its ability to maintain the inmate in that state. The Court insists that Lockett's execution involved "only 100 milligrams of midazolam," *ante*, at 892, but as explained previously, more is not necessarily better given midazolam's ceiling effect.

The Wood execution is perhaps even more probative. Despite being given over 750 milligrams of midazolam, Wood gasped and snorted for nearly two hours. These reactions were, according to Dr. Lubarsky, inconsistent with Wood being fully anesthetized, App. 177–178, and belie the claim that a lesser dose of 500 milligrams would somehow suffice. The Court attempts to distinguish the Wood execution on the ground that the timing of Arizona's administration of midazolam was different. *Ante*, at 892–893. But as Dr. Lubarsky testified, it did not "matter" whether in Wood's execution the "midazolam was introduced all at once or over . . . multiple doses," because "[t]he drug has a sufficient half life that the effect is cumulative." App. 220; see also Saari 253 (midazolam's "elimination half-life ranges from 1.7 to 3.5 h[ours]").[6] Nor does the fact that Wood's dose of midazolam was paired with hydromorphone rather than a paralytic and potassium chromide, see *ante*, at 893, appear to have any relevance—other than that the use of this analgesic drug may have meant that Wood did not experience the same degree of searing pain that an inmate executed under Oklahoma's protocol may face.

By contrast, Florida's use of this same three-drug protocol in 11 executions, see *ante*, at 892 (citing Brief for State of Florida as *Amicus Curiae* 1), tells us virtually nothing. Although these executions have featured no obvious mishaps, the key word is "obvious." Because the protocol involves the administration of a powerful paralytic, it is, as Drs. Sasich and Lubarsky explained, impossible to tell whether the condemned inmate in fact remained unconscious. App. 218, 273; see also *Baze*, 553 U. S., at 71 (Stevens, J., concurring in judgment). Even in these executions, moreover, there have

[6] The Court asserts that the State refuted these contentions, pointing to Dr. Evans' testimony that 750 milligrams of the drug "might not have the effect that was sought" if administered over an hour. Tr. 667; see *ante*, at 888, n. 6. But as has been the theme here, this pronouncement was entirely unsupported, and appears to be contradicted by the secondary sources cited by petitioners' experts.

been indications of the inmates' possible awareness. See Brief for State of Alabama et al. as *Amici Curiae* 9–13 (describing the 11 Florida executions, and noting that some allegedly involved blinking and other movement after administration of the three drugs).[7]

Finally, none of the State's "safeguards" for administering these drugs would seem to mitigate the substantial risk that midazolam will not work, as the Court contends. See *ante*, at 886. Protections ensuring that officials have properly secured a viable IV site will not enable midazolam to have an effect that it is chemically incapable of having. Nor is there any indication that the State's monitoring of the inmate's consciousness will be able to anticipate whether the inmate will *remain* unconscious while the second and third drugs are administered. No one questions whether midazolam can induce unconsciousness. The problem, as Lockett's execution vividly illustrates, is that an unconscious inmate may be awakened by the pain and respiratory distress caused by administration of the second and third drugs. At that point, even if it were possible to determine whether the inmate is conscious—dubious, given the use of a paralytic—it is already too late. Presumably for these reasons, the Tenth Circuit characterized the District Court's reliance on these procedural mechanisms as "not relevant to its rejection of [petitioners'] claims regarding the inherent characteristics of midazolam." *Warner*, 776 F. 3d, at 733.

C

The Court not only disregards this record evidence of midazolam's inadequacy, but also fails to fully appreciate the procedural posture in which this case arises. Petitioners

[7] The fact that courts in Florida have approved the use of midazolam in this fashion is arguably slightly more relevant, though it is worth noting that the majority of these decisions were handed down before the Lockett and Wood executions, and that some relied, as here, on Dr. Evans' testimony. See *ante*, at 882.

have not been accorded a full hearing on the merits of their claim. They were granted only an abbreviated evidentiary proceeding that began less than three months after the State issued its amended execution protocol; they did not even have the opportunity to present rebuttal evidence after Dr. Evans testified. They sought a preliminary injunction, and thus were not required to prove their claim, but only to show that they were likely to succeed on the merits. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008); *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006).

Perhaps the State could prevail after a full hearing, though this would require more than Dr. Evans' unsupported testimony. At the preliminary injunction stage, however, petitioners presented compelling evidence suggesting that midazolam will not work as the State intends. The State, by contrast, offered absolutely no contrary evidence worth crediting. Petitioners are thus at the very least *likely* to prove that, due to midazolam's inherent deficiencies, there is a constitutionally intolerable risk that they will be awake, yet unable to move, while chemicals known to cause "excruciating pain" course through their veins. *Baze*, 553 U. S., at 71 (Stevens, J., concurring in judgment).

III

The Court's determination that the use of midazolam poses no objectively intolerable risk of severe pain is factually wrong. The Court's conclusion that petitioners' challenge also fails because they identified no available alternative means by which the State may kill them is legally indefensible.

A

This Court has long recognized that certain methods of execution are categorically off limits. The Court first confronted an Eighth Amendment challenge to a method of execution in *Wilkerson* v. *Utah*, 99 U. S. 130 (1879). Although *Wilkerson* approved the particular method at issue—the fir-

ing squad—it made clear that "public dissection," "burning alive," and other "punishments of torture . . . in the same line of unnecessary cruelty, are forbidden by [the Eighth A]mendment to the Constitution." *Id.*, at 135–136. Eleven years later, in rejecting a challenge to the first proposed use of the electric chair, the Court again reiterated that "if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *In re Kemmler*, 136 U. S. 436, 446 (1890).

In the more than a century since, the Members of this Court have often had cause to debate the full scope of the Eighth Amendment's prohibition of cruel and unusual punishment. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*). But there has been little dispute that it at the very least precludes the imposition of "barbarous physical punishments." *Rhodes* v. *Chapman*, 452 U. S. 337, 345 (1981); see, *e. g.*, *Solem* v. *Helm*, 463 U. S. 277, 284 (1983); *id.*, at 312–313 (Burger, C. J., dissenting); *Baze*, 553 U. S., at 97–99 (THOMAS, J., concurring in judgment); *Harmelin* v. *Michigan*, 501 U. S. 957, 976 (1991) (opinion of SCALIA, J.). Nor has there been any question that the Amendment prohibits such "inherently barbaric punishments *under all circumstances*." *Graham* v. *Florida*, 560 U. S. 48, 59 (2010) (emphasis added). Simply stated, the "Eighth Amendment *categorically* prohibits the infliction of cruel and unusual punishments." *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989) (emphasis added).

B

The Court today, however, would convert this categorical prohibition into a conditional one. A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a "known and

available alternative" method of execution. *Ante*, at 880. It deems *Baze* to foreclose any argument to the contrary. *Ante*, at 879.

Baze held no such thing. In the first place, the Court cites only the plurality opinion in *Baze* as support for its known-and-available-alternative requirement. See *ante*, at 879. Even assuming that the *Baze* plurality set forth such a requirement—which it did not—none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court's judgment articulated a similar view. See 553 U. S., at 71–77, 87 (Stevens, J., concurring in judgment); *id.*, at 94, 99–107 (THOMAS, J., concurring in judgment); *id.*, at 107–108, 113 (BREYER, J., concurring in judgment). In general, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (internal quotation marks omitted). And as the Court observes, *ante*, at 879, n. 2, the opinion of JUSTICE THOMAS, joined by JUSTICE SCALIA, took the broadest position with respect to the degree of intent that state officials must have in order to have violated the Eighth Amendment, concluding that only a method of execution deliberately designed to inflict pain, and not one simply designed with deliberate indifference to the risk of severe pain, would be unconstitutional. 553 U. S., at 94 (THOMAS, J., concurring in judgment). But this understanding of the Eighth Amendment's intent requirement is unrelated to, and thus not any broader or narrower than, the requirement the Court now divines from *Baze*. Because the position that a plaintiff challenging a method of execution under the Eighth Amendment must prove the availability of an alternative means of execution did not "represent the views of a majority of the Court," it was not the holding of the *Baze* Court. *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 81 (1987).

In any event, even the *Baze* plurality opinion provides no support for the Court's proposition. To be sure, that opinion

contains the following sentence: "[The condemned] must show that the risk is substantial when compared to the known and available alternatives." 553 U. S., at 61. But the meaning of that key sentence and the limits of the requirement it imposed are made clear by the sentence directly preceding it: "A stay of execution may not be granted *on grounds such as those asserted here* unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain." *Ibid.* (emphasis added). In *Baze*, the very premise of the petitioners' Eighth Amendment claim was that they had "identified a significant risk of harm [in Kentucky's protocol] that [could] be eliminated by adopting alternative procedures." *Id.*, at 51. Their basic theory was that even if the risk of pain was only, say, 25%, that risk would be objectively intolerable if there was an obvious alternative that would reduce the risk to 5%. See Brief for Petitioners in *Baze* v. *Rees*, O. T. 2007, No. 07–5439, p. 29 ("In view of the severity of the pain risked and the ease with which it could be avoided, Petitioners should not have been required to show a high likelihood that they would suffer such pain . . . "). Thus, the "grounds . . . asserted" for relief in *Baze* were that the State's protocol was intolerably risky given the alternative procedures the State could have employed.

Addressing this claim, the *Baze* plurality clarified that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative," 553 U. S., at 51; instead, to succeed in a challenge of this type, the comparative risk must be "substantial," *id.*, at 61. Nowhere did the plurality suggest that *all* challenges to a State's method of execution would require this sort of comparative-risk analysis. Recognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks. If, for example, prison officials chose a method of exe-

cution that has a 99% chance of causing lingering and excruciating pain, certainly that risk would be objectively intolerable whether or not the officials ignored other methods in making this choice. Irrespective of the existence of alternatives, there are some risks "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to" them. *Helling* v. *McKinney*, 509 U. S. 25, 36 (1993) (emphasis in original).

That the *Baze* plurality's statement regarding a condemned inmate's ability to point to an available alternative means of execution pertained only to challenges premised on the existence of such alternatives is further evidenced by the opinion's failure to distinguish or even mention the Court's unanimous decision in *Hill* v. *McDonough*, 547 U. S. 573. *Hill* held that a § 1983 plaintiff challenging a State's method of execution need not "identif[y] an alternative, authorized method of execution." *Id.*, at 582. True, as the Court notes, *ante*, at 879–880, *Hill* did so in the context of addressing § 1983's pleading standard, rejecting the proposed alternative-means requirement because the Court saw no basis for the "[i]mposition of heightened pleading requirements," 547 U. S., at 582. But that only confirms that the Court in *Hill* did not view the availability of an alternative means of execution as an element of an Eighth Amendment claim: If it had, then requiring the plaintiff to plead this element would not have meant imposing a heightened standard at all, but rather would have been entirely consistent with "traditional pleading requirements." *Ibid.*; see *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009). The *Baze* plurality opinion should not be understood to have so carelessly tossed aside *Hill*'s underlying premise less than two years later.

C

In reengineering *Baze* to support its newfound rule, the Court appears to rely on a flawed syllogism. If the death penalty is constitutional, the Court reasons, then there must

be a means of accomplishing it, and thus some available method of execution must be constitutional. See *ante*, at 869, 880–881. But even accepting that the death penalty is, in the abstract, consistent with evolving standards of decency, but see *ante*, p. 908 (BREYER, J., dissenting), the Court's conclusion does not follow. The constitutionality of the death penalty may inform our conception of the degree of pain that would render a particular method of imposing it unconstitutional. See *Baze*, 553 U. S., at 47 (plurality opinion) (because "[s]ome risk of pain is inherent in any method of execution," "[i]t is clear . . . the Constitution does not demand the avoidance of all risk of pain"). But a method of execution that is "barbarous," *Rhodes*, 452 U. S., at 345, or "involve[s] torture or a lingering death," *Kemmler*, 136 U. S., at 447, does not become less so just because it is the only method currently available to a State. If all available means of conducting an execution constitute cruel and unusual punishment, then conducting the execution will constitute cruel and usual punishment. Nothing compels a State to perform an execution. It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty; its ends do not justify any and all means. If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.

For these reasons, the Court's available-alternative requirement leads to patently absurd consequences. Petitioners contend that Oklahoma's current protocol is a barbarous method of punishment—the chemical equivalent of being burned alive. But under the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: Because petitioners failed to prove the availability of sodium thiopental

or pentobarbital, the State could execute them using whatever means it designated. But see *Baze*, 553 U. S., at 101–102 (THOMAS, J., concurring in judgment) ("It strains credulity to suggest that the defining characteristic of burning at the stake, disemboweling, drawing and quartering, beheading, and the like was that they involved risks of pain that could be eliminated by using alternative methods of execution").[8] The Eighth Amendment cannot possibly countenance such a result.

D

In concocting this additional requirement, the Court is motivated by a desire to preserve States' ability to conduct executions in the face of changing circumstances. See *ante*, at 869–871, 892. It is true, as the Court details, that States have faced "practical obstacle[s]" to obtaining lethal injection drugs since *Baze* was decided. *Ante*, at 869–870. One study concluded that recent years have seen States change their protocols "with a frequency that is unprecedented among execution methods in this country's history." Denno, Lethal Injection Chaos Post-*Baze*, 102 Geo. L. J. 1331, 1335 (2014).

But why such developments compel the Court's imposition of further burdens on those facing execution is a mystery. Petitioners here had no part in creating the shortage of execution drugs; it is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty—actions which are, of course, wholly lawful. Nor, certainly, should these rapidly changing circumstances give us any greater confidence that the execution methods ultimately selected will be sufficiently humane to satisfy the Eighth Amendment. Quite the con-

[8] The Court protests that its holding does not extend so far, deriding this description of the logical implications of its legal rule as "simply not true" and "outlandish rhetoric." *Ante*, at 893. But presumably when the Court imposes a "requirement o[n] all Eighth Amendment method-of-execution claims," that requirement in fact applies to "*all*" methods of execution, without exception. *Ante*, at 867 (emphasis added).

trary. The execution protocols States hurriedly devise as they scramble to locate new and untested drugs, see *supra*, at 952–954, are all the more likely to be cruel and unusual—presumably, these drugs would have been the States' first choice were they in fact more effective. But see Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 65–79 (2007) (describing the hurried and unreasoned process by which States first adopted the original three-drug protocol). Courts' review of execution methods should be more, not less, searching when States are engaged in what is in effect human experimentation.

It is also worth noting that some condemned inmates may read the Court's surreal requirement that they identify the means of their death as an invitation to propose methods of executions less consistent with modern sensibilities. Petitioners here failed to meet the Court's new test because of their assumption that the alternative drugs to which they pointed, pentobarbital and sodium thiopental, were available to the State. See *ante*, at 878–879. This was perhaps a reasonable assumption, especially given that neighboring Texas and Missouri still to this day continue to use pentobarbital in executions. See Death Penalty Information Center, Execution List 2015, online at www.deathpenaltyinfo.org/execution-list-2015 (as visited June 26, 2015, and available in Clerk of Court's case file).

In the future, however, condemned inmates might well decline to accept States' current reliance on lethal injection. In particular, some inmates may suggest the firing squad as an alternative. Since the 1920's, only Utah has utilized this method of execution. See S. Banner, The Death Penalty 203 (2002); Johnson, Double Murderer Executed by Firing Squad in Utah, N. Y. Times, June 19, 2010, p. A12. But there is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection using the various combinations of drugs thus far developed. See A. Sarat, Gruesome Spectacles: Botched Executions and

America's Death Penalty, App. A, p. 177 (2014) (calculating that while 7.12% of the 1,054 executions by lethal injection between 1900 and 2010 were "botched," none of the 34 executions by firing squad had been). Just as important, there is some reason to think that it is relatively quick and painless. See Banner, *supra*, at 203.

Certainly, use of the firing squad could be seen as a devolution to a more primitive era. See *Wood* v. *Ryan*, 759 F. 3d 1076, 1103 (CA9 2014) (Kozinski, C. J., dissenting from denial of rehearing en banc). That is not to say, of course, that it would therefore be unconstitutional. But lethal injection represents just the latest iteration of the States' centuries-long search for "neat and non-disfiguring homicidal methods." C. Brandon, The Electric Chair: An Unnatural American History 39 (1999) (quoting Editorial, New York Herald, Aug. 10, 1884); see generally Banner, *supra*, at 169–207. A return to the firing squad—and the blood and physical violence that comes with it—is a step in the opposite direction. And some might argue that the visible brutality of such a death could conceivably give rise to its own Eighth Amendment concerns. See *Campbell* v. *Wood*, 511 U. S. 1119, 1121–1123 (1994) (Blackmun, J., dissenting from denial of stay of execution and certiorari); *Glass* v. *Louisiana*, 471 U. S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari). At least from a condemned inmate's perspective, however, such visible yet relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication. The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.

* * *

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper* v. *Sim-*

mons, 543 U. S. 551, 560 (2005). Today, however, the Court absolves the State of Oklahoma of this duty. It does so by misconstruing and ignoring the record evidence regarding the constitutional insufficiency of midazolam as a sedative in a three-drug lethal injection cocktail, and by imposing a wholly unprecedented obligation on the condemned inmate to identify an available means for his or her own execution. The contortions necessary to save this particular lethal injection protocol are not worth the price. I dissent.

Reporter's Note

Orders commencing with June 29, 2015, begin with page 1048. The preceding orders in 576 U. S., from June 8 through June 22, 2015, were reported in Part 1, at 1001–1048. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 14–8786. Okeayainneh *v.* United States, 575 U. S. 972;
No. 14–8834. Sayers *v.* Virginia, 575 U. S. 1014;
No. 14–8927. Casciola *v.* Jones, Secretary, Florida Department of Corrections, et al., 575 U. S. 1001; and
No. 14–9027. Wright *v.* Williamsburg Area Medical Assistance Corp., aka Olde Towne Medical Center, 575 U. S. 1002. Petitions for rehearing denied.

No. 14–7102. Kearney *v.* Graham, Superintendent, Auburn Correctional Facility, 574 U. S. 1132. Petition for rehearing denied. Justice Sotomayor took no part in the consideration or decision of this petition.

June 29, 2015

Certiorari Granted—Vacated and Remanded

No. 13–1305. Coventry Health Care of Missouri, Inc., fka Group Health Plan, Inc. *v.* Nevils. Sup. Ct. Mo. Reported below: 418 S. W. 3d 451; and
No. 13–1467. Aetna Life Insurance Co. *v.* Kobold. Ct. App. Ariz. Reported below: 233 Ariz. 100, 309 P. 3d 924. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of new regulations promulgated by the Office of Personnel Management (OPM). See OPM, Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery, 80 Fed. Reg. 29203 (May 21, 2015) (5 CFR § 890.106).

No. 14–35. Berger, President Pro Tempore of the North Carolina Senate, et al. *v.* American Civil Liberties Union of North Carolina et al. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, *ante*, p. 200. Reported below: 742 F. 3d 563.

No. 14–428. Thayer et al. *v.* City of Worcester, Massachusetts. C. A. 1st Cir. Motion of Homeless Empowerment Project for leave to file brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 755 F. 3d 60.

No. 14–430. Kelly, Warden *v.* McCarley. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Davis* v. *Ayala*, *ante*, p. 257. Reported below: 759 F. 3d 535.

No. 14–783. WAGNER *v.* CITY OF GARFIELD HEIGHTS, OHIO, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 577 Fed. Appx. 488.

No. 14–983. HOOKS, WARDEN *v.* LANGFORD. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Ayala*, *ante*, p. 257. Reported below: 593 Fed. Appx. 422.

No. 14–1160. CARDSOFT, LLC *v.* VERIFONE, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318 (2015). Reported below: 769 F. 3d 1114.

No. 14–1201. CENTRAL RADIO CO. INC. ET AL. *v.* CITY OF NORFOLK, VIRGINIA. C. A. 4th Cir. Motions of Six Law Professors et al. and Neighborhood Enterprises, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *Town of Gilbert*, *ante*, p. 155. Reported below: 776 F. 3d 229.

Certiorari Dismissed

No. 14–9807. SINGLETON *v.* NELSON ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 589 Fed. Appx. 86.

Miscellaneous Orders

No. 14A1065. ZUBIK ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. Application for an order

recalling and staying issuance of the mandate of the Court of Appeals for the Third Circuit pending the filing and disposition of a petition for writ of certiorari, having been submitted to JUSTICE ALITO, and by him referred to the Court, the application as presented is denied. The Court furthermore orders: If applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR § 54.9815–2713A(a) or 29 CFR § 2590.715–2713A(a) or 45 CFR § 147.131(b) (as applicable), respondents are enjoined from enforcing against applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of their petition for writ of certiorari. Nothing in this interim order affects the ability of applicants' or their organizations' employees to obtain, without cost, the full range of Food and Drug Administration approved contraceptives. Nor does this order preclude the Government from relying on the information provided by applicants, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act. See *Wheaton College* v. *Burwell*, 573 U. S. 958 (2014). This order should not be construed as an expression of the Court's views on the merits. *Ibid.* JUSTICE SOTOMAYOR would deny the application.

No. 14A1288. WHOLE WOMAN'S HEALTH ET AL. *v.* COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL. Application for stay, presented to JUSTICE SCALIA, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Fifth Circuit in case No. 14–50928 is 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. THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO would deny the application.

No. D–2828. IN RE DISCIPLINE OF SCHACHTER. Robert A. Schachter, of Valley Cottage, 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–2829. IN RE DISCIPLINE OF EVOLA. Vito Matteo Evola, of Rosemount, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2830. IN RE DISCIPLINE OF FLYNN. Michael Lawrence Flynn, of LaGrange Park, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2831. IN RE DISCIPLINE OF SEGUIN. Robert S. Seguin, of Milltown, 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–2832. IN RE DISCIPLINE OF FELDMAN. Richard David Feldman, of Whitestone, 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–2833. IN RE DISCIPLINE OF DAMON. Geoffrey Parker Damon, of Independence, Ky., 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–2834. IN RE DISCIPLINE OF LAWTON. Ricky Lawton, of Fernley, Nev., 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–2835. IN RE DISCIPLINE OF COOPER. Jon Charles Cooper, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2836. IN RE DISCIPLINE OF FLEMING. Lawrence J. Fleming, of St. Louis, Mo., 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. 14M30. BLAND *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., ET AL.;

No. 14M131. TUBBS *v.* CAIN, WARDEN;

No. 14M136. PAPAS ET AL. *v.* PEOPLES MORTGAGE CO. ET AL.; and

No. 14M137. TOBIAS *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M132. DIXON *v.* 24TH DISTRICT COURT OF LOUISIANA ET AL.;

No. 14M133. WHITEHEAD *v.* WHITE & CASE LLP ET AL.; and

No. 14M138. WALKER *v.* UNITED STATES. Motions for leave to proceed as veterans denied.

No. 14M134. IN RE BEN-ARI. Motion for leave to file petition for writ of mandamus under seal with redacted copies for the public record granted.

No. 14M135. SUPPRESSED *v.* SUPPRESSED. Motion for leave to file petition for writ of certiorari under seal granted.

No. 143, Orig. MISSISSIPPI *v.* TENNESSEE ET AL. Motion for leave to file bill of complaint granted. Defendants are allowed 30 days within which to file an answer. [For earlier order herein, see 574 U. S. 957.]

No. 14–449. KANSAS *v.* CARR; and

No. 14–450. KANSAS *v.* CARR. Sup. Ct. Kan. [Certiorari granted, 575 U. S. 934]; and

No. 14–452. KANSAS *v.* GLEASON. Sup. Ct. Kan. [Certiorari granted, 575 U. S. 934.] Upon consideration of the joint motion of respondents for scheduling of argument and for divided argument, and of the motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument in Nos. 14–449 and 14–450, the following allocation of oral argument time is adopted. A total of one hour is allocated for oral argument in No. 14–452, and on Question 1 in Nos. 14–449 and 14–450, to be divided as follows: 30 minutes for petitioner, 20 minutes for respondents Jonathan D. Carr and Sidney J. Glea-

son, and 10 minutes for respondent Reginald D. Carr. A total of one hour is allocated for oral argument on Question 2 in Nos. 14–449 and 14–450, to be divided as follows: 20 minutes for petitioner, 10 minutes for the Solicitor General, 20 minutes for respondent Reginald D. Carr, and 10 minutes for respondent Jonathan D. Carr.

No. 14–8608. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 981] denied.

No. 14–8970. LACROIX *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 1006] denied.

No. 14–9019. LAVERGNE *v.* DATELINE NBC ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 1006] denied.

No. 14–9817. MENDEZ *v.* UNITED STATES. C. A. Fed. Cir.; and No. 14–9981. POOLE *v.* UNITED STATES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 20, 2015, 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. 14–10119. IN RE RIVERA. Petition for writ of habeas corpus denied.

No. 14–9880. IN RE COX. Petition for writ of mandamus denied.

Certiorari Granted

No. 14–181. GOBEILLE, CHAIR OF THE VERMONT GREEN MOUNTAIN CARE BOARD *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 2d Cir. Certiorari granted. Reported below: 746 F. 3d 497.

No. 14–1095. MUSACCHIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 590 Fed. Appx. 359.

No. 14–1096. LUNA TORRES *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari granted. Reported below: 764 F. 3d 152.

No. 14–981. FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL. C. A. 5th Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 758 F. 3d 633.

Certiorari Denied

No. 13–1379. ATHENA COSMETICS, INC. *v.* ALLERGAN, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 3d 1350.

No. 14–656. RJR PENSION INVESTMENT COMMITTEE ET AL. *v.* TATUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 4th Cir. Certiorari denied. Reported below: 761 F. 3d 346.

No. 14–920. CITY OF LOMITA, CALIFORNIA *v.* FORTYUNE. C. A. 9th Cir. Certiorari denied. Reported below: 766 F. 3d 1098.

No. 14–921. VAUGHN *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 765 F. 3d 1174.

No. 14–973. NGUYEN *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 211, 858 N. W. 2d 652.

No. 14–1025. ERICKSON *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 3d 1341.

No. 14–1058. SAMPATHKUMAR *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 573 Fed. Appx. 55.

No. 14–1072. MALLO ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 774 F. 3d 1313.

No. 14–1082. RENZI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 3d 731.

No. 14–1083. SANDLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 769 F. 3d 731.

No. 14–1142. BOUDREAUX *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 757.

No. 14–1145. WHITESIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 775 F. 3d 180.

No. 14–1164. KOBACH, KANSAS SECRETARY OF STATE, ET AL. *v.* UNITED STATES ELECTION ASSISTANCE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 772 F. 3d 1183.

No. 14–1167. ANADARKO PETROLEUM CORP. *v.* UNITED STATES; and

No. 14–1217. BP EXPLORATION & PRODUCTION INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 3d 570 and 772 F. 3d 350.

No. 14–1176. PINE TOP RECEIVABLES OF ILLINOIS, LLC *v.* BANCO DE SEGUROS DEL ESTADO. C. A. 7th Cir. Certiorari denied. Reported below: 771 F. 3d 980.

No. 14–1179. STANLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 314.

No. 14–1198. WIDMAR *v.* SUN CHEMICAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 3d 457.

No. 14–1200. AMEDISYS, INC., ET AL. *v.* PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 769 F. 3d 313.

No. 14–1216. ENOS ET AL. *v.* LYNCH, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 447.

No. 14–1225. FALCON EXPRESS INTERNATIONAL, INC. *v.* DHL EXPRESS (USA), INC. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 408 S. W. 3d 406.

No. 14–1251. SUN LIFE ASSURANCE COMPANY OF CANADA *v.* GROUP DISABILITY BENEFITS PLAN FOR GYNECOLOGIC ONCOLOGY ASSOCIATES PARTNERS, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 905.

No. 14–1265. MINGO *v.* CITY OF MOBILE, ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 793.

No. 14–1266. PINILLO *v.* HSBC BANK USA. Sup. Ct. Fla. Certiorari denied. Reported below: 157 So. 3d 1047.

No. 14–1270. WELTON *v.* ANDERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 670.

No. 14–1277. JOHNSON *v.* BANK OF AMERICA, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 953.

No. 14–1281. GEICO GENERAL INSURANCE CO. *v.* GOULD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 901.

No. 14–1285. ANGHEL *v.* NEW YORK STATE DEPARTMENT OF HEALTH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 28.

No. 14–1290. CLARK *v.* CALLAHAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 1000.

No. 14–1294. MACKENZIE ET AL. *v.* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 223.

No. 14–1309. AJAELO *v.* LOS ANGELES COUNTY, CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–1310. EDWARDS *v.* LAKE ELSINORE UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied. Reported below: 230 Cal. App. 4th 1532, 179 Cal. Rptr. 3d 626.

No. 14–1332. BROCKETT *v.* BROWN. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 133.

No. 14–1348. GLASSON *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xx.

No. 14–1354. SACO ET AL. *v.* DEUTSCHE BANK NATIONAL TRUST CO. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 500.

No. 14–1356. ASSADINIA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 108 A. 3d 109.

No. 14–1360. DIX *v.* UNKNOWN TRANSPORTATION SECURITY ADMINISTRATION AGENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 499.

No. 14–1368. CATAHAMA, LLC *v.* FIRST COMMONWEALTH BANK. C. A. 3d Cir. Certiorari denied. Reported below: 601 Fed. Appx. 86.

No. 14–1370. LAGUETTE *v.* U. S. BANK, N. A., AS ALLEGED TRUSTEE OF SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006–BC4, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 936.

No. 14–1386. WILBORN *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 571.

No. 14–1387. MEYER *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 786.

No. 14–1392. ULTRAMERCIAL, LLC, ET AL. *v.* WILDTANGENT, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 772 F. 3d 709.

No. 14–1411. LORENZO JIMENEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 46.

No. 14–1421. ISAACS *v.* DARTMOUTH HITCHCOCK MEDICAL CENTER ET AL. C. A. 1st Cir. Certiorari denied.

No. 14–8293. MARRON, AKA MU'MIN *v.* MILLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 69.

No. 14–8526. LARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 935.

No. 14–8781. DAWSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–8916. ROSELLO *v.* FLOURNOY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–8980. GABE *v.* TERRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9016. MIKE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 692.

No. 14–9041. TRINIDAD LOZA *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 3d 466.

No. 14–9056. MOORE *v.* SOUTH CAROLINA. Ct. Common Pleas of Spartanburg County, S. C. Certiorari denied.

No. 14–9064. HAYNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 473.

No. 14–9138. DE LA TORRE-DE LA TORRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 301.

No. 14–9148. HOLIDAY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 767.

No. 14–9154. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 270.

No. 14–9419. DYE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 497 Mich. 952, 858 N. W. 2d 49.

No. 14–9432. BROWN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 121167, 11 N. E. 3d 882.

No. 14–9434. BAILEY *v.* FORD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9436. BLAND *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 190 So. 3d 587.

No. 14–9440. PRICE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9442. LOWRY *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9450. BILLARD *v.* TANNER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 280.

No. 14–9452. CONLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–9455. DESPORT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 105 A. 3d 46.

No. 14–9459. LESTER *v.* HENTHORNE. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 239.

No. 14–9463. KEARNEY *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 45.

No. 14–9464. SALLEY *v.* DRAGOVICH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 594 Fed. Appx. 56.

No. 14–9465. EMERSON *v.* JAMES F. LINCOLN ARC WELDING FOUNDATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 522.

No. 14–9467. MCQUEEN *v.* AEROTEK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 836.

No. 14–9473. STEWART *v.* MCCOMBER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9483. SAVINO *v.* SAVINO. C. A. 2d Cir. Certiorari denied. Reported below: 590 Fed. Appx. 80.

No. 14–9484. K. T. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 20 N. E. 3d 928.

No. 14–9490. ARCHER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 151 So. 3d 1223.

No. 14–9491. ALLAH *v.* D'ILIO, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 572 Fed. Appx. 73.

No. 14–9497. SMOTHERS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 14–9509. MCCLINTON *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–9523. CROSS *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9526. GRAHAM ET AL. *v.* HARRINGTON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 714.

No. 14–9566. HAMILTON *v.* NEGI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 346.

No. 14–9582. GONZALEZ-GUZMAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 178 Wash. App. 1017.

No. 14–9598. TALLEY *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9628. ULLRICH *v.* YORDY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9636. BELLAMY *v.* PLUMLEY, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–9647. BARRINER *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 604 Fed. Appx. 801.

No. 14–9690. MIDGYETT *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9706. SALDIVAR *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 693.

No. 14–9733. KING *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 110, 357 Wis. 2d 721, 855 N. W. 2d 903.

No. 14–9744. DAWSON *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 584.

No. 14–9746. RICHARDSON *v.* JANDA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9749. PENDERGRASS *v.* BARKSDALE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 242.

No. 14–9758. EHLER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 107.

No. 14–9765. GLENN *v.* DANFORTH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 14–9784. DISALVO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 24 N. Y. 3d 1138, 27 N. E. 3d 425.

No. 14–9790. WILSON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 49 Kan. App. 2d xxxv, 314 P. 3d 900.

No. 14–9802. RICE *v.* BLANKENSHIP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 521.

No. 14–9862. BOSWELL *v.* LOUISIANA ATTORNEY DISCIPLINARY BOARD. Sup. Ct. La. Certiorari denied. Reported below: 2015–0548 (La. 4/17/15), 168 So. 3d 391.

No. 14–9876. WILCOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9877. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 450.

No. 14–9881. RICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 481.

No. 14–9882. COPELAND *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9883. BENSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9884. IBN AHMAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 870.

No. 14–9905. GARGANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9906. HATFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9907. HATFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9908. BAKER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 165.

No. 14–9910. ALEJANDRO-MONTANEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 352.

No. 14–9919. BARBARY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 3d 1234.

No. 14–9921. THOMPSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 162 So. 3d 994.

No. 14–9922. THEARA YEM *v.* PEERY, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9927. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 324.

No. 14–9928. CAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 840.

No. 14–9929. CELESTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 271.

No. 14–9932. CRAWFORD *v.* PARRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9947. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 783 F. 3d 145.

No. 14–9948. SILVER *v.* RESCAP BORROWER CLAIMS TRUST. C. A. 2d Cir. Certiorari denied.

No. 14–9953. ESCOBAR-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 173.

No. 14–9955. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9957. ESCOBAR-MENDOZA *v.* UNITED STATES (Reported below: 606 Fed. Appx. 159); ESPINOZA-BARRON *v.* UNITED STATES (606 Fed. Appx. 160); APONTE-CARRASCO *v.* UNITED STATES (606 Fed. Appx. 181); and GARCIA-MEJIA, AKA ALBERTO LOPEZ *v.* UNITED STATES (605 Fed. Appx. 387). C. A. 5th Cir. Certiorari denied.

No. 14–9958. RIGGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 523.

No. 14–9963. AGUILERA-ENCHAUTEGUI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9966. OILER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 165.

No. 14–9968. NICKLESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 Fed. Appx. 222.

No. 14–9969. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 781.

No. 14–9970. BONILLA *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–9975. SHEPARD-FRASER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 784 F. 3d 11.

No. 14–9976. WULF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–9979. WASHINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 688.

No. 14–9982. MONTGOMERY *v.* BRENNAN, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 638.

No. 14–9984. CASSIUS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 777 F. 3d 1093.

No. 14–9986. VIAUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 833.

No. 14–9987. TAYLOR *v.* JAMES, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 381.

No. 14–9990. PRATER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 210.

No. 14–9991. MILLINER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 836.

No. 14–9993. ATWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9999. GARCIA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 182.

No. 14–10000. PRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 777 F. 3d 700.

No. 14–10002. SANCHEZ-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 3d 300.

No. 14–10006. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 64.

No. 14–10010. VERRUSIO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 762 F. 3d 1.

No. 14–10015. LAWSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 605 Fed. Appx. 785.

No. 14–10018. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 245.

No. 14–10019. SANZ DE LA ROSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–10022. PAPPAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–10023. ORTIZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 649.

No. 14–10024. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10026. PENA-GARAVITO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 424.

No. 14–10027. MORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 231.

No. 14–10028. MARTINEZ-JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 427.

No. 14–10030. VASQUEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 264.

No. 14–10032. WALTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 775 F. 3d 778.

No. 14–10034. VALDEZ-NOVOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 3d 906.

No. 14–10035. TRIPLETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10039. BEGLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 622.

No. 14–10040. ALLAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–10043. SHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 604 Fed. Appx. 473.

No. 14–10046. LUTCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–10052. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–10053. O'NEILL-SERRANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–10054. DOMINGUEZ-GODINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 279.

No. 14–395. JOYNER, WARDEN *v.* BARNES (Reported below: 751 F. 3d 229); and JOYNER, WARDEN *v.* HURST (757 F. 3d 389). C. A. 4th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The U. S. Court of Appeals for the Fourth Circuit made the same error in these cases that we have repeatedly summarily reversed this Term. I see no reason why these cases, which involve capital sentences that the State of North Carolina has a strong interest in imposing, should be treated differently. We should be consistent and use our discretionary review authority to correct this error.

I

This petition arises from two cases, which involve two separate defendants and trials. I discuss each in turn.

A

On October 29, 1992, William Leroy Barnes accompanied two other men, Robert Lewis Blakney and Frank Junior Chambers,

to the home of B. P. Tutterow and his wife, Ruby, with the intent to rob them. *State* v. *Barnes*, 345 N. C. 184, 200, 481 S. E. 2d 44, 51 (1997). The three targeted the Tutterows because Chambers knew that B. P., a deputy sheriff who worked at a jail where he had been held, often carried a significant amount of cash in his wallet. In the course of the robbery, Barnes and Chambers shot and killed the Tutterows. They then went to the apartment of some friends, where Barnes and Chambers showed off the guns they had stolen from the Tutterows.

The three men were tried together on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary. The jury found them guilty on all counts. During the penalty phase of the trial, Chambers' attorney warned the jurors as follows that they would answer for their vote before God:

> "All of us will stand in judgment one day. . . . [D]oes a true believer want to explain to God, yes, I did violate one of your commandments. Yes, I know they are not the ten suggestions. They are the ten commandments. I know it says, Thou shalt not kill, but I did it because the laws of man said I could. You can never justify violating a law of God by saying the laws of man allowed it. If there is a higher God and a higher law, I would say not." App. to Pet. for Cert. 172a.

The jury recommended that Barnes and Chambers be sentenced to death for each murder and that Blakney be sentenced to two mandatory terms of life imprisonment.

After the jury made these recommendations, defense counsel moved to question the jury based on allegations that a juror had called a minister to seek guidance about capital punishment. Defense counsel acknowledged that there was no evidence that the juror had discussed the facts of the case with the minister. The trial court denied his motion.

On direct appeal, the Supreme Court of North Carolina concluded that the trial court did not abuse its discretion in denying that motion. It explained that "[t]he trial court was faced with the mere unsubstantiated allegation that a juror called a minister to ask a question about the death penalty" and that there was "no evidence that the content of any such possible discussion prejudiced defendants or that the juror gained access to improper or

prejudicial matters and considered them with regard to th[e] case." *Barnes*, *supra*, at 228, 481 S. E. 2d, at 68.

After unsuccessfully seeking state collateral review, Barnes pursued federal relief, arguing that the Supreme Court of North Carolina had unreasonably applied clearly established federal law as determined by this Court when it denied relief on his juror misconduct claim, see 28 U. S. C. § 2254(d)(1). The U. S. District Court for the Middle District of North Carolina rejected that argument. The Court of Appeals reversed. 751 F. 3d 229 (CA4 2014). Over a dissent, the Court of Appeals concluded that the North Carolina court had unreasonably applied this Court's decision in *Remmer* v. *United States*, 347 U. S. 227 (1954), which held that "'any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial.'" 751 F. 3d, at 241 (quoting *Remmer*, *supra*, at 229; emphasis deleted). Although *Remmer* did not provide further guidance as to what constituted "the matter pending before the jury," the panel concluded, based on the Court of Appeals' own precedents, that the death penalty generally was "the matter pending before the jury." 751 F. 3d, at 248. The court remanded the case for the District Court to consider whether Barnes could show actual prejudice from the error under *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993).

B

On June 9, 2002, Jason Wayne Hurst—the second defendant involved in this petition—murdered Daniel Lee Branch after arranging to buy a pump-action shotgun from him. *State* v. *Hurst*, 360 N. C. 181, 184–186, 624 S. E. 2d 309, 314–315 (2006). As Hurst later recounted, "'[he] knew [he] was going to kill [Branch]'" as soon as they finished scheduling the sale. *Id.*, at 185, 624 S. E. 2d, at 315 (brackets in original). The two men met in a field, where Hurst asked if he could test fire the gun. As Branch walked into the field to set up some cans and bottles for that purpose, Hurst opened fire. Hurst shot Branch three times. His first shot struck Branch in the ribs or stomach, prompting him to yell, "'[N]o, no, don't shoot.'" *Ibid.* His second shot struck Branch in the side, causing him to fall. Hurst then walked over to Branch and shot him in the head, before taking his keys and driving off in Branch's car.

A jury convicted Hurst of first-degree murder and recommended that he be sentenced to death. The trial court adopted the recommendation. In a later petition for state collateral review, Hurst asserted that his constitutional rights were violated when a juror asked her father where she could look in the Bible for passages about the death penalty. He attached an affidavit from juror Christina Foster, in which she stated that she had "often had lunch with [her] father who worked near the courthouse" during the trial and, before deliberations, had asked him "where [she] could look in the Bible for help and guidance in making [her] decision for between life and death." App. in No. 13–6 (CA4), p. 441. Her father gave her "the section in the Bible where [she] could find 'an eye for an eye.'" *Ibid.*

The state court rejected Hurst's argument. It first noted that the U. S. Court of Appeals for the Fourth Circuit had "determined that the Bible does not constitute an improper external influence in a capital case." *Id.*, at 481–482. It then found that Hurst had "presented no evidence" that Foster's father either "knew what case juror Foster was sitting on" or "deliberately attempted to influence her vote by directing her to a specific passage in the Bible." *Id.*, at 482. The court therefore denied Hurst relief, and the Supreme Court of North Carolina summarily denied a petition for review.

Hurst then filed an application for federal relief, arguing, among other things, that the North Carolina court had unreasonably applied clearly established federal law as determined by this Court in rejecting his juror-influence claim. See § 2254(d)(1). As with Barnes' application, the U. S. District Court for the Middle District of North Carolina denied relief, but the Court of Appeals reversed. 757 F. 3d 389, 400 (CA4 2014). Although two judges on the panel expressed their misgivings in a concurrence, *ibid.* (opinion of Shedd, J., joined by Niemeyer, J.), the panel concluded that the earlier "holding in *Barnes* dictate[d] the same result" in Hurst's case, *id.*, at 398. The panel remanded for a further hearing on the matter to determine whether the juror's communication with her father actually prejudiced Hurst under *Brecht*, *supra*, at 637.

II

This Court should have granted a writ of certiorari to review the decisions below. In recognition of the serious disruption to state interests that occurs when a federal court collaterally re-

views a state-court judgment, the Antiterrorism and Effective Death Penalty Act of 1996 imposes strict limits on that review. Among those limits are the prohibitions found in § 2254(d), which dictates that a federal court may not grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—"

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

We have repeatedly explained that the § 2254(d) "standard is difficult to meet." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). Yet some courts continue to misapply this "part of the basic structure of federal habeas jurisdiction." *Id.*, at 103.

One of the all too common errors that some federal courts make in applying § 2254(d) is to look to their own precedents as the source of "clearly established Federal law" for purposes of § 2254(d)(1), even though that provision expressly limits that category to Supreme Court precedents. See, *e. g.*, *Glebe* v. *Frost*, 574 U. S. 21, 24 (2014) (*per curiam*); *Lopez* v. *Smith*, 574 U. S. 1, 6 (2014) (*per curiam*); *White* v. *Woodall*, 572 U. S. 415, 420, n. 2 (2014).

The Fourth Circuit's decision in *Barnes*—upon which it relied in *Hurst*—committed the same error. That court reasoned that our decision in *Remmer* "created a rebuttable presumption of prejudice applying to communications or contact between a third party and a juror concerning the matter pending before the jury." 751 F. 3d, at 241. But *Remmer* offered no specific guidance on what constituted "the matter pending before the jury." 347 U. S., at 229. Nevertheless, the Court of Appeals turned to its *own* precedents to determine whether the moral and spiritual implications of the death penalty as a general matter constituted "the matter pending before the jury." It cited its earlier decisions in *Stockton* v. *Virginia*, 852 F. 2d 740 (CA4 1988), and *United States* v. *Cheek*, 94 F. 3d 136 (CA4 1996), as setting forth a "'minimal standard'" under which "[a]n unauthorized contact between a third party and a juror concerns the matter pending before the

jury when it is 'of such a character as to reasonably draw into question the integrity of the verdict.'" 751 F. 3d, at 248. Neither of those decisions is a precedent of this Court.

Remmer was the only proper source of "clearly established Federal law," and it provided no support for the Court of Appeals' decision. That case involved a third party who "remarked to [a juror] that he could profit by bringing in a verdict favorable to the [defendant]." 347 U. S., at 228. The third-party communication in Barnes' case involved nothing of the sort. Instead, it concerned a juror who asked her minister a question about the death penalty generally and did not discuss the facts of the case. No precedent of this Court holds that such a communication concerns "the matter pending before the jury." Accordingly, the state court reasonably concluded that the juror's question about the death penalty generally—not the case specifically—did not concern the matter pending before the jury. Barnes, therefore, was not entitled to relief under § 2254(d)(1).

Despite the obvious error in *Barnes*, that decision has already begun to distort the law of the Fourth Circuit. When presented with Hurst's claim that the North Carolina court violated clearly established federal law as determined by this Court when it denied his *Remmer* claim, § 2254(d)(1), the panel deemed itself bound by *Barnes*. Even acknowledging that the affidavits submitted to the state court "did not allege that Juror Foster discussed with her father the facts or evidence that had been presented in the trial, or the status of the jury's deliberations," and that Hurst presented no "evidence that Juror Foster's father expressed any opinion about the case or attempted to influence her vote," the panel concluded that the "holding in *Barnes* dictate[d] the same result in [Hurst's] case." 757 F. 3d, at 398. That conclusion was just as erroneous as the one in *Barnes* itself.

* * *

I would have granted the writ of certiorari to review these cases. The Court of Appeals deviated from the requirements of federal law, declared two reasonable decisions of state courts "unreasonable," and put the State to the burden of two wholly unnecessary *Brecht* hearings. It committed an error that we have repeatedly corrected, including multiple times this Term. See *supra*, at 1069. Because I see no reason why these cases should be treated differently from the many others that we have

reviewed for the same error, I would have granted the petition for a writ of certiorari.

No. 14–410. GOOGLE, INC. *v.* ORACLE AMERICA, INC. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 750 F. 3d 1339.

No. 14–1098. WOLFF, TRUSTEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 773 F. 3d 583.

No. 14–8035. JORDAN *v.* FISHER, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 756 F. 3d 395.

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

Three times, the same prosecutor sought and obtained a death sentence against petitioner Richard Jordan. And each time, a court vacated that sentence. After Jordan's third successful appeal, the prosecutor entered into a plea agreement whereby Jordan would receive a sentence of life without the possibility of parole. When the Mississippi Supreme Court later invalidated that agreement, Jordan requested that the prosecutor reinstate the life-without-parole deal through a new plea. The prosecutor refused. Jordan was then retried and again sentenced to death.

Jordan applied for federal habeas corpus relief on the ground that the prosecutor's decision to seek the death penalty after having agreed to a lesser sentence was unconstitutionally vindictive. The District Court denied Jordan's petition, and the Court of Appeals for the Fifth Circuit, in a divided decision, denied Jordan's request for a certificate of appealability (COA). Because the Fifth Circuit clearly misapplied our precedents regarding the issuance of a COA, I would grant Jordan's petition and summarily reverse the Fifth Circuit's judgment.

I

A

In 1976, Jordan was arrested for the abduction and murder of Edwina Marter. Jackson County Assistant District Attorney Joe

Sam Owen led the prosecution. The jury convicted Jordan of capital murder, and, under then-applicable Mississippi law, he automatically received a sentence of death. After Jordan's sentence was imposed, however, the Mississippi Supreme Court held that automatic death sentences violated the Eighth Amendment. See *Jackson* v. *State*, 337 So. 2d 1242, 1251–1253 (1976) (citing *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Jordan was accordingly granted a new trial.

Owen continued to serve as the lead prosecutor at Jordan's second trial. Jordan was again convicted of capital murder and sentenced to death. The Fifth Circuit later determined, however, that the jury had been improperly instructed on the imposition of the death penalty. *Jordan* v. *Watkins*, 681 F. 2d 1067 (1982). The court therefore set aside Jordan's sentence.

Jordan's new sentencing trial was held in 1983. By this point, Owen had left the district attorney's office for private practice. But at the behest of Marter's family, Owen agreed to represent the State as a special prosecutor. A jury once more sentenced Jordan to death, but this Court subsequently vacated the decision upholding that sentence and remanded for reconsideration in light of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). See *Jordan* v. *Mississippi*, 476 U. S. 1101 (1986).

Rather than pursue yet another sentencing trial, Owen entered into a plea agreement with Jordan: Jordan would be sentenced to life without the possibility of parole in exchange for his promise not to challenge that sentence. In support of the agreement, Owen stipulated to several mitigating circumstances, including Jordan's remorse, his record of honorable service and disability incurred in the military during the Vietnam War, his good behavior in prison, and his significant contributions to society while incarcerated. 1 Postconviction Record 20–21. The trial court accepted the plea and, in December 1991, Jordan was sentenced to life without parole.

As it turned out, this sentence, too, was defective. At the time the parties reached their plea agreement, Mississippi's sentencing statutes authorized a term of life without parole only for those defendants who—unlike Jordan—had been found to be habitual offenders. Citing this statutory gap, the Mississippi Supreme Court held in an unrelated case that a plea agreement materially identical to Jordan's violated Mississippi public policy. *Lanier* v. *State*, 635 So. 2d 813 (1994). Such agreements, the court ex-

plained, were "void *ab initio*," and thus the parties were "placed back in the positions which they occupied prior to entering into the agreement." *Id.*, at 816–817.

Following the decision in *Lanier*, Jordan filed a *pro se* motion with the trial court seeking to remedy his unlawful sentence by changing its term from life without parole to life with the possibility of parole. While the motion was pending, the Mississippi Legislature amended the State's criminal code to permit sentences of life without parole for all capital murder convictions. See 1994 Miss. Laws p. 851 (amending Miss. Code Ann. § 97–3–21). The Mississippi Supreme Court ultimately agreed with Jordan that his sentence was invalid under *Lanier* and remanded the case for resentencing. *Jordan* v. *State*, 697 So. 2d 1190 (1997) (table).

On remand, Jordan asked Owen (reprising his role as special prosecutor) to reinstate their earlier life-without-parole agreement based on the recent amendment to Mississippi law. Jordan, in return, would agree to waive his right to challenge the retroactive application of that amendment to his case. Jordan had good reason to believe that his request would be granted: Three other Mississippi capital defendants had successfully petitioned to have their plea agreements invalidated under the logic of *Lanier*. Each had committed crimes at least as serious as Jordan's,[1] and each had received a life sentence after their successful appeals. Yet Owen refused to enter into the same agreement he had previously accepted, instead seeking the death penalty at a new sentencing trial. Owen later explained that he had declined to negotiate because he felt Jordan had violated their original agreement by asking the trial court to modify his sentence. See *Jordan* v. *State*, 786 So. 2d 987, 1000 (Miss. 2001).

Jordan filed a motion contending that Owen had sought the death penalty as retaliation for Jordan's exercise of his legal right to seek resentencing under *Lanier*. See *Blackledge* v. *Perry*, 417 U. S. 21, 28–29 (1974) (recognizing the Due Process Clause's prohibition of prosecutorial vindictiveness). The trial court denied the motion, and Jordan received a death sentence.

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[1] See *Lanier* v. *State*, 635 So. 2d 813, 815 (Miss. 1994) (assaulting, kidnaping, and murdering a police officer); *Stevenson* v. *State*, 674 So. 2d 501, 502 (Miss. 1996) (stabbing to death a prison deputy); *Patterson* v. *State*, 660 So. 2d 966, 967 (Miss. 1995) (kidnaping and murder).

Jordan continued to pursue his prosecutorial vindictiveness claim on direct appeal to the Mississippi Supreme Court. That court rejected Jordan's argument, noting, among other things, that its previous decision in Jordan's case had left open the possibility that Owen could seek the death penalty. *Jordan* v. *State*, 786 So. 2d, at 1001. Justice Banks dissented, contending that Jordan's allegations were sufficiently troubling to merit an evidentiary hearing. *Id.*, at 1031–1032.

B

After exhausting his postconviction remedies in the state courts, Jordan initiated a federal habeas corpus proceeding in the Southern District of Mississippi. The District Court denied relief on each of the claims in Jordan's petition, including his vindictiveness claim. *Jordan* v. *Epps*, 740 F. Supp. 2d 802, 819 (2010). With respect to that claim, the District Court opined that Owen could not have been vindictive because he "did not substitute a different charge for the charge that was originally imposed, nor did he seek a different penalty than that originally sought." *Ibid.* The District Court also declined to issue a COA. App. to Pet. for Cert. 149a.

Jordan renewed his efforts to obtain a COA on his vindictiveness claim in an application to the Fifth Circuit, but the court denied the request. *Jordan* v. *Epps*, 756 F. 3d 395 (2014). The Fifth Circuit held that Jordan had "fail[ed] to prove" actual vindictiveness by Owen because "it is not vindictive for a prosecutor to follow through on a threat made during plea negotiations." *Id.*, at 406 (citing *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363–364 (1978)). The court further held that its decision in *Deloney* v. *Estelle*, 713 F. 2d 1080 (1983), precluded it from applying a presumption of vindictiveness. *Deloney*, the court reasoned, stood for the proposition that there could be no claim for prosecutorial vindictiveness "absent an increase in charges beyond those raised in the original indictment." 756 F. 3d, at 408.

In rejecting Jordan's legal arguments, the Fifth Circuit acknowledged that the Ninth Circuit, sitting en banc, had granted habeas relief to a capital defendant raising a similar vindictiveness claim. See *id.*, at 411, n. 5 (citing *Adamson* v. *Ricketts*, 865 F. 2d 1011 (1988)). "While the Ninth Circuit may have taken a different approach to this question," the Fifth Circuit maintained

that it was bound by its contrary precedent. 756 F. 3d, at 411, n. 5.

Judge Dennis filed an opinion dissenting in relevant part. He began by stressing that the court was "not called upon to make a decision on the ultimate merits of Jordan's claim of prosecutorial vindictiveness." *Id.*, at 416 (opinion concurring in part and dissenting in part). Judge Dennis went on to explain why, as he saw it, Jordan had "shown sufficient merit to the prosecutorial vindictiveness claim to warrant his appeal being considered on the full merits." *Id.*, at 422.

II

A

In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court. Under the Antiterrorism and Effective Death Penalty Act of 1996, a would-be habeas appellant must first obtain a COA. 28 U. S. C. § 2253(c)(1).

The COA statute permits the issuance of a COA only where a petitioner has made "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Our precedents give form to this statutory command, explaining that a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893, n. 4 (1983); some internal quotation marks omitted). Satisfying that standard, this Court has stated, "does not require a showing that the appeal will succeed." *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003). Instead, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.*, at 338 (internal quotation marks omitted).

We have made equally clear that a COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.*, at 336. This insistence on limited review is more than a formality: The statute mandates that, absent a COA, "an appeal may not be taken to the court of appeals." § 2253(c)(1). Thus, "until

a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.*, at 336.

B

Although the Fifth Circuit accurately recited the standard for issuing a COA, its application of that standard in this case contravened our precedents in two significant respects.

To start, the Fifth Circuit was too demanding in assessing whether reasonable jurists could debate the District Court's denial of Jordan's habeas petition. Two judges—first Justice Banks, and later Judge Dennis—found Jordan's vindictiveness claim highly debatable. And the en banc Ninth Circuit, presented with a similar claim in a comparable procedural posture, had granted relief. Those facts alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim. Cf. Rule 22.3 (CA3 2011) ("[I]f any judge on the panel is of the opinion that the applicant has made the showing required by 28 U. S. C. § 2253, the certificate will issue"); *Jones* v. *Basinger*, 635 F. 3d 1030, 1040 (CA7 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine").

The Fifth Circuit nevertheless rejected Jordan's vindictiveness argument, finding the claim foreclosed by its prior decision in *Deloney*, 713 F. 2d 1080. As Judge Dennis' dissent shows, however, *Deloney* (and the restrictive gloss it placed on this Court's *Blackledge* decision) is susceptible of more than one reasonable interpretation. The defendant there entered into a plea agreement that reduced the charges against him. Later, the defendant not only backed out of his agreement with prosecutors, he insisted on proceeding to trial, undermining the entire purpose of the earlier plea-bargaining process. 713 F. 2d, at 1081. When that trial resulted in a conviction, the defendant alleged that the prosecutor had no right to try him on the original, pre-plea-bargain charges. *Id.*, at 1085. Unsurprisingly, the Fifth Circuit disagreed; it held that the defendant could not "bootstrap" his earlier efforts to obtain a lesser sentence into a vindictiveness claim. *Ibid.*

Jordan's situation is materially different. No one disputes that Jordan, like Deloney, attempted to alter the terms of his plea agreement. But he did so only because the Mississippi Supreme

Court's decision in *Lanier* rendered invalid his life-without-parole sentence. In light of *Lanier*, either Jordan or Owen should have asked to vacate Jordan's invalid sentence; Jordan simply moved first. Moreover, and again in contrast to the defendant in *Deloney*, Jordan never attempted to deprive the State of the benefit of its earlier bargain. Once Mississippi law changed, Jordan was willing to return to the *status quo ante*: He offered to accept the same sentence of life without parole. It was Owen, the prosecutor, who demanded a fourth trial. On these facts, it is far from certain that *Deloney* precludes Jordan from asserting a claim of prosecutorial vindictiveness.

In any event, Jordan's reading of the Fifth Circuit's case law need not be the best one to allow him to obtain further review. "[M]eritorious appeals are a subset of those in which a certificate should issue," *Thomas* v. *United States*, 328 F. 3d 305, 308 (CA7 2003), not the full universe of such cases. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Miller-El*, 537 U. S., at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail." *Id.*, at 338. The possibility that Jordan's claim may falter down the stretch should not necessarily bar it from leaving the starting gate.

The Fifth Circuit's second, and more fundamental, mistake was failing to "limit its examination to a threshold inquiry." *Id.*, at 327. "[A] COA ruling is not the occasion for a ruling on the merit of [a] petitioner's claim." *Id.*, at 331. It requires only "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.*, at 336.

Here, the Fifth Circuit engaged in precisely the analysis *Miller-El* and the COA statute forbid: conducting, across more than five full pages of the Federal Reporter, a detailed evaluation of the merits and then concluding that because Jordan had "fail[ed] to prove" his constitutional claim, 756 F. 3d, at 407, a COA was not warranted. But proving his claim was not Jordan's burden. When a court decides whether a COA should issue, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U. S., at 342. Where, as here, "a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA

based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.*, at 336–337.[2]

* * *

The barrier the COA requirement erects is important, but not insurmountable. In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue. I believe Jordan has plainly made that showing. For that reason, I would grant Jordan's petition and summarily reverse the Fifth Circuit's judgment. I respectfully dissent from the denial of certiorari.

No. 14–9899. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 778 F. 3d 515.

Rehearing Denied

No. 14–1032. MEGGISON *v.* BAILEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT, 575 U. S. 951;

No. 14–8316. MCDONALD *v.* FOX RUN MEADOWS PLANNED UNIT DEVELOPMENT, 575 U. S. 954;

No. 14–8365. LEARY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 575 U. S. 965;

No. 14–8480. BELTRAN *v.* MCDOWELL, ACTING WARDEN, 575 U. S. 968;

No. 14–8493. IN RE SESSON, 575 U. S. 982;

No. 14–8542. REED *v.* JOB COUNCIL OF THE OZARKS ET AL., 575 U. S. 987;

No. 14–8723. BERG *v.* UNITED STATES, 575 U. S. 972;

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[2] This is not the first time the Fifth Circuit has denied a COA after engaging in an extensive review of the merits of a habeas petitioner's claims. See, *e. g.*, *Tabler* v. *Stephens*, 588 Fed. Appx. 297 (2014); *Reed* v. *Stephens*, 739 F. 3d 753 (2014); *Foster* v. *Quarterman*, 466 F. 3d 359 (2006); *Ruiz* v. *Quarterman*, 460 F. 3d 638 (2006); *Cardenas* v. *Dretke*, 405 F. 3d 244 (2005). Nor is it the first time the Fifth Circuit has denied a COA over a dissenting opinion. See, *e. g.*, *Tabler*, 588 Fed. Appx. 297; *Jackson* v. *Dretke*, 450 F. 3d 614 (2006). Although I do not intend to imply that a COA was definitely warranted in each of these cases, the pattern they and others like them form is troubling.

No. 14–8844. MILLER *v.* WALT DISNEY CO. ET AL., 575 U. S. 989;

No. 14–8846. MILLER *v.* ABC HOLDING CO., INC., ET AL., 575 U. S. 1014;

No. 14–8908. SEWELL *v.* HOWARD, 575 U. S. 1028;

No. 14–9007. BARBER *v.* UNITED STATES, 575 U. S. 1002;

No. 14–9168. TOLEN *v.* NORMAN, WARDEN, 575 U. S. 1017;

No. 14–9213. BURT *v.* COMMISSIONER OF INTERNAL REVENUE, 575 U. S. 1004; and

No. 14–9295. DE LA CRUZ *v.* QUINTANA, WARDEN, 575 U. S. 1020. Petitions for rehearing denied.

JUNE 30, 2015

Certiorari Granted—Vacated and Remanded

No. 14–460. HICKENLOOPER, GOVERNOR OF COLORADO *v.* KERR ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, *ante*, p. 787. Reported below: 744 F. 3d 1156.

No. 14–8768. PEOPLES *v.* UNITED STATES. C. A. 5th Cir.; and

No. 14–9487. HORNYAK *v.* UNITED STATES. C. A. 5th 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 *Johnson* v. *United States*, *ante*, p. 591. Reported below: No. 14–9487, 588 Fed. Appx. 384.

No. 13–8407. BROWN *v.* UNITED STATES. C. A. 8th Cir. Reported below: 734 F. 3d 824;

No. 14–5227. ARROYO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 562 Fed. Appx. 889;

No. 14–5229. ANDERSON *v.* UNITED STATES. C. A. 1st Cir. Reported below: 745 F. 3d 593;

No. 14–6510. MELVIN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 577 Fed. Appx. 179;

No. 14–7280. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Reported below: 754 F. 3d 608;

No. 14–7347. VINALES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 564 Fed. Appx. 518;

No. 14–7445. MALDONADO *v.* UNITED STATES. C. A. 2d Cir. Reported below: 581 Fed. Appx. 19;

No. 14–7569. De La Cruz, aka Delacruz *v.* United States. C. A. 5th Cir. Reported below: 582 Fed. Appx. 327;

No. 14–7587. Smith *v.* United States. C. A. 6th Cir. Reported below: 582 Fed. Appx. 590;

No. 14–7653. Rolfer *v.* United States. C. A. 8th Cir.;

No. 14–7832. Denson *v.* United States. C. A. 11th Cir. Reported below: 569 Fed. Appx. 710;

No. 14–8151. Bernardini *v.* United States. C. A. 6th Cir. Reported below: 583 Fed. Appx. 544;

No. 14–8196. Cisneros *v.* United States. C. A. 9th Cir. Reported below: 763 F. 3d 1236;

No. 14–8258. Ball *v.* United States. C. A. 6th Cir. Reported below: 771 F. 3d 964;

No. 14–8333. Davis *v.* United States. C. A. 5th Cir. Reported below: 583 Fed. Appx. 473;

No. 14–8359. Bell *v.* United States. C. A. 6th Cir. Reported below: 575 Fed. Appx. 598;

No. 14–8427. Walker *v.* United States. C. A. 8th Cir.;

No. 14–8464. Smith *v.* United States. C. A. 11th Cir. Reported below: 742 F. 3d 949;

No. 14–8530. Langston *v.* United States. C. A. 8th Cir. Reported below: 772 F. 3d 560;

No. 14–8569. Prince *v.* United States. C. A. 9th Cir. Reported below: 772 F. 3d 1173;

No. 14–8680. Talmore *v.* United States. C. A. 9th Cir. Reported below: 585 Fed. Appx. 567;

No. 14–8848. Taste *v.* United States. C. A. 4th Cir. Reported below: 603 Fed. Appx. 139;

No. 14–8884. Cooper *v.* United States. C. A. 11th Cir. Reported below: 598 Fed. Appx. 682:

No. 14–8903. Jones *v.* United States. C. A. 9th Cir.;

No. 14–8989. Martinez *v.* United States. C. A. 9th Cir. Reported below: 771 F. 3d 672;

No. 14–9049. Aiken *v.* Pastrana, Warden. C. A. 11th Cir. Reported below: 595 Fed. Appx. 953;

No. 14–9062. Holder *v.* United States. C. A. 6th Cir. Reported below: 603 Fed. Appx. 368;

No. 14–9108. Castle *v.* United States. C. A. 6th Cir. Reported below: 596 Fed. Appx. 422;

No. 14–9227. Kirk *v.* United States. C. A. 11th Cir. Reported below: 767 F. 3d 1136;

No. 14–9229. LYNCH *v.* UNITED STATES. C. A. 11th Cir.;

No. 14–9335. DRIVER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 581 Fed. Appx. 829;

No. 14–9338. CONEY *v.* PASTRANA, WARDEN. C. A. 11th Cir. Reported below: 579 Fed. Appx. 848;

No. 14–9574. JONES *v.* UNITED STATES. C. A. 3d Cir.;

No. 14–9659. FALLINS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 777 F. 3d 296; and

No. 14–9750. NIPPER *v.* PASTRANA, WARDEN. C. A. 11th Cir. Reported below: 597 Fed. Appx. 581. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Courts of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

No. 14–282. CHANDLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 591. Reported below: 743 F. 3d 648.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career

Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

No. 14–7390. BECKLES *v.* UNITED STATES. C. A. 11th Cir. Reported below: 579 Fed. Appx. 833;

No. 14–7975. GOODEN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 576 Fed. Appx. 252;

No. 14–9326. MAYER *v.* UNITED STATES. C. A. 9th Cir.; and

No. 14–9634. WYNN *v.* UNITED STATES. C. A. 6th 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 *Johnson* v. *United States*, *ante*, p. 591. JUSTICE KAGAN took no part in the consideration or decision of these motions and these petitions.

JUSTICE ALITO, concurring.

Following the recommendation of the Solicitor General, the Court has held the petitions in these and many other cases pending the decision in *Johnson* v. *United States*, *ante*, p. 591. In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act, 18 U. S. C. § 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Courts of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

Probable Jurisdiction Noted

No. 14–232. HARRIS ET AL. *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL. Appeal from D. C. Ariz. Probable jurisdiction noted. Reported below: 993 F. Supp. 2d 1042.

Certiorari Granted

No. 14–915. FRIEDRICHS ET AL. *v.* CALIFORNIA TEACHERS ASSN. ET AL. C. A. 9th Cir. Certiorari granted.

No. 14–510. MENOMINEE INDIAN TRIBE OF WISCONSIN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari granted limited to the following question: "Whether the D. C. Circuit misapplied this Court's *Holland* v. *Florida*, 560 U. S. 631 (2010), decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?" Reported below: 764 F. 3d 51.

No. 14–1132. MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. *v.* MANNING ET AL. C. A. 3d Cir. Motion of Securities Industry and Financial Markets Association for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 772 F. 3d 158.

No. 14–1175. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. Certiorari granted limited to Questions 2 and 3 presented by the petition. Reported below: 130 Nev. 662, 335 P. 3d 125.

Certiorari Denied

No. 14–765. OTTER, GOVERNOR OF IDAHO, ET AL. *v.* LATTA ET AL.; and

No. 14–788. IDAHO *v.* LATTA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 771 F. 3d 456.

No. 14–1073. NEVADA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 14–9223. ZINK ET AL. *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 783 F. 3d 1089.

No. 14–823. BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, ET AL. *v.* FISHER-BORNE ET AL. C. A. 4th Cir. Certiorari before judgment denied.

JULY 2, 2015

Miscellaneous Order

No. 14–232. HARRIS ET AL. *v.* ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL. D. C. Ariz. [Probable jurisdiction noted, *ante*, p. 1082.] Order noting probable jurisdiction amended

as follows: Probable jurisdiction noted limited to Questions 1 and 2 presented by the statement as to jurisdiction.

JULY 14, 2015

Miscellaneous Orders

No. 15A30. ZINK *v.* STEELE, WARDEN. Application for certificate of appealability, presented to JUSTICE ALITO, and by him referred to the Court, denied.

No. 15–5183 (15A60). IN RE ZINK. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 15–5057 (15A31). ZINK *v.* STEELE, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5159 (15A55). ZINK *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5160 (15A59). ZINK *v.* GRIFFITH, WARDEN, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5176 (15A63). ZINK *v.* STEELE, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5184 (15A62). ZINK *v.* STEELE, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

JULY 20, 2015

Miscellaneous Orders

No. 14A1194 (14–8628). WARE *v.* UNITED STATES, 575 U. S. 946. Application to file petition for rehearing in excess of page

limit, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this application.

No. 14A1225 (14–8767). ROEDER *v.* KANSAS. Sup. Ct. Kan. Application for stay, addressed to JUSTICE ALITO and referred to the Court, denied.

No. D–2828. IN RE SCHACHTER. Robert A. Schachter, of Valley Cottage, N. Y., 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 June 29, 2015 [*ante*, p. 1050], is discharged.

Rehearing Denied

No. 14–1169. GOLDBLATT *v.* CITY OF KANSAS CITY, MISSOURI, ET AL., 575 U. S. 1026;

No. 14–1173. JOHNSON *v.* ILLINOIS ET AL., 575 U. S. 1026;

No. 14–1269. MOORE *v.* LIGHTSTROM ENTERTAINMENT, INC., ET AL., 575 U. S. 1027;

No. 14–1334. IN RE VADDE, 575 U. S. 1036;

No. 14–6927. MOORE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL., 575 U. S. 985;

No. 14–7120. CARR *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 574 U. S. 1124;

No. 14–7567. LADEAIROUS *v.* HOLDER, ATTORNEY GENERAL, ET AL., 574 U. S. 1141;

No. 14–7629. HAGAN *v.* KENTUCKY, 574 U. S. 1171;

No. 14–7977. HUNT *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, 575 U. S. 965;

No. 14–8210. BROWN *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 953;

No. 14–8435. IN RE SHIELDS BEY, 575 U. S. 961;

No. 14–8503. SPECKMAN *v.* TEXAS, 575 U. S. 969;

No. 14–8588. STEWART *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 970;

No. 14–8656. MILLSAP *v.* ARKANSAS, 575 U. S. 999;

No. 14–8671. BENTON *v.* CLARK COUNTY JAIL ET AL., 575 U. S. 970;

No. 14–8720. BUCKLEY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 575 U. S. 1000;

No. 14–8732. SIMMONS *v.* TEXAS, 575 U. S. 1001;

No. 14–8760. THOMAS *v.* ROCKBRIDGE REGIONAL JAIL, 575 U. S. 1012;

No. 14–8767. ROEDER *v.* KANSAS, 575 U. S. 1012;

No. 14–8799. COLEMAN *v.* SCHOLLMEYER, SPECIAL JUDGE, CIRCUIT COURT OF MISSOURI, COLE COUNTY, ET AL., 575 U. S. 1013;

No. 14–8823. CASHIOTTA *v.* DIVISION OF PARKS AND MAINTENANCE, CLEVELAND, OHIO, 575 U. S. 1013;

No. 14–8847. IN RE CUNNINGHAM, 575 U. S. 1008;

No. 14–8860. HAENDEL *v.* DIGIANTONIO ET AL., 575 U. S. 1015;

No. 14–8957. ANDRADE CALLES *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY, 575 U. S. 1029;

No. 14–8988. CAMPBELL *v.* MICHIGAN, 575 U. S. 1030;

No. 14–9031. BARASHKOFF *v.* CITY OF SEATTLE, WASHINGTON, ET AL., 575 U. S. 1031;

No. 14–9060. HEATHER S. *v.* CONNECTICUT COMMISSIONER OF CHILDREN AND FAMILIES, 575 U. S. 1016;

No. 14–9102. REY *v.* UNITED STATES, 575 U. S. 991;

No. 14–9123. BRADLEY *v.* MISSISSIPPI, 575 U. S. 1017;

No. 14–9211. ADKINS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, *ante*, p. 1007;

No. 14–9215. BUHL *v.* BERKEBILE, WARDEN, 575 U. S. 1017;

No. 14–9216. ASKEW *v.* UNITED STATES, 575 U. S. 1004;

No. 14–9329. JOHNSON *v.* UNITED STATES, 575 U. S. 1020;

No. 14–9365. GARREY *v.* MASSACHUSETTS, 575 U. S. 1032;

No. 14–9445. TRUFANT *v.* DEPARTMENT OF THE AIR FORCE, 575 U. S. 1033;

No. 14–9451. IN RE GREEN BEY, 575 U. S. 1008; and

No. 14–9456. BREWER *v.* UNITED STATES, 575 U. S. 1033. Petitions for rehearing denied.

No. 14–7681. COATES, AKA SIMMONS, AKA THOMAS *v.* HOLDER, ATTORNEY GENERAL, 574 U. S. 1173. Motion for leave to file petition for rehearing denied.

No. 14–9324. WARE *v.* UNITED STATES, 575 U. S. 1022. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JULY 24, 2015

Dismissal Under Rule 46

No. 14–1214. COALITION FOR THE PROTECTION OF MARRIAGE *v.* SEVCIK ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 771 F. 3d 456.

JULY 28, 2015

Dismissal Under Rule 46

No. 14–653. BANK OF AMERICA, N. A. *v.* LOPEZ. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 573 Fed. Appx. 922.

Miscellaneous Order

No. 14–613. GREEN *v.* BRENNAN, POSTMASTER GENERAL. C. A. 10th Cir. [Certiorari granted, 575 U. S. 983.] Catherine M. A. Carroll, Esq., of Washington, D. C., is invited to brief and argue this case as *amicus curiae* in support of the judgment below. Briefs for other *amici curiae* in support of the judgment below are to be filed within seven days of the filing of the brief for Court-appointed *amicus curiae*.

AUGUST 10, 2015

Miscellaneous Order

No. 15A16. COLLIE *v.* SOUTH CAROLINA COMMISSION ON LAWYER CONDUCT. Sup. Ct. S. C. Application to file petition for writ of certiorari in excess of the page limits, addressed to JUSTICE GINSBURG and referred to the Court, denied.

Rehearing Denied

No. 13–1428. DAVIS *v.* AYALA, *ante*, p. 257;

No. 14–1165. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE ET AL. *v.* BERCH, CHIEF JUSTICE, SUPREME COURT OF ARIZONA, ET AL., 575 U. S. 1026;

No. 14–1178. KAMPS *v.* BAYLOR UNIVERSITY ET AL., 575 U. S. 1038;

No. 14–1305. TROWBRIDGE *v.* UNITED STATES, *ante*, p. 1005;

No. 14–8491. WHITE *v.* SOUTHEAST MICHIGAN SURGICAL HOSPITAL ET AL., *ante*, p. 1023;

No. 14–8589. HITTSON *v.* CHATMAN, WARDEN, *ante*, p. 1028;

No. 14–8645. DICKERSON *v.* MURRAY ET AL., 575 U. S. 999;
No. 14–8783. MAY *v.* BARBER ET AL., 575 U. S. 1013;
No. 14–8826. TAYLOR *v.* VERIZON COMMUNICATIONS ET AL., 575 U. S. 1014;
No. 14–8831. DAVIS ET AL. *v.* CITY OF NEW HAVEN, CONNECTICUT, ET AL., 575 U. S. 1014;
No. 14–8869. MCNEILL *v.* WAYNE COUNTY, MICHIGAN, 575 U. S. 1015;
No. 14–8899. BUNCH *v.* CAIN, WARDEN, 575 U. S. 1015;
No. 14–9000. GIBBONS *v.* UNITED STATES, 575 U. S. 978;
No. 14–9004. BROUGHTON *v.* MERIT SYSTEMS PROTECTION BOARD, 575 U. S. 990;
No. 14–9156. NIXON *v.* ABBOTT, GOVERNOR OF TEXAS, *ante*, p. 1006;
No. 14–9172. DELK *v.* TEXAS, *ante*, p. 1007;
No. 14–9195. SANDS-WEDEWARD *v.* LOCAL 306, NATIONAL POSTAL MAIL HANDLERS UNION, *ante*, p. 1007;
No. 14–9197. MOATS *v.* WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, ET AL., *ante*, p. 1007;
No. 14–9257. SALARY *v.* NUSS ET AL., 575 U. S. 1041;
No. 14–9302. BROZ *v.* DEUTSCHE BANK NATIONAL TRUST CO., *ante*, p. 1008;
No. 14–9312. TEAGUE *v.* CALIFORNIA, *ante*, p. 1008;
No. 14–9340. JACKSON *v.* DOMZALSKI, 575 U. S. 1042;
No. 14–9390. COOPER *v.* VAROUXIS, EXECUTRIX OF THEODORE VAROUXIS ESTATE AND TRUST, 575 U. S. 1033;
No. 14–9571. MARCH *v.* MCALLISTER, WARDEN, *ante*, p. 1010;
No. 14–9651. VIOLA *v.* UNITED STATES, *ante*, p. 1012; and
No. 14–9705. WHITE *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 1041. Petitions for rehearing denied.

AUGUST 12, 2015

Certiorari Denied

No. 15–5141 (15A48). LOPEZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion for leave to proceed *in forma pauperis* denied. Certiorari denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would vote to grant the motion

for leave to proceed *in forma pauperis*. Reported below: 783 F. 3d 524.

AUGUST 13, 2015

Miscellaneous Order

No. 15A111 (14–1516). DUNCAN, WARDEN *v.* OWENS. C. A. 7th Cir. Application to recall and stay the mandate pending disposition of the petition for writ of certiorari, addressed to JUSTICE SCALIA, and by him referred to the Court, denied.

AUGUST 21, 2015

Miscellaneous Order

No. 15A137. MELLOULI *v.* LYNCH, ATTORNEY GENERAL. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, granted. Further proceedings in the Board of Immigration Appeals are stayed pending the timely filing of a petition for writ of certiorari, or of a petition for writ of mandamus and prohibition, and further order of this Court.

AUGUST 28, 2015

Miscellaneous Orders

No. 14A1154. ECKSTROM *v.* VALENZUELA, WARDEN. Application for certificate of appealability, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 15A96 (15–5289). ARAKJI *v.* HESS ET AL. Application for stay pending disposition of the petition for writ of certiorari, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 13–1067. OBB PERSONENVERKEHR AG *v.* SACHS. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1133.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–520. HAWKINS ET AL. *v.* COMMUNITY BANK OF RAYMORE. C. A. 8th Cir. [Certiorari granted, 574 U. S. 1190.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–1096. LUNA TORRES *v.* LYNCH, ATTORNEY GENERAL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1053.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Denied

No. 14–983. Hooks, Warden *v.* Langford, *ante*, p. 1049;

No. 14–1215. Jones *v.* Jones, 575 U. S. 1038;

No. 14–1246. Gorski *v.* United States et al., *ante*, p. 1036;

No. 14–1310. Edwards *v.* Lake Elsinore Unified School District et al., *ante*, p. 1056;

No. 14–1360. Dix *v.* Unknown Transportation Security Administration Agent et al., *ante*, p. 1057;

No. 14–1369. Ramon Tarango, aka Tarango *v.* Lynch, Attorney General, *ante*, p. 1037;

No. 14–1386. Wilborn *v.* Johnson, Secretary of Homeland Security, *ante*, p. 1057;

No. 14–7955. Glossip et al. *v.* Gross et al., *ante*, p. 863;

No. 14–8932. In re Mitchell, 575 U. S. 1024;

No. 14–9052. Themeus *v.* Jones, Secretary, Florida Department of Corrections, et al., 575 U. S. 1039;

No. 14–9098. Dingle *v.* Virginia, 575 U. S. 1040;

No. 14–9136. Valenzuela, fka Mendez *v.* Corizon Health Care et al., 575 U. S. 1041;

No. 14–9163. Strahorn *v.* Florida, *ante*, p. 1006;

No. 14–9260. Marceaux *v.* United States Marine Corps, *ante*, p. 1008;

No. 14–9309. Yates *v.* Iowa, *ante*, p. 1024;

No. 14–9311. Turner *v.* Coleman, Warden, *ante*, p. 1024;

No. 14–9330. Furs-Julius *v.* Social Security Administration, *ante*, p. 1008;

No. 14–9375. Yuan *v.* Green Century Development, LLC, et al., *ante*, p. 1038;

No. 14–9376. Tomaselli et al. *v.* Beaulieu et al., *ante*, p. 1038;

No. 14–9415. Patton *v.* Bryant et al., *ante*, p. 1039;

No. 14–9421. Mazin *v.* Town of Norwood, Massachusetts, et al., *ante*, p. 1039;

No. 14–9463. Kearney *v.* New York State Department of Correctional Services et al., *ante*, p. 1059;

No. 14–9467. McQueen *v.* Aerotek et al., *ante*, p. 1059;

No. 14–9480. Craddock *v.* United States, 575 U. S. 1034;

No. 14–9509. McClinton *v.* Kelley, Director, Arkansas Department of Correction, *ante*, p. 1059;

No. 14–9527. Fairchild-Littlefield *v.* Cavazos, Warden, *ante*, p. 1009;

No. 14–9581. HENSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, *ante*, p. 1040;

No. 14–9628. ULLRICH *v.* YORDY, WARDEN, *ante*, p. 1060;

No. 14–9881. RICE *v.* UNITED STATES, *ante*, p. 1061;

No. 14–9915. DOE *v.* UNITED STATES, *ante*, p. 1043;

No. 14–9919. BARBARY *v.* UNITED STATES, *ante*, p. 1062;

No. 14–9958. RIGGS *v.* UNITED STATES, *ante*, p. 1062;

No. 14–9982. MONTGOMERY *v.* BRENNAN, POSTMASTER GENERAL, *ante*, p. 1063; and

No. 14–10119. IN RE RIVERA, *ante*, p. 1053. Petitions for rehearing denied.

AUGUST 31, 2015

Miscellaneous Orders

No. 15A218. MCDONNELL *v.* UNITED STATES. Application for stay of mandate, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted, and the issuance of the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15–4019 is 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.

No. 15A250. DAVIS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ROWAN COUNTY CLERK *v.* MILLER ET AL. D. C. E. D. Ky. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

SEPTEMBER 1, 2015

Miscellaneous Order

No. 15–5874 (15A260). IN RE NUNLEY. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 15–5605 (15A163). NUNLEY *v.* BOWERSOX. C. A. 8th Cir. Application for stay of execution of sentence of death, presented

to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 784 F. 3d 468.

No. 15–5808 (15A247). NUNLEY *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 15–5851 (15A251). NUNLEY *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 2, 2015

Miscellaneous Order

No. 15A252. FIBROGEN, INC. *v.* AKEBIA THERAPEUTICS, INC. D. C. N. D. Cal. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered by JUSTICE KENNEDY is vacated.

SEPTEMBER 14, 2015

Miscellaneous Orders

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 575 U. S. 911.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the parties and the Court-appointed *amicus curiae* for enlargement of time for oral argument and for divided argument granted, and the time is divided as follows: 15 minutes for the Court-appointed *amicus curiae*, 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for respondent. Court-appointed *amicus curiae* and petitioner will each be permitted to reserve time for rebuttal.

No. 14–940. EVENWEL ET AL. *v.* ABBOTT, GOVERNOR OF TEXAS, ET AL. D. C. W. D. Tex. [Probable jurisdiction noted, 575 U. S. 1024.] Motion of appellants to dispense with printing joint appendix granted.

SEPTEMBER 28, 2015

Miscellaneous Orders

No. 14–840. FEDERAL ENERGY REGULATORY COMMISSION *v.* ELECTRIC POWER SUPPLY ASSN. ET AL.; and

No. 14–841. EnerNOC, Inc., et al. *v.* Electric Power Supply Assn. et al. C. A. D. C. Cir. [Certiorari granted, 575 U. S. 995.] Motion of the Solicitor General for divided argument granted. Justice Alito took no part in the consideration or decision of this motion.

No. 14–857. Campbell-Ewald Co. *v.* Gomez. C. A. 9th Cir. [Certiorari granted, 575 U. S. 1008.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 14–1504. Wittman et al. *v.* Personhuballah et al. Appeal from D. C. E. D. Va. The parties are directed to file supplemental briefs addressing the following question: "Whether appellants have standing under Article III of the United States Constitution." Briefs, not to exceed 15 pages each, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before Tuesday, October 13, 2015. Reply briefs, not to exceed 10 pages each, are to be filed with the Clerk and served upon opposing counsel on or before Tuesday, October 20, 2015.

September 29, 2015

Certiorari Denied

No. 15–6275 (15A331). Gissendaner *v.* Bryson, Commissioner, Georgia Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Justice Sotomayor would grant the application for stay of execution. Reported below: 794 F. 3d 1327.

No. 15–6327 (15A337). Gissendaner *v.* Chatman, Warden. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

No. 15–6336 (15A336). Gissendaner *v.* Bryson, Commissioner, Georgia Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 803 F. 3d 565.

SEPTEMBER 30, 2015

Certiorari Denied

No. 15–6340 (15A333). GLOSSIP *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE BREYER would grant the application for stay of execution.

OCTOBER 1, 2015

Dismissal Under Rule 46

No. 15–5019. OSBORNE ET AL. *v.* TULIS, AS CHAPTER 7 TRUSTEE FOR OSBORNE ET AL. (two judgments). C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 594 Fed. Appx. 34 (second judgment) and 39 (first judgment).

Miscellaneous Order

No. 15–6325 (15A334). IN RE PRIETO. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 14–770. BANK MARKAZI, AKA CENTRAL BANK OF IRAN *v.* PETERSON ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 758 F. 3d 185.

No. 14–1209. STURGEON *v.* FROST, ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 768 F. 3d 1066.

No. 14–1280. HEFFERNAN *v.* CITY OF PATERSON, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 777 F. 3d 147.

No. 14–1373. UTAH *v.* STRIEFF. Sup. Ct. Utah. Certiorari granted. Reported below: 2015 UT 2, 357 P. 3d 532.

No. 14–1382. AMERICOLD LOGISTICS, LLC, ET AL. *v.* CONAGRA FOODS, INC., ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 776 F. 3d 1175.

No. 14–1406. NEBRASKA ET AL. *v.* PARKER ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 774 F. 3d 1166.

No. 14–1458. MHN GOVERNMENT SERVICES, INC., ET AL. *v.* ZABOROWSKI ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 601 Fed. Appx. 461.

No. 14–1516. DUNCAN, WARDEN *v.* OWENS. C. A. 7th Cir. Certiorari granted. Reported below: 781 F. 3d 360.

No. 15–108. COMMONWEALTH OF PUERTO RICO *v.* SANCHEZ VALLE ET AL. Sup. Ct. P. R. Certiorari granted.

No. 14–6166. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 754 F. 3d 217.

No. 14–8913. MOLINA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 588 Fed. Appx. 333.

No. 15–138. RJR NABISCO, INC., ET AL. *v.* EUROPEAN COMMUNITY ET AL. C. A. 2d Cir. Motion of Washington Legal Foundation for leave to file brief as *amicus curiae* granted. Certiorari granted. JUSTICE SOTOMAYOR took no part in the consideration or decision of this motion and this petition. Reported below: 764 F. 3d 129.

No. 15–5040. WILLIAMS *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 629 Pa. 533, 105 A. 3d 1234.

Certiorari Denied

No. 15–6064 (15A304). PRIETO *v.* ZOOK, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 791 F. 3d 465.

OCTOBER 2, 2015

Dismissal Under Rule 46

No. 14–1511. GIRL SCOUTS OF MIDDLE TENNESSEE, INC. *v.* GIRL SCOUTS OF THE U. S. A. C. A. 6th Cir. Certiorari dis-

missed under this Court's Rule 46.1. Reported below: 770 F. 3d 414.

Miscellaneous Order

No. 15A343. PRIETO *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, dismissed as moot.