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IN

THE SUPREME COURT

AT

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JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS

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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 June 27, 2017, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, STEPHEN BREYER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Sixth Circuit, ELENA KAGAN, Associate Justice.

For the Seventh Circuit, ELENA KAGAN, Associate Justice.

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

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, SONIA SOTOMAYOR, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

June 27, 2017.

(For next previous allotment, see 582 U. S., p. v.)

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CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 2017

MARINELLO *v.* UNITED STATES

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

No. 16–1144. Argued December 6, 2017—Decided March 21, 2018

Between 2004 and 2009, the Internal Revenue Service (IRS) intermittently investigated petitioner Marinello’s tax activities. In 2012, the Government indicted Marinello for violating, among other criminal tax statutes, a provision in 26 U.S.C. § 7212(a) known as the Omnibus Clause, which forbids “corruptly or by force or threats of force . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code].” The judge instructed the jury that, to convict Marinello of an Omnibus Clause violation, it must find that he “corruptly” engaged in at least one of eight specified activities, but the jury was not told that it needed to find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. Marinello was convicted. The Second Circuit affirmed, rejecting his claim that an Omnibus Clause violation requires the Government to show the defendant tried to interfere with a pending IRS proceeding, such as a particular investigation.

Held: To convict a defendant under the Omnibus Clause, the Government must prove the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence. Pp. 6–14.

(a) In *United States v. Aguilar*, 515 U.S. 593, this Court interpreted a similarly worded criminal statute—which made it a felony “corruptly

Syllabus

or by threats or force . . . [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice,” 18 U.S.C. § 1503(a). There, the Court required the Government to show there was a “nexus” between the defendant’s obstructive conduct and a particular judicial proceeding. The Court said that the defendant’s “act must have a relationship in time, causation, or logic with the judicial proceedings.” 515 U.S., at 599. In reaching this conclusion, the Court emphasized that it has “traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Id.*, at 600. That reasoning applies here with similar strength. The verbs “obstruct” and “impede” require an object. The taxpayer must hinder a particular person or thing. The object in § 7212(a) is the “due administration of [the Tax Code].” That phrase is best viewed, like the “due administration of justice” in *Aguilar*, as referring to discrete targeted administrative acts rather than every conceivable task involved in the Tax Code’s administration. Statutory context confirms this reading. The Omnibus Clause appears in the middle of a sentence that refers to efforts to “intimidate or impede any officer or employee of the United States acting in an official capacity.” § 7212(a). The first part of the sentence also refers to “force or threats of force,” which the statute elsewhere defines as “threats of bodily harm to the officer or employee of the United States or to a member of his family.” *Ibid.* And § 7212(b) refers to the “forcibl[e] rescu[e]” of “any property after it shall have been seized under” the Internal Revenue Code. Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. In context, the Omnibus Clause logically serves as a “catchall” for the obstructive conduct the subsection sets forth, not for every violation that interferes with routine administrative procedures such as the processing of tax returns, receipt of tax payments, or issuance of tax refunds. The statute’s legislative history does not suggest otherwise. The broader context of the full Internal Revenue Code also counsels against a broad reading. Interpreting the Omnibus Clause to apply to all Code administration could transform the Code’s numerous misdemeanor provisions into felonies, making them redundant or perhaps the subject matter of plea bargaining. It could also result in a similar lack of fair warning and related kinds of unfairness that led this Court to “exercise” interpretive “restraint” in *Aguilar*. See 515 U.S., at 600. The Government claims that the “corrupt state of mind” requirement will cure any overbreadth problem, but it is difficult to imagine a scenario when that requirement

Syllabus

will make a practical difference in the context of federal tax prosecutions. And to rely on prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute’s general language places too much power in the prosecutor’s hands. Pp. 6–11.

(b) Following the same approach taken in similar cases, the Government here must show that there is a “nexus” between the defendant’s conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. See *Aguilar, supra*, at 599. The term “particular administrative proceeding” does not mean every act carried out by IRS employees in the course of their administration of the Tax Code. Just because a taxpayer knows that the IRS will review her tax return annually does not transform every Tax Code violation into an obstruction charge. In addition to satisfying the nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See *Arthur Andersen LLP v. United States*, 544 U. S. 696, 703, 707–708. Pp. 11–14.

839 F. 3d 209, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 16.

Matthew S. Hellman argued the cause for petitioner. With him on the briefs were *David Bitkower*, *Joseph M. LaTona*, *David A. Strauss*, and *Sarah M. Konsky*.

Robert A. Parker argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Hubbert*, *Deputy Solicitor General Dreeben*, *S. Robert Lyons*, *Stanley J. Okula, Jr.*, *Gregory Victor Davis*, and *Gregory S. Knapp*.*

*Briefs of *amici curiae* urging reversal were filed for the American College of Tax Counsel by *Jenny L. Johnson*, *Guinevere M. Moore*, *Armando Gomez*, and *David W. Foster*; for the Cause of Action Institute et al. by *Erica L. Marshall*, *John Vecchione*, and *Joshua L. Dratel*; for the Chamber of Commerce of the United States of America et al. by *Lewis J. Liman*, *Nowell D. Bamberger*, *Kate Comerford Todd*, *Warren Postman*, *Karen R. Harned*, and *Elizabeth Milito*; and for the New York Council of Defense Lawyers by *Alexandra A. E. Shapiro*.

Opinion of the Court

JUSTICE BREYER delivered the opinion of the Court.

A clause in § 7212(a) of the Internal Revenue Code makes it a felony “corruptly or by force” to “endeavo[r] to obstruct or imped[e] the due administration of this title.” 26 U. S. C. § 7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, “due administration of [the Tax Code]” does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

I

The Internal Revenue Code provision at issue, § 7212(a), has two substantive clauses. The first clause, which we shall call the “Officer Clause,” forbids

“corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code].” *Ibid.* (emphasis added).

The second clause, which we shall call the “Omnibus Clause,” forbids

“corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, *the due administration* of [the Internal Revenue Code].” *Ibid.* (emphasis added).

As we said at the outset, we here consider the scope of the Omnibus Clause. (We have placed the full text of § 7212 in the Appendix, *infra*.)

Opinion of the Court

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including “failing to maintain corporate books and records,” “failing to provide” his tax accountant “with complete and accurate” tax “information,” “destroying . . . business records,” “hiding income,” and “paying employees . . . with cash.” 839 F. 3d 209, 213 (CA2 2016).

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so “corruptly,” meaning “with the intent to secure an unlawful advantage or benefit, either for [himself] or for another.” App. in No. 15–2224 (CA2), p. 432. The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts.

Marinello appealed to the Court of Appeals for the Second Circuit. He argued, among other things, that a violation of the Omnibus Clause requires the Government to show that the defendant had tried to interfere with a “pending IRS proceeding,” such as a particular investigation. Brief for Appellant in No. 15–2224, pp. 23–25. The appeals court disagreed. It held that a defendant need not possess “an awareness of a particular [IRS] action or investigation.” 839 F. 3d, at 221 (quoting *United States v. Wood*, 384 Fed. Appx. 698, 704 (CA10 2010); alteration in original). The full

Opinion of the Court

Court of Appeals rejected Marinello’s petition for rehearing, two judges dissenting. 855 F. 3d 455 (CA2 2017).

Marinello then petitioned for certiorari, asking us to decide whether the Omnibus Clause requires the Government to prove the defendant was aware of “a pending IRS action or proceeding, such as an investigation or audit,” when he “engaged in the purportedly obstructive conduct.” Pet. for Cert. i. In light of a division of opinion among the Circuits on this point, we granted the petition. Compare *United States v. Kassouf*, 144 F. 3d 952 (CA6 1998) (requiring showing of a pending proceeding), with 839 F. 3d, at 221 (disagreeing with *Kassouf*).

II

In *United States v. Aguilar*, 515 U. S. 593 (1995), we interpreted a similarly worded criminal statute. That statute made it a felony “corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruct[, or imped[e], or endeavor[] to influence, obstruct, or impede, the due administration of justice.” 18 U. S. C. § 1503(a). The statute concerned not (as here) “the due administration of” *the Internal Revenue Code* but rather “the due administration of *justice*.” (We have placed the full text of § 1503 in the Appendix, *infra*.)

In interpreting that statute we pointed to earlier cases in which courts had held that the Government must prove “an intent to influence judicial or grand jury proceedings.” *Aguilar, supra*, at 599 (citing *United States v. Brown*, 688 F. 2d 596, 598 (CA9 1982)). We noted that some courts had imposed a “‘nexus’ requirement”: that the defendant’s “act must have a relationship in time, causation, or logic with the judicial proceedings.” *Aguilar, supra*, at 599 (citing *United States v. Wood*, 6 F. 3d 692, 696 (CA10 1993), and *United States v. Walasek*, 527 F. 2d 676, 679, and n. 12 (CA3 1975)). And we adopted the same requirement.

We set forth two important reasons for doing so. We wrote that we “have traditionally exercised restraint in as-

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sessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Aguilar, supra*, at 600 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931); citation omitted). Both reasons apply here with similar strength.

As to Congress’ intent, the literal language of the statute is neutral. The statutory words “obstruct or impede” are broad. They can refer to anything that “block[s],” “make[s] difficult,” or “hinder[s].” Black’s Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster’s New International Dictionary 1248 (2d ed. 1957) (Webster’s) (impede); *id.*, at 1682 (obstruct); accord, 5 Oxford English Dictionary 80 (1933) (impede); 7 *id.*, at 36 (obstruct). But the verbs “obstruct” and “impede” suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the “due administration of this title.” The word “administration” can be read literally to refer to every “[a]ct or process of administering” including every act of “managing” or “conduct[ing]” any “office,” or “perform[ing] the executive duties of” any “institution, business, or the like.” Webster’s 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. Cf. *Aguilar, supra*, at 600–601 (concluding false statements made to an investigating agent rather than a grand jury do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to “intimidate or impede *any officer or employee of the United States* acting in an official capacity.” 26 U.S.C. § 7212(a) (emphasis added). The first

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part of the sentence also refers to “force or threats of force,” which the statute elsewhere defines as “threats of bodily harm to the *officer or employee of the United States or to a member of his family.*” *Ibid.* (emphasis added). The following subsection refers to the “forcibl[e] rescu[e]” of “any *property* after it shall have been seized under” the Internal Revenue Code. § 7212(b) (emphasis added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And in that context the Omnibus Clause logically serves as a “catch-all” in respect to the obstructive conduct the subsection sets forth, not as a “catchall” for every violation that interferes with what the Government describes as the “continuous, ubiquitous, and universally known” administration of the Internal Revenue Code. Brief in Opposition 9.

Those who find legislative history helpful can find confirmation of the more limited scope of the Omnibus Clause in the House and Senate Reports written when Congress first enacted the Omnibus Clause. See H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954). According to the House Report, § 7212 “provides for the punishment of threats or threatening acts against *agents* of the Internal Revenue Service, or any other *officer or employee* of the United States, or *members of the families of such persons*, on account of the performance by such agents or officers or employees of their official duties” and “*will also punish the corrupt solicitation of an internal revenue employee.*” H. R. Rep. No. 1337, at A426 (emphasis added). The Senate Report also refers to the section as aimed at targeting officers and employees. It says that § 7212 “covers all cases where the *officer* is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.” S. Rep. No. 1622, at 147 (emphasis added). We have found nothing in the statute’s history suggesting that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including

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the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds.

Viewing the Omnibus Clause in the broader statutory context of the full Internal Revenue Code also counsels against adopting the Government's broad reading. That is because the Code creates numerous misdemeanors, ranging from willful failure to furnish a required statement to employees, § 7204, to failure to keep required records, § 7203, to misrepresenting the number of exemptions to which an employee is entitled on IRS Form W-4, § 7205, to failure to pay any tax owed, however small the amount, § 7203. To interpret the Omnibus Clause as applying to all Code administration would potentially transform many, if not all, of these misdemeanor provisions into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining. Some overlap in criminal provisions is, of course, inevitable. See, e.g., *Sansone v. United States*, 380 U. S. 343, 349 (1965) (affirming conviction for tax evasion despite overlap with other provisions). Indeed, as the dissent notes, *post*, at 22 (opinion of THOMAS, J.), Marinello's preferred reading of § 7212 potentially overlaps with another provision of federal law that criminalizes the obstruction of the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States," 18 U. S. C. § 1505. But we have not found any case from this Court interpreting a statutory provision that would create overlap and redundancy to the degree that would result from the Government's broad reading of § 7212—particularly when it would "render superfluous other provisions in the same enactment." *Freytag v. Commissioner*, 501 U. S. 868, 877 (1991) (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U. S. 552, 562 (1990)); see also *Yates v. United States*, 574 U. S. 528, 543 (2015) (plurality opinion).

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to "exercise" interpretive "restraint." See 515

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U. S., at 600; see also *Yates, supra*, at 547–548; *Arthur Andersen LLP v. United States*, 544 U. S. 696, 703–704 (2005). Interpreted broadly, the provision could apply to a person who pays a babysitter \$41 per week in cash without withholding taxes, see 26 CFR §31.3102–1(a) (2017); IRS, Publication 926, pp. 5–6 (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

The Government argues that the need to show the defendant’s obstructive conduct was done “corruptly” will cure any overbreadth problem. But we do not see how. The Government asserts that “corruptly” means acting with “the specific intent to obtain an unlawful advantage” for the defendant or another. See Tr. of Oral Arg. 37; accord, 839 F. 3d, at 218. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would “willfully” violate the Tax Code (the *mens rea* requirement of various tax crimes, including misdemeanors, see, *e. g.*, 26 U. S. C. §§ 7203, 7204, 7207) without intending someone to obtain an unlawful advantage. See *Cheek v. United States*, 498 U. S. 192, 201 (1991) (“Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty”). A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent’s argument that the distinction between “willfully” and “corruptly”—at least as defined by the Government—

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reflects any meaningful difference in culpability. See *post*, at 21.

Neither can we rely upon prosecutorial discretion to narrow the statute's scope. True, the Government used the Omnibus Clause only sparingly during the first few decades after its enactment. But it used the clause more often after the early 1990's. Brief for Petitioner 9. And at oral argument the Government told us that, where more punitive and less punitive criminal provisions both apply to a defendant's conduct, the Government will charge a violation of the more punitive provision as long as it can readily prove that violation at trial. Tr. of Oral Arg. 46–47, 55–57; see Office of Atty. Gen., Department Charging and Sentencing Policy (May 10, 2017), online at <http://www.justice.gov/opa/press-release/file/965896/download> (as last visited Mar. 16, 2018).

Regardless, to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing “policemen, prosecutors, and juries to pursue their personal predilections,” *Smith v. Goguen*, 415 U. S. 566, 575 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we “cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’” *McDonnell v. United States*, 579 U. S. 550, 576 (2016) (quoting *United States v. Stevens*, 559 U. S. 460, 480 (2010)). And it is why “[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute.” *Aguilar, supra*, at 600.

III

In sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)'s Omnibus Clause. To be

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sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. See *Aguilar*, *supra* (interpreting a statute prohibiting the obstruction of “the due administration of justice”); *Arthur Andersen*, *supra* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates*, *supra*, at 531 (interpreting a statute prohibiting the destruction, concealment, or covering up of any “record, document, or tangible object with the intent to” obstruct the “investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States”). The Government and the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar*, 18 U. S. C. § 1503, prohibited influencing, intimidating, or impeding “any witness or officer in any court of the United States” or endeavoring “to obstruct or impede the due administration of justice *therein*.” *Pettibone v. United States*, 148 U. S. 197, 202 (1893) (citing Rev. Stat. § 5399; emphasis added); see *post*, at 23. But Congress subsequently deleted the word “therein,” leaving only a broadly worded prohibition against obstruction of “the due administration of justice.” Act of June 25, 1948, § 1503, 62 Stat. 769–770. Congress then used that same amended formulation when it enacted § 7212, prohibiting the obstruction of “the due administration” of the Tax Code. Internal Revenue Code of 1954, 68A Stat. 855. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. See *Smith v. City of Jackson*, 544 U. S. 228, 233 (2005).

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We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a “nexus” between the defendant’s conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a “relationship in time, causation, or logic with the [administrative] proceedings.” *Aguilar*, 515 U. S., at 599 (citing *Wood*, 6 F. 3d, at 696). By “particular administrative proceeding” we do not mean every act carried out by IRS employees in the course of their “continuous, ubiquitous, and universally known” administration of the Tax Code. Brief in Opposition 9. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant’s effort to mislead the investigating agent in *Aguilar*. The agent’s investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant’s conduct did not support an obstruction charge. 515 U. S., at 600. In light of our decision in *Aguilar*, we find it appropriate to construe § 7212’s Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See *Arthur Andersen*, 544 U. S., at 703, 707–708 (requiring

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the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their “use in an official proceeding”). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

For these reasons, the Second Circuit’s judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

26 U. S. C. § 7212: “Attempts to interfere with administration of internal revenue laws**“(a) Corrupt or forcible interference**

“Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term ‘threats of force’, as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

“(b) Forcible rescue of seized property

“Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined

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not more than \$500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.”

18 U. S. C. § 1503: “Influencing or injuring officer or juror generally

“(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

“(b) The punishment for an offense under this section is—

“(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

“(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

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“(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.”

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Omnibus Clause of 26 U. S. C. § 7212(a) of the Internal Revenue Code (Tax Code) makes it a felony to “corruptly . . . endeavor[r] to obstruct or imped[e] the due administration of this title.” “[T]his title” refers to Title 26, which contains the entire Tax Code and authorizes the Internal Revenue Service (IRS) to calculate, assess, and collect taxes. I would hold that the Omnibus Clause does what it says: forbid corrupt efforts to impede the IRS from performing any of these activities. The Court, however, reads “this title” to mean “a particular [IRS] proceeding.” *Ante*, at 13. And that proceeding must be either “pending” or “in the offing.” *Ante*, at 13–14. The Court may well prefer a statute written that way, but that is not what Congress enacted. I respectfully dissent.

I

Petitioner Carlo J. Marinello, II, owned and managed a company that provided courier services. Marinello, however, kept almost no records of the company’s earnings or expenditures. He shredded or discarded most business records. He paid his employees in cash and did not give them tax documents. And he took tens of thousands of dollars from the company each year to pay his personal expenses.

Unbeknownst to Marinello, the IRS began investigating him in 2004. The IRS learned that he had not filed a tax return—corporate or individual—since at least 1992. But the investigation came to a standstill because the IRS did not have enough information about Marinello’s earnings. This was not surprising given his diligent efforts to avoid creating a paper trail. After the investigation ended, Marinello consulted a lawyer and an accountant, both of whom

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advised him that he needed to file tax returns and keep business records. Despite these warnings, Marinello did neither for another four years.

In 2009, the IRS decided to investigate Marinello again. In an interview with an IRS agent, Marinello initially claimed he was exempt from filing tax returns because he made less than \$1,000 per year. Upon further questioning, however, Marinello changed his story. He admitted that he earned more than \$1,000 per year, but said he “‘never got around’” to paying taxes. 839 F. 3d 209, 212 (CA2 2016). He also admitted that he shredded documents, did not keep track of the company’s income or expenses, and used the company’s income for personal bills. His only excuse was that he “took the easy way out.” *Ibid.* After just a few hours of deliberation, a jury convicted Marinello of corruptly endeavoring to obstruct or impede the due administration of the Tax Code, § 7212(a).

II

Section 7212(a)’s Omnibus Clause prohibits “corruptly . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of this title.” I agree with the Court’s interpretations of “obstruct or impede” and “due administration,” which together refer to conduct that hinders the IRS’ performance of its official duties. See *ante*, at 7. I also agree that the object of these words—the thing a person is prohibited from obstructing the due administration of—is “this title,” *i. e.*, Title 26, which contains the entire Tax Code. See *ibid.* But I part ways when the Court concludes that the whole phrase “due administration of the Tax Code” means “only some of” the Tax Code—specifically “particular [IRS] proceeding[s], such as an investigation, an audit, or other targeted administrative action.” *Ante*, at 7, 13. That limitation has no basis in the text. In my view, the plain text of the Omnibus Clause prohibits obstructing the due administration of the Tax Code in its entirety, not just particular IRS proceedings.

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A

The words “this title” cannot be read to mean “only some of this title.” As this Court recently reiterated, phrases such as “this title” most naturally refer to the cited provision “as a whole.” *Rubin v. Islamic Republic of Iran*, 583 U. S. 202, 212 (2018). Congress used “this title” throughout Title 26 to refer to the Tax Code in its entirety. See, e. g., § 7201 (“[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title”); § 7203 (“[a]ny person required under this title to pay any estimated tax or tax, or required by this title . . . to make a return, keep any records, or supply any information, who willfully fails to [do so]”). And “[w]hen Congress wanted to refer only to a particular subsection or paragraph, it said so.” *NLRB v. SW General, Inc.*, 580 U. S. 288, 300 (2017); see, e. g., § 7204 (criminalizing willfully failing to furnish a statement “required under section 6051”); § 7207 (criminalizing willfully furnishing fraudulent or materially false information “required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527”); § 7210 (criminalizing neglecting to appear or produce documents “required under section 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b)”). Thus, “this title” must refer to the Tax Code as a whole.

The phrase “due administration of this title” likewise refers to the due administration of the entire Tax Code. As this Court has recognized, “administration” of the Tax Code includes four basic steps: information gathering, assessment, levy, and collection. See *Direct Marketing Assn. v. Brohl*, 575 U. S. 1, 8–10 (2015). The first “phase of tax administration procedure” is “information gathering.” *Id.*, at 8; see, e. g., §§ 6001–6096. “This step includes private reporting of information used to determine tax liability, including reports by third parties who do not owe the tax.” *Id.*, at 8 (citation omitted). The “next step in the process” is “‘assessment,’” which includes “the process by which [a taxpayer’s liability] is calculated” and the “official recording of a taxpayer’s liabil-

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ity.” *Id.*, at 9; see, e. g., §§ 6201–6241. After information gathering and assessment come “levy” and “collection.” See *id.*, at 9–10; see, e. g., §§ 6301–6344. Levy refers to “a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer’s property.” *Id.*, at 9. Collection refers to “the act of obtaining payment of taxes due.” *Id.*, at 10.

Subtitle F of the Tax Code—titled “Procedure and Administration”—contains directives related to each of these steps. It requires taxpayers to keep certain records and file certain returns, § 6001; specifies that taxpayers with qualifying incomes must file returns, § 6012; and authorizes the Secretary of the Treasury to create returns for taxpayers who fail to file returns or who file fraudulent ones, § 6020. It requires the Secretary to make inquiries, determinations, and assessments of tax liabilities. § 6201. And it authorizes the Secretary to collect and levy taxes. §§ 6301, 6331. Subtitle F also gives the Secretary the power to commence proceedings to recover unpaid taxes or fees, §§ 7401–7410, and to conduct investigations into the accuracy of particular returns, §§ 7601–7613.

Accordingly, the phrase “due administration of this title” refers to the entire process of taxation, from gathering information to assessing tax liabilities to collecting and levying taxes. It is not limited to only a few specific provisions within the Tax Code.

B

The Court rejects this straightforward reading, describing the “literal language” of the Omnibus Clause as “neutral.” *Ante*, at 7. It concludes that the statute prohibits only acts related to a pending or imminent proceeding. *Ante*, at 13–14. There is no textual or contextual support for this limitation.

The text of the Omnibus Clause is not “neutral”; it omits the limitation that the Court reads into it. The Omnibus Clause nowhere suggests that “only some of” the processes

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in the Tax Code are covered, *ante*, at 7, or that the line between covered and uncovered processes is drawn at some vague notion of “proceeding.” The Omnibus Clause does not use the word “proceeding” at all, but instead refers to the entire Tax Code, which covers much more than that. This Court cannot “lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005).

Having failed to find its proposed limit in the text, the Court turns to context. However, its two contextual arguments fare no better.

First, the Court contends that the Omnibus Clause must be limited to pending or imminent proceedings because the other clauses of § 7212 are limited to actions “taken against individual identifiable persons or property.” *Ante*, at 8. But specific clauses in a statute typically do not limit the scope of a general omnibus clause. See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008) (explaining that the *ejusdem generis* canon does not apply to a “disjunctive” phrase in a statute “with one specific and one general category”). Nor do the other clauses in § 7212 contain the pending-or-imminent-proceeding requirement that the Court reads into the Omnibus Clause. See § 7212(a) (prohibiting efforts to “intimidate or impede any officer or employee of the United States acting in an official capacity”); § 7212(b) (prohibiting “forcibly rescu[ing] or caus[ing] to be rescued any property after it shall have been seized under this title”). They thus provide no support for the Court’s atextual limitation.

Second, the Court asserts that its reading prevents the Omnibus Clause from overlapping with certain misdemeanors in the Tax Code. *Ante*, at 9 (discussing §§ 7203, 7204, 7205). But there is no redundancy problem because these provisions have different *mens rea* requirements. The Omnibus Clause requires that an act be done “corruptly,” but

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the misdemeanor provisions require that an act be done “willfully.” The difference between these *mens rea* requirements is significant. While “willfully” requires proof only “that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty,” *Cheek v. United States*, 498 U. S. 192, 201 (1991), “corruptly” requires proof that the defendant “act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person,” *United States v. Floyd*, 740 F. 3d 22, 31 (CA1 2014) (collecting cases); see also Black’s Law Dictionary 414 (rev. 4th ed. 1951) (“corruptly” “generally imports a wrongful design to acquire some pecuniary or other advantage”). In other words, “corruptly” requires proof that the defendant not only knew he was obtaining an “unlawful benefit” but that his “objective” or “purpose” was to obtain that unlawful benefit. See 21 Am. Jur. 2d, Criminal Law § 114 (2016) (explaining that specific intent requires both knowledge and purpose).

The Court dismisses the significance of the different *mens rea* requirements, see *ante*, at 10, but this difference is important under basic principles of criminal law. The law recognizes that the same conduct, when committed with a higher *mens rea*, is more culpable and thus more deserving of punishment. See *Schad v. Arizona*, 501 U. S. 624, 643 (1991) (plurality opinion). For that reason, different *mens rea* requirements often differentiate culpability for the same conduct. See, e. g., 40 C. J. S., Homicide § 80 (2014) (explaining that the distinction between first- and second-degree murder is based on the defendant’s state of mind); § 103 (same for voluntary and involuntary manslaughter). Unless the Court means to cast doubt on this well-established principle, it should not casually dismiss the different *mens rea* requirements in the Omnibus Clause and the various misdemeanors in the Tax Code.

Even if the Omnibus Clause did overlap with these other misdemeanors, that would prove little. For better or worse,

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redundancy abounds in both the criminal law and the Tax Code. This Court has repeatedly declined to depart from the plain meaning of the text simply because the same conduct would be criminalized under two or more provisions. See, e. g., *Loughrin v. United States*, 573 U. S. 351, 358, n. 4 (2014) (“No doubt, the overlap between the two clauses is substantial on our reading, but that is not uncommon in criminal statutes”); *Hubbard v. United States*, 514 U. S. 695, 714, n. 14 (1995) (“Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct”); *Sansone v. United States*, 380 U. S. 343, 352 (1965) (allowing the Government to proceed on a felony tax evasion charge even though that charge “‘covered precisely the same ground’” as two misdemeanors in the Tax Code). In fact, the Court’s interpretation of the Omnibus Clause does not eliminate the redundancy. Certain misdemeanor offenses in the Tax Code—such as failing to obey a summons, § 7210—apply to conduct that takes place during a proceeding and, thus, would still violate the Omnibus Clause under the Court’s interpretation. The Court’s interpretation also makes the Omnibus Clause largely redundant with 18 U. S. C. § 1505, which already prohibits “corruptly . . . endeavor[ing] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States.” Avoiding redundancy is thus not a reason to favor the Court’s interpretation. Cf. *Marx v. General Revenue Corp.*, 568 U. S. 371, 385 (2013) (“[T]he canon against surplusage ‘assists only where a competing interpretation gives effect to every clause and word of a statute’”).*

*The Court also relies on legislative history to support its interpretation. See *ante*, at 8–9. Even assuming legislative history could impose a requirement that does not appear in the text, the Court cites nothing in the legislative history that limits the Omnibus Clause to proceedings—or even uses the word “proceeding.” In fact, the legislative history does not say anything at all about the Omnibus Clause. As Marinello concedes,

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C

The Court contends that its narrow reading of “due administration of this title” is supported by three decisions interpreting other obstruction statutes, though it admits that the “language and history” of the Omnibus Clause “differ somewhat” from those other obstruction provisions. *Ante*, at 12 (citing *United States v. Aguilar*, 515 U. S. 593 (1995); *Arthur Andersen LLP v. United States*, 544 U. S. 696 (2005); *Yates v. United States*, 574 U. S. 528 (2015) (plurality opinion)). “[D]iffer somewhat” is putting it lightly. The differences between the Omnibus Clause and those other obstruction statutes demonstrate why the former does not contain the Court’s proceeding requirement.

Aguilar interpreted 18 U. S. C. § 1503. The omnibus clause of § 1503 forbids corruptly endeavoring to obstruct “the due administration of justice.” The Court concluded that this language requires the prosecution to prove a “nexus” between the defendant’s obstructive act and “judicial proceedings.” 515 U. S., at 599–600. But this nexus requirement was based on the specific history of § 1503. The predecessor to that statute prohibited obstructing “the due administration of justice” “in any court of the United States.” *Pettibone v. United States*, 148 U. S. 197, 202 (1893) (citing Rev. Stat. § 5399). Based on this statutory history, the Court assumed that § 1503 continued to refer to the administration of justice in a court. *Aguilar, supra*, at 599. None of that history is present here.

Arthur Andersen is even further afield. There the Court interpreted 18 U. S. C. § 1512(b)(2)(A), which prohibits “knowingly . . . corruptly persuad[ing] another person . . . with intent to . . . cause or induce [that] person to . . . with-

the vague snippets of legislative history that the Court cites are discussing a different portion of 26 U. S. C. § 7212(a), involving threats against IRS officers and their family members. See Reply Brief 11 (“The conceded focus of § 7212(a)’s legislative history was the *officers* clause” and it was “relative[ly] silen[t] regarding [the Omnibus Clause]”).

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hold testimony, or withhold a record, document, or other object, from an official proceeding.” Relying on *Aguilar*, the Court concluded that § 1512(b)(2)(A) required the Government to show a “nexus” with “[a] particular proceeding.” 544 U. S., at 707–708. But this nexus requirement came from the statutory text, which expressly included “an official proceeding.” If anything, then, § 1512(b)(2)(A) cuts against the Court’s interpretation of the Omnibus Clause because it shows that Congress knows how to impose a “proceeding” requirement when it wants to do so. See *Kucana v. Holder*, 558 U. S. 233, 248 (2010); *Jama*, 543 U. S., at 341.

Yates underscores this point. There the Court interpreted 18 U. S. C. § 1519, which prohibits obstructing “the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” The four Justices in the plurality recognized that this language made § 1519 broader than other obstruction statutes: Section 1519 “covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement.” 574 U. S., at 547. The plurality contrasted the term “‘official proceeding’” with the phrase “‘investigation or proper administration of any matter within the jurisdiction of any department or agency,’” noting that the latter is broader. *Id.*, at 542. The same is true for the broad language of the Omnibus Clause.

In sum, these cases demonstrate that, when text and history justify it, this Court interprets obstruction statutes to include a proceeding requirement. But we have never inserted such a requirement into an obstruction statute without textual or historical support. Today the Court does precisely that.

D

All else having failed, the Court invokes lenity-sounding concerns to justify reading its proceeding requirement into the Omnibus Clause. See *ante*, at 7, 9–10. But the rule of lenity applies only if after applying ordinary tools of statu-

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tory interpretation, “there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.” *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citation and internal quotation marks omitted). The Court identifies no such grievous ambiguity in the Omnibus Clause, and breadth is not the same thing as ambiguity. The Omnibus Clause is both “very broad” and “very clear.” *Yates, supra*, at 566 (KAGAN, J., dissenting). Lenity does not apply.

If the Court is concerned that the Omnibus Clause does not give defendants “fair warning” of what it prohibits, *ante*, at 6–7, I am hard pressed to see how today’s decision makes things better. The Court outlines its atextual proceeding requirement in only the vaguest of terms. Under its interpretation, the prosecution must prove a “nexus” between the defendant’s conduct and some “particular administrative proceeding.” *Ante*, at 13. “[P]articular administrative proceeding” is defined negatively as “not . . . every act carried out by IRS employees in the course of their ‘continuous, ubiquitous, and universally known’ administration of the Tax Code.” *Ibid.* Further, the Government must prove that the proceeding was “reasonably foreseeable” to the defendant. *Ibid.* “Reasonably foreseeable” is again defined negatively as “not . . . that the defendant knew the IRS may catch onto his unlawful scheme eventually.” *Ante*, at 14. It is hard to see how the Court’s statute is less vague than the one Congress drafted, which simply instructed individuals not to corruptly obstruct or impede the IRS’ administration of the Tax Code.

E

To be sure, §7212(a) is a sweeping obstruction statute. Congress may well have concluded that a broad statute was warranted because “our tax structure is based on a system of self-reporting” and “the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability.” *United*

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States v. Bisceglia, 420 U.S. 141, 145 (1975). Whether or not we agree with Congress’ judgment, we must leave the ultimate “[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly . . . for Congress.” *United States v. Rodgers*, 466 U.S. 475, 484 (1984). “[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.” *Lewis v. Chicago*, 560 U.S. 205, 217 (2010).

The Court frets that the Omnibus Clause might apply to “a person who pays a babysitter \$41 per week in cash without withholding taxes,” “leaves a large cash tip in a restaurant,” “fails to keep donation receipts from every charity,” or “fails to provide every record to an accountant.” *Ante*, at 10. Whether the Omnibus Clause would cover these hypotheticals—and whether the Government would waste its resources identifying and prosecuting them—is debatable. But what should not be debatable is that the statute covers Marinello, who systematically shredded documents and hid evidence about his company’s earnings to avoid paying taxes even after warnings from his lawyer and accountant. It is not hard to find similar cases prosecuted under the Omnibus Clause. See, e.g., *United States v. Sorenson*, 801 F.3d 1217, 1221–1222 (CA10 2015) (defendant hid taxable income in elaborate system of trusts); *Floyd*, 740 F.3d, at 26–27, 31–32 (defendant created elaborate scheme to avoid paying payroll taxes).

The Court, in its effort to exclude hypotheticals, has constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability. In doing so, it failed to heed what this Court recognized in a similar case: “[T]he authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system.” *Bisceglia*, *supra*, at 146.

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* * *

Regardless of whether this Court thinks the Omnibus Clause should contain a proceeding requirement, it does not have one. Because the text prohibits all efforts to obstruct the due administration of the Tax Code, I respectfully dissent.

Page Proof Pending Publication

Syllabus

AYESTAS, AKA ZELAYA COREA *v.* DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISIONCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 16–6795. Argued October 30, 2017—Decided March 21, 2018

Petitioner Ayestas was convicted of murder and sentenced to death in a Texas state court. He secured new counsel, but his conviction and sentence were affirmed on appeal. A third legal team sought, unsuccessfully, state habeas relief, claiming trial-level ineffective assistance of counsel but not counsel's failure to investigate petitioner's mental health and alcohol and drug abuse during the trial's penalty phase. His fourth set of attorneys did raise that failure in a federal habeas petition, but because the claim had never been raised in state court, the District Court held, it was barred by procedural default. That decision was vacated and remanded for reconsideration in light of *Martinez v. Ryan*, 566 U. S. 1—where this Court held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding—and *Trevino v. Thaler*, 569 U. S. 413—which extended that holding to Texas prisoners. Petitioner filed an *ex parte* motion asking the District Court for funding to develop his claim that both his trial and state habeas counsel were ineffective, relying on 18 U. S. C. § 3599(f), which provides, in relevant part, that a district court “may authorize” funding for “investigative, expert, or other services . . . reasonably necessary for the representation of the defendant.” The court found his claim precluded by procedural default and thus denied his funding request. The Fifth Circuit also rejected the funding claim under its precedent: that a § 3599(f) funding applicant must show that he has a “substantial need” for investigative or other services, and that funding may be denied when an applicant fails to present “a viable constitutional claim that is not procedurally barred.” 817 F. 3d 888, 895–896.

Held:

1. The District Court's denial of petitioner's funding request was a judicial decision subject to appellate review under the standard jurisdictional provisions. Pp. 37–43.

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(a) Title 28 U. S. C. §§ 1291, 2253, and 1254 confer jurisdiction to review decisions made by a district court in a *judicial* capacity. “Administrative” decisions—about, *e. g.*, facilities, personnel, equipment, supplies, and rules of procedure—are “not subject to [this Court’s] review,” *Hohn v. United States*, 524 U. S. 236, 245, but the District Court’s ruling here does not remotely resemble such decisions. Petitioner’s request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And resolution of the funding question requires the application of a legal standard—whether the funding is “reasonably necessary” for effective representation—that demands an evaluation of petitioner’s prospects of obtaining habeas relief. Pp. 38–40.

(b) Respondent’s arguments in support of her claim that § 3599’s funding requests are nonadversarial and administrative are unpersuasive. First, that the requests can be decided *ex parte* does not make the proceeding nonadversarial. The habeas proceeding here was clearly adversarial. And petitioner and respondent plainly have adverse interests on the funding question and have therefore squared off as adversaries. The mere fact that a § 3599 funding request may sometimes be made *ex parte* is thus hardly dispositive. Second, nothing in § 3599 even hints that the funding decisions may be revised by the Director of the Administrative Office of the Courts. Lower court cases that appear to have accepted Administrative Office review of certain Criminal Justice Act (CJA) payments, even if a proper interpretation of the CJA, are inapposite. Finally, the fact that § 3599(g)(2) requires funding in excess of the generally applicable statutory cap to be approved by the circuit’s chief judge or another designated circuit judge, instead of by a panel of three, does not make the proceeding administrative. If Congress wishes to make certain rulings reviewable by a single circuit judge, the Constitution does not stand in the way. Pp. 40–43.

2. The Fifth Circuit did not apply the correct legal standard in affirming the denial of petitioner’s funding request. Section 3599 authorizes funding for the “reasonably necessary” services of experts, investigators, and the like. But the Fifth Circuit’s requirement that applicants show a “substantial need” for the services is arguably a more demanding standard. Section 3599 appears to use the term “necessary” to mean something less than essential. Because it makes little sense to refer to something as being “reasonably essential,” the Court concludes that the statutory phrase calls for the district court to determine, in its discretion, whether a reasonable attorney would regard the services as sufficiently important, guided by considerations detailed in the opinion. The term “substantial” in the Fifth Circuit’s test, however, suggests a heavier burden. And that court exacerbated the difference by also

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requiring a funding applicant to present “a viable constitutional claim that is not procedurally barred.” That rule that is too restrictive after *Trevino*, see 569 U. S., at 429, because, in cases where funding stands a credible chance of enabling a habeas petitioner to overcome the procedural default obstacle, it may be error for a district court to refuse funding. That being said, district courts were given broad discretion in assessing funding requests when Congress changed the phrase “shall authorize” in § 3599’s predecessor statute, see 21 U. S. C. § 848(q)(9), to “may authorize” in § 3599(f). A funding applicant must not be expected to prove that he will be able to win relief if given the services, but the “reasonably necessary” test does require an assessment of the likely utility of the services requested.

Respondent’s alternative ground for affirmance—that funding is never “reasonably necessary” where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record—remains open for the Fifth Circuit to consider on remand. Pp. 43–48.

817 F. 3d 888, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 48.

Lee B. Kovarsky argued the cause for petitioner. With him on the briefs were *Meaghan VerGow*, *Deanna M. Rice*, *Jason Zarrow*, *Samantha Goldstein*, *Jared Tyler*, and *Sheri Lynn Johnson*.

Scott A. Keller, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Beth Klusmann* and *Jason R. LaFond*, Assistant Solicitors General.*

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Linda A. Klein*, *Clifford M. Sloan*, and *Donald P. Salzman*; for the Capital Punishment Center of the University of Texas at Austin School of Law by *Jordan M. Steiker*, *Jim Marcus*, and *Raoul D. Schonemann*; for the Constitution Project by *Eugene A. Sokoloff*; and for the National Association of Criminal Defense Lawyers et al. by *Jessica Ring Amunson*, *Matthew S. Hellman*, *David A. Strauss*, *Sarah M. Konisky*, *Barbara E. Bergman*, *David D. Cole*, and *Brian W. Stull*.

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Dominic*

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JUSTICE ALITO delivered the opinion of the Court.

Petitioner Carlos Ayestas, who was convicted of murder and sentenced to death in a Texas court, argues that he was wrongfully denied funding for investigative services needed to prove his entitlement to federal habeas relief. Petitioner moved for funding under 18 U. S. C. § 3599(f), which makes funds available if they are “reasonably necessary,” but petitioner’s motion was denied. We hold that the lower courts applied the wrong legal standard, and we therefore vacate the judgment below and remand for further proceedings.

I

A

In 1997, petitioner was convicted of capital murder in a Texas court. Evidence at trial showed that he and two accomplices invaded the home of a 67-year-old Houston woman, Santiago Paneque, bound her with duct tape and electrical cord, beat and strangled her, and then made off with a stash of her belongings.

The jury also heard testimony from Henry Nuila regarding an incident that occurred about two weeks after the murder. Petitioner was drunk at the time, and he revealed to Nuila that he had recently murdered a woman in Houston. Petitioner then brandished an Uzi machinegun and threatened to murder Nuila if he did not help petitioner kill his two accomplices. Fortunately for Nuila, petitioner kept talking until he eventually passed out; Nuila then called the police, who arrested petitioner, still in possession of the gun.

E. Draye, Solicitor General, *Lacey Stover Gard*, Chief Counsel, and *J. D. Nielsen*, Assistant Attorney General, by *Kevin T. Kane*, Chief State’s Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Alan Wilson* of South Carolina, *Patrick Morrissey* of West Virginia, and *Brad D. Schimel* of Wisconsin.

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After the jury found petitioner guilty, it was asked to determine whether he should be sentenced to death or to life in prison. In order to impose a death sentence, Texas law required the jury to answer the following three questions. First, would petitioner pose a continuing threat to society? Second, had he personally caused the death of the victim, intended to kill her, or anticipated that she would be killed? Third, in light of all the evidence surrounding the crime and petitioner's background, were there sufficient mitigating circumstances to warrant a sentence of life without parole instead of death? Tex. Code Crim. Proc. Ann., Art. 37.071, §§2(b), (e) (Vernon Cum. Supp. 2017). Only if the jury gave a unanimous yes to the first two questions, and a unanimous no to the third question, could a death sentence be imposed; otherwise, petitioner would receive a sentence of life without parole. See §§2(d)(2), (f)(2), (g).

In asking the jury to impose a death sentence, the prosecution supplemented the trial record with evidence of petitioner's criminal record and his encounter with a man named Candelario Martinez a few days after the murder. Martinez told the jury that he was standing in a hotel parking lot waiting for a friend when petitioner approached and began to make small talk. Before long, petitioner pulled out a machinegun and forced Martinez into a room where two of petitioner's compatriots were holding Martinez's friend at knife-point. Ordered to lie down on the bathroom floor and await his execution, Martinez begged for his life while petitioner and his cohorts haggled about who would carry out the killing. Finally, petitioner relented, but he threatened to kill Martinez and his family if he contacted the police. Petitioner then stole Martinez's truck.

Petitioner's trial counsel presented very little mitigation evidence. This was due, at least in part, to petitioner's steadfast refusal for many months to allow his lawyers to contact his family members, who were living in Honduras and might have testified about his character and upbringing.

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Petitioner gave in on the eve of trial, and at that point, according to the state habeas courts, his lawyers “made every effort to contact [his] family.” App. 171. They repeatedly contacted petitioner’s family members and urged them to attend the trial; they requested that the U. S. Embassy in Honduras facilitate family members’ travel to the United States; and they met in person with the Honduran Consulate to seek assistance. But these efforts were to no avail. Petitioner’s sister told his legal team that the family would not leave Honduras because the journey would create economic hardship and because their father was ill and had killed one of their neighbors. A defense attorney who spoke to petitioner’s mother testified that she seemed unconcerned about her son’s situation. In general, the state habeas courts found, petitioner “did nothing to assist counsel’s efforts to contact his family and did not want them contacted by the consulate or counsel.” *Id.*, at 174.

In the end, the only mitigation evidence introduced by petitioner’s trial counsel consisted of three letters from petitioner’s English instructor. The letters, each two sentences long, described petitioner as “a serious and attentive student who was progressing well in English.” *Ibid.*

The jury unanimously concluded that petitioner should be sentenced to death, and a capital sentence was imposed. Petitioner secured new counsel to handle his appeal, and his conviction and sentence were affirmed by the Texas Court of Criminal Appeals in 1998. *Ayestas v. State*, No. 72,928, App. 115. Petitioner did not seek review at that time from this Court.

B

While petitioner’s direct appeal was still pending, a third legal team filed a habeas petition on his behalf in state court. This petition included several claims of trial-level ineffective assistance of counsel, but the petition did not assert that trial counsel were ineffective for failing to investigate petitioner’s mental health and abuse of alcohol and drugs. Petitioner’s

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quest for state habeas relief ended unsuccessfully in 2008. *Ex parte Ayestas*, No. WR-69,674-01 (Tex. Ct. Crim. App., Sept. 10, 2008), 2008 WL 4151814 (*per curiam*) (unpublished).

In 2009, represented by a fourth set of attorneys, petitioner filed a federal habeas petition under 28 U. S. C. § 2254, and this time he *did* allege that his right to the effective assistance of counsel at trial was violated because his attorneys failed to conduct an adequate search for mitigation evidence. As relevant here, petitioner argued that trial counsel overlooked evidence that he was mentally ill and had a history of drug and alcohol abuse. *Ayestas v. Thaler*, Civ. Action No. H-09-2999 (SD Tex., Jan. 26, 2011), 2011 WL 285138, *4. Petitioner alleged that he had a history of substance abuse, and he noted that he had been diagnosed with schizophrenia while the state habeas proceeding was still pending. See Pet. for Writ of Habeas Corpus in *Ayestas v. Quarterman*, No. 4:09-cv-2999 (SD Tex.), Doc. 1, pp. 21-23. Petitioner claimed that trial counsel's deficient performance caused prejudice because there was a reasonable chance that an adequate investigation would have produced mitigation evidence that would have persuaded the jury to spare his life.

Among the obstacles standing between petitioner and federal habeas relief, however, was the fact that he never raised this trial-level ineffective-assistance-of-counsel claim in state court. The District Court therefore held that the claim was barred by procedural default, *Ayestas v. Thaler*, 2011 WL 285138, *4-*7, and the Fifth Circuit affirmed, *Ayestas v. Thaler*, 462 Fed. Appx. 474, 482 (2012) (*per curiam*).

Petitioner sought review in this Court, and we vacated the decision below and remanded for reconsideration in light of two of our subsequent decisions, *Martinez v. Ryan*, 566 U. S. 1 (2012), and *Trevino v. Thaler*, 569 U. S. 413 (2013). *Ayestas v. Thaler*, 569 U. S. 1015 (2013). *Martinez* held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level

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ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding. 566 U. S., at 14. *Trevino* extended that holding to Texas prisoners, 569 U. S., at 416–417, and on remand, petitioner argued that he fell within *Trevino* because effective state habeas counsel would have uncovered evidence showing that trial counsels’ investigative efforts were deficient.

To assist in developing these claims, petitioner filed an *ex parte* motion asking the District Court for \$20,016 in funding to conduct a search for evidence supporting his petition. He relied on 18 U. S. C. § 3599(f), which provides in relevant part as follows:

“Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant’s attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor.”

Petitioner averred that the funds would be used to conduct an investigation that would show that his trial counsel and his state habeas counsel were ineffective. Accordingly, he claimed, the investigation would establish both that his trial-level ineffective-assistance-of-counsel claim was not barred by procedural default and that he was entitled to resentencing based on the denial of his Sixth Amendment right to the effective assistance of trial counsel.

The District Court refused the funding request and ultimately denied petitioner’s habeas petition. *Ayestas v. Stephens*, Civ. Action No. H–09–2999 (SD Tex., Nov. 18, 2014), 2014 WL 6606498, *6–*7. On the merits of petitioner’s new ineffective-assistance-of-trial-counsel claim, the District Court held that petitioner failed both prongs of the *Strickland* test. See *Strickland v. Washington*, 466 U. S.

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668 (1984). Noting that most of the evidence bearing on petitioner's mental health had emerged only after he was sentenced, the court concluded that petitioner's trial lawyers were not deficient in failing to find such evidence in time for the sentencing proceeding. 2014 WL 6606498, *5. In addition, the court found that state habeas counsel did not render deficient performance by failing to investigate petitioner's history of substance abuse, and that, in any event, petitioner was not prejudiced at the sentencing phase of the trial or during the state habeas proceedings because the potential mitigation evidence at issue would not have made a difference to the jury in light of "the extremely brutal nature of [the] crime and [petitioner's] history of criminal violence." *Ibid.*

With respect to funding, the District Court pointed to Fifth Circuit case law holding that a § 3599(f) funding applicant cannot show that investigative services are "‘reasonably necessary’" unless the applicant can show that he has a "‘substantial need’" for those services. *Id.*, at *6. In addition, the court noted that "[t]he Fifth Circuit upholds the denial of funding" when, among other things, "a petitioner has . . . failed to supplement his funding request with a viable constitutional claim that is not procedurally barred." *Ibid.* (internal quotation marks omitted).

Given its holding that petitioner's new ineffective-assistance-of-counsel claim was precluded by procedural default, this rule also doomed his request for funding. The District Court denied petitioner's habeas petition and refused to grant him a certificate of appealability (COA). *Id.*, at *7. On appeal, the Fifth Circuit held that a COA was not needed for review of the funding issue, but it rejected that claim for essentially the same reasons as the District Court, citing both the "substantial need" test and the rule that funding may be denied when a funding applicant fails to present "a viable constitutional claim that is not procedurally barred." *Ayestas v. Stephens*, 817 F. 3d 888, 895–896 (2016)

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(internal quotation marks omitted). With respect to petitioner's other claims, including his claim of ineffective assistance of trial counsel, the Fifth Circuit refused to issue a COA. *Id.*, at 898.

C

We granted certiorari to decide whether the lower courts applied the correct legal standard in denying the funding request. 581 U. S. 904 (2017).

II

Before we reach that question, however, we must consider a jurisdictional argument advanced by respondent, the Director of the Texas Department of Criminal Justice.¹ Re-

¹ We also consider a jurisdictional issue not raised by the parties, namely, whether we have jurisdiction even though no COA has yet been issued. We do not have jurisdiction if jurisdiction was lacking in the Court of Appeals, and the jurisdiction of a court of appeals to entertain an appeal from a final order in a habeas proceeding is dependent on the issuance of a COA. See 28 U. S. C. § 2253(c)(1); *Gonzalez v. Thaler*, 565 U. S. 134, 142 (2012).

In this case, petitioner appealed an order of the District Court that denied both his request for funding under 18 U. S. C. § 3599 and his underlying habeas claims. The Court of Appeals denied a COA as to the merits of his request for habeas relief but held that a COA was not required insofar as petitioner challenged the District Court's denial of funding under § 3599. The Fifth Circuit relied on *Harbison v. Bell*, 556 U. S. 180 (2009), in which a prisoner appealed from an order that denied counsel under § 3599 for a state clemency proceeding but that did not address the merits of any habeas petition. This Court held that a COA was not required. Here, petitioner took his appeal from the final order in his habeas proceeding.

The parties have not briefed whether that difference between *Harbison* and the present case is relevant or whether an appeal from a denial of a § 3599 request for funding would fit within the COA framework, and we find it unnecessary to resolve the issue. Though we take no view on the merits, we will assume for the sake of argument that the Court of Appeals could not entertain petitioner's § 3599 claim without the issuance of a COA.

We may review the denial of a COA by the lower courts. See, e. g., *Miller-El v. Cockrell*, 537 U. S. 322, 326–327 (2003). When the lower

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spondent contends that the District Court's denial of petitioner's funding request was an administrative, not a judicial, decision and therefore falls outside the scope of the jurisdictional provisions on which petitioner relied in seeking review in the Court of Appeals and in this Court.

A

When the District Court denied petitioner's funding request and his habeas petition, he took an appeal to the Fifth Circuit under 28 U. S. C. §§ 1291 and 2253, which grant the courts of appeals jurisdiction to review final "decisions" and "orders" of a district court.² And when the Fifth Circuit affirmed, petitioner sought review in this Court under § 1254, which gives us jurisdiction to review "[c]ases" in the courts of appeals.³ As respondent correctly notes, these provisions confer jurisdiction to review decisions made by a district court in a *judicial* capacity. But we have recognized that not all decisions made by a federal court are "judicial"

courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See *Slack v. McDaniel*, 529 U. S. 473, 485–486, 489–490 (2000). We take that course here. As we will explain, the correctness of the rule applied by the District Court in denying the funding request was not only debatable; it was erroneous.

²In relevant part § 1291 declares that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Similarly, § 2253 provides, as relevant, that "[i]n a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." § 2253(a).

³"Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." § 1254(1).

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in nature; some decisions are properly understood to be “administrative,” and in that case they are “not subject to our review.” *Hohn v. United States*, 524 U.S. 236, 245 (1998).

The need for federal judges to make many administrative decisions is obvious. The Federal Judiciary, while tiny in comparison to the Executive Branch, is nevertheless a large and complex institution, with an annual budget exceeding \$7 billion and more than 32,000 employees. See Administrative Office of the U. S. Courts, *The Judiciary FY 2018 Congressional Budget Summary Revised 9–10* (June 2017). Administering this operation requires many “decisions” in the ordinary sense of the term—decisions about such things as facilities, personnel, equipment, supplies, and rules of procedure. *In re Application for Exemption from Electronic Pub. Access Fees by Jennifer Gollan and Shane Shifflett*, 728 F.3d 1033, 1037 (CA9 2013). It would be absurd to suggest that every “final decision” on any such matter is appealable under § 1291 or reviewable in this Court under § 1254. See *Hohn*, *supra*; 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3903, pp. 134–135 (2d ed. 1992). Such administrative decisions are not the kind of decisions or orders—*i. e.*, decisions or orders made in a judicial capacity—to which the relevant jurisdictional provisions apply.

Respondent argues that the denial of petitioner’s funding request was just such an administrative decision, but the District Court’s ruling does not remotely resemble the sort of administrative decisions noted above. Petitioner’s request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And as we will explain, resolution of the funding question requires the application of a legal standard—whether the funding is “reasonably necessary” for effective representation—that demands an evaluation of petitioner’s prospects of obtaining habeas relief. We have never held that a ruling like that is adminis-

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trative and thus not subject to appellate review under the standard jurisdictional provisions.

Respondent claims that two factors support the conclusion that the funding decision was administrative, but her argument is unpersuasive.

B

Respondent first argues as follows: Judicial proceedings must be adversarial; 18 U.S.C. § 3599(f) funding adjudications are not adversarial because the statute allows requests to be decided *ex parte*; therefore, § 3599(f) funding adjudications are not judicial in nature. This reasoning is flawed.

It is certainly true that cases and controversies in our legal system are adversarial in nature, *e. g.*, *Bond v. United States*, 564 U.S. 211, 217 (2011); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–241 (1937), but here, both the habeas proceeding as a whole and the adjudication of the specific issue of funding were adversarial. That the habeas proceeding was adversarial is beyond dispute. And on the funding question, petitioner and respondent plainly have adverse interests and have therefore squared off as adversaries. The motion for funding was formally noted as “opposed” on the District Court’s docket. App. 341. That is not surprising: On one side, petitioner is seeking funding that he hopes will prevent his execution. On the other, respondent wants to enforce the judgment of the Texas courts and to do so without undue delay. Petitioner and respondent have vigorously litigated the funding question all the way to this Court.

In arguing that the funding dispute is nonadversarial, respondent attaches too much importance to the fact that the request was made *ex parte*. As we have noted, the “*ex parte*” nature of a proceeding has not been thought to imply that an act otherwise within a judge’s lawful jurisdiction was deprived of its judicial character.” *Forrester v. White*, 484 U.S. 219, 227 (1988).

In our adversary system, *ex parte* motions are disfavored, but they have their place. See, *e. g.*, *Hohn, supra*, at 248

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(application for COA); *Dalia v. United States*, 441 U.S. 238, 255 (1979) (application for a search warrant); 50 U.S.C. § 1805(a) (application to conduct electronic surveillance for foreign intelligence); 18 U.S.C. § 2518(3) (applications to intercept “wire, oral, or electronic communications”); 15 U.S.C. § 1116(d)(1)(A) (application to seize certain goods and counterfeit marks involved in violations of the trademark laws); Fed. Rule Crim. Proc. 17(b) (application for witness subpoena); Fed. Rule Crim. Proc. 47(c) (generally recognizing *ex parte* motions and applications); *Ullmann v. United States*, 350 U.S. 422, 423–424, 434 (1956) (application for an order granting a witness immunity in exchange for self-incriminating testimony); *United States v. Monsanto*, 491 U.S. 600, 603–604 (1989) (motion to freeze defendant’s assets pending trial).

Thus, the mere fact that a § 3599 funding request may sometimes be made *ex parte* is hardly dispositive. See *Hohn, supra*, at 249; *Tutun v. United States*, 270 U.S. 568, 577 (1926).

C

Respondent’s second argument is based on the venerable principle “that Congress cannot vest review of the decisions of Article III courts in” entities other than “superior courts in the Article III hierarchy.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–219 (1995) (citing *Hayburn’s Case*, 2 Dall. 409 (1792)). Respondent claims that § 3599 funding decisions may be revised by the Director of the Administrative Office of the Courts and that this shows that such decisions must be administrative. This argument, however, rests on a faulty premise. Nothing in § 3599 even hints that review by the Director of the Administrative Office is allowed.

Respondent’s argument rests in part on a handful of old lower court cases that appear to have accepted Administrative Office review of Criminal Justice Act of 1964 (CJA) payments that had been authorized by a District Court and ap-

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proved by the chief judge of the relevant Circuit. See *United States v. Aadal*, 282 F. Supp. 664, 665 (SDNY 1968); *United States v. Gast*, 297 F. Supp. 620, 621–622 (Del. 1969); see also *United States v. Hunter*, 385 F. Supp. 358, 362 (DC 1974). The basis for these decisions was a provision of the CJA, 18 U. S. C. §3006A(h) (1964 ed.), stating that CJA payments “shall be made under the supervision of the Director of the Administrative Office of the United States Courts.”⁴

It is not clear whether these decisions correctly interpreted the CJA,⁵ but in any event, no similar language appears in §3599. And respondent has not identified a single instance in which the Director of the Administrative Office or any other nonjudicial officer has attempted to review or alter a §3599 decision.

Moreover, attorneys’ requests for CJA funds are markedly different from the funding application at issue here. Attorneys appointed under the CJA typically submit those requests after the conclusion of the case, and the prosecution has no stake in the resolution of the matter. The judgment in the criminal case cannot be affected by a decision on compensation for services that have been completed, and any funds awarded come out of the budget of the Judiciary, not the Executive. See 18 U. S. C. §3006A(i) (2012 ed.). Thus, the adversaries in the criminal case are not pitted against each other. In this case, on the other hand, as we have explained, petitioner and respondent have strong adverse interests. For these reasons, we reject respondent’s argument that the adjudication of the funding issue is nonadversarial and administrative.

⁴ This language now appears at 18 U. S. C. §3006A(i) (2012 ed.).

⁵ As far as we are aware, neither the Administrative Office nor any other nonjudicial entity currently claims the power to revise or reject a CJA compensation order issued by a court. Nothing in the CJA Guidelines suggests such a policy. See generally 7A Guide to Judiciary Policy (May 17, 2017).

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Respondent, however, claims that the funding decision is administrative for an additional reason. “A §3599(f) funding determination is properly deemed administrative,” she contends, “because it . . . may be revised outside the traditional Article III judicial hierarchy.” Brief for Respondent 23. The basis for this argument is a provision of §3599 stating that funding in excess of the generally applicable statutory cap of \$7,500 must be approved by the chief judge of the circuit or another designated circuit judge. §3599(g)(2). If a funding decision is judicial and not administrative, respondent suggests, it could not be reviewed by a single circuit judge as opposed to a panel of three.

This argument confuses what is familiar with what is constitutionally required. Nothing in the Constitution ties Congress to the typical structure of appellate review established by statute. If Congress wishes to make certain rulings reviewable by a single circuit judge, rather than a panel of three, the Constitution does not stand in the way.

III

Satisfied that we have jurisdiction, we turn to the question whether the Court of Appeals applied the correct legal standard when it affirmed the denial of petitioner’s funding request.

Section 3599(a) authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is “financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.” The statute applies to defendants in federal cases, §3599(a)(1), as well as to state and federal prisoners seeking collateral relief in federal court, §3599(a)(2).

Here we are concerned not with legal representation but with services provided by experts, investigators, and the like. Such services must be “reasonably necessary for the representation of the [applicant]” in order to be eligible for funding. §3599(f). If the statutory standard is met, a

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court “may authorize the [applicant’s] attorneys to obtain such services on [his] behalf.” *Ibid.*

The Fifth Circuit has held that individuals seeking funding for such services must show that they have a “substantial need” for the services. 817 F. 3d, at 896; *Allen v. Stephens*, 805 F. 3d 617, 626 (2015); *Ward v. Stephens*, 777 F. 3d 250, 266, cert. denied, 577 U.S. 844 (2015). Petitioner contends that this interpretation is more demanding than the standard—“reasonably necessary”—set out in the statute. And although the difference between the two formulations may not be great, petitioner has a point.

In the strictest sense of the term, something is “necessary” only if it is essential. See Webster’s Third New International Dictionary 1510 (1993) (something is necessary if it “must be by reason of the nature of things,” if it “cannot be otherwise by reason of inherent qualities”); 10 Oxford English Dictionary 275–276 (2d ed. 1989) (OED) (defining the adjective “necessary” to mean “essential”). But in ordinary speech, the term is often used more loosely to refer to something that is merely important or strongly desired. (“I need a vacation.” “I need to catch up with an old friend.”) The term is sometimes used in a similar way in the law. The term “necessary” in the Necessary and Proper Clause does not mean “*absolutely* necessary,” *McCulloch v. Maryland*, 4 Wheat. 316, 414–415 (1819), and a “necessary” business expense under the Internal Revenue Code, 26 U.S.C. § 162(a), may be an expense that is merely helpful and appropriate, *Commissioner v. Tellier*, 383 U.S. 687, 689 (1966). As Black’s Law Dictionary puts it, the term “may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.” Black’s Law Dictionary 928 (5th ed. 1979) (Black’s).

Section 3599 appears to use the term “necessary” to mean something less than essential. The provision applies to services that are “reasonably necessary,” but it makes little sense to refer to something as being “reasonably essential.”

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What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, guided by the considerations we set out more fully below.

The Fifth Circuit's test—"substantial need"—is arguably more demanding. We may assume that the term "need" is comparable to "necessary"—that is, that something is "needed" if it is "necessary." But the term "substantial" suggests a heavier burden than the statutory term "reasonably." Compare 13 OED 291 (defining "reasonably" to mean, among other things, "[s]ufficiently, suitably, fairly"; "[f]airly or pretty well") with 17 *id.*, at 66–67 (defining "substantial," with respect to "reasons, causes, evidence," to mean "firmly or solidly established"); see also Black's 1456 (10th ed. 2014) (defining "reasonable" to mean "[f]air, proper, or moderate under the circumstances See plausible"); *id.*, at 1656 (defining "substantial" to mean, among other things, "[i]mportant, essential, and material").

The difference between "reasonably necessary" and "substantially need[ed]" may be small, but the Fifth Circuit exacerbated the problem by invoking precedent to the effect that a habeas petitioner seeking funding must present "a viable constitutional claim that is not procedurally barred." 817 F. 3d, at 895 (internal quotation marks omitted). See also, *e. g.*, *Riley v. Dretke*, 362 F. 3d 302, 307 (CA5 2004) ("A petitioner cannot show a substantial need when his claim is procedurally barred from review"); *Allen, supra*, at 638–639 (describing "'our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review'" (quoting *Crutsinger v. Stephens*, 576 Fed. Appx. 422, 431 (CA5 2014) (*per curiam*))); *Ward, supra*, at 266 ("The denial of funding will be upheld . . . when the constitutional claim is procedurally barred").

The Fifth Circuit adopted this rule before our decision in *Trevino*, but after *Trevino*, the rule is too restrictive. *Trevino* permits a Texas prisoner to overcome the failure to

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raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective, 569 U. S., at 429, and it is possible that investigation might enable a petitioner to carry that burden. In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.

Congress has made it clear, however, that district courts have broad discretion in assessing requests for funding. Section 3599's predecessor declared that district courts "shall authorize" funding for services deemed "reasonably necessary." 21 U. S. C. § 848(q)(9) (1988 ed.). Applying this provision, courts of appeals reviewed district court funding decisions for abuse of discretion. *E. g.*, *Bonin v. Calderon*, 59 F. 3d 815, 837 (CA9 1995); *In re Lindsey*, 875 F. 2d 1502, 1507, n. 4 (CA11 1989); *United States v. Alden*, 767 F. 2d 314, 319 (CA7 1984). Then, as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1226, Congress changed the verb from "shall" to "may" and thus made it perfectly clear that determining whether funding is "reasonably necessary" is a decision as to which district courts enjoy broad discretion. See *Kingdomware Technologies, Inc. v. United States*, 579 U. S. 162, 171–172 (2016).

A natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief. After all, the proposed services must be "*reasonably* necessary" for the applicant's representation, and it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief. Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and

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the prospect that the applicant will be able to clear any procedural hurdles standing in the way.

To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks. But the “reasonably necessary” test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

Petitioner does not deny this. He agrees that an applicant must “articulat[e] specific reasons why the services are warranted”—which includes demonstrating that the underlying claim is at least “‘plausible’”—and he acknowledges that there may even be cases in which it would be within a court’s discretion to “deny funds after a finding of ‘reasonable necessity.’” Brief for Petitioner 43.

These interpretive principles are consistent with the way in which § 3599’s predecessors were read by the lower courts. See, e. g., *Alden*, *supra*, at 318–319 (explaining that it was “appropriate for the district court to satisfy itself that [the] defendant may have a plausible defense before granting the defendant’s . . . motion for psychiatric assistance to aid in that defense,” and that it is not proper to use the funding statute to subsidize a “‘fishing expedition’”); *United States v. Hamlet*, 480 F. 2d 556, 557 (CA5 1973) (*per curiam*) (upholding District Court’s refusal to fund psychiatric services based on the District Court’s conclusion that “the request for psychiatric services was . . . lacking in merit” because there was “no serious possibility that appellant was legally insane at any time pertinent to the crimes committed”). This abundance of precedent shows courts have plenty of experience making the determinations that § 3599(f) contemplates.

IV

Perhaps anticipating that we might not accept the Fifth Circuit’s reading of § 3599(f), respondent devotes a substan-

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tial portion of her brief to an alternative ground for affirmance that was neither presented nor passed on below.

Respondent contends that whatever “reasonably necessary” means, funding is *never* “reasonably necessary” in a case like this one, where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record. Citing 28 U.S.C. §2254(e)(2), respondent contends that the fruits of any such investigation would be inadmissible in a federal habeas court.

We decline to decide in the first instance whether respondent’s reading of §2254(e)(2) is correct. Petitioner agrees that the argument remains open for the Fifth Circuit to consider on remand. Tr. of Oral Arg. 6.

* * *

We conclude that the Fifth Circuit’s interpretation of §3599(f) is not a permissible reading of the statute. We therefore vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

The Court correctly concludes that the Fifth Circuit applied the wrong legal standard in evaluating a request for funding for investigative services under 18 U.S.C. §3599(f). That should come as no surprise, as the Fifth Circuit required capital habeas petitioners to show a “‘substantial need’” for services, when the statute requires only a showing that the services are “‘reasonably necessary.’” *Ante*, at 44. “Substantial,” of course, imposes a higher burden than “reasonable.” *Ante*, at 45. The Fifth Circuit “exacerbated the problem” by requiring a showing of “a viable constitutional claim that is not procedurally barred,” which ignores “that

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investigation might enable a petitioner . . . to overcome the obstacle of procedural default.” *Ante*, at 45–46 (internal quotation marks omitted). I therefore join the opinion of the Court in full holding that to satisfy § 3599(f), a petitioner need only show that “a reasonable attorney would regard the services as sufficiently important.” *Ante*, at 45.

Having answered the question presented of what is the appropriate § 3599(f) standard, the Court remands Ayestas’ case for the lower courts to consider the application of the standard in the first instance. *Ante*, at 48.¹ I write separately to explain why, on the record before this Court, there should be little doubt that Ayestas has satisfied § 3599(f).

I

At the center of the § 3599(f) funding request in this case is Ayestas’ claim that his trial counsel was ineffective for failing to investigate mitigation. Specifically, Ayestas claims that his trial counsel was deficient in failing to conduct an investigation of his mental health and substance abuse, which could have been presented at the penalty phase of the trial to convince the jury to spare his life. As the Court notes, however, Ayestas faces a hurdle in presenting this ineffective-assistance-of-trial-counsel claim in his federal habeas petition, as his state postconviction counsel never presented that claim in the Texas collateral proceedings. See *ante*, at 34.

To overcome that procedural default, Ayestas relies on *Martinez v. Ryan*, 566 U. S. 1 (2012), and *Trevino v. Thaler*, 569 U. S. 413 (2013). In those cases, this Court recognized a “particular concern” in the application of a procedural default rule that would prevent a petitioner from “present[ing] a claim of trial error,” especially “when the claim is one of ineffective assistance of counsel.” *Martinez*, 566 U. S., at 12. “The right to the effective assistance of counsel,” the Court

¹The Court also declines to consider arguments that respondent advanced that were neither presented nor passed on below. *Ante*, at 47–48.

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reasoned, “is a bedrock principle in our justice system.” *Ibid.* The Court thus held that where the “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal,” then “‘a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective.’” *Trevino*, 569 U. S., at 429 (quoting *Martinez*, 566 U. S., at 17; alteration omitted).²

Therefore, the fact that Ayestas’ postconviction counsel failed to raise his ineffective-assistance-of-trial-counsel claim in state court does not bar federal review of that claim if Ayestas can show that the “attorney in his first collateral proceeding was ineffective” and that “his claim of ineffective assistance of trial counsel is substantial.” *Id.*, at 18. The substantiality of the ineffective-assistance-of-trial-counsel claim and the ineffectiveness of postconviction counsel are both analyzed under the familiar framework set out in *Strickland v. Washington*, 466 U. S. 668 (1984). “Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness.” *Rompilla v. Beard*, 545 U. S. 374, 380 (2005) (citation and internal quotation marks omitted).

Remember, however, the specific context in which ineffective assistance is being considered in Ayestas’ case: a request

²The reason for this exception is evident. Excusing the procedural default “acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient.” *Martinez*, 566 U. S., at 14. “Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy,” and “the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” *Id.*, at 11–12; see also *Trevino*, 569 U. S., at 423–424, 428.

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under § 3599(f) for investigative services, which requires a showing only that “a reasonable attorney would regard the services as sufficiently important.” *Ante*, at 45. Ayestas is not “expected to *prove* that he will be able to win relief if given the services he seeks.” *Ante*, at 47 (emphasis in original). A court simply must consider at this stage “the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.” *Ante*, at 46–47. Thus, the inquiry is not whether Ayestas can prove that his trial counsel was ineffective under *Strickland* or whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*. Rather, at this § 3599(f) request stage, the focus is on the potential merit of these claims.

II

A

With this framework in mind, the focus first is on the evidence of the deficient performance of Ayestas’ state-appointed counsel.³ Trial counsel secured the appointment of an investigator, who met with Ayestas shortly after the appointment. For nearly 15 months, however, there was apparently no investigation into Ayestas’ history in preparation for trial. Counsel instructed the investigator “to resume investigation” only about a month before jury selection. Record 878. The investigator then subpoenaed psychological and disciplinary prison records and had Ayestas fill out a questionnaire, in response to which Ayestas revealed that he had experienced multiple head traumas and had a history of substance abuse. Jail records also noted a rules infraction for possession of homemade intoxicants. Trial counsel never followed up on any of this information, sought further

³The State appointed two attorneys to represent Ayestas at trial. I refer to them together as “trial counsel.”

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related records, or had Ayestas evaluated by a mental health professional.

About two weeks before jury selection, trial counsel for the first time reached out to Ayestas' family in Honduras. Shortly thereafter, five days before trial, counsel wrote Ayestas' family stating that she needed them to come testify. Ayestas' family agreed, but they indicated that they could not obtain visas because a letter that trial counsel was supposed to have sent to the U. S. Embassy to facilitate their travel never arrived, and ultimately no family members appeared at Ayestas' trial.

The guilt phase lasted two days, and trial counsel presented no witnesses. The penalty phase lasted less than a day, and trial counsel presented two minutes of mitigation evidence consisting of three letters from an instructor who taught English classes to Ayestas in prison, attesting that he was "a serious and attentive student." App. 41–43.⁴

On this record, Ayestas has made a strong showing that trial counsel was deficient. "It is unquestioned that under the prevailing professional norms at the time of [Ayestas'] trial, counsel had an obligation to conduct a thorough investigation of [his] background." *Porter v. McCollum*, 558 U. S. 30, 39 (2009) (*per curiam*) (internal quotation marks omitted). Here, Ayestas' trial counsel "clearly did not satisfy those norms." *Ibid.* With a client facing a possible death sentence, counsel and her investigator did not start looking into Ayestas' personal history until the eve of trial. The little the investigator uncovered—head trauma and a history of substance abuse—should have prompted further inquiry. Yet trial counsel did nothing. Even if Ayestas prohibited counsel from contacting his family in Honduras until the

⁴Trial counsel also attempted to introduce evidence that Ayestas had no criminal history in Honduras, but failed to link Ayestas to the records, which were under his given name, "Dennis Zelaya Corea." See *Ayestas v. Stephens*, 817 F. 3d 888, 892, n. 1 (CA5 2016) (*per curiam*).

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start of trial was imminent, see *ante*, at 32–33,⁵ that still would not explain why counsel failed to perform any other mitigation investigation, see *Porter*, 558 U.S., at 40 (noting that even if the defendant is “uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation” (emphasis in original)). In the end, the decision to sentence Ayestas to death was made in less than one day, and his counsel spent less than two minutes presenting mitigation to the jury. *Two minutes*.

This Court has recognized that the decision not to present mitigation may be supported in certain cases by “strategic judgments,” provided the reviewing court is satisfied with “the adequacy of the investigations supporting those judgments.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). But this does not appear to be one of those cases. There is nothing in the record that would support the conclusion that counsel chose the two-minutes-of-mitigation strategy after careful investigation and consideration of Ayestas’ case. Instead, counsel for the most part “did not even take the first step of interviewing witnesses or requesting records” and “ignored pertinent avenues for investigation of which [they] should have been aware.” *Porter*, 558 U.S., at 39–40.

In evaluating the potential merit of Ayestas’ claim, the Fifth Circuit misapplied *Strickland* and the § 3599(f) standard. It reasoned that Ayestas had not presented a viable claim that trial counsel was deficient in failing to investigate Ayestas’ mental illness because, as he was not diagnosed with schizophrenia until his time in prison, there was nothing that flagged mental illness issues prior to trial.⁶ See *Ayes-*

⁵ During postconviction proceedings, trial counsel filed an affidavit asserting that Ayestas did not allow contact with his family in Honduras until after jury selection had commenced. When the record evidence contradicted that assertion, counsel submitted another affidavit with a revised timeline. Ayestas disputes having instructed trial counsel not to contact his family in Honduras.

⁶ It is unclear whether the Fifth Circuit ultimately relied on its determination that trial counsel was not deficient in rejecting Ayestas’ claims. In its panel opinion, it incorrectly stated that trial counsel had conducted a

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tas v. Stephens, 817 F. 3d 888, 895–897 (2016) (*per curiam*). The absence of a documented diagnosis, however, did not excuse trial counsel from their “obligation to conduct a thorough investigation of [Ayestas’] background.” *Porter*, 558 U. S., at 39 (internal quotation marks omitted). In fact, the obligation to investigate exists in part precisely because it is all too common for individuals to go years battling an undiagnosed and untreated mental illness.

In any event, the Fifth Circuit failed to consider that one of the purposes of the § 3599(f) investigation was to look at Ayestas’ life around the time of the crime and trial to determine if there were mitigating circumstances that trial counsel could have discovered, such as whether symptoms of his schizophrenia had begun to manifest even before his diagnosis. The Court makes clear today that in evaluating § 3599(f) funding requests, courts must consider “the likelihood that the services will generate useful and admissible evidence.” *Ante*, at 46. It was error, therefore, for the Fifth Circuit to evaluate the merit of the ineffective-assistance-of-trial-counsel claim and to deny § 3599(f) funding based solely on an evaluation of the evidence in the record at the time of the request, without evaluating the potential evidence that Ayestas sought. *Ante*, at 46–47.

B

The evidence concerning the deficiency of Ayestas’ state postconviction counsel is similarly strong. State postconviction counsel retained the services of a mitigation specialist, who prepared an investigation plan noting that it was “obvious no social history investigation was conducted” and that the jury had “heard nothing about [Ayestas’] mental health,

psychological evaluation of Ayestas. 817 F. 3d, at 897. After Ayestas corrected the record in his petition for rehearing, the panel issued an order reaffirming its holding, relying on its finding of no prejudice. See *Ayestas v. Stephens*, 826 F. 3d 214, 215 (2016) (*per curiam*). Still, the Fifth Circuit never disavowed its conclusion regarding trial-counsel deficiency. *Ibid*.

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possible mental illness, [or] substance abuse history.” App. 81, 267. The plan also noted that it was “clear [that Ayestas] had a history of substance abuse.” Record 721; see also App. 267. The specialist recommended a comprehensive investigation into Ayestas’ biological, psychological, and social history to explore, *inter alia*, issues related to addiction and mental health.

State postconviction counsel failed to follow these recommendations. He did nothing to investigate issues related to Ayestas’ mental health or substance abuse. Notably, Ayestas suffered a psychotic episode and was diagnosed with schizophrenia while his state postconviction application was pending. Moreover, in 2003, a counsel-arranged evaluation pursuant to *Atkins v. Virginia*, 536 U. S. 304 (2002), noted concerns about Ayestas’ “delusional thinking.” App. 139–140. These events still did not prompt counsel to investigate Ayestas’ mental health history.

Instead, state postconviction counsel explored the circumstances of Ayestas’ arrest, conducted some juror interviews, and interviewed Ayestas’ mother and sisters, obtaining affidavits regarding Ayestas’ upbringing in Honduras and their interactions with trial counsel. Postconviction counsel eventually filed an application that contained a narrow claim of ineffective assistance of trial counsel with respect to mitigation regarding the attorneys’ failure to secure the attendance of Ayestas’ family members at trial. The Texas Court of Criminal Appeals denied the application, relying on the affidavit submitted by trial counsel, see n. 4, *supra*, to find no ineffectiveness in failing to get Ayestas’ family to attend trial.

The Fifth Circuit concluded that Ayestas’ state postconviction counsel was not ineffective because, in its view, Ayestas had not established any deficiency at trial in the failure to investigate mental health and substance abuse mitigation. See 817 F. 3d, at 898. That conclusion, as noted in Part II–A, *supra*, was based on a misapplication of *Strickland* and

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the § 3599(f) standard, and thus cannot support a finding that the failure to present the claim in postconviction proceedings was “strategic.” 817 F. 3d, at 898. Nor is there anything else in the record that would excuse that deficiency. State postconviction counsel ignored his own mitigation specialist, who alerted him to a serious failing in the trial because the jury heard virtually no mitigation and to the serious failings of trial counsel because of the failure to conduct a social history investigation of Ayestas. Even after Ayestas’ psychotic episode, schizophrenia diagnosis, and documented tendencies of “delusional thinking” during the course of the representation, state postconviction counsel did nothing. As with trial counsel, the record provides no support for any “strategic justification” to disregard completely a mitigation investigation of Ayestas’ mental health and substance abuse.

III

Strickland next requires consideration of prejudice. To establish prejudice, this Court has held that a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” meaning “a probability sufficient to undermine confidence in the outcome.” 466 U. S., at 694. In cases alleging a failure to investigate mitigation, as here, the Court must “reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U. S., at 534.

Even with the scant evidence in the record at this time as to what Ayestas could have presented to the jury in the form of mitigation, Ayestas has made a strong showing that his claim has potential merit. That trial counsel presented only two minutes of mitigation already goes a long way to establishing prejudice. In fact, the State emphasized to the jury at sentencing:

“Does he have anything there that would lead you to conclude there is some type of mitigation, anything at

SOTOMAYOR, J., concurring

all? There is no drug problem . . . no health problem . . . no alcohol problem. . . . [O]nly . . . these three pieces of paper Making steps to learn a second language does not lessen his moral blameworthiness” Record 4747.

The State, in contrast, presented evidence of Ayestas’ criminal history as well as victim impact testimony. After deliberating for only 25 minutes, the jury assessed a punishment of death against Ayestas, finding that he was a future danger, that he intended to cause death or anticipated the loss of life, and that there were no mitigating circumstances that warranted imposition of a life sentence over a death sentence. Had just one juror dissented on a single one of these findings, no death sentence could have been imposed. See Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(g) (Vernon Cum. Supp. 2017); see also *ante*, at 32. With even minimal investigation by trial counsel, at least one may well have, as this Court has held that evidence of mental illness and substance abuse is relevant to assessing moral culpability. See *Rompilla*, 545 U. S., at 393; *Porter*, 558 U. S., at 43–44. Instead, the jury “heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability.” *Id.*, at 41. There is thus good reason to believe that, were Ayestas’ § 3599(f) motion granted, he could establish prejudice under *Strickland*.

The Fifth Circuit held otherwise based on its belief that no amount of mitigation would have changed the outcome of the sentencing given the “brutality of the crime.” 817 F. 3d, at 898. That “brutality of the crime” rationale is simply contrary to our directive in case after case that, in assessing prejudice, a court must “consider the totality of the available mitigation evidence . . . and reweigh it against the evidence in aggravation.” *Porter*, 558 U. S., at 41 (internal quotation marks and alterations omitted); see also *Williams v. Taylor*, 529 U. S. 362, 397–398 (2000); *Wiggins*, 539 U. S., at 534. By

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considering aggravation in isolation, the Fifth Circuit directly contravened this fundamental principle.⁷

IV

In sum, Ayestas has made a strong showing that he is entitled to § 3599(f) funding. As the Court notes, the statute affords district courts some discretion in these funding determinations, even where a petitioner shows the services are “‘reasonably necessary.’” *Ante*, at 46–47. Exercise of that discretion may be appropriate if there is a showing of gamesmanship or where the State has provided funding for the same investigation services, as Ayestas conceded at argument. See Tr. of Oral Arg. 13. Nonetheless, the troubling failures of counsel at both the trial and state postconviction stages of Ayestas’ case are exactly the types of facts that should prompt courts to afford investigatory services to ensure that trial errors that go to a “bedrock principle in our justice system” do not go unaddressed. *Martinez*, 566 U. S., at 12.

⁷ Notably, application of this “brutality of the crime” rule is particularly irrational in the § 3599(f) context, where the court is unaware of what the undiscovered evidence of mitigation looks like.

Syllabus

HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN
LOUISE HALL FAMILY TRUST *v.* HALL ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 16–1150. Argued January 16, 2018—Decided March 27, 2018

Respondent Samuel Hall served as caretaker and legal adviser to his mother Ethlyn Hall, a property owner in the United States Virgin Islands. After falling out with Samuel, Ethlyn transferred her property into a trust and designated her daughter, petitioner Elsa Hall, as her successor trustee. Ethlyn sued Samuel and his law firm over the handling of her affairs (the “trust case”). When Ethlyn died, Elsa took Ethlyn’s place as trustee and as plaintiff. Samuel later filed a separate complaint against Elsa in her individual capacity (the “individual case”).

On Samuel’s motion, the District Court consolidated the trust and individual cases under Federal Rule of Civil Procedure 42(a). The District Court held a single trial of the consolidated cases. In the individual case, the jury returned a verdict for Samuel, but the District Court granted Elsa a new trial. In the trust case, the jury returned a verdict against Elsa, and she filed a notice of appeal from the judgment in that case. Samuel moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment in the trust case was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed and dismissed the appeal.

Held: When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending. Pp. 64–78.

(a) Title 28 U. S. C. § 1291 vests the courts of appeals with jurisdiction over “appeals from all final decisions of the district courts,” except those directly appealable to this Court. Under § 1291, “any litigant armed with a final judgment from a lower federal court is entitled to take an appeal.” *Arizona v. Manypenny*, 451 U. S. 232, 244. Here an appeal would normally lie from the judgment in the trust case. But Samuel argues that because the trust and individual cases were consolidated under Rule 42(a)(2), they merged and should be regarded as one case, such that the judgment in the trust case was merely interlocutory and

Syllabus

not appealable before the consolidated cases in the aggregate are finally resolved. Pp. 64–65.

(b) Rule 42(a)(2) provides that if “actions before the court involve a common question of law or fact, the court may . . . consolidate the actions.” The meaning of the term “consolidate” in this context is ambiguous. But the term has a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, §3, 3 Stat. 21 (later codified as Rev. Stat. §921 and 28 U. S. C. §734 (1934 ed.)). That history makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases. Pp. 65–66.

(c) Under the consolidation statute—which was in force for 125 years, until its replacement by Rule 42(a)—consolidation was understood not as completely merging the constituent cases into one, but as enabling more efficient case management while preserving the distinct identities of the cases and rights of the separate parties in them. See, e. g., *Rich v. Lambert*, 12 How. 347; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Stone v. United States*, 167 U. S. 178. Just five years before Rule 42(a) became law, the Court reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson v. Manhattan R. Co.*, 289 U. S. 479, 496–497. This body of law supports the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. Pp. 67–72.

(d) Rule 42(a) was expressly modeled on the consolidation statute. Because the Rule contained no definition of “consolidate,” the term presumably carried forward the same meaning ascribed to it under the statute and reaffirmed in *Johnson*.

Samuel nonetheless asserts that “consolidate” took on a different meaning under Rule 42(a). He describes the Rule as permitting two forms of consolidation: consolidation for limited purposes and consolidation for all purposes. He locates textual authority for the former in a new provision, subsection (a)(1), which permits courts to “join for hearing or trial any or all matters at issue in the actions.” And he contends that subsection (a)(2), so as not to be superfluous, must permit the merger of cases that have been consolidated for all purposes into a single, undifferentiated case. But the narrow grant of authority in subsection (a)(1) cannot fairly be read as the exclusive source of a district court’s power to consolidate cases for limited purposes, because there is much more to litigation than hearings or trials. Instead, that undisputed power must stem from subsection (a)(2). That defeats Samuel’s argument that interpreting subsection (a)(2) to adopt the traditional un-

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derstanding of consolidation would render it duplicative of subsection (a)(1), and that subsection (a)(2) therefore must permit courts to merge the actions into a single unit.

Moreover, a Federal Rules Advisory Committee would not take a term that had long meant that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do. Nothing in the pertinent Committee proceedings supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation; the Committee simply commented that Rule 42(a) “is based upon” its statutory predecessor, “but insofar as the statute differs from this rule, it is modified.” Advisory Committee’s Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U.S.C. App., p. 887. The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms that the traditional understanding remains in place. See, e.g., *Bank Markazi v. Peterson*, 578 U.S. 212, 232–233; *Butler v. Dexter*, 425 U.S. 262, 266–267.

This decision does not mean that district courts may not consolidate cases for all purposes in appropriate circumstances. But constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party.

Pp. 72–77.

679 Fed. Appx. 142, reversed and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

Andrew C. Simpson argued the cause for petitioner and filed the briefs.

Neal Kumar Katyal argued the cause for respondents. With him on the brief was *Marie E. Thomas Griffith*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Three Terms ago, we held that one of multiple cases consolidated for multidistrict litigation under 28 U.S.C. § 1407 is immediately appealable upon an order disposing of that case, regardless of whether any of the others remain pending. *Gelboim v. Bank of America Corp.*, 574 U.S. 405

*A brief of *amici curiae* urging affirmance was filed for Retired United States District Judges by *Ruthanne M. Deutsch* and *Hyland Hunt*.

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(2015). We left open, however, the question whether the same is true with respect to cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure. *Id.*, at 413, n. 4. This case presents that question.

I

Petitioner Elsa Hall and respondent Samuel Hall are siblings enmeshed in a long-running family feud. Their mother, Ethlyn Hall, lived and owned property in the United States Virgin Islands. Samuel, a lawyer in the Virgin Islands, served as Ethlyn's caretaker and provided her with legal assistance. But trouble eventually came to paradise, and Samuel and Ethlyn fell out over Samuel's management of Ethlyn's real estate holdings. During a visit from Elsa, Ethlyn established an *inter vivos* trust, transferred all of her property into the trust, and designated Elsa as her successor trustee. Ethlyn then moved to Miami—under circumstances disputed by the parties—to live with her daughter.

The family squabble made its way to court in May 2011. Ethlyn, acting in her individual capacity and as trustee of her *inter vivos* trust, sued Samuel and his law firm in Federal District Court (the "trust case"). Ethlyn's claims—for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment—concerned the handling of her affairs by Samuel and his law firm before she left for Florida.

Then Ethlyn died, and Elsa stepped into her shoes as trustee and accordingly as plaintiff in the trust case. Samuel promptly filed counterclaims in that case against Elsa—in both her individual and representative capacities—for intentional infliction of emotional distress, fraud, breach of fiduciary duty, conversion, and tortious interference. Samuel contended that Elsa had turned their mother against him by taking advantage of Ethlyn's alleged mental frailty. But Samuel ran into an obstacle: Elsa was not a party to the trust case in her individual capacity (only Ethlyn had been). So Samuel filed a new complaint against Elsa in her individ-

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ual capacity in the same District Court (the “individual case”), raising the same claims that he had asserted as counterclaims in the trust case.

The trust and individual cases initially proceeded along separate tracks. Eventually, on Samuel’s motion, the District Court consolidated the cases under Rule 42(a) of the Federal Rules of Civil Procedure, ordering that “[a]ll submissions in the consolidated case shall be filed in” the docket assigned to the trust case. App. to Pet. for Cert. A–15.

Just before the trial commenced, the District Court dismissed from the trust case Samuel’s counterclaims against Elsa. Those claims remained in the individual case. The parties then tried the consolidated cases together before a jury.

In the individual case, the jury returned a verdict for Samuel on his intentional infliction of emotional distress claim against Elsa, awarding him \$500,000 in compensatory damages and \$1.5 million in punitive damages. The clerk entered judgment in that case, but the District Court granted Elsa a new trial, which had the effect of reopening the judgment. The individual case remains pending before the District Court.

In the trust case, the jury returned a verdict against Elsa, in her representative capacity, on her claims against Samuel and his law firm. The clerk entered judgment in that case directing that Elsa “recover nothing” and that “the action be dismissed on the merits.” *Id.*, at A–12.

Elsa filed a notice of appeal from the District Court’s judgment in the trust case. Samuel and his law firm moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed. When two cases have been consolidated for all purposes, the court reasoned, a final decision on one set of claims is generally not appealable while the second set remains pending.

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The court explained that it considers “whether a less-than-complete judgment is appealable” on a “case-by-case basis.” 679 Fed. Appx. 142, 145 (2017). Here, the fact that the claims in the trust and individual cases had been “scheduled together and tried before a single jury” “counsel[ed] in favor of keeping the claims together on appeal.” *Ibid.* The court dismissed Elsa’s appeal for lack of jurisdiction.

We granted certiorari, 582 U.S. 966 (2017), and now reverse.

II

A

Had the District Court never consolidated the trust and individual cases, there would be no question that Elsa could immediately appeal from the judgment in the trust case. Title 28 U. S. C. § 1291 vests the courts of appeals with jurisdiction over “appeals from all final decisions of the district courts,” except those directly appealable to this Court. A final decision “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Ray Haluch Gravel Co. v. Central Pension Fund of Operating Engineers and Participating Employers*, 571 U. S. 177, 183 (2014). The archetypal final decision is “one[] that trigger[s] the entry of judgment.” *Mohawk Industries, Inc. v. Carpenter*, 558 U. S. 100, 103 (2009). Appeal from such a final decision is a “matter of right.” *Gelboim*, 574 U. S., at 407. Under § 1291, “any litigant armed with a final judgment from a lower federal court is entitled to take an appeal,” *Arizona v. Manypenny*, 451 U. S. 232, 244 (1981), which generally must be filed within 30 days, 28 U. S. C. § 2107(a).

Here the jury’s verdict against Elsa resolved all of the claims in the trust case, and the clerk accordingly entered judgment in that case providing that “the action be dismissed on the merits.” App. to Pet. for Cert. A–12. With the entry of judgment, the District Court “completed its adjudication of [Elsa’s] complaint and terminated [her] action.”

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Gelboim, 574 U. S., at 414. An appeal would normally lie from that judgment.

But, Samuel contends, there is more to the litigation than the suit Elsa pursued against him in her representative capacity. There is also his suit against her in her individual capacity, which has not yet been decided. Because the District Court consolidated the trust and individual cases under Rule 42(a)(2), he argues, they merged and should be regarded as one case. Viewed that way, the judgment in the trust case was merely interlocutory, and more remains to be done in the individual case before the consolidated cases in the aggregate are finally resolved and subject to appeal.

B

Rule 42(a)—entitled “[c]onsolidation”—provides that if “actions before the court involve a common question of law or fact, the court may” take one of three measures. First, the court may “join for hearing or trial any or all matters at issue in the actions.” Fed. Rule Civ. Proc. 42(a)(1). Second, the court may “consolidate the actions.” Rule 42(a)(2). Third, the court may “issue any other orders to avoid unnecessary cost or delay.” Rule 42(a)(3). Whether the judgment entered in the trust case is an immediately appealable final decision turns on the effect of consolidation under Rule 42(a).

Samuel, looking to dictionary definitions, asserts that the “plain meaning of the phrase ‘consolidate the actions’ is . . . to unite two or more actions into one whole—that is, to join them into a single case.” Brief for Respondents 23 (citing Black’s Law Dictionary (10th ed. 2014); some internal quotation marks and alterations omitted). But the meaning of “consolidate” in the present context is ambiguous. When Rule 42(a) was adopted, the term was generally defined, as it is now, as meaning to “unite, as various particulars, into one mass or body; to bring together in close union; to combine.” Webster’s New International Dictionary 570 (2d

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ed. 1939). Consolidation can thus sometimes signify the complete merger of discrete units: “The company consolidated two branches.” But the term can also mean joining together discrete units without causing them to lose their independent character. The United States, for example, is composed of States “unite[d], as various particulars, into one mass or body,” “br[ought] together in close union,” or “combine[d].” Yet all agree that entry into our Union “by no means implies the loss of distinct and individual existence . . . by the States.” *Texas v. White*, 7 Wall. 700, 725 (1869). “She consolidated her books” hardly suggests that the “books” became “book.” The very metaphor Samuel offers—that consolidation “make[s] two one, like marriage”—highlights this point. Tr. of Oral Arg. 57. However dear to each other, spouses would be surprised to hear that their union extends beyond the metaphysical. This is not a plain meaning case.

It is instead about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, § 3, 3 Stat. 21 (later codified as Rev. Stat. § 921 and 28 U. S. C. § 734 (1934 ed.)). Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of “consolidate” in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

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C

Lord Mansfield pioneered the consolidation of related cases in England, and the practice quickly took root in American courts. See *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292 (1892). In 1813, Congress authorized the newly formed federal courts, when confronted with “causes of like nature, or relative to the same question,” to “make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice” and to “consolidate[.]” the causes when it “shall appear reasonable.” § 3, 3 Stat. 21. This consolidation statute applied at law, equity, and admiralty, see 1 W. Rose, *A Code of Federal Procedure* § 823(a) (1907) (Rose), and remained in force for 125 years, until its replacement by Rule 42(a).

From the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them. In *Rich v. Lambert*, 12 How. 347 (1852), for example, we considered an appeal from several consolidated cases in admiralty. The appellees, the owners of cargo damaged during shipment, raised a challenge to our jurisdiction that turned on the nature of the consolidation. At the time, we could exercise appellate jurisdiction only over cases involving at least \$2,000 in controversy. The damages awarded to the cargo owners in the consolidated cases surpassed \$2,000 in the aggregate, but most of the constituent cases did not individually clear that jurisdictional hurdle. *Id.*, at 352–353.

We declined to view the consolidated cases as one for purposes of appeal, concluding that we had jurisdiction only over those constituent cases that individually involved damages exceeding \$2,000. *Ibid.* As we explained, “although [a con-

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solidated] proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action.” *Id.*, at 353. Consolidation was “allowed by the practice of the court for its convenience, and the saving of time and expense to the parties.” *Ibid.*

The trial court’s decree, we noted, had the effect of individually resolving each constituent case. *Ibid.* (“The same decree . . . is entered as in the case of separate suits.”); see Black’s Law Dictionary 532 (3d ed. 1933) (“decree” is a “judgment of a court of equity or admiralty, answering for most purposes to the judgment of a court of common law”). Accordingly, we did “not perceive . . . any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout.” *Rich*, 12 How., at 353; see *Hanover Fire Ins. Co. v. Kinneard*, 129 U. S. 176, 177 (1889) (evaluating appellate jurisdiction over a writ of error in one of several consolidated cases without reference to the others).

We elaborated on the principles underlying consolidation in *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285. *Hillmon*, a staple of law school courses on evidence, involved three separate actions instituted against different life insurance companies by one Sallie Hillmon, the beneficiary on policies purchased by her husband John. Sallie claimed she was entitled to the sizable proceeds of the policies because John had died while journeying through southern Kansas with two companions in search of a site for a cattle ranch. The three companies countered that John was in fact still alive, having conspired with one of the companions to murder the other and pass his corpse off as John’s, all as part of an insurance fraud scheme. The trial court consolidated the cases and tried them together. *Id.*, at 285–287.

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The court, for purposes of determining the number of peremptory juror challenges to which each defendant was entitled, treated the three cases as though they had merged into one. *Ibid.* On appeal we disagreed, holding that each defendant should receive the full complement of peremptory challenges. *Id.*, at 293. That was because, “although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defence . . . to which it would have been entitled if the cases had been tried separately.” *Ibid.* On remand, one case settled, and a consolidated trial of the others “result[ed] in separate judgments” for Sallie. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 188 U. S. 208, 209 (1903).

In *Stone v. United States*, 167 U. S. 178, 189 (1897), we held that a party appealing from the judgment in one of two cases consolidated for trial could not also raise claims with respect to the other case. John Stone was the sole defendant in one case and one of three defendants in the other. *Id.*, at 179–181. After a consolidated trial, the jury returned a verdict in the case against Stone alone; its verdict in the multi-defendant case was set aside. *Id.*, at 181. Stone appealed from the judgment in his case, arguing that the failure to grant a peremptory challenge in the multidefendant case affected the jury’s verdict in his. *Id.*, at 189. We rejected that claim, punctiliously respecting the distinction between the constituent cases. There was “no merit in the objection,” we said, because in the case before us Stone had “had the benefit of the three peremptory challenges” to which he was entitled in that case. *Ibid.*; see *Stone v. United States*, 64 F. 667, 672 (CA9 1894) (“The two cases, although consolidated, were separate and distinct. Defendant had exercised all the rights and privileges he was entitled to in this case.”).

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And just five years before Rule 42(a) became law, we reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson v. Manhattan R. Co.*, 289 U. S. 479, 496–497 (1933). A major case of its day, *Johnson* arose from the “financial embarrassment” during the Great Depression of two companies involved in operating the New York subway system. *Johnson v. Manhattan R. Co.*, 61 F. 2d 934, 936 (CA2 1932). In the resulting litigation, the District Court consolidated two suits, apparently with the intent to “effect an intervention of the parties to the [first suit] in the [second] suit”—in other words, to make the two suits one. *Id.*, at 940. Judge Learned Hand, writing for the Second Circuit on appeal, would have none of it: “consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before.” *Ibid.* We affirmed, relying on *Hillmon* and several lower court cases reflecting the same understanding of consolidation. *Johnson*, 289 U. S., at 497, n. 8. We explained once more that “consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *Id.*, at 496–497.

Decisions by the Courts of Appeals, with isolated departures,* reflected the same understanding in cases involving all manners of consolidation. See, e. g., *Baltimore S. S. Co.*,

*See, e. g., *Edward P. Allis Co. v. Columbia Mill Co.*, 65 F. 52, 54 (CA8 1894) (involving two suits “consolidated, and tried as one action,” with the “complaint in the first suit . . . treated as a counterclaim interposed in the second suit”). State practice was varied. Compare, e. g., *East Bay Municipal Util. Dist. v. Kieffer*, 99 Cal. App. 240, 263 (1929) (denial of rehearing) (“By such consolidation the three proceedings became one proceeding and should have been determined by a single verdict, ‘a single set of findings and a single judgment.’”), with *Missouri Pac. R. Co. v. Helmert*, 196 Ark. 1073, 121 S. W. 2d 103 (1938) (consolidated cases resulted in separate judgments).

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Inc. v. Koppel Indus. Car & Equip. Co., 299 F. 158, 160 (CA4 1924) (“the consolidation for convenience of trial did not merge the two causes of action” or “deprive either party of any right or relieve it of any burden incident to the libel or cross-libel as a separate proceeding”); *Taylor v. Logan Trust Co.*, 289 F. 51, 53 (CA8 1923) (parties to one constituent case could not appeal orders in the other because “consolidation did not make the parties to one suit parties to the other”; cited in *Johnson*); *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 F. 497, 506 (CA6 1899) (consolidation “operates as a mere carrying on together of two separate suits supposed to involve identical issues” and “does not avoid the necessity of separate decrees in each case”; cited in *Johnson*).

One frequently cited case illustrates the point. In *Adler v. Seaman*, 266 F. 828, 831 (CA8 1920), the District Court “sought to employ consolidation as a medium of getting the two independent suits united,” but the Court of Appeals made clear that the consolidation statute did not authorize such action. The court explained that constituent cases sometimes “assume certain natural attitudes toward each other, such as ‘in the nature of’ a cross-bill or intervention.” *Id.*, at 838. Be that as it may, the court continued, “this is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit.” *Ibid.* The court described “the result of consolidation” as instead “merely to try cases together, necessitating separate verdicts and judgments or separate decrees,” and to “leave” the constituent cases “separate, independent action[s].” *Id.*, at 838, 840.

Treatises summarizing federal precedent applying the consolidation statute also concluded that consolidated cases “remain distinct.” 1 Rose § 823(c), at 758. They recognized that consolidated cases should “remain separate as to parties, pleadings, and judgment,” W. Simkins, *Federal Practice* 63 (rev. ed. 1923), and that “[t]here must be separate verdicts, judgments or decrees, even although the consolidating party

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wished for one verdict,” 1 Rose § 823(c), at 758 (footnote omitted); see also G. Virden, Consolidation Under Rule 42 of the Federal Rules of Civil Procedure, in 141 F. R. D. 169, 173–174 (1992) (Virden) (“as of 1933 and the *Johnson* case of that year, it was well settled that consolidation in the federal courts did not merge the separate cases into a single action”).

Several aspects of this body of law support the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. We made clear, for example, that each constituent case must be analyzed individually on appeal to ascertain jurisdiction and to decide its disposition—a compartmentalized analysis that would be gratuitous if the cases had merged into a single case subject to a single appeal. We emphasized that constituent cases should end in separate decrees or judgments—the traditional trigger for the right to appeal, for which there would be no need if an appeal could arise only from the resolution of the consolidated cases as a whole. We explained that the parties to one case did not become parties to the other by virtue of consolidation—indicating that the right of each to pursue his individual case on appeal should not be compromised by the litigation conduct of the other. And, finally, we held that consolidation could not prejudice rights to which the parties would have been due had consolidation never occurred. Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a “matter of right,” *Gelboim*, 574 U.S., at 407, to which he was “entitled,” *Manypenny*, 451 U.S., at 244.

D

Against this background, two years after *Johnson*, the Rules Advisory Committee began discussion of what was to become Rule 42(a). The Rule, which became effective in 1938, was expressly modeled on its statutory predecessor, the Act of July 22, 1813. See Advisory Committee’s Notes

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on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U.S.C. App., p. 887. The Rule contained no definition of “consolidate,” so the term presumably carried forward the same meaning we had ascribed to it under the consolidation statute for 125 years and had just recently reaffirmed in *Johnson*. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) (“if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it”); cf. *Class v. United States*, 583 U.S. 174, 184 (2018) (Federal Rule of Criminal Procedure 11(a)(2) did not silently alter existing doctrine established by this Court’s past decisions).

Samuel nonetheless asserts that there is a significant distinction between the original consolidation statute and Rule 42(a). The statute authorized district courts to “consolidate” related “causes when it appears reasonable to do so” or to “make such orders and rules . . . as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice.” 28 U.S.C. § 734 (1934 ed.). Rule 42(a) permits district courts not only to “consolidate the actions” (subsection (a)(2)) and “issue any other orders to avoid unnecessary cost or delay” (subsection (a)(3)), but also to “join for hearing or trial any or all matters at issue in the actions” (subsection (a)(1)).

Whatever “consolidate” meant under the statute, Samuel posits, it took on a different meaning under Rule 42(a) with the addition of subsection (a)(1). Samuel describes the Rule as “permit[ting] two forms of consolidation”: consolidation that “extend[s] only to certain proceedings,” such as discovery, and consolidation “for all purposes.” Brief for Respondents 4–5. He locates textual authority for the former in subsection (a)(1), which he says empowers courts to “join[] multiple actions for procedural purposes.” *Id.*, at 23. In light of this broad grant of authority, he contends, subsection (a)(2) must provide for something more if it is not to be su-

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perfluous. And Samuel sees that something more as the ability to merge cases that have been consolidated for “all purposes” into a single, undifferentiated case—one appealable only when all issues in each formerly distinct case have been decided. See *id.*, at 22–24 (to “consolidate” separate actions is “to join them into a single case” or “meld [them] into a single unit” (alterations omitted)).

We disagree. It is only by substantially overreading subsection (a)(1) that Samuel can argue that its addition compels a radical reinterpretation of the familiar term “consolidate” in subsection (a)(2). The text of subsection (a)(1) permits the joining of cases only for “hearing or trial.” That narrow grant of authority cannot fairly be read as the exclusive source of a district court’s power to “join[] multiple actions for procedural purposes.” *Id.*, at 23. There is, after all, much more to litigation than hearings or trials—such as motions practice or discovery. A district court’s undisputed ability to consolidate cases for such limited purposes must therefore stem from subsection (a)(2). That defeats Samuel’s argument that interpreting subsection (a)(2) to adopt the traditional understanding of consolidation would render it “wholly duplicative of [subsection] (a)(1),” and that subsection (a)(2) “therefore must permit courts . . . to ‘consolidate’ the actions *themselves* into a single unit.” *Id.*, at 23–24. Samuel’s reinterpretation of “consolidate” is, in other words, a solution in search of a problem.

We think, moreover, that if Rule 42(a) were meant to transform consolidation into something sharply contrary to what it had been, we would have heard about it. Congress, we have held, “does not alter the fundamental details” of an existing scheme with “vague terms” and “subtle device[s].” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); cf. *Class*, 583 U. S., at 184. That is true in spades when it comes to the work of the Federal Rules Advisory Committees. Their laborious drafting process requires years of effort and many layers of careful review before a

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proposed Rule is presented to this Court for possible submission to Congress. See Report of Advisory Committee on Rules for Civil Procedure (Apr. 1937) (describing the exhaustive process undertaken to draft the first Federal Rules of Civil Procedure). No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do.

Similarly, nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation. See *United States v. Vonn*, 535 U. S. 55, 64, n. 6 (2002) (Advisory Committee Notes are “a reliable source of insight into the meaning of a rule”). In this instance, the Committee simply commented that Rule 42(a) “is based upon” its statutory predecessor, “but insofar as the statute differs from this rule, it is modified.” Advisory Committee’s Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., at 887. The Committee did not identify any specific instance in which Rule 42(a) changed the statute, let alone the dramatic transformation Samuel would have us recognize. See Virden 174–181 (evaluating the history of the development of Rule 42(a) and finding no evidence that the Committee intended a shift in meaning along the lines proposed by Samuel). This is significant because when the Committee intended a new rule to change existing federal practice, it typically explained the departure. See, e. g., Advisory Committee’s Notes on 1937 Adoption of Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 747 (a predecessor statute “is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded”); Advisory Committee’s Notes on 1937 Adoption of Fed. Rule Civ. Proc. 18, 28 U. S. C. App., p. 802 (“In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner . . . to conform to the

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provisions of the Uniform Fraudulent Conveyance Act, §§9 and 10.”).

As a leading treatise explained at the time, through consolidation under Rule 42(a) “one or many or all of the phases of the several actions may be merged. But merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.” 3 J. Moore & J. Friedman, *Moore’s Federal Practice* §42.01, pp. 3050–3051 (1938). Thus, “separate verdicts and judgments are normally necessary.” *Id.*, at 3051, n. 12.

The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms the traditional understanding. Just recently in *Bank Markazi v. Peterson*, 578 U. S. 212, 232–233 (2016), for example, the Court determined that cases “consolidated for administrative purposes at the execution stage . . . were not independent of the original actions for damages and each claim retained its separate character.” The Court quoted as authority a treatise explaining that “actions do not lose their separate identity because of consolidation.” *Id.*, at 233 (quoting 9A C. Wright & A. Miller, *Federal Practice and Procedure* §2382, p. 10 (3d ed. 2008) (Wright & Miller)).

In *Butler v. Dexter*, 425 U. S. 262, 266–267 (1976) (*per curiam*), we dismissed an appeal because the constitutional question that supplied our jurisdiction had been raised not in the case before us, but instead only in other cases with which it had been consolidated. We explained that “[e]ach case . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.” *Id.*, at 267, n. 12; see *Rich*, 12 How., at 352–353. And in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U. S. 682, 735, and n. 22 (1976) (Marshall, J., dissenting), four dissenting Justices—reaching an issue not addressed by the majority—cited *Johnson* for the proposition that actions are

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“not merged” and do “not lose their separate identities because of . . . consolidation” under Rule 42(a).

In the face of all the foregoing, we cannot accept Samuel’s contention that “consolidate” in Rule 42(a) carried a very different meaning—with very different consequences—than it had in *Johnson*, just five years before the Rule was adopted.

None of this means that district courts may not consolidate cases for “all purposes” in appropriate circumstances. District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases. See 9A Wright & Miller §2383 (collecting cases). What our decision does mean is that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. That is, after all, the point at which, by definition, a “district court disassociates itself from a case.” *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995). We thus express no view on any issue arising prior to that time.

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* * *

The normal rule is that a “final decision” confers upon the losing party the immediate right to appeal. That rule provides clear guidance to litigants. Creating exceptions to such a critical step in litigation should not be undertaken lightly. Congress has granted us the authority to prescribe rules “defin[ing] when a ruling of a district court is final for the purposes of appeal under” §1291, 28 U.S.C. §2072(c), and we have explained that changes with respect to the meaning of final decision “are to come from rulemaking, . . . not judicial decisions in particular controversies,” *Microsoft Corp. v. Baker*, 582 U.S. 23, 39 (2017). If, as Samuel fears, our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.

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Rule 42(a) did not purport to alter the settled understanding of the consequences of consolidation. That understanding makes clear that when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals.

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

It is so ordered.

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Syllabus

ENCINO MOTORCARS, LLC *v.* NAVARRO ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 16–1362. Argued January 17, 2018—Decided April 2, 2018

Respondents, current and former service advisors for petitioner Encino Motorcars, LLC, sued petitioner for backpay, alleging that petitioner violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA’s overtime-pay requirement under 29 U.S.C. § 213(b)(10)(A), which applies to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted “salesman” to exclude service advisors. This Court vacated the Ninth Circuit’s judgment, holding that courts could not defer to the procedurally defective 2011 rule, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220–224 (*Encino I*), but not deciding whether the exemption covers service advisors, *id.*, at 224. On remand, the Ninth Circuit again held that the exemption does not include service advisors.

Held: Because service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles,” they are exempt from the FLSA’s overtime-pay requirement. Pp. 85–91.

(a) A service advisor is obviously a “salesman.” The ordinary meaning of “salesman” is someone who sells goods or services, and service advisors “sell [customers] services for their vehicles,” *Encino I*, *supra*, at 214. Pp. 85–86.

(b) Service advisors are also “primarily engaged in . . . servicing automobiles.” “Servicing” can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary 39. Service advisors satisfy both definitions because they are integral to the servicing process. They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Encino I*, *supra*, at 214–215. While service advisors do not spend most

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of their time physically repairing automobiles, neither do partsmen, who the parties agree are “primarily engaged in . . . servicing automobiles.” Pp. 86–87.

(c) The Ninth Circuit invoked the distributive canon—matching “salesman” with “selling” and “partsman [and] mechanic” with “[servicing]”—to conclude that the exemption simply does not apply to “salesm[en] . . . primarily engaged in . . . servicing automobiles.” But the word “or,” which connects all of the exemption’s nouns and gerunds, is “almost always disjunctive.” *United States v. Woods*, 571 U. S. 31, 45. Using “or” to join “selling” and “servicing” thus suggests that the exemption covers a salesman primarily engaged in either activity.

Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, “salesman . . . primarily engaged in . . . servicing automobiles” is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with “any” and using the disjunctive “or” three times. Pp. 87–88.

(d) The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. But the Court rejects this principle as a guide to interpreting the FLSA. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading. Pp. 88–89.

(e) Finally, the Ninth Circuit’s reliance on two extraneous sources to support its interpretation—the 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history—is unavailing. Pp. 89–90.

845 F. 3d 925, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 91.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Todd B. Scherwin*, *Wendy McGuire Coats*, *George W. Hicks, Jr.*, and *Matthew D. Rowen*.

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

JUSTICE THOMAS delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq.*, requires employers to pay overtime compensation to covered employees. The FLSA exempts from the overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” at a covered dealership. §213(b)(10)(A). We granted certiorari to decide whether this exemption applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions. We conclude that service advisors are exempt.

I

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Enacted in 1938, the FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a week. 29 U. S. C. §207(a). But the FLSA exempts many categories of employees from this requirement. See §213. Employees at car dealerships have long been among those exempted.

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Matthew W. Lampe*, *Warren D. Postman*, *E. Michael Rossman*, *Ryan J. Watson*, and *Deborah White*; and for the National Automobile Dealers Association et al. by *Felicia R. Reid* and *Douglas I. Greenhaus*.

Briefs of *amici curiae* urging affirmance were filed for the International Association of Machinists and Aerospace Workers, AFL-CIO, by *David A. Rosenfeld*, *Mark D. Schneider*, and *Caren P. Sencer*; for Law Professors by *David C. Frederick*; for the National Employment Lawyers Association by *Michael L. Foreman*; and for Sen. Patty Murray et al. by *Vincent Levy*, *Daniel M. Sullivan*, *Gregory Dubinsky*, and *Matthew V. H. Noller*.

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Congress initially exempted all employees at car dealerships from the overtime-pay requirement. See Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. Congress then narrowed that exemption to cover “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft.” Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. In 1974, Congress enacted the version of the exemption at issue here. It provides that the FLSA’s overtime-pay requirement does not apply to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” § 213(b)(10)(A).

This language has long been understood to cover service advisors. Although the Department of Labor initially interpreted it to exclude them, 35 Fed. Reg. 5896 (1970) (codified at 29 CFR § 779.372(c)(4) (1971)), the federal courts rejected that view, see *Brennan v. Deel Motors, Inc.*, 475 F. 2d 1095 (CA5 1973); *Brennan v. North Bros. Ford, Inc.*, 76 CCH LC ¶33,247 (ED Mich. 1975), *aff’d sub nom. Dunlop v. North Bros. Ford, Inc.*, 529 F. 2d 524 (CA6 1976) (table). After these decisions, the Department issued an opinion letter in 1978, explaining that service advisors are exempt in most cases. See Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978), [1978–1981 Transfer Binder] CCH Wages–Hours Administrative Rulings ¶31,207. From 1978 to 2011, Congress made no changes to the exemption, despite amending § 213 nearly a dozen times. The Department also continued to acquiesce in the view that service advisors are exempt. See Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04(k) (Oct. 20, 1987), online at <https://perma.cc/5GHD-KCJJ> (as last visited Mar. 28, 2018).

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In 2011, however, the Department reversed course. It issued a rule that interpreted “salesman” to exclude service advisors. 76 Fed. Reg. 18859 (2011) (codified at 29 CFR § 779.372(c)). That regulation prompted this litigation.

B

Petitioner Encino Motorcars, LLC, is a Mercedes-Benz dealership in California. Respondents are current and former service advisors for petitioner. Service advisors “interact with customers and sell them services for their vehicles.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 214 (2016) (*Encino I*). They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Ibid.*

In 2012, respondents sued petitioner for backpay. Relying on the Department’s 2011 regulation, respondents alleged that petitioner had violated the FLSA by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt under § 213(b)(10)(A). The District Court agreed with petitioner and dismissed the complaint, but the Court of Appeals for the Ninth Circuit reversed. Finding the text ambiguous and the legislative history “inconclusive,” the Ninth Circuit deferred to the Department’s 2011 rule under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1275 (2015).

We granted certiorari and vacated the Ninth Circuit’s judgment. We explained that courts cannot defer to the 2011 rule because it is procedurally defective. See *Encino I*, 579 U.S., at 220–224. Specifically, the regulation under-

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mined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation. *Id.*, at 222. But we did not decide whether, without administrative deference, the exemption covers service advisors. *Id.*, at 224. We remanded that issue for the Ninth Circuit to address in the first instance. *Ibid.*

C

On remand, the Ninth Circuit again held that the exemption does not include service advisors. The Court of Appeals agreed that a service advisor is a “salesman” in a “generic sense,” 845 F. 3d 925, 930 (2017), and is “‘primarily engaged in . . . servicing automobiles’” in a “general sense,” *id.*, at 931. Nonetheless, it concluded that “Congress did not intend to exempt service advisors.” *Id.*, at 929.

The Ninth Circuit began by noting that the Department’s 1966–1967 Occupational Outlook Handbook listed 12 job titles in the table of contents that could be found at a car dealership, including “automobile mechanics,” “automobile parts counterment,” “automobile salesmen,” and “automobile service advisors.” *Id.*, at 930. Because the FLSA exemption listed three of these positions, but not service advisors, the Ninth Circuit concluded that service advisors are not exempt. *Ibid.* The Ninth Circuit also determined that service advisors are not primarily engaged in “servicing” automobiles, which it defined to mean “only those who are actually occupied in the repair and maintenance of cars.” *Id.*, at 931. And the Ninth Circuit further concluded that the exemption does not cover salesmen who are primarily engaged in servicing. *Id.*, at 933. In reaching this conclusion, the Ninth Circuit invoked the distributive canon. See A. Scalia & B. Garner, *Reading Law* 214 (2012) (“Distributive phrasing applies each expression to its appropriate referent”). It reasoned that “Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman

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sells; a partsman services; and a mechanic services.” 845 F. 3d, at 934. Finally, the Court of Appeals noted that its interpretation was supported by the principle that exemptions to the FLSA should be construed narrowly, *id.*, at 935, and by the lack of any “mention of service advisors” in the legislative history, *id.*, at 939.

We granted certiorari, 582 U.S. 966 (2017), and now reverse.

II

The FLSA exempts from its overtime-pay requirement “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.” §213(b)(10)(A). The parties agree that petitioner is a “nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers.” The parties also agree that a service advisor is not a “partsman” or “mechanic,” and that a service advisor is not “primarily engaged in selling . . . automobiles.” The question, then, is whether service advisors are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” We conclude that they are. Under the best reading of the text, service advisors are “salesm[e]n,” and they are “primarily engaged in . . . servicing automobiles.” The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.

A

A service advisor is obviously a “salesman.” The term “salesman” is not defined in the statute, so “we give the term its ordinary meaning.” *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of “salesman” is someone who sells goods or services. See 14 Oxford English Dictionary 391 (2d ed. 1989) (“[a] man whose

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business it is to sell goods or conduct sales”); Random House Dictionary of the English Language 1262 (1966) (“a man who sells goods, services, etc.”). Service advisors do precisely that. As this Court previously explained, service advisors “sell [customers] services for their vehicles.” *Encino I*, 579 U. S., at 214.

B

Service advisors are also “primarily engaged in . . . servicing automobiles.” § 213(b)(10)(A). The word “servicing” in this context can mean either “the action of maintaining or repairing a motor vehicle” or “[t]he action of providing a service.” 15 Oxford English Dictionary, at 39; see also Random House Dictionary of the English Language, at 1304 (“to make fit for use; repair; restore to condition for service”). Service advisors satisfy both definitions. Service advisors are integral to the servicing process. They “mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles.” *Encino I, supra*, at 214–215. If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor.

True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are “primarily engaged in . . . servicing automobiles.” Brief for Petitioner 40; Brief for Respondents 41–44. But partsmen, like service advisors, do not spend most of their time under the hood. Instead, they “obtain the vehicle parts . . . and provide those parts to the mechanics.” *Encino I, supra*, at 215; see also 1 Dept. of Labor, Dictionary of Occupational Titles 33 (3d ed. 1965) (defining “partsman” as someone who “[p]urchases, stores, and issues spare parts

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for automotive and industrial equipment”). In other words, the phrase “primarily engaged in . . . servicing automobiles” must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

C

The Ninth Circuit concluded that service advisors are not covered because the exemption simply does not apply to “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” The Ninth Circuit invoked the distributive canon to reach this conclusion. Using that canon, it matched “salesman” with “selling” and “partsmen [and] mechanic” with “servicing.” We reject this reasoning.

The text of the exemption covers “any salesman, partsmen, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” §213(b)(10)(A). The exemption uses the word “or” to connect all of its nouns and gerunds, and “or” is “almost always disjunctive.” *United States v. Woods*, 571 U.S. 31, 45 (2013). Thus, the use of “or” to join “selling” and “servicing” suggests that the exemption covers a salesman primarily engaged in either activity.

Unsurprisingly, statutory context can overcome the ordinary, disjunctive meaning of “or.” The distributive canon, for example, recognizes that sometimes “[w]here a sentence contains several antecedents and several consequents,” courts should “read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.” 2A N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* §47:26, p. 448 (rev. 7th ed. 2014).

But here, context favors the ordinary disjunctive meaning of “or” for at least three reasons. First, the distributive canon has the most force when the statute allows for one-to-one matching. But here, the distributive canon would mix and match some of three nouns—“salesman, partsmen, or

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mechanic”—with one of two gerunds—“selling or servicing.” § 213(b)(10)(A). We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. Cf., e.g., *Huidekoper’s Lessee v. Douglass*, 3 Cranch 1, 67 (1805) (Marshall, C. J.) (applying the distributive canon when a purely disjunctive reading “would involve a contradiction in terms”). But as explained above, the phrase “salesman . . . primarily engaged in . . . servicing automobiles” not only makes sense; it is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth. It begins with the word “any.” See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (noting the “‘expansive meaning’” of “any”). And it uses the disjunctive word “or” three times. In fact, all agree that the third list in the exemption—“automobiles, trucks, or farm implements”—modifies every other noun and gerund. But it would be odd to read the exemption as starting with a distributive phrasing and then, halfway through and without warning, switching to a disjunctive phrasing—all the while using the same word (“or”) to signal both meanings. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (noting the “vigorous” presumption that, “when a term is repeated within a given sentence,” it “is used to mean the same thing”). The more natural reading is that the exemption covers any combination of its nouns, gerunds, and objects.

D

The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 845 F.3d, at 935–936. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no “textual indication” that its exemptions should be construed narrowly, “there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.” Scalia,

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Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA “‘pursues’” its remedial purpose “‘at all costs.’” *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 234 (2013) (quoting *Rodriguez v. United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*)); see also *Henson v. Santander Consumer USA Inc.*, 582 U. S. 79, 89 (2017) (“[I]t is quite mistaken to assume . . . that whatever might appear to further the statute’s primary objective must be the law” (internal quotation marks and alterations omitted)). But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement. See *id.*, at 89 (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage”). We thus have no license to give the exemption anything but a fair reading.

E

Finally, the Ninth Circuit relied on two extraneous sources to support its interpretation: the Department’s 1966–1967 Occupational Outlook Handbook and the FLSA’s legislative history. We find neither persuasive.

1

The Ninth Circuit first relied on the Department’s 1966–1967 Occupational Outlook Handbook. It identified 12 jobs from the Handbook’s table of contents that it thought could be found at automobile dealerships. See 845 F. 3d, at 930. The Ninth Circuit then stressed that the exemption aligns with three of those job titles—“[a]utomobile mechanics,” “[a]utomobile parts countertermen,” and “[a]utomobile salesmen”—but not “[a]utomobile service advisors.” *Ibid.*

The Ninth Circuit cited nothing, however, suggesting that the exemption was meant to align with the job titles listed in the Handbook. To the contrary, the exemption applies to

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“any salesman . . . primarily engaged in selling or servicing automobiles.” It is not limited, like the term in the Handbook, to “automobile salesmen.” And the ordinary meaning of “salesman” plainly includes service advisors.

2

The Ninth Circuit also relied on legislative history to support its interpretation. See *id.*, at 936–939. Specifically, it noted that the legislative history discusses “automobile salesmen, partsmen, and mechanics” but never discusses service advisors. *Id.*, at 939. Although the Ninth Circuit had previously found that same legislative history “inconclusive,” *Encino*, 780 F. 3d, at 1275, on remand it was “firmly persuaded” that the legislative history demonstrated Congress’ desire to exclude service advisors, 845 F. 3d, at 939.

The Ninth Circuit was right the first time. As we have explained, the best reading of the statute is that service advisors are exempt. Even for those Members of this Court who consider legislative history, silence in the legislative history, “no matter how ‘clanging,’” cannot defeat the better reading of the text and statutory context. *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479, 496, n. 13 (1985). If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. See *Avco Corp. v. Department of Justice*, 884 F. 2d 621, 625 (CA DC 1989). Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading. See *Union Bank v. Wolas*, 502 U. S. 151, 158 (1991).

* * *

In sum, we conclude that service advisors are exempt from the overtime-pay requirement of the FLSA because they are “salesm[e]n . . . primarily engaged in . . . servicing automobiles.” § 213(b)(10)(A). Accordingly, we reverse the

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

It is so ordered.

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

Diverse categories of employees staff automobile dealerships. Of employees so engaged, Congress explicitly exempted from the Fair Labor Standards Act hours requirements only three occupations: salesmen, partsmen, and mechanics. The Court today approves the exemption of a fourth occupation: automobile service advisors. In accord with the judgment of the Court of Appeals for the Ninth Circuit, I would not enlarge the exemption to include service advisors or other occupations outside Congress' enumeration.

Respondents are service advisors at a Mercedes-Benz automobile dealership in the Los Angeles area. They work regular hours, 7 a.m. to 6 p.m., at least five days per week, on the dealership premises. App. 54. Their weekly minimum is 55 hours. Maximum hours, for workers covered by the Fair Labor Standards Act (FLSA or Act), are 40 per week. 29 U. S. C. § 207(a)(1). In this action, respondents seek time-and-a-half compensation for hours worked beyond the 40 per week maximum prescribed by the FLSA.

The question presented: Are service advisors exempt from receipt of overtime compensation under 29 U. S. C. § 213(b)(10)(A)? That exemption covers “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” Service advisors, such as respondents, neither sell automobiles nor service (*i. e.*, repair or maintain) vehicles. Rather, they “meet and greet [car] owners”; “solicit and sugges[t]” repair services “to remedy the [owner’s] complaints”; “solicit and suggest . . . supplemental [vehicle] service[s]”; and provide owners with cost estimates. App. 55. Because service advisors neither sell nor repair automo-

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biles, they should remain outside the exemption and within the Act's coverage.

I

In 1961, Congress exempted all automobile-dealership employees from the Act's overtime-pay requirements. See Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73.¹ Five years later, in 1966, Congress confined the dealership exemption to three categories of employees: automobile salesmen, mechanics, and partsmen. See Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. At the time, it was well understood that mechanics perform “preventive maintenance” and “repairs,” Dept. of Labor, Occupational Outlook Handbook 477 (1966–1967 ed.) (Handbook), while partsmen requisition parts, “suppl[y] [them] to mechanics,” *id.*, at 312, and, at times, have “mechanical responsibilities in repairing parts,” Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as *Amicus Curiae* 30; see Handbook, at 312–313 (partsmen may “measure parts for interchangeability,” test parts for “defect[s],” and “repair parts”). Congress did not exempt numerous other categories of dealership employees, among them, automobile painters, upholsterers, bookkeeping workers, cashiers, janitors, purchasing agents, shipping and receiving clerks, and, most relevant here, service advisors. These positions and their duties were well known at the time, as documented in U. S. Government catalogs of American jobs. See Handbook, at XIII, XV, XVI (table of contents); Brief for International Association of Machinists and Aerospace Workers,

¹The exemption further extended to all employees of establishments selling “trucks” and “farm implements.” Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. When Congress later narrowed the provision's scope for automobile-dealership employees, it similarly diminished the exemption's application to workers at truck and farm-implement dealerships. See, *e. g.*, Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836.

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AFL–CIO, as *Amicus Curiae* 34 (noting “more than twenty distinct [job] classifications” in the service department alone).

“Where Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *TRW Inc. v. Andrews*, 534 U. S. 19, 28 (2001) (internal quotation marks omitted). The Court thus has no warrant to add to the three explicitly exempt categories (salesmen, partsmen, and mechanics) a fourth (service advisors) for which the Legislature did not provide. The reach of today’s ruling is uncertain, troublingly so: By expansively reading the exemption to encompass all salesmen, partsmen, and mechanics who are “integral to the servicing process,” *ante*, at 86, the Court risks restoring much of what Congress intended the 1966 amendment to terminate, *i. e.*, the blanket exemption of all dealership employees from overtime-pay requirements.

II

Had the §213(b)(10)(A) exemption covered “any salesman or mechanic primarily engaged in selling or servicing automobiles,” there could be no argument that service advisors fit within it. Only “salesmen” primarily engaged in “selling” automobiles and “mechanics” primarily engaged in “servicing” them would fall outside the Act’s coverage. Service advisors, defined as “*salesmen* primarily engaged in the *selling of services*,” *Encino Motorcars, LLC v. Navarro*, 579 U. S. 211, 227 (2016) (THOMAS, J., dissenting) (emphasis added), plainly do not belong in either category. Moreover, even if the exemption were read to reach “salesmen” “primarily engaged in *servicing* automobiles,” not just selling them, service advisors would not be exempt. The ordinary meaning of “servicing” is “the action of maintaining or repairing a motor vehicle.” *Ante*, at 86 (quoting 15 Oxford English Dictionary 39 (2d ed. 1989)). As described above,

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see *supra*, at 91, service advisors neither maintain nor repair automobiles.²

Petitioner stakes its case on Congress' addition of the "partsman" job to the exemption. See Reply Brief 6–10. That inclusion, petitioner urges, has a vacuum effect: It draws into the exemption job categories other than the three for which Congress provided, in particular, service advisors. Because partsmen, like service advisors, neither "sell" nor "service" automobiles in the conventional sense, petitioner reasons, Congress must have intended the word "service" to mean something broader than repair and maintenance.

To begin with, petitioner's premise is flawed. Unlike service advisors, partsmen "'get their hands dirty' by 'working as a mechanic's right-hand man or woman.'" *Encino Motorcars*, 579 U.S., at 225, n. 1 (GINSBURG, J., concurring) (quoting Brief for Respondents in No. 15–415, p. 11; alterations omitted); see *supra*, at 92 (describing duties of partsmen). As the Solicitor General put it last time this case was before the Court, a mechanic "might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side." Brief for United States as *Amicus Curiae* in No. 15–415, p. 23. But dividing the "key [repair] tasks . . . between two individuals" only "reinforces" "that both the mechanic and the partsman are . . . involved in repairing ('servicing') the vehicle." *Ibid.* Service advisors, in contrast, "*sell . . . services* [to customers] for their vehicles," *Encino Motorcars*, 579 U.S., at 214 (emphasis

²Service advisors do not maintain or repair motor vehicles even if, as the Court concludes, they are "integral to the servicing process." *Ante*, at 86. The Ninth Circuit provided an apt analogy: "[A] receptionist-scheduler at a dental office fields calls from patients, matching their needs (*e. g.*, a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient's obtaining dental services, but we would not say that the receptionist-scheduler is 'primarily engaged in' cleaning teeth or installing crowns." 845 F.3d 925, 932 (2017).

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added)—services that are later performed by mechanics and partsmen.

Adding partsmen to the exemption, moreover, would be an exceptionally odd way for Congress to have indicated that “servicing” should be given a meaning deviating from its ordinary usage. There is a more straightforward explanation for Congress’ inclusion of partsmen alongside salesmen and mechanics: Common features of the three enumerated jobs make them unsuitable for overtime pay.

Both salesmen and mechanics work irregular hours, including nights and weekends, not uncommonly offsite, rendering time worked not easily tracked.³ As noted in the 1966 Senate floor debate, salesmen “go out at unusual hours, trying to earn commissions.” 112 Cong. Rec. 20504 (1966) (remarks of Sen. Bayh). See also *ibid.* (remarks of Sen. Yarborough) (“[T]he salesman . . . [can] sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime.”). Mechanics’ work may involve similar “difficult[ies] [in] keeping regular hours.” *Ibid.* For example, mechanics may be required to “answe[r] calls in . . . rural areas,” *ibid.*, or to “go out on the field where there is a harvesting of sugarbeets,” *id.*, at 20505 (remarks of Sen. Clark).⁴ And, like salesmen, mechanics may be “subject to

³ In addition to practical difficulties in calculating hours, a core purpose of overtime may not be served when employees’ hours regularly fluctuate. Enacted in the midst of the Great Depression, the FLSA overtime rules encourage employers to hire more individuals who work 40-hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours. See *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 577–578 (1942) (overtime rules apply “financial pressure” on employers to “spread employment”); 7 D. VanDeusen, Labor and Employment Law § 176.02[1] (2018). But if a position’s working hours routinely ebb and flow, while averaging 40 each week, then it does not make sense to encourage employers to hire more workers for that position.

⁴ Recall that the exemption extends to salesmen, mechanics, and partsmen at dealerships selling farm implements and trucks, not just automobiles. See *supra*, at 92, n. 1.

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substantial seasonal variations in business.” *Id.*, at 20502 (remarks of Sen. Hruska).

Congress added “partsman” to the exemption because it believed that job, too, entailed irregular hours. See *ibid.* This is “especially true,” several Senators emphasized, “in the farm equipment business where farmers, during planting, cultivating and harvesting seasons, may call on their dealers for parts at any time during the day or evening and on weekends.” *Ibid.* (remarks of Sen. Bayh). See also *id.*, at 20503 (remarks of Sen. Mansfield). In Senator Bayh’s experience, for instance, a mechanic who “could not find [a] necessary part” after hours might “call the partsman, get him out of bed, and get him to come down to the store.” *Id.*, at 20504. See also *id.*, at 20503 (remarks of Sen. Hruska) (“Are we going to say to the farmer who needs a part . . . on Sunday: You cannot get a spark plug . . . because the partsman is not exempt, but you can have machinery repaired by a mechanic who is exempt[?]”). Although some Senators opposed adding partsmen to the exemption because, as they understood the job’s demands, partsmen did not work irregular hours, *e. g.*, *id.*, at 20505 (remarks of Sen. Clark), the crux of the debate underscores the exemption’s rationale.

That rationale has no application here. Unlike salesmen, partsmen, and mechanics, service advisors “wor[k] ordinary, fixed schedules on-site.” Brief for Respondents 47 (citing Handbook, at 316). Respondents, for instance, work *regular* 11-hour shifts, at all times of the year, for a weekly minimum of 55 hours. See App. 54. Service advisors thus do not implicate the concerns underlying the §213(b)(10)(A) exemption. Indeed, they are precisely the type of workers Congress intended the FLSA to shield “from the evil of overwork,” *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (internal quotation marks omitted).

I note, furthermore, that limiting the exemption to the three delineated jobs—salesman, partsman, and mechanic—

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does not leave the phrase “primarily engaged in selling or servicing,” §213(b)(10)(A), without utility. Congress included that language to ensure that only employees who actually perform the tasks commonly associated with the enumerated positions would be covered. Otherwise, for example, a worker who acts as a “salesman” in name only could lose the FLSA’s protections merely because of the formal title listed on the employer’s payroll records. See *Bowers v. Fred Haas Toyota World*, 2017 WL 5127289, *4 (SD Tex., June 21, 2017) (“[An employee’s] title alone is not dispositive of whether he meets the . . . exemption.”). Thus, by partsmen “primarily engaged in . . . *servicing* automobiles,” Congress meant nothing more than partsmen primarily engaged in *the ordinary duties of a partsman, i. e.*, requisitioning, supplying, and repairing parts. See *supra*, at 91, 94–95. The inclusion of “partsman” therefore should not result in the removal of service advisors from the Act’s protections.

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Petitioner contends that “affirming the decision below would disrupt decades of settled expectations” while exposing “employers to substantial retroactive liability.” Brief for Petitioner 51. “[M]any dealerships,” petitioner urges, “have offered compensation packages based primarily on sales commissions,” in reliance on court decisions and agency guidance ranking service advisors as exempt. *Id.*, at 51–52. Respondents here, for instance, are compensated on a “pure commission basis.” App. 55. Awarding retroactive overtime pay to employees who were “focused on earning commissions,” not “working a set number of hours,” petitioner argues, would yield an “unjustified windfal[l].” Brief for Petitioner 53.

Petitioner’s concerns are doubly overstated. As the Court previously acknowledged, see *Encino Motorcars*, 579 U. S., at 223, the FLSA provides an affirmative defense that explicitly protects regulated parties from retroactive liabil-

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ity for actions taken in good-faith reliance on superseded agency guidance. See 29 U. S. C. §259(a). Given the Department of Labor’s longstanding view that service advisors fit within the §213(b)(10)(A) exemption, see *ante*, at 82, the reliance defense would surely shield employers from retroactive liability were the Court to construe the exemption properly.

Congress, moreover, has spoken directly to the treatment of *commission*-based workers. The FLSA exempts from its overtime directives any employee of a “retail or service establishment” who receives more than half of his or her pay on commission, so long as the employee’s “regular rate of pay” is more than 1½ times the minimum wage. §207(i). Thus, even without the §213(b)(10)(A) exemption, many service advisors compensated on commission would remain ineligible for overtime remuneration.⁵

In crafting the commission-pay exemption, Congress struck a deliberate balance: It exempted *higher* paid commissioned employees, perhaps in recognition of their potentially irregular hours, see *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F. 2d 1173, 1176–1177 (CA7 1987); cf. *supra*, at 95–96, but it maintained protection for *lower* paid employees, to vindicate the Act’s “principal . . . purpose” of shielding “workers from substandard wages and oppressive working hours,” *Barrentine*, 450 U. S., at 739.⁶ By stretching the §213(b)(10)(A) exemption to encompass even the lowest income service advisors compensated on commission, the Court up-

⁵The current FLSA minimum wage, for example, is \$7.25 per hour. See 29 U. S. C. §206(a)(1)(C). The only commission-based service advisors at retail or service establishments who are *not* already exempt under §207(i)—and who thus remain eligible for overtime—are those earning less than \$10.88 per hour. Providing such workers time-and-a-half pay, as Congress directed, would confer, at most, \$5.44 per overtime hour.

⁶Congress struck a similar balance in 29 U. S. C. §207(f), which exempts employees whose duties “necessitate irregular hours of work,” but only if they receive specified minimum rates of pay.

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sets Congress’ careful balance, while stripping away protection for the most vulnerable workers in this occupation.

* * *

This Court once recognized that the “particularity” of FLSA exemptions “preclude[s] their enlargement by implication.” *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944). Employees outside the Act’s “narrow and specific” exemptions, the Court affirmed, “remain within the Act.” *Powell v. United States Cartridge Co.*, 339 U. S. 497, 517 (1950).⁷ The Court today, in adding an exemption of its own creation, veers away from that comprehension of the FLSA’s mission. I would instead resist, as the Ninth Circuit did, diminishment of the Act’s overtime strictures.

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⁷This Court has long held that FLSA “exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960). This principle is a well-grounded application of the general rule that an “exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision.” *Maracich v. Spears*, 570 U. S. 48, 60 (2013) (internal quotation marks omitted). In a single paragraph, the Court “reject[s]” this longstanding principle as applied to the FLSA, *ante*, at 88, without even acknowledging that it unsettles more than half a century of our precedent.

Syllabus

KISELA v. HUGHES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–467. Decided April 2, 2018

Arizona police officer Andrew Kisela and two other officers responded to a 911 call about a woman behaving erratically and hacking a tree with a kitchen knife. When the officers arrived, they spotted a woman, later identified as Sharon Chadwick, standing on the other side of a chain-link fence from them in the driveway of a nearby house. The officers then saw another woman, Amy Hughes, emerge from the house carrying a large knife. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her. The officers drew their guns and, at least twice, ordered Hughes to drop the knife. Hughes did not acknowledge the officers' presence or drop the knife. Kisela then fired four shots through the fence striking Hughes. Hughes was transported to a hospital where she was treated for non-life-threatening injuries. Hughes sued Kisela under 42 U. S. C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Ninth Circuit reversed, holding that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment and that the violation was clearly established.

Held: Even assuming a Fourth Amendment violation occurred in this case, Kisela was at least entitled to qualified immunity. “Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *White v. Pauly*, 580 U. S. 73, 78–79 (internal quotation marks omitted). Thus, an officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Plumhoff v. Rickard*, 572 U. S. 765, 778–779. The Ninth Circuit failed to implement that necessary part of the qualified-immunity standard in a correct way. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. And the court made additional errors in concluding that its own precedent clearly established that Kisela used excessive force.

Certiorari granted; 862 F. 3d 775, reversed and remanded.

Per Curiam

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but

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she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a \$20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted her to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get \$20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. *Ibid.* Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention." Record 108.

Hughes sued Kisela under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F.3d 775 (2016).

The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demon-

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strate that Kisela violated the Fourth Amendment. See *id.*, at 782. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. *Id.*, at 785. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

In one of the first cases on this general subject, *Tennessee v. Garner*, 471 U. S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Id.*, at 11.

In *Graham v. Connor*, 490 U. S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Ibid.* And “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.*, at 396–397.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amend-

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ment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

“Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *White v. Pauly*, 580 U. S. 73, 78–79 (2017) (*per curiam*) (internal quotation marks omitted). “Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.” *Brosseau v. Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*).

Although “this Court’s case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *White*, 580 U. S., at 79 (alteration and internal quotation marks omitted). “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” *Ibid.* (internal quotation marks omitted). This Court has “‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’” *City and County of San Francisco v. Sheehan*, 575 U. S. 600, 613 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U. S. 731, 742 (2011)); see also *Brosseau*, *supra*, at 198–199.

“[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” *Mullenix v. Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (alteration and internal quotation marks omitted). Use of excessive force is an area of the law “in which the result depends very much on the facts of each case,” and thus police officers are entitled to qualified immunity unless existing precedent “squarely governs” the specific facts at issue. *Id.*, at 13 (internal quota-

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tion marks omitted; emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise “hazy border between excessive and acceptable force” and thereby provide an officer notice that a specific use of force is unlawful. *Id.*, at 18 (internal quotation marks omitted).

“Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers.” *White*, 580 U. S., at 79 (internal quotation marks omitted). But the general rules set forth in “*Garner* and *Graham* do not by themselves create clearly established law outside an ‘obvious case.’” *Id.*, at 80. Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” *Plumhoff v. Rickard*, 572 U. S. 765, 778–779 (2014). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious

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case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, “even if ‘a controlling circuit precedent could constitute clearly established . . . law in these circumstances,’ it does not do so here.” *Sheehan*, *supra*, at 614 (citation omitted). In fact, the most analogous Circuit precedent favors Kisela. See *Blanford v. Sacramento County*, 406 F. 3d 1110 (CA9 2005). In *Blanford*, the police responded to a report that a man was walking through a residential neighborhood carrying a sword and acting in an erratic manner. *Id.*, at 1112. There, as here, the police shot the man after he refused their commands to drop his weapon (there, as here, the man might not have heard the commands). *Id.*, at 1113. There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others. *Ibid.* There, the Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. *Id.*, at 1119. Based on that decision, a reasonable officer could have believed the same thing was true in the instant case.

In contrast, not one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford*, 272 F. 3d 1272 (CA9 2001), *Glenn v. Washington County*, 673 F. 3d 864 (CA9 2011), and *Harris v. Roderick*, 126 F. 3d 1189 (CA9 1997)—supports denying Kisela qualified immunity. As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law. *Sheehan*, 575 U. S., at 614–616. *Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been “physically compliant

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and generally followed all the officers' instructions"; and he had been under police observation for roughly 40 minutes. 272 F. 3d, at 1276, 1281–1282. In this case, by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. "Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, *supra*, at 614.

Glenn, which the panel described as "[t]he most analogous Ninth Circuit case," 862 F. 3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U.S., at 200, n. 4. *Glenn* was therefore "of no use in the clearly established inquiry." *Brosseau*, *supra*, at 200, n. 4. Other judges brought this mistaken or misleading citation to the panel's attention while Kisela's petition for rehearing en banc was pending before the Court of Appeals. 862 F. 3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to "rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010." *Id.*, at 784, n. 2 (majority opinion). The panel failed to explain the difference between "illustrative" and "indicative" precedent, and none is apparent.

The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals' decision in *Harris* clearly established that the shooting here was unconstitutional. 862 F. 3d, at 785. The new mention of *Harris* replaced a reference in the panel's first opinion to *Glenn*—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) ("As indicated by *Glenn* and

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Deorle, . . . that right was clearly established”), with 862 F. 3d, at 785 (“As indicated by *Deorle* and *Harris*, . . . that right was clearly established”).

The panel’s reliance on *Harris* “does not pass the straight-face test.” 862 F. 3d, at 797 (opinion of Ikuta, J.). In *Harris*, the Court of Appeals determined that a Federal Bureau of Investigation sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202–1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes’ front yard.

For these reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared “composed and content,” Appellant’s Excerpts of Record 109 (Record), and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he “wanted to continue trying verbal command[s] and see if that would work.” *Id.*, at 120. But not Kisela. He thought it

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necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. See *ante*, at 103–105. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence . . . in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." *Tolan v. Cotton*, 572 U. S. 650, 657 (2014) (*per curiam*). The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. 862 F. 3d 775, 778 (CA9 2016). They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the

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woman with the knife had been acting “erratically.” *Ibid.* A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared “composed and content,” Record 109, and did not look angry. See 862 F. 3d, at 778. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and “was not the least bit threatened by the fact that [Hughes] had a knife in her hand” and that Hughes “never acted in a threatening manner.” Record 110–111. The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one. See 862 F. 3d, at 780.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came “in quick succession.” *Id.*, at 778. The evidence in the record suggests that Hughes may not have heard or understood the officers’ commands and may not have been aware of the officers’ presence at all. Record 109–110, 195, 323–324 (Officer Kunz’s testimony that “it seemed as though [Hughes] didn’t even know we were there,” and “[i]t was like she didn’t hear us almost”); *id.*, at 304 (Officer Garcia’s testimony that Hughes acted “almost as if we weren’t there”). Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers’ rushed commands. Instead, Kisela

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immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, “‘Why’d you shoot me?’” *Id.*, at 308. Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’” *District of Columbia v. Wesby*, 583 U. S. 48, 62–63 (2018) (quoting *Reichle v. Howards*, 566 U. S. 658, 664 (2012)). Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. Hughes alleges that Kisela violated her Fourth Amendment rights by deploying excessive force against her. In assessing such a claim, courts must ask “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” *Graham v. Connor*, 490 U. S. 386, 397 (1989). That inquiry “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers

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or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*, at 396; see also *Tennessee v. Garner*, 471 U. S. 1, 11 (1985). All of those factors (and others) support the Ninth Circuit’s conclusion that a jury could find that Kisela’s use of deadly force was objectively unreasonable. 862 F. 3d, at 779–782. Indeed, the panel’s resolution of this question was so convincing that not a single judge on the Ninth Circuit, including the seven who dissented from denial of rehearing en banc, expressly disputed that conclusion. See *id.*, at 791–799 (opinion of Ikuta, J.). Neither does the majority here, which simply assumes without deciding that “a Fourth Amendment violation occurred.” *Ante*, at 103–104.

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a “check welfare” call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes’ description had been acting erratically. But the police officers themselves never witnessed any erratic conduct. Instead, when viewed in the light most favorable to Hughes, the record evidence of what the police encountered paints a calmer picture. It shows that Hughes was several feet from Chadwick and even farther from the officers, she never made any aggressive or threatening movements, and she appeared “composed and content” during the brief encounter.

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers’ presence at all, and evidence suggests

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that Hughes did not hear the officers' swift commands to drop the knife.

Finally, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. 862 F. 3d, at 781. For instance, Hughes submitted expert testimony concluding that Kisela should have used his Taser and that shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers. *Ibid.*; see also *Bryan v. MacPherson*, 630 F. 3d 805, 831 (CA9 2010) (noting that "police are required to consider what other tactics if any were available to effect the arrest" and whether there are "clear, reasonable, and less intrusive alternatives" (internal quotation marks and alteration omitted)). Consistent with that assessment, the other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use "some of the lesser means" than shooting, including verbal commands, because he believed there was time "[t]o try to talk [Hughes] down." Record 120–121. That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes. See *Plumhoff v. Rickard*, 572 U. S. 765, 775 (2014) ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene" (internal quotation marks omitted)).

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times.

B

Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the "clearly established" prong of the qualified-immunity analysis. *Ante*, at 103–104. To be "'clearly established' . . . [t]he contours of the right must be sufficiently

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clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, *ante*, at 104, this Court has long rejected the notion that “an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,” *Anderson*, 483 U. S., at 640. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U. S. 730, 741 (2002). At its core, then, the “clearly established” inquiry boils down to whether Kisela had “fair notice” that he acted unconstitutionally. See *ibid.*; *Brosseau v. Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*) (“[T]he focus” of qualified immunity “is on whether the officer had fair notice that her conduct was unlawful”).

The answer to that question is yes. This Court’s precedents make clear that a police officer may only deploy deadly force against an individual if the officer “has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.” *Garner*, 471 U. S., at 11; see also *Graham*, 490 U. S., at 397. It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. See *Scott v. Harris*, 550 U. S. 372, 383 (2007); *Mullenix v. Luna*, 577 U. S. 7, 20, 21–22 (2015) (SOTOMAYOR, J., dissenting). Consistent with those clearly established principles, and contrary to the majority’s conclusion, Ninth Circuit precedent predating these events further confirms that Kisela’s conduct was clearly unreasonable. See *Brosseau*, 543 U. S., at 199 (“[A] body of relevant case law” may “‘clearly establish’” the violation of a constitutional right); *Ashcroft v. al-Kidd*, 563 U. S. 731, 746 (2011) (KENNEDY, J., concurring) (“[Q]ualified immunity is lost when plaintiffs point either to ‘cases of controlling authority in their jurisdiction at the time of the incident’ or to ‘a consensus of cases of persuasive authority such that a

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reasonable officer could not have believed that his actions were lawful” (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999))). Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

The Ninth Circuit’s opinion in *Deorle v. Rutherford*, 272 F.3d 1272 (2001), proves the point. In that case, the police encountered a man who had reportedly been acting “erratically.” *Id.*, at 1276. The man was “verbally abusive,” shouted “‘kill me’” at the officers, screamed that he would “‘kick [the] ass’” of one of the officers, and “brandish[ed] a hatchet at a police officer,” ultimately throwing it “into a clump of trees when told to put it down.” *Id.*, at 1276–1277. The officers also observed the man carrying an unloaded crossbow in one hand and what appeared to be “a can or a bottle of lighter fluid in the other.” *Id.*, at 1277. The man discarded the crossbow when instructed to do so by the police and then steadily walked toward one of the officers. *Ibid.* In response, that officer, without giving a warning, shot the man in the face with beanbag rounds. *Id.*, at 1278. The man suffered serious injuries, including multiple fractures to his cranium and the loss of his left eye. *Ibid.*

The Ninth Circuit denied qualified immunity to the officer, concluding that his use of force was objectively unreasonable under clearly established law. *Id.*, at 1285–1286. The court held, “Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.” *Id.*, at 1285.

The same holds true here. Like the man in *Deorle*, Hughes committed no serious crime, had been given no

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warning of the imminent use of force, posed no risk of flight, and presented no objectively reasonable threat to the safety of officers or others. In fact, Hughes presented even less of a danger than the man in *Deorle*, for, unlike him, she did not threaten to “kick [their] ass,” did not appear agitated, and did not raise her kitchen knife or make any aggressive gestures toward the police or Chadwick. If the police officers acted unreasonably in shooting the agitated, screaming man in *Deorle* with beanbag bullets, *a fortiori* Kisela acted unreasonably in shooting the calm-looking, stationary Hughes with real bullets. In my view, *Deorle* and the precedent it cites place the unlawfulness of Kisela’s conduct “‘beyond debate.’” *Wesby*, 583 U. S., at 64.

The majority strains mightily to distinguish *Deorle*, to no avail. It asserts, for instance, that, unlike the man in *Deorle*, Hughes was “armed with a large knife.” *Ante*, at 107. But that is not a fair characterization of the record, particularly at this procedural juncture. Hughes was not “armed” with a knife. She was holding “a kitchen knife—an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes”—down at her side with the blade pointed away from Chadwick. 862 F. 3d, at 788 (Berzon, J., concurring in denial of rehearing en banc). Hughes also spoke calmly with Chadwick during the events at issue, did not raise the knife, and made no other aggressive movements, undermining any suggestion that she was a threat to Chadwick or anyone else. Similarly, the majority asserts that Hughes was “within striking distance” of Chadwick, *ante*, at 107, but that stretches the facts and contravenes this Court’s repeated admonition that inferences must be drawn in the exact opposite direction, *i. e.*, in favor of Hughes. See *Tolan*, 572 U. S., at 657. The facts, properly viewed, show that, when she was shot, Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could “stri[k]e” Chadwick from that particular distance, even though the kitchen knife was held down

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at her side, is an inference that should be drawn by the jury, not this Court.

The majority next posits that Hughes, unlike the man in *Deorle*, “ignored the officers’ orders to drop the” kitchen knife. *Ante*, at 107. Yet again, the majority here draws inferences in favor of Kisela, instead of Hughes. The available evidence would allow a reasonable jury to find that Hughes did not hear or register the officers’ swift commands and that Kisela, like his fellow officers on the scene, should have realized that as well. See *supra*, at 109–111. Accordingly, at least at the summary-judgment stage, the Court is mistaken in distinguishing *Deorle* based on Hughes’ ostensible disobedience to the officers’ directives.

The majority also implies that *Deorle* is distinguishable because the police in that case observed the man over a 40-minute period, whereas the situation here unfolded in less than a minute. *Ante*, at 106–107. But that fact favors Hughes, not Kisela. The only reason this case unfolded in such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a “lesser means” of force. See Record 120–121, 304.

Finally, the majority passingly notes that “this Court has already instructed the Court of Appeals not to read [*Deorle*] too broadly.” *Ante*, at 106 (citing *City and County of San Francisco v. Sheehan*, 575 U. S. 600, 614–616 (2015)). But the Court in *Sheehan* concluded that *Deorle* was plainly distinguishable because, unlike in *Deorle*, the officers there confronted a woman who “was dangerous, recalcitrant, law breaking, and out of sight.” 575 U. S., at 614. As explained above, however, Hughes was none of those things: She did not threaten or endanger the officers or Chadwick, she did not break any laws, and she was visible to the officers on the scene. See *supra*, at 109–111. Thus, there simply is no basis for the Court’s assertion that “‘the differences between [*Deorle*] and the case before us leap from the page.’” *Ante*, at 107 (quoting *Sheehan*, 575 U. S., at 614).

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Deorle, moreover, is not the only case that provided fair notice to Kisela that shooting Hughes under these circumstances was unreasonable. For instance, the Ninth Circuit has held that the use of deadly force against an individual holding a semiautomatic rifle was unconstitutional where the individual “did not point the gun at the officers and apparently was not facing them when they shot him the first time.” *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (1991). Similarly, in *Harris v. Roderick*, 126 F.3d 1189 (1997), the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made “no threatening movement” or “aggressive move of any kind.” *Id.*, at 1203.* Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. See *Harris*, 126 F.3d, at 1201 (“Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons”).

If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. See, e.g., *McKinney v. DeKalb County*, 997 F.2d 1440, 1442 (CA11 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other,

*The majority insists that reliance on *Harris* fails the “‘straight-face test’” because *Harris* involved a Federal Bureau of Investigation sniper on a hilltop who shot a man while he was retreating to a cabin during a standoff. *Ante*, at 108 (quoting 862 F.3d, at 797 (opinion of Ikuta, J.)). If anything, though, the context of *Harris* could be viewed as more dangerous than the context here because, unlike Hughes, the suspect in *Harris* had engaged in a firefight with other officers the previous day, during which an officer was shot. See 126 F.3d, at 1193–1194.

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where the person threw the stick and began to rise from his seated position); *Reyes v. Bridgwater*, 362 Fed. Appx. 403, 404–405 (CA5 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer’s multiple commands to drop the knife); *Duong v. Telford*, 186 Fed. Appx. 214, 215, 217 (CA3 2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from the officer at the time he was shot and had not received any warnings to drop the knife).

Against this wall of case law, the majority points to a single Ninth Circuit decision, *Blanford v. Sacramento County*, 406 F. 3d 1110 (2005), as proof that Kisela reasonably could have believed that Hughes posed an immediate danger. But *Blanford* involved far different circumstances. In that case, officers observed a man walking through a neighborhood brandishing a 2½-foot cavalry sword; officers commanded the man to drop the sword, identified themselves as police, and warned “‘We’ll shoot.’” *Id.*, at 1112–1113. The man responded with “a loud growling or roaring sound,” which increased the officers’ concern that he posed a risk of harm. *Id.*, at 1113. In an effort to “evade [police] authority,” the man, while still wielding the sword, tried to enter a home, thus prompting officers to open fire to protect anyone who might be inside. *Id.*, at 1113, 1118. The Ninth Circuit concluded that use of deadly force was reasonable in those circumstances. See *id.*, at 1119.

This case differs significantly from *Blanford* in several key respects. Unlike the man in *Blanford*, Hughes held a kitchen knife down by her side, as compared to a 2½-foot sword; she appeared calm and collected, and did not make threatening noises or gestures toward the officers on the scene; she stood still in front of her own home, and was not

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wandering about the neighborhood, evading law enforcement, or attempting to enter another house. Moreover, unlike the officers in *Blanford*, Kisela never verbally identified himself as an officer and never warned Hughes that he was going to shoot before he did so. Given these significant differences, no reasonable officer would believe that *Blanford* justified Kisela's conduct. The majority's conclusion to the contrary is fanciful.

* * *

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. *Hope*, 536 U. S., at 739. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *Wesby*, 583 U. S., at 63 (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

For the foregoing reasons, it is clear to me that the Court of Appeals got it right. But even if that result were not so clear, I cannot agree with the majority's apparent view that the decision below was so manifestly incorrect as to warrant "the extraordinary remedy of a summary reversal." *Major League Baseball Players Assn. v. Garvey*, 532 U. S. 504, 512–513 (2001) (Stevens, J., dissenting). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J.,

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dissenting); *Office of Personnel Management v. Richmond*, 496 U. S. 414, 422 (1990) (“Summary reversals of courts of appeals are unusual under any circumstances”). This is not such a case. The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.

This unwarranted summary reversal is symptomatic of “a disturbing trend regarding the use of this Court’s resources” in qualified-immunity cases. *Salazar-Limon v. Houston*, 581 U. S. 946, 954 (2017) (SOTOMAYOR, J., dissenting from denial of certiorari). As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.” *Ibid.*; see also Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 82 (2018) (“[N]early all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials”); Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Syllabus

WILSON *v.* SELLERS, WARDENCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 16–6855. Argued October 30, 2017—Decided April 17, 2018

Petitioner Marion Wilson was convicted of murder and sentenced to death. He sought habeas relief in Georgia Superior Court, claiming that his counsel's ineffectiveness during sentencing violated the Sixth Amendment. The court denied the petition, in relevant part, because it concluded that counsel's performance was not deficient and had not prejudiced Wilson. The Georgia Supreme Court summarily denied his application for a certificate of probable cause to appeal. Wilson subsequently filed a federal habeas petition, raising the same ineffective-assistance claim. The District Court assumed that his counsel was deficient but deferred to the state habeas court's conclusion that any deficiencies did not prejudice Wilson. The Eleventh Circuit affirmed. First, however, the panel concluded that the District Court was wrong to "look though" the State Supreme Court's unexplained decision and assume that it rested on the grounds given in the state habeas court's opinion, rather than ask what arguments "could have supported" the State Supreme Court's summary decision. The en banc court agreed with the panel's methodology.

Held: A federal habeas court reviewing an unexplained state-court decision on the merits should "look through" that decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. The State may rebut the presumption by showing that the unexplained decision most likely relied on different grounds than the reasoned decision below. Pp. 128–134.

(a) In *Ylst v. Nunnemaker*, 501 U.S. 797, the Court held that where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. In *Ylst*, where the last reasoned opinion on the claim explicitly imposed a procedural default, the Court presumed that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Since *Ylst*, every Circuit to have considered the matter, but for the Eleventh Circuit, has applied a "look through" presumption even where the state courts did not apply a procedural bar to review, and most Circuits applied the presumption prior to *Ylst*. The presumption is

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often realistic, for state higher courts often issue summary decisions when they have examined the lower court's reasoning and found nothing significant with which they disagree. The presumption also is often more efficiently applied than a contrary approach that would require a federal court to imagine what might have been the state court's supportive reasoning.

The State argues that *Harrington v. Richter*, 562 U. S. 86, controls here and that *Ylst* should apply, at most, where the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground or whether the state court reached the merits of a federal issue. *Richter*, however, did not directly concern the issue in this case—whether to “look through” the silent state higher court opinion to the lower court's reasoned opinion in order to determine the reasons for the higher court's decision. In *Richter*, there was no lower court opinion to look to. And *Richter* does not say that *Ylst*'s reasoning does not apply in the context of an unexplained decision on the merits. Indeed, this Court has “looked through” to lower court decisions in cases involving the merits. See, e. g., *Premo v. Moore*, 562 U. S. 115, 123–133. Pp. 128–132.

(b) The State's further arguments are unconvincing. It points out that the “look through” presumption may not accurately identify the grounds for a higher court's decision. But the “look through” presumption is not an absolute rule. Additional evidence that might not be sufficient to rebut the presumption in a case like *Ylst*, where the lower court rested on a state-law procedural ground, would allow a federal court to conclude that counsel has rebutted the presumption in a case decided on the merits. For instance, a federal court may conclude that the presumption is rebutted where counsel identifies convincing alternative arguments for affirmance that were made to the State's highest court, or equivalent evidence such as an alternative ground that is obvious in the state-court record. The State also argues that this Court does not necessarily presume that a federal court of appeals' silent opinion adopts the reasoning of the court below, but that is a different context. Were there to be a “look through” approach as a general matter in that context, judges and lawyers might read those decisions as creating, through silence, binding circuit precedent. Here, a federal court “looks through” the silent decision for a specific and narrow purpose, to identify the grounds for the higher court's decision as the Antiterrorism and Effective Death Penalty Act requires. Nor does the “look through” approach show disrespect for the States; rather, it seeks to replicate the grounds for the higher state court's decision. Finally, the “look through” approach is unlikely to lead state courts to write full opinions

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where they would have preferred to decide summarily, at least not to any significant degree. Pp. 132–134.

834 F. 3d 1227, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 134.

Mark E. Olive argued the cause for petitioner. With him on the briefs were *Brian S. Kammer*, *Marcia A. Widder*, *John H. Blume*, *Autumn N. Nero*, and *David J. Harth*.

Sarah Hawkins Warren argued the cause for respondent. With her on the brief were *Christopher M. Carr*, Attorney General of Georgia, *Andrew A. Pinson*, Deputy Solicitor General, *Beth A. Burton*, Deputy Attorney General, and *Sabrina D. Graham*, Senior Assistant Attorney General.*

JUSTICE BREYER delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter “adjudicated on the merits in

**Timothy P. O’Toole* filed a brief for Retired State Supreme Court Justices as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Arkansas et al. by *Leslie Rutledge*, Attorney General of Arkansas, *Lee Rudofsky*, Solicitor General, *Brooke Gasaway*, Assistant Attorney General, and *Nicholas J. Bronni*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Pamela Jo Bondi* of Florida, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Hector H. Balderas* of New Mexico, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Patrick Morrissey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

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State court” to show that the relevant state-court “decision” (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U. S. C. § 2254(d). Deciding whether a state court’s decision “involved” an unreasonable application of federal law or “was based on” an unreasonable determination of fact requires the federal habeas court to “train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims,” *Hittson v. Chatman*, 576 U. S. 1028 (2015) (GINSBURG, J., concurring in denial of certiorari), and to give appropriate deference to that decision, *Harrington v. Richter*, 562 U. S. 86, 101–102 (2011).

This is a straightforward inquiry when the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again. See, e. g., *Porter v. McCollum*, 558 U. S. 30, 39–44 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U. S. 374, 388–392 (2005); *Wiggins v. Smith*, 539 U. S. 510, 523–538 (2003).

The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court’s reasons when the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied with those reasons. For instance, the decision may consist of a one-word order, such as “affirmed” or “denied.” What then is the federal habeas court to do? We hold that the federal court should “look through” the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds

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than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.

I

In 1997 a Georgia jury convicted petitioner, Marion Wilson, of murder and related crimes. After a sentencing hearing, the jury sentenced Wilson to death. In 1999 the Georgia Supreme Court affirmed Wilson's conviction and sentence, *Wilson v. State*, 271 Ga. 811, 525 S. E. 2d 339 (1999), and this Court denied his petition for certiorari, *Wilson v. Georgia*, 531 U. S. 838 (2000).

Wilson then filed a petition for habeas corpus in a state court, the Superior Court for Butts County. Among other things, he claimed that his counsel was "ineffective" during his sentencing, in violation of the Sixth Amendment. See *Strickland v. Washington*, 466 U. S. 668, 687 (1984) (setting forth "two components" of an ineffective-assistance-of-counsel claim: "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense"). Wilson identified new evidence that he argued trial counsel should have introduced at sentencing, namely, testimony from various witnesses about Wilson's childhood and the impairment of the frontal lobe of Wilson's brain.

After a hearing, the state habeas court denied the petition in relevant part because it thought Wilson's evidence did not show that counsel was "deficient," and, in any event, counsel's failure to find and present the new evidence that Wilson offered had not prejudiced Wilson. *Wilson v. Terry*, No. 2001-v-38 (Super. Ct. Butts Cty., Ga., Dec. 1, 2008), App. 60-61. In the court's view, that was because the new evidence was "inadmissible on evidentiary grounds," was "cumulative of other testimony," or "otherwise would not have, in reasonable probability, changed the outcome of the trial." *Id.*, at 61. Wilson applied to the Georgia Supreme Court for a certificate of probable cause to appeal the state habeas

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court's decision. But the Georgia Supreme Court denied the application without any explanatory opinion. *Wilson v. Terry*, No. 2001–v–38 (May 3, 2010), App. 87, cert. denied, 562 U. S. 1093 (2010).

Wilson subsequently filed a petition for habeas corpus in the United States District Court for the Middle District of Georgia. He made what was essentially the same “ineffective assistance” claim. After a hearing, the District Court denied Wilson’s petition. *Wilson v. Humphrey*, No. 5:10–cv–489 (Dec. 19, 2013), App. 88–89. The court assumed that Wilson’s counsel had indeed been “deficient” in failing adequately to investigate Wilson’s background and physical condition for mitigation evidence and to present what he likely would have found at the sentencing hearing. *Id.*, at 144. But, the court nonetheless deferred to the state habeas court’s conclusion that these deficiencies did not “prejudice” Wilson, primarily because the testimony of many witnesses was “cumulative,” and because the evidence of physical impairments did not include any physical examination or other support that would have shown the state-court determination was “unreasonable.” *Id.*, at 187; see *Richter*, 562 U. S., at 111–112.

Wilson appealed to the Court of Appeals for the Eleventh Circuit. *Wilson v. Warden*, 774 F. 3d 671 (2014). The panel first held that the District Court had used the wrong method for determining the reasoning of the relevant state court, namely, that of the Georgia Supreme Court (the final and highest state court to decide the merits of Wilson’s claims). *Id.*, at 678. That state-court decision, the panel conceded, was made without an opinion. But, the federal court was wrong to “look through” that decision and assume that it rested on the grounds given in the lower court’s decision. Instead of “looking through” the decision to the state habeas court’s opinion, the federal court should have asked what arguments “could have supported” the Georgia Supreme Court’s refusal to grant permission to appeal. The panel

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proceeded to identify a number of bases that it believed reasonably could have supported the decision. *Id.*, at 678–681.

The Eleventh Circuit then granted Wilson rehearing en banc so that it could consider the matter of methodology. *Wilson v. Warden*, 834 F. 3d 1227 (2016). Ultimately six judges (a majority) agreed with the panel and held that its “could have supported” approach was correct. *Id.*, at 1235. Five dissenting judges believed that the District Court should have used the methodology it did use, namely, the “look through” approach. *Id.*, at 1242–1247, 1247–1269. Wilson then sought certiorari here. Because the Eleventh Circuit’s opinion creates a split among the Circuits, we granted the petition. Compare *id.*, at 1235 (applying “could have supported” approach), with *Grueninger v. Director, Va. Dept. of Corrections*, 813 F. 3d 517, 525–526 (CA4 2016) (applying “look through” presumption post-*Richter*), and *Cannedy v. Adams*, 706 F. 3d 1148, 1156–1159 (CA9 2013) (same); see also *Clements v. Clarke*, 592 F. 3d 45, 52 (CA1 2010) (applying “look through” presumption pre-*Richter*); *Bond v. Beard*, 539 F. 3d 256, 289–290 (CA3 2008) (same); *Mark v. Ault*, 498 F. 3d 775, 782–783 (CA8 2007) (same); *Joseph v. Coyle*, 469 F. 3d 441, 450 (CA6 2006) (same).

II

We conclude that federal habeas law employs a “look through” presumption. That conclusion has parallels in this Court’s precedent. In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), a defendant, convicted in a California state court of murder, appealed his conviction to the state appeals court where he raised a constitutional claim based on *Miranda v. Arizona*, 384 U.S. 436 (1966). 501 U.S., at 799–800. The appeals court rejected that claim, writing that “‘an objection based upon a *Miranda* violation cannot be raised for the first time on appeal.’” *Id.*, at 799. The defendant then similarly challenged his conviction in the California Supreme Court and on collateral review in several state courts (including

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once again the California Supreme Court). In each of these latter instances the state court denied the defendant relief (or review). In each instance the court did so without an opinion or other explanation. *Id.*, at 799–800.

Subsequently, the defendant asked a federal habeas court to review his constitutional claim. *Id.*, at 800. The higher state courts had given no reason for their decision. And this Court ultimately had to decide how the federal court was to find the state court’s reasoning in those circumstances. Should it have “looked through” the unreasoned decisions to the state procedural ground articulated in the appeals court or should it have used a different method?

In answering that question Justice Scalia wrote the following for the Court:

“The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion ‘fairly appear[s] to rest primarily upon federal law,’ we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.” *Id.*, at 803 (citation omitted).

Since *Ylst*, every Circuit to have considered the matter has applied this presumption, often called the “look through”

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presumption, but for the Eleventh Circuit—even where the state courts did not apply a procedural bar to review. See *supra*, at 128. And most Federal Circuits applied it prior to *Ylst*. See *Ylst, supra*, at 803 (citing *Prihoda v. McCaughtry*, 910 F. 2d 1379, 1383 (CA7 1990); *Harmon v. Barton*, 894 F. 2d 1268, 1272 (CA11 1990); *Evans v. Thompson*, 881 F. 2d 117, 123, n. 2 (CA4 1989); *Ellis v. Lynaugh*, 873 F. 2d 830, 838 (CA5 1989)).

That is not surprising in light of the fact that the “look through” presumption is often realistic, for state higher courts often (but certainly not always, see *Redmon v. Johnson*, 302 Ga. 763, 809 S. E. 2d 468 (2018)) write “denied” or “affirmed” or “dismissed” when they have examined the lower court’s reasoning and found nothing significant with which they disagree.

Moreover, a “look through” presumption is often (but not always) more efficiently applied than a contrary approach—an approach, for example, that would require a federal habeas court to imagine what might have been the state court’s supportive reasoning. The latter task may prove particularly difficult where the issue involves state law, such as state procedural rules that may constrain the scope of a reviewing court’s summary decision, a matter in which a federal judge often lacks comparative expertise. See *Ylst, supra*, at 805.

The State points to a later case, *Harrington v. Richter*, 562 U. S. 86, which, it says, controls here instead of *Ylst*. In its view, *Ylst* should apply, at most, to cases in which the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground (for example, a procedural default) or whether the state court has reached the merits of a federal issue. In support, it notes that *Richter* held that the state-court decisions to which AEDPA refers include summary dispositions, *i. e.*, decisions without opinion. *Richter* added that “determining whether a state court’s decision resulted from an un-

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reasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." 562 U. S., at 98.

Richter then said that, where "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Ibid.* And the Court concluded that, when "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.*, at 99.

In our view, however, *Richter* does not control here. For one thing, *Richter* did not directly concern the issue before us—whether to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision. Indeed, it could not have considered that matter, for in *Richter*, there was no lower court opinion to look to. That is because the convicted defendant sought to raise his federal constitutional claim for the first time in the California Supreme Court (via a direct petition for habeas corpus, as California law permits). *Id.*, at 96.

For another thing, *Richter* does not say the reasoning of *Ylst* does not apply in the context of an unexplained decision on the merits. To the contrary, the Court noted that it was setting forth a presumption, which "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter, supra*, at 99–100. And it referred in support to *Ylst*, 501 U. S., at 803.

Further, we have "looked through" to lower court decisions in cases involving the merits. See, e.g., *Premo v. Moore*, 562 U. S. 115, 123–133 (2011); *Sears v. Upton*, 561 U. S. 945, 951–956 (2010) (*per curiam*). Indeed, we decided one of those cases, *Premo*, on the same day we decided *Richter*. And in our opinion in *Richter* we referred to *Premo*.

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562 U. S., at 91. Had we intended *Richter*'s "could have supported" framework to apply even where there is a reasoned decision by a lower state court, our opinion in *Premo* would have looked very different. We did not even cite the reviewing state court's summary affirmance. Instead, we focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA. 562 U. S., at 132 ("The state postconviction court's decision involved no unreasonable application of Supreme Court precedent").

III

The State's further arguments do not convince us. The State points out that there could be many cases in which a "look through" presumption does not accurately identify the grounds for the higher court's decision. And we agree. We also agree that it is more likely that a state supreme court's single word "affirm" rests upon alternative grounds where the lower state court decision is unreasonable than, *e. g.*, where the lower court rested on a state-law procedural ground, as in *Ylst*. But that is why we have set forth a presumption and not an absolute rule. And the unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the state supreme court adopted the same reasoning. Thus, additional evidence that might not be sufficient to rebut the presumption in a case like *Ylst* would allow a federal court to conclude that counsel has rebutted the presumption in a case like this one. For instance, a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made to the State's highest court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State's highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record. The dissent argues that the Georgia Supreme Court's recent decision in

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Redmon v. Johnson rebuts the presumption in Georgia because that court indicated its summary decisions should not be read to adopt the lower court's reasoning. *Post*, at 140–141, 143–144 (opinion of GORSUCH, J.). This misses the point. A presumption that can be rebutted by evidence of, for instance, an alternative ground that was argued or that is clear in the record was the likely basis for the decision is in accord with full and proper respect for state courts, like those in Georgia, which have well-established systems and procedures in place in order to ensure proper consideration to the arguments and contention in the many cases they must process to determine whether relief should be granted when a criminal conviction or its ensuing sentence is challenged.

The State also points out that we do not necessarily presume that a silent opinion of a federal court of appeals adopts the reasoning of the court below. The dissent similarly invokes these “traditional rules of appellate practice.” See *post*, at 138–140, 143. But neither the State nor the dissent provides examples of similar context. Were we to adopt a “look through” approach in respect to silent federal appeals court decisions as a general matter in other contexts, we would risk judges and lawyers reading those decisions as creating, through silence, a precedent that could be read as binding throughout the circuit—just what a silent decision may be thought not to do. Here, however, we “look through” the silent decision for a specific and narrow purpose—to identify the grounds for the higher court's decision, as AEDPA directs us to do. See *supra*, at 124–126. We see no reason why the federal court's interpretation of the state court's silence should be taken as binding precedent outside this context, for example, as a statewide binding interpretation of state law.

Further, the State argues that the “look through” approach shows disrespect for the States. See Brief for Respondent 39 (“Wilson's approach to summary decisions reflects an utter lack of faith in the ability of the highest

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state courts to adjudicate constitutional rights”). We do not believe this is so. Rather the presumption seeks to replicate the grounds for the higher state court’s decision. Where there are convincing grounds to believe the silent court had a different basis for its decision than the analysis followed by the previous court, the federal habeas court is free, as we have said, to find to the contrary. In our view, this approach is more likely to respect what the state court actually did, and easier to apply in practice, than to ask the federal court to substitute for silence the federal court’s thought as to more supportive reasoning.

Finally, the State argues that the “look through” approach will lead state courts to believe they must write full opinions where, given the workload, they would have preferred to have decided summarily. Though the matter is empirical, given the narrowness of the context, we do not believe that they will feel compelled to do so—at least not to any significant degree. The State offers no such evidence in the many Circuits that have applied *Ylst* outside the procedural context. See *supra*, at 128.

For these reasons, we reverse the Eleventh Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

After a state supreme court issues a summary order sustaining a criminal conviction, should a federal habeas court reviewing that decision presume it rests only on the reasons found in a lower state court opinion? The answer is no. The statute governing federal habeas review permits no such “look through” presumption. Nor do traditional principles of appellate review. In fact, we demand the *opposite* presumption for our work—telling readers that we independently review each case and that our summary affirmances

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may be read only as signaling agreement with a lower court's judgment and not necessarily its reasons. Because I can discern no good reason to treat the work of our state court colleagues with less respect than we demand for our own, I would reject petitioner's presumption and must respectfully dissent.

Even so, some good news can be found here. While the Court agrees to adopt a "look through" presumption, it does so only after making major modifications to petitioner's proposal. The Court tells us that the presumption should count for little in cases "where the lower state court decision is unreasonable" because it is not "likely" a state supreme court would adopt unreasonable reasoning. *Ante*, at 132. In cases like that too, the Court explains, federal courts remain free to sustain state court convictions whenever reasonable "ground[s] for affirmance [are] obvious from the state-court record" or appear in the parties' submissions in state court or the federal habeas proceeding. *Ibid.* Exactly right, and exactly what the law has always demanded. So while the Court takes us on a journey through novel presumptions and rebuttals, it happily returns us in the end very nearly to the place where we began and belonged all along.

* * *

To see the problem with petitioner's presumption, start with the statute. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs federal review of state criminal convictions. It says a federal court may not grant habeas relief overturning a state court conviction "with respect to any claim that was adjudicated on the merits in State court proceedings" unless (among other things) the petitioner can show that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). As the text and our precedent make clear, a federal habeas court must focus its review on the

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final state court decision on the merits, not any preceding decision by an inferior state court. See *Greene v. Fisher*, 565 U. S. 34, 40 (2011). Nor does it matter whether the final state court decision comes with a full opinion or in a summary order: the same deference is due all final state court decisions. *Harrington v. Richter*, 562 U. S. 86, 98 (2011); *Cullen v. Pinholster*, 563 U. S. 170, 187 (2011).

The upshot of these directions is clear. Even when the final state court decision “is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing *there was no reasonable basis* for the state court to deny relief.” *Richter*, 562 U. S., at 98 (emphasis added). And before a federal court can disregard a final summary state court decision, it “must determine what arguments or theories . . . *could have supporte[d]* the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” *Id.*, at 102 (emphasis added). Far from suggesting federal courts should presume a state supreme court summary order rests on views expressed in a lower court’s opinion, then, AEDPA and our precedents require more nearly the *opposite* presumption: federal courts must presume the order rests on any reasonable basis the law and facts allow.

If this standard seems hard for a habeas petitioner to overcome, “that is because it was meant to be.” *Ibid.* In AEDPA, Congress rejected the notion that federal habeas review should be “a substitute for ordinary error correction.” *Id.*, at 102–103. Instead, AEDPA “reflects the view that habeas corpus is a ‘guard against *extreme malfunctions* in the state criminal justice systems.’” *Id.*, at 102 (emphasis added). “The reasons for this approach are familiar. ‘Federal habeas review of state convictions frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’ It ‘disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offend-

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ers, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.’” *Id.*, at 103 (citations omitted).

Petitioner and the Court today labor to distinguish these authorities, but I don’t see how they might succeed. They point to the fact that in *Richter* no state court had issued a reasoned order, while here a lower state court did. See Brief for Petitioner 28–30; *ante*, at 131. But on what account of AEDPA or *Richter* does that factual distinction make a legal difference? Both the statute and our precedent explain that federal habeas review looks to the final state court decision, not any decision preceding it. Both instruct that to dislodge the final state court decision a petitioner must prove it involved an unreasonable application of federal law. And to carry that burden in the face of a final state court summary decision, *Richter* teaches that the petitioner must show no lawful basis could have reasonably supported it. To observe that some final state court summary decisions are preceded by lower court reasoned opinions bears no more relevance to the AEDPA analysis than to say that some final state court summary decisions are issued on Mondays.¹

¹ Petitioner and the Court separately suggest that *Premo v. Moore*, 562 U. S. 115 (2011), supports their position because the Court there did not follow *Richter*’s approach. See Brief for Petitioner 40; *ante*, at 131–132. But the following sentences from *Moore* (with emphasis added) are clear proof it did: “[t]he question is whether there is *any reasonable argument* that counsel satisfied *Strickland*’s deferential standard,” 562 U. S., at 123 (quoting *Richter*); “[t]o overcome the limitation imposed by § 2254(d), the Court of Appeals had to conclude that both findings [*i. e.*, no deficient performance and no prejudice] *would have* involved an unreasonable application of clearly established law,” *ibid.* (citing *Richter*); “[t]he state court here *reasonably could have* determined that [no prejudice existed],” *id.*, at 129. *Moore* simply found that a reasonable basis—provided by a state postconviction court—could (and did) support the denial of habeas relief. *Id.*, at 123. It did not rely on an unreasonable basis provided by a lower court to grant habeas relief, as petitioner seeks to have us do. *Moore* thus accords with AEDPA and our precedents, while petitioner’s presumption does not.

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Unable to distinguish *Richter*, petitioner seeks to confine it by caricature. Because that case requires a federal court to “imagine” its own arguments for denying habeas relief and engage in “decision-making-by-hypothetical,” he argues it should be limited to its facts. Brief for Petitioner 28–30, 33; Reply Brief 9. But the Court today does not adopt petitioner’s characterization, and for good reason: *Richter* requires no such thing. In our adversarial system a federal court generally isn’t *required* to imagine or hypothesize arguments that neither the parties before it nor any lower court has presented. To determine if a reasonable basis “could have supported” a summary denial of habeas relief under *Richter*, a federal court must look to the state lower court opinion (if there is one), any argument presented by the parties in the state proceedings, and any argument presented in the federal habeas proceeding. Of course, a federal court sometimes may consider on its own motion alternative bases for denying habeas relief apparent in the law and the record, but it does not generally bear an *obligation* to do so. See *Wood v. Milyard*, 566 U. S. 463, 471–473 (2012) (discussing *Day v. McDonough*, 547 U. S. 198 (2006), and *Granberry v. Greer*, 481 U. S. 129 (1987)).

Nor is that the end of the problems with petitioner’s “look through” presumption. It also defies traditional rules of appellate practice that informed Congress’s work when it adopted AEDPA and that should inform our work today. *McQuiggin v. Perkins*, 569 U. S. 383, 398, n. 3 (2013). Appellate courts usually have an independent duty to review the facts and law in the cases that come to them. Often they see errors in lower court opinions. But often, too, they may affirm on alternative bases either argued by the parties or (sometimes) apparent to them on the face of the record. See, e. g., *SEC v. Chenery Corp.*, 318 U. S. 80, 88 (1943) (noting “the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘al-

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though the lower court relied upon a wrong ground or gave a wrong reason’”); *Wood*, *supra*, at 473. And a busy appellate court sometimes may not see the profit in devoting its limited resources to explaining the error and the alternative basis for affirming when the outcome is sure to remain the same, so it issues a summary affirmance instead. To reflect these realities, this Court has traditionally warned readers *against* presuming our summary affirmance orders rest on reasons articulated in lower court opinions. *Comptroller of Treasury of Md. v. Wynne*, 575 U. S. 542, 560 (2015) (“[A] summary affirmance is an affirmance of the judgment only,’ and ‘the rationale of the affirmance may not be gleaned solely from the opinion below’”); *Mandel v. Bradley*, 432 U. S. 173, 176 (1977) (*per curiam*). The courts of appeals have issued similar warnings for similar reasons about their own summary orders. See, e. g., *Rates Technology, Inc. v. Mediatrix Telecom, Inc.*, 688 F. 3d 742, 750 (CA Fed. 2012); *DeShong v. Seaboard Coast Line R. Co.*, 737 F. 2d 1520, 1523 (CA11 1984). And respect for this traditional principle of appellate practice surely weighs against presuming a state court’s summary disposition rests solely on a lower court’s opinion. On what account could we reasonably demand more respect for our summary decisions than we are willing to extend to those of our state court colleagues?

Petitioner and the Court offer only this tepid reply. They suggest that their “look through” presumption seeks to reflect “realistic[ally]” the basis on which the state summary decision rests. See Brief for Petitioner 44; *ante*, at 130. But to the extent this is a claim that their presumption comports realistically with longstanding traditions of appellate practice, it is wrong for the reasons just laid out. In fact, applying traditional understandings of appellate practice, this Court has refused to presume that state appellate courts even read lower court opinions rather than just the briefs before them. See *Baldwin v. Reese*, 541 U. S. 27, 31 (2004).

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And surely it is a mystery how the Court might today presume state supreme courts *rely* on that which it traditionally presumes they do not *read*.

If the argument here is instead an empirical claim that the “look through” presumption comports realistically with what happened in this case and others like it, it is wrong too. Petitioner was convicted in Georgia. And during the pendency of this case in our Court, the Georgia Supreme Court issued an order confirming that lower courts in that State may not “presum[e] that when this Court summarily denies an application to appeal an order denying habeas corpus relief, we necessarily agree with everything said in that order.” *Redmon v. Johnson*, 302 Ga. 763, 768, 809 S. E. 2d 468, 472 (2018). The court explained that it has long followed just this rule for all the reasons you’d expect. It independently reviews the facts and law in each habeas case. If it finds something it thinks might amount to a consequential error, the court sets the case for argument and usually prepares a full opinion. But “[o]n many occasions,” the court finds only “inconsequential errors.” *Id.*, at 765–766, 809 S. E. 2d, at 471.² And in these cases the court normally issues a sum-

² In language that will sound familiar to all judges and lawyers involved in litigating habeas claims, the Georgia Supreme Court explained that “[t]here are many examples of inconsequential errors, but among the most common are the following:

- The habeas court rejects a claim both on a procedural ground and, alternatively, on the substantive merits. This Court determines that one of those rulings appears factually or legally erroneous, but the other is correct, so an appeal would result in the habeas court’s judgment being affirmed on the correct ground.
- In addressing an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the habeas court rules that counsel did not perform deficiently as alleged. That ruling appears to be erroneous, but this Court determines based on our review of the record that no prejudice resulted from the deficient performance, so an appeal would result in affirming the habeas court’s judgment. See *id.*, at 697; *Rozier v. Caldwell*, 300 Ga. 30, 31–32 (2016).
- In addressing other claims that require the petitioner to prove each element of a multi-part test, such as a claim under *Brady v. Maryland*,

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mary affirmance because the costs associated with full treatment of the appeal outweigh the benefits of correcting what is at most harmless error, especially given the court's heavy caseload and the need to attend to more consequential matters.³ Petitioner's presumption thus does not seek to reflect reality; it seeks to deny it.

The presumption is especially unrealistic in another way. The Court and petitioner presume that a summary order by a state supreme court adopts *all the specific reasons* expressed by a lower state court. In doing so, they disregard a far more realistic possibility: that the state supreme court might have relied only on the same *grounds* for the denial of relief as did the lower court without necessarily adopting all its reasoning. Here, the lower state court denied petitioner's *Strickland* claim on the grounds that counsel's perform-

373 U. S. 83 (1963), the habeas court makes factual or legal errors regarding the petitioner's proof of one element but correctly concludes (or the record clearly shows) that the petitioner has not proved another required element. An appeal would result in this Court's affirming the habeas court's judgment.

- The habeas court misstates a legal standard in one part of its order, but recites the standard correctly elsewhere in the order, and it is clear that the judgment is correct applying the right standard.
- In addressing a habeas petition with multitudinous claims, the habeas court's order fails to explicitly rule on a claim, but the record shows that the claim is entirely meritless." *Redmon*, 302 Ga., at 766–767, 809 S. E. 2d, at 471 (some citations omitted).

³ "[T]he burdens of invoking the full appellate process, including writing opinions simply to point out factual or legal errors that do not affect the judgment, are significant for this Court. We issue about 350 published opinions each year, all en banc, meaning that each Justice (seven of us until 2017, nine now) must evaluate an opinion a day and author 35 to 50 majority opinions a year, with the help of only two law clerks in each chambers. Moreover, the Georgia Constitution requires this Court to issue its decision within the two terms of court after an appeal is docketed (which means within about eight months, given our three terms per year). . . . And our reasoned decisions are precedent binding on all other Georgia courts, . . . so issuing opinions where the relevant law is already well-established runs the risk of creating inconsistencies." *Id.*, at 767–768, 809 S. E. 2d, at 472 (footnote omitted).

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ance was not deficient and petitioner suffered no prejudice. And it gave several reasons for its conclusions: for example, the evidence petitioner sought to admit “would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial.” App. 61. In summarily denying relief, the state supreme court might have reached the same conclusions (no deficient performance and no prejudice) without resting on the exact same reasons.

While the “look through” presumption cannot be squared with AEDPA’s text, traditional rules, or Georgia’s actual practice, petitioner and the Court contend it is at least consistent with *Ylst v. Nunnemaker*, 501 U. S. 797 (1991). See Brief for Petitioner 38; *ante*, at 128–131. But it is not. In habeas review of state court convictions, federal courts may only review questions of federal law. So if a state court decision rejecting a petitioner’s federal law claim rests on a state procedural defect (say the petitioner filed too late under state rules), federal courts generally have no authority to reach the federal claim. *Ylst* simply teaches that, if a lower state court opinion expressly relied on an independent and adequate state ground, we should presume a later state appellate court summary disposition invoked it too. See 501 U. S., at 801, 803. The decision thus seeks to protect state court decisions from displacement and reaches a result consistent with the traditional rule that a summary order invokes *all* fairly presented bases for affirmance.

Neither can *Ylst* be reimagined today as meaning anything more. The case came years before AEDPA’s new standards for habeas review and can offer nothing useful about them. The work of interpreting AEDPA’s demands was left instead to *Richter*. And, as we’ve seen, *Richter* forecloses petitioner’s presumption. Of course, and as petitioner stresses, *Richter* didn’t overrule *Ylst*. But that’s for the simple reason that *Ylst* continues to do important, if limited, work in the disposition of procedural default claims because “AEDPA

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did not change the application of pre-AEDPA procedural default principles.” B. Means, Federal Habeas Manual §9B:3 (2017).

Uncomfortable questions follow too from any effort to re-imagine *Ylst*. If we were to take *Ylst* as suggesting that summary decisions presumptively rely only on the reasons found in lower court opinions, wouldn’t we have to overrule our many precedents like *Wynne* and *Mandel* that explicitly reject any such presumption? Wouldn’t circuit courts have to discard their own similar precedents? See *supra*, at 138–139. Consistency would seem to demand no less.

The only answer petitioner and the Court offer is no answer at all. Consistency, they suggest, is overrated. *Everywhere else* in the law we should retain the usual rule that a summary affirmance can’t be read as presumptively resting on the lower court’s reasons. They encourage us to use *Ylst* only as a tool for making a *special exception* for AEDPA cases: here and here alone should we adopt petitioner’s “look through” presumption. Brief for Petitioner 18, 20; *ante*, at 133 (stating that “we ‘look through’ the silent decision for a specific and narrow purpose” under AEDPA). But just stating this good-for-habeas-only rule should be enough to reject it. Summary orders that happen to arise in state habeas cases should receive no less respect than those that arise anywhere else in the law. If anything, they should receive *more* respect, because federal habeas review of state court decisions “‘intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.’” *Richter*, 562 U. S., at 103.

* * *

Petitioner’s novel presumption not only lacks any provenance in the law, it promises nothing for its trouble. Consider the most obvious question it invites, one suggested by the facts of our own case: what happens when a state supreme court issues an order explaining that its summary

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affirmances do not necessarily adopt the reasons in lower court opinions? Should that be enough to rebut the “look through” presumption? After defending the presumption, even the dissent in the Eleventh Circuit decision under review recognized that a disclaimer along these lines should suffice to rebut it. See *Wilson v. Warden*, 834 F. 3d 1227, 1263 (2016) (en banc) (opinion of J. Pryor, J.) (“The Georgia Supreme Court could simply issue a one-line order denying an application for a certificate of probable cause that indicates agreement with the result the superior court reached but not the lower court’s reasons for rejecting the petitioner’s claim”). And, of course, the Georgia Supreme Court has recently responded to the dissent’s invitation by issuing just such a disclaimer. So in the end petitioner’s presumption seems likely to accomplish nothing for him and only needless work for others—inducing more state supreme courts to churn out more orders restating the obvious fact that their summary dispositions don’t necessarily rest on the reasons given by lower courts. Along the way, too, it seems federal courts will have their hands full. For while the Eleventh Circuit dissent had no difficulty acknowledging that an order like Georgia’s suffices to overcome petitioner’s presumption, the Court today refuses to supply the same obvious answer.

Consider, too, the questions that would follow in the unlikely event a general order like the one from the Georgia Supreme Court wasn’t considered enough to overcome petitioner’s presumption. Quickly federal courts would be forced to decide: does the “look through” presumption survive even when a state supreme court includes language in *every* summary order explaining that its decision does not necessarily adopt the reasoning below? What if the state supreme court says something slightly different but to the same effect, declaring in each case that it has independently considered the relevant law and evidence before denying relief? And if we start dictating what state court disclaimers should look like and where they should appear, what exactly

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is left of Congress's direction that our review is intended to guard only against "'extreme malfunctions'" in state criminal justice systems? *Richter, supra*, at 102. Wouldn't we be slipping into the business of "tell[ing] state courts how they must write their opinions," something this Court has long said federal habeas courts "have no power" to do? *Coleman v. Thompson*, 501 U. S. 722, 739 (1991).

Apart from whether a (general or case-specific) order from a state supreme court suffices to overcome petitioner's presumption, there's the question what else might. Say a lower state court opinion includes an error but the legal briefs or other submissions presented to the state supreme court supply sound alternative bases for affirmance. In those circumstances, should a federal habeas court really presume that the state supreme court chose to repeat the lower court's mistake rather than rely on the solid grounds argued to it by the parties? What if a sound alternative basis for affirmance is presented for the first time in the parties' federal habeas submissions: are we to presume that the state supreme court was somehow less able to identify a reasonable basis for affirmance than federal habeas counsel?

Here at least the Court does offer an answer. Petitioner insists that federal courts should presume that state supreme court summary orders rest on *unreasonable* lower state court opinions even in the face of *reasonable* alternative arguments presented to the state supreme court or in federal habeas proceedings. But seeming to recognize the unreasonableness of this request, the Court opts to reshape radically petitioner's proposed presumption before adopting it. First, the Court states that "it is more likely that a state supreme court's single word 'affirm' rests upon alternative grounds where the lower state court decision is unreasonable." *Ante*, at 132. Then, the Court proceeds to explain that "a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made to the State's highest

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court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State's highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record." *Ibid.*

The Court's reshaping of petitioner's presumption reveals just how futile this whole business really is. If, as the Court holds, the "look through" presumption can be rebutted "where the lower state court decision is unreasonable," *ibid.*, it's hard to see what good it does. Petitioner sought to assign *unreasonable* lower court opinions to final state court summary decisions. To hear now that essentially only *reasonable* (and so sustainable) lower state court opinions are presumptively adopted by final state court summary decisions will surely leave him sour on this journey and federal habeas courts scratching their heads about the point of it all. And if, as the Court also tells us, a federal habeas court can always deny relief on a basis that is apparent from the record or on the basis of alternative arguments presented by the parties in state or federal proceedings, then the "look through" presumption truly means nothing and we are back where we started. With the Court's revisions to petitioner's presumption, a federal habeas court is neither obliged to *look through* exclusively to the reasons given by a lower state court nor required to *presume* that a summary order adopts those reasons.

All this is welcome news of a sort. The Court may promise us a future of foraging through presumptions and rebuttals. But at least at the end of it we rest knowing that what was true before remains true today: a federal habeas court should look at all the arguments presented in state and federal court and examine the state court record. And a federal habeas court should sustain a state court summary decision denying relief if those materials reveal a basis to do so reasonably consistent with this Court's holdings. Exactly what a federal court applying the statute and *Richter* has

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had to do all along. See *supra*, at 135–138. And exactly what the Eleventh Circuit correctly held it had to do in this case.

* * *

Today, petitioner invites us to adopt a novel presumption that AEDPA, traditional principles of appellate review, and Georgia practice all preclude. It's an invitation that requires us to treat the work of state court colleagues with disrespect we would not tolerate for our own. And all to what end? None at all, it turns out. As modified by the Court, petitioner's presumption nearly drops us back where we began, with only trouble to show for the effort. Respectfully, I would decline the invitation to this circuitous journey and just affirm.

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SESSIONS, ATTORNEY GENERAL *v.* DIMAYACERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 15–1498. Argued January 17, 2017—Reargued October 2, 2017—
Decided April 17, 2018

The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an “aggravated felony” after entering the United States will be deported. See 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes “a crime of violence (as defined in [18 U. S. C. § 16] . . .) for which the term of imprisonment [is] at least one year.” § 1101(a)(43)(F). Section 16’s definition of a crime of violence is divided into two clauses—often referred to as the elements clause, § 16(a), and the residual clause, § 16(b). The residual clause, the provision at issue here, defines a “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” To decide whether a person’s conviction falls within the scope of that clause, courts apply the categorical approach. This approach has courts ask not whether “the particular facts” underlying a conviction created a substantial risk, *Leocal v. Ashcroft*, 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether “the ordinary case” of an offense poses the requisite risk, *James v. United States*, 550 U. S. 192, 208.

Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under § 16(b). While Dimaya’s appeal was pending in the Ninth Circuit, this Court held that a similar residual clause in the Armed Career Criminal Act (ACCA)—defining “violent felony” as any felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” 18 U. S. C. § 924(e)(2)(B)—was unconstitutionally “void for vagueness” under the Fifth Amendment’s Due Process Clause. *Johnson v. United States*, 576 U. S. 591, 597–598. Relying on *Johnson*, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague.

Held: The judgment is affirmed.

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803 F. 3d 1110, affirmed.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, concluding that § 16’s residual clause is unconstitutionally vague. Pp. 157–162, 166–175.

(a) A straightforward application of *Johnson* effectively resolves this case. Section 16(b) has the same two features as ACCA’s residual clause—an ordinary-case requirement and an ill-defined risk threshold—combined in the same constitutionally problematic way. To begin, ACCA’s residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a speculative hypothesis about the crime’s “ordinary case,” but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at 597. Compounding that uncertainty, ACCA’s residual clause layered an imprecise “serious potential risk” standard on top of the requisite “ordinary case” inquiry. The combination of “indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony” resulted in “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at 598. Section 16(b) suffers from those same two flaws. Like ACCA’s residual clause, § 16(b) calls for a court to identify a crime’s “ordinary case” in order to measure the crime’s risk but “offers no reliable way” to discern what the ordinary version of any offense looks like. *Ibid.* And its “substantial risk” threshold is no more determinate than ACCA’s “serious potential risk” standard. Thus, the same “[t]wo features” that “conspire[d] to make” ACCA’s residual clause unconstitutionally vague also exist in § 16(b), with the same result. *Id.*, at 597. Pp. 157–162.

(b) The Government identifies three textual discrepancies between ACCA’s residual clause and § 16(b) that it claims make § 16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that *Johnson* found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 166–174.

(1) First, the Government argues that § 16(b)’s express requirement (absent from ACCA) that the risk arise from acts taken “in the course of committing the offense” serves as a “temporal restriction”—in other words, a court applying § 16(b) may not “consider risks arising *after*” the offense’s commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary-case approach, whether in § 16’s or ACCA’s residual clause, would do the same thing—ask what usually happens

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when a crime is committed. The phrase “in the course of” makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government says that the § 16(b) inquiry, which focuses on the risk of “physical force,” “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA’s residual clause asked about the risk of “physical injury,” requiring a second inquiry into a speculative “chain of causation that could possibly result in a victim’s injury.” *Ibid.* However, this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” *Johnson v. United States*, 559 U. S. 133, 140. So under § 16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court’s analysis of whether a crime qualifies as violent.

Third, the Government notes that § 16(b) avoids the vagueness of ACCA’s residual clause because it is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA’s residual clause meaning. But to say that they failed to resolve the clause’s vagueness is hardly to say they caused the problem. Pp. 166–171.

(2) The Government also relies on judicial experience with § 16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting § 16(b)’s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two § 16(b) cases, this Court vacated the judgments in a number of other § 16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 171–174.

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

(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one *Johnson* employed because the removal of an alien is a civil matter rather than a criminal case. This Court’s precedent forecloses that argument. In *Jordan v. De George*, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases and concluded that, “in view of the grave nature of deportation,” the most exacting vagueness standard must apply. *Id.*, at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” *Jae Lee v. United States*, 582 U. S. 357, 370. Pp. 155–157.

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(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in *Johnson*, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again “has not asked [the Court] to abandon the categorical approach in residual-clause cases,” suggesting the fact-based approach is an untenable interpretation of § 16(b). 576 U. S., at 604. Moreover, a fact-based approach would generate constitutional questions. In any event, § 16(b)’s text demands a categorical approach. This Court’s decisions have consistently understood language in the residual clauses of both ACCA and § 16 to refer to “the statute of conviction, not to the facts of each defendant’s conduct.” *Taylor v. United States*, 495 U. S. 575, 601. And the words “by its nature” in § 16(b) even more clearly compel an inquiry into an offense’s normal and characteristic quality—that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately “reconstruct[ing],” often many years later, “the conduct underlying [a] conviction,” the conduct-based approach’s “utter impracticability”—and associated inequities—is as great in § 16(b) as in ACCA. *Johnson*, 576 U. S., at 605. Pp. 162–166.

JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in *Johnson v. United States*, 576 U. S. 591, concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government’s argument that a less-than-fair-notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute’s operation is unavailing. In the criminal context, the law generally must afford “ordinary people fair notice of the conduct it punishes,” *id.*, at 595, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice standard because of the special gravity of its penalty when so many civil laws impose so many similarly severe sanctions. Alternative approaches that do not concede the propriety of the categorical ordinary case analysis are more properly addressed in another case, involving either the Immigration and Nationality Act or another statute, where the parties have a chance to be heard. Pp. 175–192.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, in which GINSBURG, BREYER, SOTOMAYOR, and GORSUCH, JJ., joined, and an opinion with

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respect to Parts II and IV–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 175. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, THOMAS, and ALITO, JJ., joined, *post*, p. 192. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined as to Parts I–C–2, II–A–1, and II–B, *post*, p. 205.

Deputy Solicitor General Kneedler argued and reargued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Mizer*, *John F. Bash*, *Donald E. Keener*, and *Bryan S. Beier*.

E. Joshua Rosenkranz argued and reargued the cause for respondent. With him on the brief were *Thomas M. Bondy*, *Brian P. Goldman*, *Naomi J. Mower*, and *Andrew Knapp*.*

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

Three Terms ago, in *Johnson v. United States*, this Court held that part of a federal law’s definition of “violent felony” was impermissibly vague. See 576 U. S. 591 (2015). The question in this case is whether a similarly worded clause in a statute’s definition of “crime of violence” suffers from the same constitutional defect. Adhering to our analysis in *Johnson*, we hold that it does.

*Briefs of *amici curiae* urging affirmance were filed for the National Association of Federal Defenders by *Kara Hartzler*, *Vincent J. Brunkow*, *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett*; for the National Immigration Law Center by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Eugene R. Fidell*; for the National Immigration Project of the National Lawyers Guild et al. by *Sejal R. Zota* and *Eamon P. Joyce*; and for Retired Article III Judges by *Justin Florence* and *Jonathan Ference-Burke*.

Opinion of the Court

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an “aggravated felony” after entering the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. See §§ 1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated-felony conviction, no matter how long he has previously resided here.

The INA defines “aggravated felony” by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. § 1101(a)(43); see *Luna Torres v. Lynch*, 578 U. S. 452, 455 (2016). According to one item on that long list, an aggravated felony includes “a crime of violence (as defined in section 16 of title 18 . . .) for which the term of imprisonment [is] at least one year.” § 1101(a)(43)(F). The specified statute, 18 U.S.C. § 16, provides the federal criminal code’s definition of “crime of violence.” Its two parts, often known as the elements clause and the residual clause, cover:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person’s conviction “falls within the ambit” of that clause, courts use a distinctive form of what we have called the categorical approach. *Leocal v. Ashcroft*, 543 U. S. 1, 7 (2004). The question, we have explained, is not whether “the particular facts” underlying a conviction

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posed the substantial risk that § 16(b) demands. *Ibid.* Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.¹ The § 16(b) inquiry instead turns on the “nature of the offense” generally speaking. *Ibid.* (referring to § 16(b)’s “by its nature” language). More precisely, § 16(b) requires a court to ask whether “the ordinary case” of an offense poses the requisite risk. *James v. United States*, 550 U. S. 192, 208 (2007); see *infra*, at 160.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§ 459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under § 16(b). “[B]y its nature,” the Board reasoned, the offense “carries a substantial risk of the use of force.” App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of “violent felony” in the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e). ACCA prescribes a 15-year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has

¹ The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction. See, e. g., *Descamps v. United States*, 570 U. S. 254, 260–261 (2013); *Moncrieffe v. Holder*, 569 U. S. 184, 190–191 (2013).

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three prior convictions for a “violent felony.” § 924(e)(1). The definition of that statutory term goes as follows:

“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 italicized portion of that definition (like the similar language of § 16(b)) came to be known as the statute’s residual clause. In *Johnson v. United States*, the Court declared that clause “void for vagueness” under the Fifth Amendment’s Due Process Clause. 576 U. S., at 597–598.

Relying on *Johnson*, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya’s favor. See *Dimaya v. Lynch*, 803 F. 3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA’s residual clause from § 16’s.² We granted certiorari to resolve the conflict. *Lynch v. Dimaya*, 579 U. S. 969 (2016).

II

“The prohibition of vagueness in criminal statutes,” our decision in *Johnson* explained, is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” 576 U. S., at 595 (quoting *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926)). The void-

² Compare *Shuti v. Lynch*, 828 F. 3d 440 (CA6 2016) (finding § 16(b) unconstitutionally vague); *United States v. Vivas-Ceja*, 808 F. 3d 719 (CA7 2015) (same), with *United States v. Gonzalez-Longoria*, 831 F. 3d 670 (CA5 2016) (en banc) (upholding § 16(b)).

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for-vagueness doctrine, as we have called it, guarantees that ordinary people have “fair notice” of the conduct a statute proscribes. *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See *Kolender v. Lawson*, 461 U. S. 352, 357–358 (1983). In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. *id.*, at 358, n. 7 (“[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department” (internal quotation marks omitted)).

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case. See Brief for Petitioner 13–15. As the Government notes, this Court has stated that “[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment”: In particular, the Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982). The removal of an alien is a civil matter. See *Arizona v. United States*, 567 U. S. 387, 396 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25–26.

But this Court’s precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In *Jordan v. De George*, we considered whether a provision of immigration

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law making an alien deportable if convicted of a “crime involving moral turpitude” was “sufficiently definite.” 341 U. S. 223, 229 (1951). That provision, we noted, “is not a criminal statute” (as § 16(b) actually is). *Id.*, at 231; *supra*, at 153. Still, we chose to test (and ultimately uphold) it “under the established criteria of the ‘void for vagueness’ doctrine” applicable to criminal laws. 341 U. S., at 231. That approach was demanded, we explained, “in view of the grave nature of deportation,” *ibid.*—a “drastic measure,” often amounting to lifelong “banishment or exile,” *ibid.* (quoting *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” *Jae Lee v. United States*, 582 U. S. 357, 370 (2017) (quoting *Padilla v. Kentucky*, 559 U. S. 356, 365, 368 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more “intimately related to the criminal process.” *Chaidez v. United States*, 568 U. S. 342, 352 (2013) (quoting *Padilla*, 559 U. S., at 365). What follows, as *Jordan* recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one *Johnson* employed. To salvage § 16’s residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by *Johnson*’s analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: “Two features of [ACCA’s] residual clause

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conspire to make it unconstitutionally vague.” 576 U. S., at 597. The opinion then identifies each of those features and explains how their joinder produced “hopeless indeterminacy,” inconsistent with due process. *Id.*, at 598. And with that reasoning, *Johnson* effectively resolved the case now before us. For §16’s residual clause has the same two features as ACCA’s, combined in the same constitutionally problematic way. Consider those two, just as *Johnson* described them:

“In the first place,” *Johnson* explained, ACCA’s residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a hypothesis about the crime’s “ordinary case.” *Id.*, at 597. Under the clause, a court focused on neither the “real-world facts” nor the bare “statutory elements” of an offense. *Ibid.* Instead, a court was supposed to “imagine” an “idealized ordinary case of the crime”—or otherwise put, the court had to identify the “kind of conduct the ‘ordinary case’ of a crime involves.” *Ibid.* But how, *Johnson* asked, should a court figure that out? By using a “statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” *Ibid.* (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the “ordinary case” wholly “speculative.” *Ibid.* *Johnson* gave as its prime example the crime of attempted burglary. One judge, contemplating the “ordinary case,” would imagine the “violent encounter” apt to ensue when a “would-be burglar [was] spotted by a police officer [or] private security guard.” *Ibid.* Another judge would conclude that “any confrontation” was more “likely to consist of [an observer’s] yelling ‘Who’s there?’ . . . and the burglar’s running away.” *Ibid.* But how could either judge really know? “The residual clause,” *Johnson* summarized, “offer[ed] no reliable way” to discern what the ordinary version of any offense looked like. *Id.*, at 598. And without that, no one could tell how much risk the offense generally posed.

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Compounding that first uncertainty, *Johnson* continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony." See *ibid.* The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like "serious potential risk" (as in ACCA's residual clause) or "substantial risk" (as in § 16's). The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As the Court explained:

"[W]e 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[.] 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[,] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts." *Id.*, at 603–604 (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: "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" violates the guarantee of due process. *Id.*, at 598.³

³ *Johnson* also anticipated and rejected a significant aspect of JUSTICE THOMAS's dissent in this case. According to JUSTICE THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications—as he thinks is true of *completed* burglary, which is the offense Dimaya committed. See *post*, at 220–223. But as an initial matter, *Johnson* explained that supposedly easy applications of the residual clause might not be "so easy after all." 576 U.S., at 602. The crime of com-

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Section 16's residual clause violates that promise in just the same way. To begin where *Johnson* did, § 16(b) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 ("Section 16(b), like [ACCA's] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense"). And indeed, the Government's briefing in *Johnson* warned us about that likeness, observing that § 16(b) would be "equally susceptible to [an] objection" that focused on the problems of positing a crime's ordinary case. Supp. Brief for Respondent, O. T. 2014, No. 13–7120, pp. 22–23. Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in *Johnson*: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See *Johnson*, 576 U.S., at 597; *supra*, at 158; *post*, at 189 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate *Johnson*'s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See *post*, at 189 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the "ordinary case" remains, as *Johnson* described it,

pleted burglary at issue here illustrates that point forcefully. See *id.*, at 598 (asking whether an "ordinary burglar invade[s] an occupied home by night or an unoccupied home by day"); *Dimaya v. Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015) (noting that only about seven percent of burglaries actually involve violence); Cal. Penal Code Ann. §§ 459, 460 (West 2010) (sweeping so broadly as to cover even dishonest door-to-door salesmen). And still more fundamentally, *Johnson* made clear that our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S., at 602.

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an excessively “speculative,” essentially inscrutable thing. 576 U. S., at 597; accord *post*, at 230 (THOMAS, J., dissenting).⁴

And § 16(b) also possesses the second fatal feature of ACCA’s residual clause: uncertainty about the level of risk that makes a crime “violent.” In ACCA, that threshold was “serious potential risk”; in § 16(b), it is “substantial risk.” See *supra*, at 153, 155. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE’s valiant attempt to do so shows, that would be slicing the baloney mighty thin. See *post*, at 196–198 (dissenting opinion). And indeed, *Johnson* as much as equated the two phrases: Return to the block quote above, and note how *Johnson*—as though anticipating this case—refers to them interchangeably, as alike examples of imprecise “qualitative standard[s].” See *supra*, at 159; 576 U. S., at 604. Once again, the point is not that such a non-numeric standard is alone problematic: In *Johnson*’s words, “we do not doubt” the constitutionality of applying § 16(b)’s “substantial risk [standard] to real-world conduct.” *Id.*, at 603–604 (internal quotation marks omitted). The difficulty comes, in § 16’s residual clause just as in ACCA’s, from applying such a standard to “a judge-imagined abstraction”—*i. e.*, “an idealized ordinary case of the crime.” *Id.*, at 598, 604. It is then that the standard ceases to work in a way consistent with due process.

In sum, § 16(b) has the same “[t]wo features” that “conspire[d] to make [ACCA’s residual clause] unconstitutionally

⁴THE CHIEF JUSTICE’s dissent makes light of the difficulty of identifying a crime’s ordinary case. In a single footnote, THE CHIEF JUSTICE portrays that task as no big deal: Just eliminate the “atypical” cases, and (presto!) the crime’s nature and risk are revealed. See *post*, at 196, n. 1. That rosy view—at complete odds with *Johnson*—underlies his whole dissent (and especially, his analysis of how § 16(b) applies to particular offenses, see *post*, at 198–200). In effect, THE CHIEF JUSTICE is able to conclude that § 16(b) can survive *Johnson* only by refusing to acknowledge one of the two core insights of that decision.

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vague.” *Id.*, at 597. It too “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents” some not-well-specified-yet-sufficiently-large degree of risk. *Id.*, at 596. The result is that § 16(b) produces, just as ACCA’s residual clause did, “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at 598.

IV

The Government and dissents offer two fundamentally different accounts of how § 16(b) can escape unscathed from our decision in *Johnson*. JUSTICE THOMAS accepts that the ordinary-case inquiry makes § 16(b) “impossible to apply.” *Post*, at 230. His solution is to overthrow our historic understanding of the statute: We should now read § 16(b), he says, to ask about the risk posed by a particular defendant’s particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that § 16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that “distinctive textual features” of § 16’s residual clause make applying it “more predictable” than its ACCA counterpart. Brief for Petitioner 28, 29. We disagree with both arguments.

A

The essentials of JUSTICE THOMAS’s position go as follows. Section 16(b), he says, cannot have one meaning, but could have one of two others. See *post*, at 229. The provision cannot demand an inquiry merely into the elements of a crime, because that is the province of § 16(a). See *supra*, at 153 (setting out § 16(a)’s text). But that still leaves a pair of options: the categorical, ordinary-case approach and the “underlying-conduct approach,” which asks about the specific way in which a defendant committed a crime. *Post*, at 229. According to JUSTICE THOMAS, each option is textually viable (although he gives a slight nod to the latter based on

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§ 16(b)'s use of the word "involves"). See *post*, at 227–229. What tips the scales is that only one—the conduct approach—is at all "workable." *Post*, at 230. The difficulties of the ordinary-case inquiry, JUSTICE THOMAS rightly observes, underlie this Court's view that § 16(b) is too vague. So abandon that inquiry, JUSTICE THOMAS urges. After all, he reasons, it is the Court's "plain duty," under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems. *Post*, at 231 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909)).

For anyone who has read *Johnson*, that argument will ring a bell. The dissent there issued the same invitation, based on much the same reasoning, to jettison the categorical approach in residual-clause cases. 576 U. S., at 631–636 (opinion of ALITO, J.). The Court declined to do so. It first noted that the Government had not asked us to switch to a fact-based inquiry. It then observed that the Court "had good reasons" for originally adopting the categorical approach, based partly on ACCA's text (which, by the way, uses the word "involves" identically) and partly on the "utter impracticability" of the alternative. *Id.*, at 604–605 (majority opinion). "The only plausible interpretation" of ACCA's residual clause, we concluded, "requires use of the categorical approach"—even if that approach could not in the end satisfy constitutional standards. *Id.*, at 605 (internal quotation marks and alteration omitted).

The same is true here—except more so. To begin where *Johnson* did, the Government once again "has not asked us to abandon the categorical approach in residual-clause cases." *Id.*, at 604. To the contrary, and as already noted, the Government has conceded at every step the correctness of that statutory construction. See *supra*, at 160. And this time, the Government's decision is even more noteworthy than before—precisely because the *Johnson* dissent laid out the opposite view, presenting it in prepackaged form for the

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Government to take off the shelf and use in the § 16(b) context. Of course, we are not foreclosed from going down JUSTICE THOMAS's path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach JUSTICE THOMAS proposes is a tenable interpretation of § 16's residual clause.

Perhaps one reason for the Government's reluctance is that such an approach would generate its own constitutional questions. As JUSTICE THOMAS relates, *post*, at 225, 231, this Court adopted the categorical approach in part to "avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps v. United States*, 570 U. S. 254, 267 (2013). JUSTICE THOMAS thinks that issue need not detain us here because "the right of trial by jury ha[s] no application in a removal proceeding." *Post*, at 231 (internal quotation marks omitted). But although this particular case involves removal, § 16(b) is a criminal statute, with criminal sentencing consequences. See *supra*, at 153. And this Court has held (it could hardly have done otherwise) that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U. S., at 12, n. 8. So JUSTICE THOMAS's suggestion would merely ping-pong us from one constitutional issue to another. And that means the avoidance canon cannot serve, as he would like, as the interpretive tie breaker.

In any event, § 16(b)'s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." *Taylor v. United States*, 495 U. S. 575, 601 (1990); see *Leocal*, 543 U. S., at 7 (Section 16 "directs our focus to the 'offense' of conviction . . . rather than to the particular facts"). Simple references to a "conviction," "felony," or "offense," we have stated, are

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“read naturally” to denote the “crime as *generally* committed.” *Nijhawan v. Holder*, 557 U. S. 29, 34 (2009); see *Leocal*, 543 U. S., at 7; *Johnson*, 576 U. S., at 604–605. And the words “by its nature” in § 16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense’s “nature” means its “normal and characteristic quality.” Webster’s Third New International Dictionary 1507 (2002). So § 16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, “ordinarily”—entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is *missing* from § 16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime’s circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See *Descamps*, 570 U. S., at 267. If Congress had wanted judges to look into a felon’s actual conduct, “it presumably would have said so; other statutes, in other contexts, speak in just that way.” *Id.*, at 267–268.⁵ The upshot of all this textual evidence is that § 16’s residual clause—like ACCA’s, except still more plainly—has no “plausible” fact-based reading. *Johnson*, 576 U. S., at 605.

⁵ For example, in *United States v. Hayes*, 555 U. S. 415 (2009), this Court held that a firearms statute referring to former crimes as “committed by” specified persons requires courts to consider underlying facts. *Id.*, at 421. And in *Nijhawan v. Holder*, 557 U. S. 29 (2009), the Court similarly adopted a non-categorical interpretation of one of the aggravated felonies listed in the INA because of the phrase, appended to the named offense, “in which the loss to the victim or victims exceeds \$10,000.” *Id.*, at 32, 38 (emphasis deleted). JUSTICE THOMAS suggests that *Nijhawan* rejected the relevance of our ACCA precedents in interpreting the INA’s aggravated-felony list—including its incorporation of § 16(b). *Post*, at 232. But that misreads the decision. In *Nijhawan*, we considered an item on the INA’s list that looks nothing like ACCA, and we concluded—no surprise here—that our ACCA decisions did not offer a useful guide. As to items on the INA’s list that *do* mirror ACCA, the opposite conclusion of course follows.

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And finally, the “utter impracticability”—and associated inequities—of such an interpretation is as great in the one statute as in the other. *Ibid.* This Court has often described the daunting difficulties of accurately “reconstruct[ing],” often many years later, “the conduct underlying [a] conviction.” *Ibid.*; *Descamps*, 570 U. S., at 270; *Taylor*, 495 U. S., at 601–602. According to JUSTICE THOMAS, we need not worry here because immigration judges have some special factfinding talent, or at least experience, that would mitigate the risk of error attaching to that endeavor in federal courts. See *post*, at 232–233. But we cannot see putting so much weight on the superior factfinding prowess of (notoriously overburdened) immigration judges. And as we have said before, § 16(b) is a criminal statute with applications outside the immigration context. See *supra*, at 153, 164. Once again, then, we have no ground for discovering a novel interpretation of § 16(b) that would remove us from the dictates of *Johnson*.

B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA’s residual clause and § 16(b), and argues that they make § 16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime. That is why, contrary to the Government’s final argument, the experience of applying *both* statutes has generated confusion and division among lower courts.

1

The Government first—and foremost—relies on § 16(b)’s express requirement (absent from ACCA) that the risk arise

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from acts taken “in the course of committing the offense.” Brief for Petitioner 31. (THE CHIEF JUSTICE’s dissent echoes much of this argument. See *post*, at 197–198.) Because of that “temporal restriction,” a court applying § 16(b) may not “consider risks arising *after*” the offense’s commission is over. Brief for Petitioner 31. In the Government’s view, § 16(b)’s text thereby demands a “significantly more focused inquiry” than did ACCA’s residual clause. *Id.*, at 32.

To assess that claim, start with the meaning of § 16(b)’s “in the course of” language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime’s commission—not just the conduct sufficient to satisfy the offense’s formal elements. The Government agrees with that construction, explaining that the words “in the course of” sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017) (illustrating that idea with reference to conspiracy, burglary, kidnapping, and escape from prison). So, for example, conspiracy may be a crime of violence under § 16(b) because of the risk of force while the conspiracy is ongoing (*i. e.*, “in the course of” the conspiracy); it is irrelevant that conspiracy’s elements are met as soon as the participants have made an agreement. See *ibid.*; *United States v. Doe*, 49 F. 3d 859, 866 (CA2 1995). Similarly, and closer to home, burglary may be a crime of violence under § 16(b) because of the prospects of an encounter while the burglar remains in a building (*i. e.*, “in the course of” the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017); *James*, 550 U. S., at 203. In other words, a court applying § 16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, § 16(b)’s “in the course of” language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court’s ability to consider the risk that force will be used after the crime has entirely con-

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cluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern—say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court’s view of the *ordinary case* of a crime, which is all that matters under the statute. See *supra*, at 153–154, 158. In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without § 16(b)’s explicit temporal language, a court applying the section would do the same thing—ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA’s residual clause—and for the same reason. True, that clause lacked an express temporal limit. But not a single one of this Court’s ACCA decisions turned on conduct that might occur after a crime’s commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing. See, *e. g.*, *Sykes v. United States*, 564 U. S. 1, 10 (2011) (assessing the risks attached to the “confrontations that initiate and terminate” vehicle flight, along with “intervening” events); *Chambers v. United States*, 555 U. S. 122, 128 (2009) (rejecting the Government’s argument that violent incidents “occur[ring] long after” a person unlawfully failed to report to prison rendered that crime a violent felony). Nor could those decisions have done otherwise, given the statute’s concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during—not after—its commission. Thus, the analyses under ACCA’s residual clause and § 16(b) coincide.

The upshot is that the phrase “in the course of” makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA’s residual clause might equally fall within § 16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we

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cannot think of a single federal crime whose treatment becomes more obvious under § 16(b) than under ACCA because of the words “in the course of.”⁶ The phrase, then, cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government (and again, THE CHIEF JUSTICE’s dissent, see *post*, at 197) observes that § 16(b) focuses on the risk of “physical force” whereas ACCA’s residual clause asked about the risk of “physical injury.” The § 16(b) inquiry, the Government says, “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. By contrast, the Government continues, ACCA’s residual clause required a second inquiry: After describing the ordinary criminal’s conduct, a court had to “speculate about a chain of causation that could possibly result in a victim’s injury.” *Ibid.* The Government’s conclusion is that the § 16(b) inquiry is “more specific.” *Ibid.*

⁶In response to repeated questioning at two oral arguments, the Government proposed one (and only one) such crime—but we disagree that § 16(b)’s temporal language would aid in its analysis. According to the Government, possession of a short-barreled shotgun could count as violent under ACCA but not under § 16(b) because shooting the gun is “not in the course of committing the crime of possession.” Tr. of Oral Arg. 59–60 (Oct. 2, 2017); see Tr. of Oral Arg. 6–7 (Jan. 17, 2017); Brief for Petitioner 32–34. That is just wrong: When a criminal shoots a gun, he does so while (“in the course of”) possessing it (except perhaps in some physics-defying fantasy world). What makes the offense difficult to classify as violent is something different: that while some people use the short-barreled shotguns they possess to commit murder, others merely store them in a nearby firearms cabinet—and it is hard to settle which is the more likely scenario. Compare *Johnson*, 576 U. S., at 642 (ALITO, J., dissenting) (“It is fanciful to assume that a person who [unlawfully possesses] a notoriously dangerous weapon is unlikely to use that weapon in violent ways”), with *id.*, at 610 (THOMAS, J., concurring) (Unlawful possession of a short-barreled shotgun “takes place in a variety of ways . . . many, perhaps most, of which do not involve likely accompanying violence” (internal quotation marks omitted)). But contrary to THE CHIEF JUSTICE’s suggestion, see *post*, at 198–199 (which, again, is tied to his disregard of the ordinary-case inquiry, see *supra*, at 161, n. 4), that issue must be settled no less under § 16(b) than under ACCA.

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But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government's two steps—defining the conduct in the ordinary case—is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, § 16(b) involves two steps as well—and essentially the same ones. In interpreting statutes like § 16(b), this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” *Johnson v. United States*, 559 U. S. 133, 140 (2010) (defining the term for purposes of deciding what counts as a “violent” crime). So under § 16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of “physical force” itself entails considering the risk of “physical injury.” For those reasons, the force/injury distinction is unlikely to affect a court's analysis of whether a crime qualifies as violent. All the same crimes might—or, then again, might not—satisfy both requirements. Accordingly, this variance in wording cannot make ACCA's residual clause vague and § 16(b) not.

Third, the Government briefly notes that § 16(b), unlike ACCA's residual clause, is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. (THE CHIEF JUSTICE's dissent reiterates this argument, with some additional references to our caselaw. See *post*, at 201–203.) Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (*i. e.*, burglary, arson, extortion, and use of explosives). See *supra*, at 155. According to the Government, those crimes provided “contradictory and opaque indications” of what non-specified offenses should also count as violent. Brief for Petitioner 38. Because § 16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA's residual clause.

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We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning. See, *e.g.*, *Begay v. United States*, 553 U. S. 137, 142 (2008); *James*, 550 U. S., at 203. But to no avail. As the Government relates (and *Johnson* explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38–40; 576 U. S., at 603. Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause's application. See Brief for Petitioner 38–40.

But the Government's conclusion does not follow. To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. Had they done so, *Johnson* would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. (Contrary to THE CHIEF JUSTICE's suggestion, see *post*, at 171, discarding an interpretive tool once it is found not to actually aid in interpretation hardly “expand[s]” the scope of a statute.) That *Johnson* went so much further—invalidating a statutory provision rather than construing it independently of another—demonstrates that the list of crimes was not the culprit. And indeed, *Johnson* explicitly said as much. As described earlier, *Johnson* found the residual clause's vagueness to reside in just “two” of its features: the ordinary-case requirement and a fuzzy risk standard. See 576 U. S., at 597–598; *supra*, at 158–159. Strip away the enumerated crimes—as Congress did in § 16(b)—and those dual flaws yet remain. And ditto the textual indeterminacy that flows from them.

Faced with the two clauses' linguistic similarity, the Government relies significantly on an argument rooted in judicial

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experience. Our opinion in *Johnson*, the Government notes, spoke of the longstanding “trouble” that this Court and others had in “making sense of [ACCA’s] residual clause.” 576 U.S., at 601; see Brief for Petitioner 45. According to the Government, § 16(b) has not produced “comparable difficulties.” *Id.*, at 46. Lower courts, the Government claims, have divided less often about the provision’s meaning, and as a result this Court granted certiorari on “only a single Section 16(b) case” before this one. *Ibid.*⁷ “The most likely explanation,” the Government concludes, is that “Section 16(b) is clearer” than its ACCA counterpart. *Id.*, at 47.

But in fact, a host of issues respecting § 16(b)’s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under § 16(b)? Some courts say yes, another says no.⁸ What of statutory rape? Once again, the Circuits part ways.⁹ How about evading arrest? The decisions point in different directions.¹⁰ Resi-

⁷ And, THE CHIEF JUSTICE emphasizes, we decided that one unanimously! See *post*, at 194 (discussing *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions “squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” 576 U.S., at 602; see *supra*, at 161, n. 4.

⁸ Compare *Escudero-Arciniega v. Holder*, 702 F. 3d 781, 784–785 (CA5 2012) (*per curiam*) (yes, it does), and *United States v. Guzman-Landeros*, 207 F. 3d 1034, 1035 (CA8 2000) (*per curiam*) (same), with *Sareang Ye v. INS*, 214 F. 3d 1128, 1133–1134 (CA9 2000) (no, it does not).

⁹ Compare *Aguilar v. Gonzales*, 438 F. 3d 86, 89–90 (CA1 2006) (statutory rape involves a substantial risk of force); *Chery v. Ashcroft*, 347 F. 3d 404, 408–409 (CA2 2003) (same); and *United States v. Velazquez-Overa*, 100 F. 3d 418, 422 (CA5 1996) (same), with *Valencia v. Gonzales*, 439 F. 3d 1046, 1052 (CA9 2006) (statutory rape does not involve such a risk).

¹⁰ Compare *Dixon v. Attorney Gen.*, 768 F. 3d 1339, 1343–1346 (CA11 2014) (holding that one such statute falls under § 16(b)), with *Flores-Lopez v. Holder*, 685 F. 3d 857, 863–865 (CA9 2012) (holding that another does not).

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dential trespass? The same is true.¹¹ Those examples do not exhaust the current catalogue of Circuit conflicts concerning § 16(b)'s application. See Brief for National Immigration Project of the National Lawyers Guild et al. as *Amici Curiae* 7–18 (citing divided appellate decisions as to the unauthorized use of a vehicle, firearms possession, and abduction). And that roster would just expand with time, mainly because, as *Johnson* explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative—and therefore undisputed—“ordinary case.” See 576 U. S., at 597–598.

Nor does this Court's prior handling of § 16(b) cases support the Government's argument. To be sure, we have heard oral argument in only two cases arising from § 16(b) (including this one), as compared with five involving ACCA's residual clause (including *Johnson*).¹² But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the § 16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those § 16(b) cases

¹¹ Compare *United States v. Venegas-Ornelas*, 348 F. 3d 1273, 1277–1278 (CA10 2003) (residential trespass is a crime of violence), with *Zivkovic v. Holder*, 724 F. 3d 894, 906 (CA7 2013) (it is not).

¹² From all we can tell—and all the Government has told us, see Brief for Petitioner 45–52—lower courts have also decided many fewer cases involving § 16(b) than ACCA's residual clause. That disparity likely reflects the Government's lesser need to rely on § 16(b). That provision is mainly employed (as here) in the immigration context, to establish an “aggravated felony” requiring deportation. See *supra*, at 153. But immigration law offers many other ways to achieve that result. The INA lists 80 or so crimes that count as aggravated felonies; only if a conviction is not for one of those specified offenses need the Government resort to § 16(b) (or another catch-all provision). See *Luna Torres v. Lynch*, 578 U. S. 452, 455 (2016). By contrast, ACCA enumerates only four crimes as a basis for enhancing sentences; the Government therefore had reason to use the statute's residual clause more often.

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and remanded them for further consideration.¹³ That we disposed of the ACCA and § 16(b) petitions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that § 16(b) shares with ACCA's residual clause.

And of course, this Court's experience in deciding ACCA cases only supports the conclusion that § 16(b) is too vague. For that record reveals that a statute with all the same hallmarks as § 16(b) could not be applied with the predictability the Constitution demands. See *id.*, at 598–600; *supra*, at 157–159. The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? “Insanity,” Justice Scalia wrote in the last ACCA residual-clause case before *Johnson*, “is doing the same thing over and over again, but expecting different results.” *Sykes*, 564 U.S., at 28 (dissenting opinion). We abandoned that lunatic practice in *Johnson* and see no reason to start it again.

V

Johnson tells us how to resolve this case. That decision held that “[t]wo features of [ACCA’s] residual clause conspire[d] to make it unconstitutionally vague.” 576 U.S., at 597. Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily “devolv[ed] into guesswork and intuition,” invited arbitrary enforcement, and failed to provide fair notice. *Id.*, at 600. Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes

¹³See, e.g., *Amendariz-Moreno v. United States*, 555 U.S. 1133 (2009) (vacating and remanding for reconsideration in light of *Begay v. United States*, 553 U.S. 137 (2008), and *Chambers v. United States*, 555 U.S. 122 (2009)); *Castillo-Lucio v. United States*, 555 U.S. 1133 (2009) (same); *Addo v. Mukasey*, 555 U.S. 1132 (2009) (vacating and remanding in light of *Chambers*); *Serna-Guerra v. Holder*, 556 U.S. 1279 (2009) (same); *Reyes-Figueroa v. United States*, 555 U.S. 1132 (2009) (same).

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any real difference. So just like ACCA’s residual clause, §16(b) “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at 598. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

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

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown’s abuse of “pretended” crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today’s vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien’s crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law’s silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

* * *

I begin with a foundational question. Writing for the Court in *Johnson v. United States*, 576 U. S. 591 (2015), Jus-

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tice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited “more unpredictability and arbitrariness” than the Constitution allows. *Id.*, at 598. Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

But first in *Johnson* and now again today JUSTICE THOMAS has questioned whether our vagueness doctrine can fairly claim roots in the Constitution as originally understood. See, *e. g.*, *post*, at 206–210 (dissenting opinion); *Johnson*, *supra*, at 611–624 (opinion concurring in judgment). For its part, the Court has yet to offer a reply. I believe our colleague’s challenge is a serious and thoughtful one that merits careful attention. At day’s end, though, it is a challenge to which I find myself unable to subscribe. Respectfully, I am persuaded instead that void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.

Consider first the doctrine’s due process underpinnings. The Fifth and Fourteenth Amendments guarantee that “life, liberty, or property” may not be taken “without due process of law.” That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those “customary procedures to which free-men were entitled by the old law of England.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotation marks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government’s current laws may tolerate. *Post*, at 207, n. 1 (opinion of THOMAS, J.) (collecting authorities). But in my view the weight of the historical evidence shows that the Clause sought to ensure that the people’s

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rights are never any less secure against governmental invasion than they were at common law. Lord Coke took this view of the English due process guarantee. 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 50 (1797). John Rutledge, our second Chief Justice, explained that Coke's teachings were carefully studied and widely adopted by the framers, becoming "'almost the foundations of our law.'" *Klopper v. North Carolina*, 386 U. S. 213, 225 (1967). And many more students of the Constitution besides—from Justice Story to Justice Scalia—have agreed that this view best represents the original understanding of our own Due Process Clause. See, e. g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856); 3 J. Story, *Commentaries on the Constitution of the United States* §1783, p. 661 (1833); *Pacific Mut.*, *supra*, at 28–29 (opinion of Scalia, J.); Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 341 (1987).

Perhaps the most basic of due process's customary protections is the demand of fair notice. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926); see also Note, *Textualism as Fair Notice*, 123 Harv. L. Rev. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law"). Criminal indictments at common law had to provide "precise and sufficient certainty" about the charges involved. 4 W. Blackstone, *Commentaries on the Laws of England* 301 (1769) (Blackstone). Unless an "offence [was] set forth with clearness and certainty," the indictment risked being held void in court. *Id.*, at 302 (emphasis deleted); 2 W. Hawkins, *Pleas of the Crown*, ch. 25, §§99, 100, pp. 244–245 (2d ed. 1726) ("[I]t seems to have been anciently the common Practice, where an Indictment appeared to be [in]sufficient, either for its Uncertainty or the Want of proper legal words, not to put the defendant to answer it").

The same held true in civil cases affecting a person's life, liberty, or property. A civil suit began by obtaining a writ—a detailed and specific form of action asking for partic-

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ular relief. Bellia, Article III and the Cause of Action, 89 Iowa L. Rev. 777, 784–786 (2004); Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 914–915 (1987). Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court. *Id.*, at 917; Moffitt, Pleadings in the Age of Settlement, 80 Ind. L. J. 727, 731 (2005). And a writ risked being held defective if it didn’t provide fair notice. *Goldington v. Bassingburn*, Y. B. Trin. 3 Edw. II, f. 27b, 196 (1310) (explaining that it was “the law of the land” that “no one [could] be taken by surprise” by having to “answer in court for what [one] has not been warned to answer”).

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made “stealing sheep, or other cattle,” a felony. 1 Blackstone 88 (emphasis deleted). Because the term “cattle” embraced a good deal more than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term “cattle” as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to “bulls, cows, oxen,” and more “by name.” *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F. Cas. 732 (No. 4,499) (CC NY 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that “the court had better pass” the statutory terms by “as unintelligible and useless” rather than “put on them, at great uncertainty, a very harsh signification, and one which the legislature may

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never have designed.” *Id.*, at 735. In *United States v. Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815), Justice Washington confronted a statute which prohibited seamen from making a “revolt.” *Id.*, at 1043. But he was unable to determine the meaning of this provision “by any authority . . . either in the common, admiralty, or civil law.” *Ibid.* As a result, he declined 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.*¹

Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest pen-

¹ Many state courts also held vague laws ineffectual. See, e.g., *State v. Mann*, 2 Ore. 238, 240–241 (1867) (holding statute that prohibited “gambling devices” was “void” because “the term has no settled and definite meaning”); *Drake v. Drake*, 15 N. C. 110, 115 (1833) (explaining that “if the terms in which [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to execute it . . . it is necessarily inoperative”); *McConvill v. Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 44 (1876) (holding that an ordinance was “bad for vagueness and uncertainty in the thing forbidden”); *State v. Boon*, 1 N. C. 103, 105 (1801) (refusing to apply a statute because “no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases ought never to be allowed a Judge”); *Ex parte Jackson*, 45 Ark. 158, 164 (1885) (declaring a statutory prohibition on acts “injurious to the public morals” to be “vague” and “simply null” (emphasis deleted)); *McJunkins v. State*, 10 Ind. 140, 145 (1858) (“It would therefore appear that the term *public indecency* has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense”); *Jennings v. State*, 16 Ind. 335, 336 (1861) (“We are of opinion that for want of a proper definition, no act is made criminal by the terms ‘public indecency,’ employed in the statute”); *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842) (holding “the language of [shareholder election] legislation so devoid of certainty” that “no valid election [could have] been held, and that none can be held without further legislation”); *Cheezem v. State*, 2 Ind. 149, 150 (1850) (finding statute to “contai[n] no prohibition of any kind whatever” and thus declaring it “a nullity”); see also Note, Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process, 38 Harv. L. Rev. 963, 964, n. 4 (1925) (collecting cases).

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alties. See, *e. g.*, *McJunkins v. State*, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, *e. g.*, *Drake v. Drake*, 15 N. C. 110, 115 (1833); *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842). As one court put it, “all laws” “ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate.” *McConvill v. Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 42 (1876). “‘It is impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.’” *Id.*, at 42–43.

These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. See, *e. g.*, *post*, at 208–209 (opinion of THOMAS, J.); *Johnson*, 576 U. S., at 613–616 (opinion of THOMAS, J.). But in substance void the law is often exactly what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term “cattle,” but argued against giving it any effect *at all*. 1 Blackstone 88; see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 582 (1989) (“I doubt . . . that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed”); Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, n. 3 (1931) (explaining that “since strict construction, in effect, nullified ambiguous provisions, it was but a short step to declaring them void *ab initio*”); n. 1, *supra* (state courts holding vague statutory terms “void” or “null”).

What history suggests, the structure of the Constitution confirms. Many of the Constitution’s other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment’s requirement that ar-

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rest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a "parchment barrie[r]" against arbitrary power. The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers. The Constitution assigns "[a]ll legislative Powers" in our federal government to Congress. Art. I, § 1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See The Federalist No. 78, at 465 (A. Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated"). Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." Art. III, § 2. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events. *Osborn v. Bank of United States*, 9 Wheat. 738, 866 (1824).

From this division of duties, it comes clear that legislators may not "abdicate their responsibilities for setting the standards of the criminal law," *Smith v. Goguen*, 415 U. S. 566, 575 (1974), by leaving to judges the power to decide "the various crimes includable in [a] vague phrase," *Jordan v. De George*, 341 U. S. 223, 242 (1951) (Jackson, J., dissenting). For "if the

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legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[, t]his would, to some extent, substitute the judicial for the legislative department of government.” *Kolender v. Lawson*, 461 U.S. 352, 358, n. 7 (1983) (internal quotation marks omitted). Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis”).

These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to “condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it.” *Jordan, supra*, at 242 (Jackson, J., dissenting). Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. See, *e.g.*, A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 151 (1962) (“A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact”). For just these reasons, Hamilton warned, while “liberty can have nothing to fear from the judiciary alone,” it has “every thing to fear from” the union of the judicial and legislative powers.

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The Federalist No. 78, at 466. No doubt, too, for reasons like these this Court has held “that the *more important* aspect of vagueness doctrine ‘is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement’” and keep the separate branches within their proper spheres. *Kolender, supra*, at 358 (quoting *Goguen, supra*, at 574 (emphasis added)).

* * *

Persuaded that vagueness doctrine enjoys a secure footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute’s operation, we should declare the law unconstitutional only if it is “unintelligible.” But in the criminal context this Court has generally insisted that the law must afford “ordinary people fair notice of the conduct it punishes.” *Johnson*, 576 U. S., at 595. And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law’s demands, as we’ve seen, is “the first essential of due process.” *Connally*, 269 U. S., at 391. And as we’ve seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law. See *supra*, at 176–180.

First principles aside, the government suggests that at least this Court’s precedents support adopting a less-than-fair-notice standard for civil cases. But even that much I do not see. This Court has already expressly held that a “stringent vagueness test” should apply to at least some civil laws—those abridging basic First Amendment freedoms. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455

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U.S. 489, 499 (1982). This Court has made clear, too, that due process protections against vague laws are “not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.” *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. To be sure, this Court has also said that what qualifies as fair notice depends “in part on the nature of the enactment.” *Hoffman Estates*, 455 U.S., at 498. And the Court has sometimes “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Id.*, at 498–499. But to acknowledge these truisms does nothing to prove that civil laws must always be subject to the government’s emaciated form of review.

In fact, if the severity of the consequences counts when deciding the standard of review, shouldn’t we also take account of the fact that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today’s “civil” penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are “punitive civil sanctions . . . rapidly expanding,” they are “sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*.” Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L. J. 1795, 1798 (1992) (emphasis added). Given all this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard

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should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.

Retreating to a more modest line of argument, the government emphasizes that this case arises in the immigration context and so implicates matters of foreign relations where the Executive enjoys considerable constitutional authority. But to acknowledge that the *President* has broad authority to act in this general area supplies no justification for allowing *judges* to give content to an impermissibly vague law.

Alternatively still, JUSTICE THOMAS suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. An Act Concerning Aliens § 1, 1 Stat. 571; *post*, at 210–215 (opinion of THOMAS, J.). But the Alien Friends Act—better known as the “Alien” part of the Alien and Sedition Acts—is one of the most notorious laws in our country’s history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. See, *e. g.*, Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 *Tulsa J. Comp. & Int’l L.* 63, 70–71 (2002). Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens’ due process rights at the founding.²

²See, *e. g.*, Virginia Resolutions, in 4 *Debates on the Federal Constitution* 528 (J. Elliot ed. 1836) (explaining that the Act, “by uniting legislative and judicial powers to those of executive, subverts . . . the particular organization, and positive provisions of the federal constitution” (emphasis deleted)); Madison’s Report on the Virginia Resolutions (Jan. 7, 1800), in 17 *Papers of James Madison* 318 (D. Mattern ed. 1991) (Madison’s Report) (contending that the Act violated “the only preventive justice known to American jurisprudence,” because “[t]he ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate

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Besides, none of this much matters. Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process. See, *e. g.*, *Sandin v. Conner*, 515 U. S. 472, 477–478 (1995); Easterbrook, *Substance and Due Process*, 1982 S. Ct. Rev. 85, 88 (“If . . . the constitution, statute, or regulation creates a liberty or property interest, then the second step—determining ‘what process is due’—comes into play”). Madison made this very point, suggesting an alien’s admission in this country could in some circumstances be analogous to the “grant of land to an individual,” which “may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away.” Madison’s Report 319. And, of course, that’s exactly what Congress eventually chose to do here.

alone”); L. Canfield & H. Wilder, *The Making of Modern America* 158 (H. Anderson et al. eds. 1952) (“People all over the country protested against the Alien and Sedition Acts”); M. Baseler, “Asylum for Mankind”: America, 1607–1800, p. 287 (1998) (“The election of 1800 was a referendum on—and a repudiation of—the Federalist ‘doctrines’ enunciated in the debates” over, among other things, the Alien Friends Act); Moore, *Aliens and the Constitution*, 88 N. Y. U. L. Rev. 801, 865, n. 300 (2013) (“The Aliens Act and Sedition Act were met with widespread criticism”); Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 Conn. L. Rev. 743, 759 (2013) (“[T]he [Alien Friends] Act proved wildly unpopular among the American public, and contributed to the Republican electoral triumph in 1800 and the subsequent demise of the Federalist Party”). Whether the law was unenforced or, at most, enforced only once, the literature is not quite clear. Compare Sidak, *War, Liberty, and Enemy Aliens*, 67 N. Y. U. L. Rev. 1402, 1406 (1992) (explaining the Act was never enforced); Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 989 (2002) (same); Klein & Wittes, *Preventative Detention in American Theory and Practice*, 2 Harv. Nat. Sec. J. 85, 102, n. 71 (2011) (same); Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 Colum. Hum. Rts. L. Rev. 713, 726, 733 (1995) (same), with Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 Tulsa J. Comp. & Int’l L. 63, 109 (2002) (stating that the Act was enforced once, on someone who was planning on leaving the country in a few months anyway).

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Decades ago, it enacted a law affording Mr. Dimaya lawful permanent residency in this country, extending to him a statutory liberty interest others traditionally have enjoyed to remain in and move about the country free from physical imprisonment and restraint. See *Dimaya v. Lynch*, 803 F. 3d 1110, 1111 (CA9 2015); 8 U. S. C. §§ 1101(a)(20), 1255. No one suggests Congress *had* to enact statutes of this sort. And exactly what processes must attend the deprivation of a statutorily afforded liberty interest like this may pose serious and debatable questions. Cf. *Murray's Lessee*, 18 How., at 277 (approving summary procedures in another context). But however summary those procedures might be, it's hard to fathom why fair notice of the law—the most venerable of due process's requirements—would not be among them. *Connally*, 269 U. S., at 391.³

³This Court already and long ago held that due process requires affording aliens the “opportunity, at some time, to be heard” before some lawful authority in advance of removal—and it's unclear how that opportunity might be meaningful without fair notice of the law's demands. *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Nor do the cases JUSTICE THOMAS cites hold that a statutory right to lawful permanent residency in this country can be withdrawn without due process. *Post*, at 214–215 (dissenting opinion). Rather, each merely holds that the particular statutory removal procedures under attack comported with due process. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 585 (1952) (rejecting argument that an “alien is entitled to constitutional [due process] protection . . . to the same extent as the citizen” before removal (emphasis added)); *United States ex rel. Turner v. Williams*, 194 U. S. 279, 289–290 (1904) (deporting an alien found to be in violation of a constitutionally valid law doesn't violate due process); *Fong Yue Ting v. United States*, 149 U. S. 698, 730 (1893) (deporting an alien who hasn't “complied with the conditions” required to stay in the country doesn't violate due process). Even when it came to judicially unenforceable privileges in the past, “executive officials had to respect statutory privileges that had been granted to private individuals and that Congress had not authorized the officials to abrogate.” Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 581 (2007) (emphasis deleted). So in a case like ours it would've been incumbent on any executive official to determine that the alien committed a qualifying crime, and statutory vagueness could pose a disabling problem even there.

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Today, a plurality of the Court agrees that we should reject the government's plea for a feeble standard of review, but for a different reason. *Ante*, at 156. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.

* * *

With the fair notice standard now in hand, all that remains is to ask how it applies to the case before us. And here at least the answer comes readily for me: to the extent it requires an "ordinary case" analysis, the portion of the Immigration and Nationality Act before us fails the fair notice test for the reasons Justice Scalia identified in *Johnson* and the Court recounts today.

Just like the statute in *Johnson*, the statute here instructs courts to impose special penalties on individuals previously "convicted of" a "crime of violence." 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(F). Just like the statute in *Johnson*, the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in *Johnson*, the statute here seems to require a judge to guess about the ordinary case of the crime of conviction and then guess whether a "substantial risk" of "physical force" attends its commission. 18 U. S. C. § 16(b); *Johnson*, 576 U. S., at 597–598. *Johnson* held that a law that asks so much of courts while offering them so little by way of guidance is unconstitutionally vague. And I do not see how we might reach a different judgment here.

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Any lingering doubt is resolved for me by taking account of just some of the questions judges trying to apply the statute using an ordinary case analysis would have to confront. Does a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers. Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren't any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?

The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

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* * *

Having said this much, it is important to acknowledge some limits on today's holding too. I have proceeded on the premise that the Immigration and Nationality Act, as it incorporates § 16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime. I have done so because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it. *Johnson, supra*, at 604; *Taylor v. United States*, 495 U.S. 575, 600 (1990); Brief for Petitioner 11, 30, 32, 36, 40, 47 (conceding that an ordinary case analysis is required).

But any more than that I would not venture. In response to the problems engendered by the ordinary case analysis, JUSTICE THOMAS suggests that we should overlook the government's concession about the propriety of that approach; reconsider our precedents endorsing it; and read the statute as requiring us to focus on the facts of the alien's crime as committed rather than as the facts appear in the ordinary case of conviction. *Post*, at 223–235. But normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government. And normally, too, the crucible of adversarial testing is crucial to sound judicial decision-making. We rely on it to “yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.” *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (GORSUCH, J., concurring in part and concurring in judgment).

While sometimes we may or even must forgo the adversarial process, I do not see the case for doing so today. Maybe especially because I am not sure JUSTICE THOMAS's is the only available alternative reading of the statute we would have to consider, even if we did reject the government's concession and wipe the precedential slate clean. We might

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also have to consider an interpretation that would have courts ask not whether the alien’s crime of conviction ordinarily involves a risk of physical force, or whether the defendant’s particular crime involved such a risk, but whether the defendant’s crime of conviction *always* does so. After all, the language before us requires a conviction for an “offense . . . that, *by its nature*, involves a substantial risk of physical force.” 18 U. S. C. § 16(b) (emphasis added). Plausibly, anyway, the word “nature” might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. See 10 Oxford English Dictionary 247 (2d ed. 1989). While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case, whether involving the INA or a different statute, where the parties have a chance to be heard and we might benefit from their learning.

It’s important to note the narrowness of our decision today in another respect too. Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office. Our history surely bears examples of the judicial misuse of the so-called “substantive component” of due process to dictate policy on matters that belonged to the people to decide. But concerns with substantive due process should not lead us to react by withdrawing an ancient procedural protection compelled by the original meaning of the Constitution.

Today’s decision sweeps narrowly in yet one more way. By any fair estimate, Congress has largely satisfied the procedural demand of fair notice even in the INA provision before us. The statute lists a number of specific crimes that can lead to a lawful resident’s removal—for example, murder, rape, and sexual abuse of a minor. 8 U. S. C.

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§ 1101(a)(43)(A). Our ruling today does not touch this list. We address only the statute’s “residual clause” where Congress ended its own list and asked us to begin writing our own. Just as Blackstone’s legislature passed a revised statute clarifying that “cattle” covers bulls and oxen, Congress remains free at any time to add more crimes to its list. It remains free, as well, to write a new residual clause that affords the fair notice lacking here. Congress might, for example, say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. Congress has done almost exactly this in other laws. See, *e. g.*, 18 U. S. C. § 922(g). What was done there could be done here.

But those laws are not this law. And while the statute before us doesn’t rise to the level of threatening death for “pretended offences” of treason, no one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power. And, in my judgment, that foundational principle dictates today’s result. Because I understand them to be consistent with what I have said here, I join Parts I, III, IV–B, and V of the Court’s opinion and concur in the judgment.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In *Johnson v. United States*, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the “indeterminacy of the wide-ranging inquiry” it required. 576 U. S. 591, 597 (2015). Today, the Court relies wholly on *Johnson*—but only some of *Johnson*—to strike down another provision, 18 U. S. C. § 16(b). Because § 16(b) does not give rise to the concerns that drove the Court’s decision in *Johnson*, I respectfully dissent.

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I

The term “crime of violence” appears repeatedly throughout the Federal Criminal Code. Section 16 of Title 18 defines it to mean:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

This definition of “crime of violence” is also incorporated in the definition of “aggravated felony” in the Immigration and Nationality Act. 8 U. S. C. § 1101(a)(43)(F) (“aggravated felony” includes “a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year” (footnote omitted)). A conviction for an aggravated felony carries serious consequences under the immigration laws. It can serve as the basis for an alien’s removal from the United States, and can preclude cancellation of removal by the Attorney General. §§ 1227(a)(2)(A)(iii), 1229b(a)(3).

Those consequences came to pass in respondent James Dimaya’s case. An Immigration Judge and the Board of Immigration Appeals interpreted § 16(b) to cover Dimaya’s two prior convictions for first-degree residential burglary under California law, subjecting him to removal. To stave off that result, Dimaya argued that the language of § 16(b) was void for vagueness under the Due Process Clause of the Fifth Amendment.

The parties begin by disputing whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya’s challenge. A plurality of the Court rejects the Government’s argument in favor of a civil standard, because of the “grave nature of deportation,” *Jordan v. De George*,

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341 U. S. 223, 231 (1951); see *ante*, at 157 (plurality opinion); JUSTICE GORSUCH does so for broader reasons, see *ante*, at 183–188 (opinion concurring in part and concurring in judgment). I see no need to resolve which standard applies, because I would hold that §16(b) is not unconstitutionally vague even under the standard applicable to criminal laws.

II

This is not our first encounter with §16(b). In *Leocal v. Ashcroft*, 543 U. S. 1 (2004), we were asked to decide whether either subsection of §16 covers a particular category of state crimes, specifically driving under the influence (DUI) offenses involving no more than negligent conduct. *Id.*, at 6. Far from finding §16(b) “hopeless[ly] indetermina[te],” *Johnson*, 576 U. S., at 598, we considered the provision clear and unremarkable: “while §16(b) is broader than §16(a) in the sense that physical force need not actually be applied,” the provision “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense,” *Leocal*, 543 U. S., at 10–11. Applying that standard to the state offense at issue, we concluded—unanimously—that §16(b) “cannot be read to include [a] conviction for DUI causing serious bodily injury under Florida law.” *Id.*, at 11.

Leocal thus provides a model for how courts should assess whether a particular crime “by its nature” involves a risk of the use of physical force. At the outset, our opinion set forth the elements of the Florida DUI statute, which made it a felony “for a person to operate a vehicle while under the influence and, ‘by reason of such operation, caus[e] . . . [s]erious bodily injury to another.’” *Id.*, at 7. Our §16(b) analysis, in turn, focused on those specific elements in concluding that a Florida offender’s acts would not naturally give rise to the requisite risk of force “in the course of committing the offense.” *Id.*, at 11. “In no ‘ordinary or natural’ sense,” we explained, “can it be said that a person risks having to ‘use’

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physical force against another person in the course of operating a vehicle while intoxicated and causing injury.” *Ibid.*

The Court holds that the same provision we had no trouble applying in *Leocal* is in fact incapable of reasoned application. The sole justification for this turnabout is the resemblance between the language of §16(b) and the language of the residual clause of the Armed Career Criminal Act (ACCA) that was at issue in *Johnson*. The latter provision defined a “violent felony” to include “any crime punishable by imprisonment for a term exceeding one year . . . that . . . 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)(ii) (emphasis added).

In *Johnson*, we concluded that the ACCA residual clause (the “or otherwise” language) gave rise to two forms of intractable uncertainty, which “conspire[d]” to render the provision unconstitutionally vague. 576 U. S., at 597. First, the residual clause asked courts to gauge the “potential risk” of “physical injury” posed by the conduct involved in the crime. *Ibid.* That inquiry, we determined, entailed not only an evaluation of the “criminal’s behavior,” but also required courts to consider “how the idealized ordinary case of the crime subsequently plays out.” *Ibid.* Second, the residual clause obligated courts to compare that risk to an indeterminate standard—one that was inextricably linked to the provision’s four enumerated crimes, which presented differing kinds and degrees of risk. *Id.*, at 598. This murky confluence of features, each of which “may [have been] tolerable in isolation,” together “ma[de] a task for us which at best could be only guesswork.” *Id.*, at 602.

Section 16(b) does not present the same ambiguities. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both

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statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. See *James v. United States*, 550 U. S. 192, 208 (2007) (this categorical inquiry asks “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents” the requisite risk).¹ In the Court’s view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between §16(b) and the ACCA residual clause. See also *ante*, at 175–176 (opinion of GORSUCH, J.). Those differences undermine the conclusion that §16(b) shares each of the “dual flaws” of that clause. *Ante*, at 171 (majority opinion).

To begin, §16(b) yields far less uncertainty “about how to estimate the risk posed by a crime.” *Johnson*, 576 U. S., at 597. There are three material differences between §16(b) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender’s conduct presented a “*potential* risk” of injury. Forced to give meaning to that befuddling choice of phrase—which layered one indeterminate term on top of another—we understood the word “potential” to signify that “Congress intended to encompass possibilities even more contingent or remote than a simple ‘risk.’” *James*, 550 U. S., at 207–208. As we explained in *Johnson*, that made for a “speculative”

¹ All this “ordinary case” caveat means is that while “[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk,” courts should exclude those atypical cases in assessing whether the offense qualifies. *James*, 550 U. S., at 208. As we have explained, under that approach, it is not the case that “every conceivable factual offense covered by a statute” must pose the requisite risk “before the offense can be deemed” a crime of violence. *Ibid.* But the same is true of the categorical approach generally. See *ibid.* (using the terms just quoted to characterize both the ordinary case approach and the categorical approach for enumerated offenses set forth in *Taylor v. United States*, 495 U. S. 575 (1990)); *Moncrieffe v. Holder*, 569 U. S. 184, 191 (2013); *Gonzales v. Duenas-Alvarez*, 549 U. S. 183, 193 (2007).

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inquiry “detached from statutory elements.” 576 U. S., at 597. In other words, the offense elements could not constrain the risk inquiry in the manner they do here. See *Leocal*, 543 U. S., at 11. The “serious potential risk” standard also forced courts to assess in an expansive way the “collateral consequences” of the perpetrator’s acts. For example, courts had to take into account the concern that *others* might cause injury in attempting to apprehend the offender. See *Sykes v. United States*, 564 U. S. 1, 8–9 (2011). Section 16(b), on the other hand, asks about “risk” alone, a familiar concept of everyday life. It therefore calls for a common-sense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, § 16(b) focuses exclusively on the risk that the offender will “use[]” “physical force” “against” another person or another person’s property. Thus, unlike the ACCA residual clause, “§ 16(b) plainly does not encompass all offenses which create a ‘substantial risk’ that *injury will result from* a person’s conduct.” *Leocal*, 543 U. S., at 10, n. 7 (emphasis added). The point is not that an inquiry into the risk of “physical force” is markedly more determinate than an inquiry into the risk of “physical injury.” But see *ante*, at 169–170. The difference is that § 16(b) asks about the risk that the offender himself will *actively employ* force against person or property. That language does not sweep in all instances in which the offender’s acts, or another person’s reaction, might result in unintended or negligent harm.

Third, § 16(b) has a temporal limit that the ACCA residual clause lacked: The “substantial risk” of force must arise “in the course of committing the offense.” Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. See *Leocal*, 543 U. S., at 10 (“The reckless disregard in § 16 relates . . . to the risk that the use of physical force against another might be required in committing a crime.”).

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The provision thereby excludes more attenuated harms that might arise following the completion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to “potential” risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. See, *e. g.*, *United States v. Benton*, 639 F.3d 723, 732 (CA6 2011) (finding that “solicitation to commit aggravated assault” qualified under the ACCA residual clause on the theory that the solicited individual might subsequently carry out the requested act).

Why does any of this matter? Because it mattered in *Johnson*. More precisely, the expansive language in the ACCA residual clause contributed to our determination that the clause gave rise to “grave uncertainty about how to estimate the risk posed by a crime.” 576 U.S., at 597. “Critically,” we said—a word that tends to mean something—“*picturing the criminal’s behavior is not enough.*” *Ibid.* (emphasis added). Instead, measuring “potential risk” “seemingly require[d] the judge to imagine how the idealized ordinary case of the crime *subsequently plays out.*” *Ibid.* (emphasis added). Not so here. In applying § 16(b), considering “the criminal’s behavior” *is* enough.

Those three distinctions—the unadorned reference to “risk,” the focus on the offender’s own active employment of force, and the “in the course of committing” limitation—also mean that many hard cases under ACCA are easier under § 16(b). Take the firearm possession crime from *Johnson* itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, “by its nature,” carries “a substantial risk” that the possessor will use force against another “in the course of committing the offense.” Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone.

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See *United States v. Serafin*, 562 F. 3d 1105, 1113 (CA10 2009) (recognizing that “*Leocal* instructs [a court] to focus not on whether possession will likely *result* in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession”).² Yet short-barreled shotgun possession presented a closer question under the ACCA residual clause, because the “serious potential risk” language seemingly directed us to consider “the circumstances and conduct that ordinarily attend the offense,” in addition to the offense itself. *Johnson*, 576 U. S., at 639 (ALITO, J., dissenting); see *id.*, at 642 (reasoning that the crime must qualify because “a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is [likely] to use that weapon in violent ways”).

Failure to report to a penal institution, the subject of *Chambers v. United States*, 555 U. S. 122 (2009), is another crime “whose treatment becomes more obvious under § 16(b) than under ACCA,” *ante*, at 169. In *Chambers*, the Government argued that the requisite risk of injury arises not necessarily at the time the offender fails to report to prison, but instead later, when an officer attempts to recapture the

²The Court protests that this straightforward analysis fails to take account of the crime’s ordinary case. *Ante*, at 169, n. 6. But the fact that the element of “possession” may “take[] place in a variety of ways”—for instance, one may possess a firearm “in a closet, in a storeroom, in a car, in a pocket,” “unloaded, disassembled, or locked away,” *Johnson*, 576 U. S., at 610 (THOMAS, J., concurring in judgment)—matters very little. That is because none of the alternative ways of satisfying that element produce a substantial risk that the possessor will use physical force against the person or property of another. And no one would say that a person “possesses” a gun by firing it or threatening someone with it. Cf. *id.*, at 611 (“[T]he risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it.”). The Court’s insistence that this offense is nonetheless “difficult to classify” under § 16(b), *ante*, at 169, n. 6, is surprising in light of our assessment, just two Terms ago, that § 16 does not cover “felon-in-possession laws and other firearms offenses,” *Luna Torres v. Lynch*, 578 U. S. 452, 466 (2016).

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fugitive. 555 U. S., at 128. The majority is correct that we ultimately “reject[ed]” the Government’s contention. *Ante*, at 168. But we did so after “assum[ing] for argument’s sake” its premise—that is, “the relevance of violence that may occur long after an offender fails to report.” 555 U. S., at 128; see *id.*, at 129 (looking at 160 cases of “failure to report” and observing that “none at all involved violence . . . during the commission of the offense itself, [nor] during the offender’s later apprehension”). The “in the course of committing the offense” language in § 16(b) helpfully forecloses that debate.

DUI offenses are yet another example. Because § 16(b) asks about the risk that the offender will “use[]” “physical force,” we readily concluded in *Leocal* that the subsection does not cover offenses where the danger arises from the offender’s negligent or accidental conduct, including drunk driving. 543 U. S., at 11. Applying the ACCA residual clause proved more trying. When asked to decide whether the clause covered drunk driving offenses, a majority of the Court concluded that the answer was no. *Begay v. United States*, 553 U. S. 137 (2008). Our decision was based, however, on the inference that the clause must cover only “purposeful, ‘violent,’ and ‘aggressive’ conduct”—a test derived not from the “conduct that presents a serious potential risk of physical injury” language, but instead by reference to (what we guessed to be) the unifying characteristics of the enumerated offenses. *Id.*, at 144–145. Four Members of the Court criticized that test, see *id.*, at 150–153 (Scalia, J., concurring in judgment); *id.*, at 158–160, 162–163 (ALITO, J., dissenting), though they themselves disagreed about whether DUIs were covered, see *id.*, at 153–154 (opinion of Scalia, J.); *id.*, at 156–158 (opinion of ALITO, J.). And the Court distanced itself from the *Begay* requirement only a few years later when confronting the crime of vehicular flight. See *Sykes*, 564 U. S., at 12–13; *Johnson*, 576 U. S., at 600–601.

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Which brings me to the second part of the Court’s analysis: its objection that § 16(b), like the ACCA residual clause, leaves “uncertainty about the level of risk that makes a crime ‘violent.’” *Ante*, at 161. The “substantial risk” standard in § 16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a “violent felony” to include a crime that “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)(ii) (emphasis added). As our Court recognized early on, that “otherwise” told the reader to understand the “serious potential risk of physical injury” standard by way of the four enumerated crimes. *James*, 550 U. S., at 203. But how, exactly? That question dogged our residual clause cases for years, until we said *no más* in *Johnson*.

In our first foray, *James*, we resolved the case by asking whether the risk posed by the crime of attempted burglary was “comparable to that posed by its closest analog among the enumerated offenses,” which was completed burglary. 550 U. S., at 203. While that rule “[took] care of attempted burglary,” it “offer[ed] no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes.” *Johnson*, 576 U. S., at 599. The *James* dissent, for its part, would have determined the requisite degree of risk from the least dangerous of the enumerated crimes, and compared the offense to that. 550 U. S., at 218–219 (opinion of Scalia, J.). But that approach also proved to be harder than it sounded. See *id.*, at 219–227.

After *James* came *Begay*, in which we concluded that the enumerated offenses served as an independent limitation on the *kind* of crime that could qualify. 553 U. S., at 142; see *Chambers*, 555 U. S., at 128 (applying the *Begay* standard). As discussed, that test was short lived (though we did not purport to wholly repudiate it). See *Sykes*, 564 U. S., at 13.

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Finally, in *Sykes*—our penultimate residual clause case—we acknowledged the prior use of the closest-analog test in *James*, but instead focused on whether the risk posed by vehicular flight was “similar in degree of danger” to the listed offenses of arson and burglary. 564 U.S., at 8–10. As a result, Justice Scalia’s dissent characterized the *Sykes* majority as applying the test from his prior dissent in *James*, not *James* itself. See 564 U.S., at 29–30, 33. This series of precedents laid bare our “repeated inability to craft a principled test out of the statutory text,” *id.*, at 34 (opinion of Scalia, J.), as the Court ultimately acknowledged in *Johnson*, 576 U.S., at 599.

The enumerated offenses, and our Court’s failed attempts to make sense of them, were essential to *Johnson*’s conclusion that the residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.*, at 598. As *Johnson* explained, the issue was not that the statute employed a fuzzy standard. That kind of thing appears in the statute books all the time. *Id.*, at 598, 603. In the majority’s retelling today, the difficulty inhered solely in the fact that the statute paired such a standard with the ordinary case inquiry. See *ante*, at 159, 161, 171. But that account sidesteps much of *Johnson*’s reasoning. See 576 U.S., at 596–597, 598, 599–601, 603. Our opinion emphasized that the word “otherwise” “force[d]” courts to interpret the amorphous standard “in light of” the four enumerated crimes, which are “not much more similar to one another in kind than in degree of risk posed.” *Id.*, at 598, 600. Or, as *Johnson* put it more vividly, “[t]he 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.” *Id.*, at 603. Indeed, the author of *Johnson* had previously, and repeatedly, described this feature of the residual clause as the “crucial . . . respect” in which the law was problematic. See *James*, 550 U.S., at

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230, n. 7 (opinion of Scalia, J.); *Sykes*, 564 U. S., at 35 (opinion of Scalia, J.).

With § 16(b), by contrast, a court need simply consider the meaning of the word “substantial”—a word our Court has interpreted and applied innumerable times across a wide variety of contexts.³ The court does not need to give that familiar word content by reference to four different offenses with varying amounts and kinds of risk.

In its effort to recast a considerable portion of *Johnson* as dicta, the majority speculates that if the enumerated offenses had truly mattered to the outcome, the Court would have told lower courts to “give up on trying to interpret the clause by reference to” those offenses, rather than striking down the provision entirely. *Ante*, at 171. No litigant in *Johnson* suggested that solution, which is not surprising. Such judicial redrafting could have expanded the reach of the criminal provision—surely a job for Congress alone.

In any event, I doubt the majority’s proposal would have done the trick. And that is because the result in *Johnson* did not follow from the presence of one frustrating textual feature or another. Quite the opposite: The decision emphasized that it was the “sum” of the “uncertainties” in the ACCA residual clause, confirmed by years of experience, that “convince[d]” us the provision was beyond salvage. *Johnson*, 576 U. S., at 601–602. Those failings do not characterize the provision at issue here.

³To name a round dozen: *Ayestas v. Davis*, *ante*, at 45; *Life Technologies Corp. v. Promega Corp.*, 580 U. S. 140, 146–149 (2017); *Virginia v. Hicks*, 539 U. S. 113, 119–120, 122–124 (2003); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U. S. 184, 196–198 (2002); *Slack v. McDaniel*, 529 U. S. 473, 483–484 (2000); *Gentile v. State Bar of Nev.*, 501 U. S. 1030, 1075–1076 (1991); *Cage v. Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*); *Steadman v. SEC*, 450 U. S. 91, 98 (1981); *Palermo v. United States*, 360 U. S. 343, 351–353 (1959); *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593–596 (1957); *Levinson v. Spector Motor Service*, 330 U. S. 649, 670–671 (1947); *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 229 (1938).

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III

The more constrained inquiry required under § 16(b)—which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender “grave uncertainty about how to estimate the risk posed by a crime.” And the provision’s use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable “uncertainty about how much risk it takes for a crime to qualify.” That should be enough to reject Dimaya’s facial vagueness challenge.⁴

Because I would rely on those distinctions to uphold § 16(b), the Court reproaches me for not giving sufficient weight to a “core insight” of *Johnson*. *Ante*, at 161, n. 4; see *ante*, at 188 (opinion of GORSUCH, J.) (arguing that § 16(b) runs afoul of *Johnson* “to the extent [§ 16(b)] requires an ‘ordinary case’ analysis”). But the fact that the ACCA residual clause required the ordinary case approach was not itself sufficient to doom the law. We instead took pains to clarify that our opinion should not be read to impart such an absolute rule. See *Johnson*, 576 U. S., at 602. I would adhere to that careful holding and not reflexively extend the decision to a different statute whose reach is, on the whole, far more clear.

⁴The Court also finds it probative that “a host of issues” respecting § 16(b) “divide” the lower courts. *Ante*, at 172. Yet the Court does little to explain how those alleged conflicts vindicate its particular concern about the provision (namely, the ordinary case inquiry). And as the Government illustrates, many of those divergent results likely can be chalked up to material differences in the state offense statutes at issue. Compare *Escudero-Arciniega v. Holder*, 702 F. 3d 781, 783–785 (CA5 2012) (*per curiam*) (reasoning that New Mexico car burglary “requires that the criminal lack authorization to enter the vehicle—a requirement alone which will most often ensure some force [against property] is used”), with *Sareang Ye v. INS*, 214 F. 3d 1128, 1134 (CA9 2000) (finding it relevant that California car burglary does not require unlawful or unprivileged entry); see Reply Brief 17–20, and nn. 5–6.

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The Court does the opposite, and the ramifications of that decision are significant. First, of course, today's holding invalidates a provision of the Immigration and Nationality Act—part of the definition of “aggravated felony”—on which the Government relies to “ensure that dangerous criminal aliens are removed from the United States.” Brief for Petitioner 54. Contrary to the Court's back-of-the-envelope assessment, see *ante*, at 173, n. 12, the Government explains that the definition is “critical” for “numerous” immigration provisions, Brief for Petitioner 12.

In addition, § 16 serves as the universal definition of “crime of violence” for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§ 25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, § 16 is replicated in the definition of “crime of violence” applicable to § 924(c), which prohibits using or carrying a firearm “during and in relation to any crime of violence,” or possessing a firearm “in furtherance of any such crime.” §§ 924(c)(1)(A), (c)(3). Though I express no view on whether § 924(c) can be distinguished from the provision we consider here, the Court's holding calls into question convictions under what the Government warns us is an “oft-prosecuted offense.” Brief for Petitioner 12.

Because *Johnson* does not compel today's result, I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join as to Parts I–C–2, II–A–1, and II–B, dissenting.

I agree with THE CHIEF JUSTICE that 18 U. S. C. § 16(b), as incorporated by the Immigration and Nationality Act

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(INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in *Johnson v. United States*, 576 U.S. 591 (2015). ACCA’s residual clause—a provision that this Court had applied four times before *Johnson*—was not unconstitutionally vague either. See *id.*, at 607–608 (THOMAS, J., concurring in judgment); *id.*, at 636–639 (ALITO, J., dissenting). But if the Court insists on adhering to *Johnson*, it should at least take *Johnson* at its word that the residual clause was vague due to the “‘sum’” of its specific features. *Id.*, at 602 (majority opinion). By ignoring this limitation, the Court jettisons *Johnson*’s assurance that its holding would not jeopardize “dozens of federal and state criminal laws.” *Id.*, at 603.

While THE CHIEF JUSTICE persuasively explains why respondent cannot prevail under our precedents, I write separately to make two additional points. First, I continue to doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause. See *id.*, at 613–624 (opinion of THOMAS, J.). Second, if the Court thinks that § 16(b) is unconstitutionally vague because of the “categorical approach,” see *ante*, at 157–162, then the Court should abandon that approach—not insist on reading it into statutes and then strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause—and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context. But I need not resolve these questions because, if the vagueness doctrine has any basis in the Due Process Clause, it must be limited to cases in which the statute is unconstitutionally vague as ap-

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plied to the person challenging it. That is not the case for respondent, whose prior convictions for first-degree residential burglary in California fall comfortably within the scope of § 16(b).

A

The Fifth Amendment’s Due Process Clause provides that no person shall be “deprived of life, liberty, or property, without due process of law.” Section 16(b), as incorporated by the INA, cannot violate this Clause unless the following propositions are true: The Due Process Clause requires federal statutes to provide certain minimal procedures, the vagueness doctrine is one of those procedures, and the vagueness doctrine applies to statutes governing the removal of aliens. Although I need not resolve any of these propositions today, each one is questionable. I will address them in turn.

1

First, the vagueness doctrine is not legitimate unless the “law of the land” view of due process is incorrect. Under that view, due process “require[s] only that our Government . . . proceed . . . according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property.” *Nelson v. Colorado*, 581 U. S. 128, 131, n. 1 (2017) (THOMAS, J., dissenting) (internal quotation marks omitted). More than a half century after the founding, the Court rejected this view of due process in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856). See *id.*, at 276 (holding that the Due Process Clause “is a restraint on the legislative as well as on the executive and judicial powers of the government”). But the textual and historical support for the law-of-the-land view is not insubstantial.¹

¹See, e. g., *In re Winship*, 397 U. S. 358, 382–384 (1970) (Black, J., dissenting); Rosenkranz, *The Objects of the Constitution*, 63 *Stan. L. Rev.* 1005, 1041–1043 (2011); Berger, “Law of the Land” Reconsidered, 74 *Nw. U. L. Rev.* 1, 2–17 (1979); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *Harv. L. Rev.* 366, 368–373 (1911); see also 4 *The*

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2

Even under *Murray's Lessee*, the vagueness doctrine is legitimate only if it is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors.” *Id.*, at 277. That proposition is dubious. Until the end of the 19th century, “there is little indication that anyone . . . believed that courts had the power under the Due Process Claus[e] to nullify statutes on [vagueness] ground[s].” *Johnson, supra*, at 616–617 (opinion of THOMAS, J.). That is not because Americans were unfamiliar with vague laws. Rather, early American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law. See Note, Void for Vagueness: An Escape From Statutory Interpretation, 23 Ind. L. J. 272, 274–279 (1948). They invoked the rule of lenity and declined to apply vague penal statutes on a case-by-case basis. See *Johnson*, 576 U. S., at 613–616 (opinion of THOMAS, J.); *e.g., ante*, at 178–180, and n. 1 (GORSUCH, J., concurring in part and concurring in judgment) (collecting cases).² The modern vagueness doctrine,

Papers of Alexander Hamilton 35 (H. Syrett & J. Cooke eds. 1962) (“The words ‘*due process*’ have a precise technical import, and . . . can never be referred to an act of legislature”).

² Before the 19th century, when virtually all felonies were punishable by death, English courts would sometimes go to extremes to find a reason to invoke the rule of lenity. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935); *e.g., ante*, at 178–180 (GORSUCH, J., concurring in part and concurring in judgment) (citing Blackstone’s discussion of a case about “cattle”). As the death penalty became less common, courts on this side of the Atlantic tempered the rule of lenity, clarifying that the rule requires an “ambiguity” in the text and cannot be used “to defeat the obvious intention of the legislature.” *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.).

Early American courts also declined to apply nonpenal statutes that were “unintelligible.” *Johnson v. United States*, 576 U. S. 591, 616, n. 3 (2015) (THOMAS, J., concurring in judgment); *e.g., ante*, at 178–180, and n. 1 (opinion of GORSUCH, J.) (collecting cases). Like lenity, however, this practice reflected a principle of statutory construction that was much nar-

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which claims the judicial authority to “strike down” vague legislation on its face, did not emerge until the turn of the 20th century. See *Johnson, supra*, at 616–618 (opinion of THOMAS, J.).

The difference between the traditional rule of lenity and the modern vagueness doctrine is not merely semantic. Most obviously, lenity is a tool of statutory construction, which means States can abrogate it—and many have. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 752–754 (1935); see also Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 583 (1989) (“Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed” (citing Ariz. Rev. Stat. Ann. § 1–211C (1989))). The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to “penal” statutes, 1 W. Blackstone, *Commentaries on the Laws of England* 88 (1765), but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal, *Johnson, supra*, at 612–613 (opinion of THOMAS, J.); see also Note, *Indefinite Criteria of Definiteness in Statutes*, 45 Harv. L. Rev. 160, 163 (1931) (explaining that the modern vagueness doctrine was not merely an “extension of the rule of strict construction of penal statutes” because it “expressly include[s] civil statutes within its scope,” reflecting a “regrettable disregard” for legislatures).³ In short,

rower than the modern constitutional vagueness doctrine. Unintelligible statutes were considered inoperative because they were impossible to apply to individual cases, not because they were unconstitutional for failing to provide “fair notice.” See *Johnson, supra*, at 616, n. 3 (opinion of THOMAS, J.).

³This distinction between penal and nonpenal statutes would be decisive here because, traditionally, civil deportation laws were not considered penal. See *Bugajewitz v. Adams*, 228 U. S. 585, 591 (1913); *Fong Yue Ting v. United States*, 149 U. S. 698, 709, 730 (1893). Although this Court has applied a kind of strict construction to civil deportation laws, that practice

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early American courts were not applying the modern vagueness doctrine by another name. They were engaged in a fundamentally different enterprise.

Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due Process Clause to strike down democratically enacted laws—first in the name of the “liberty of contract,” then in the name of the “right to privacy.” See *Johnson, supra*, at 618–621 (opinion of THOMAS, J.). That the vagueness doctrine “develop[ed] on the federal level concurrently with the growth of the tool of substantive due process” does not seem like a coincidence. Note, 23 Ind. L. J., at 278. Like substantive due process, the vagueness doctrine provides courts with “open-ended authority to oversee [legislative] choices.” *Kolender v. Lawson*, 461 U. S. 352, 374 (1983) (White, J., dissenting). This Court, for example, has used the vagueness doctrine to invalidate antiloitering laws, even though those laws predate the Declaration of Independence. See *Johnson, supra*, at 613 (opinion of THOMAS, J.) (discussing *Chicago v. Morales*, 527 U. S. 41 (1999)).

This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. See, e. g., *Williams v. Pennsylvania*, 579 U. S. 1 (2016); *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996); *Foucha v. Louisiana*, 504 U. S. 71 (1992); cf. *Montgomery v. Louisiana*, 577 U. S. 190 (2016). If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.

3

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. Cf. *Johnson, supra*, at 622, n. 7 (opinion of THOMAS, J.) (stressing the need for specificity when assessing alleged due process rights). The Founders were familiar

did not emerge until the mid-20th century. See *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948).

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with English law, where “the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parliament.” *Demore v. Kim*, 538 U. S. 510, 538 (2003) (O’Connor, J., concurring in part and concurring in judgment) (quoting *Fong Yue Ting v. United States*, 149 U. S. 698, 709 (1893)). And, in this country, the notion that the Due Process Clause governed the removal of aliens was not announced until the 20th century.

Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens “he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof.” An Act Concerning Aliens § 1, 1 Stat. 571. This statute was modeled after the Aliens Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens as he “shall think necessary for the public Security.” 33 Geo. III, ch. 4, § 18, in 39 Eng. Stat. at Large 16. Both the Fifth Congress and the States thoroughly debated the Alien Friends Act. Virginia and Kentucky enacted resolutions (anonymously drafted by Madison and Jefferson) opposing the Act, while 10 States enacted counterresolutions condemning the views of Virginia and Kentucky. See Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 *Tulsa J. Comp. & Int’l L.* 63, 85, 103 (2002).

The Jeffersonian Democratic-Republicans, who viewed the Alien Friends Act as a threat to their party and the institution of slavery,⁴ raised a number of constitutional objections.

⁴The Jeffersonian Democratic-Republicans who opposed the Alien Friends Act primarily represented slave States, and their party’s political strength came from the South. See Fehlings, *Storm on the Constitution*:

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Some of the Jeffersonians argued that the Alien Friends Act violated the Fifth Amendment's Due Process Clause. They complained that the Act failed to provide aliens with all the accouterments of a criminal trial. See, *e. g.*, Kentucky Resolutions ¶6, in 4 Debates on the Constitution 541–542 (J. Elliot ed. 1836) (Elliot's Debates); 8 Annals of Cong. 1982–1983 (1798) (statement of Rep. Gallatin); Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 6 Writings of James Madison 361–362 (G. Hunt ed. 1906) (Madison's Report).⁵

The Federalists gave two primary responses to this due process argument. First, the Federalists argued that the rights of aliens were governed by the law of nations, not the Constitution. See, *e. g.*, Randolph, Debate on Virginia Resolutions, in The Virginia Report of 1799–1800, pp. 34–35 (1850) (Virginia Debates) (statement of George K. Taylor) (arguing that aliens “were not a party to the [Constitution]” and that “cases between the government and aliens . . . arise under the law of nations”); *id.*, at 100 (statement of William Cowan) (identifying the source of rights “as to citizens, the Constitution; as to aliens, the law of nations”); A. Addison, A Charge to the Grand Juries of the County Courts of the Fifth

The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 84 (2002). The Jeffersonians opposed any federal control over immigration, which their constituents feared would be used to pre-empt state laws that prohibited the entry of free blacks. *Id.*, at 84–85; see also Berns, Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, 1970 S. Ct. Rev. 109, 116 (“Whether pro- or anti-slavery, most southerners, including Jefferson and Madison . . . were united behind a policy of denying to the national government any competence to deal with the question of slavery”). The fear was that “mobile free Negroes would intermingle with slaves, encourage them to run away, and foment insurrection.” I. Berlin, *Slaves Without Masters* 92 (1974).

⁵The Jeffersonians also argued that the Alien Friends Act violated due process because, if aliens disobeyed the President's orders to leave the country, they could be convicted of a crime and imprisoned without a trial. See, *e. g.*, Kentucky Resolutions ¶6, 4 Elliot's Debates 541. That charge was false. The Alien Friends Act gave federal courts jurisdiction over alleged violations of the President's orders. See §4, 1 Stat. 571.

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Circuit of the State of Pennsylvania 18 (1799) (Charge to the Grand Juries) (“[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations”); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, in 4 Records of the Governor and Council of the State of Vermont 528 (1876) (denying “that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality”). The law of nations imposed no enforceable limits on a nation’s power to remove aliens. See, e.g., 1 E. de Vattel, *Law of Nations* §§230–231, pp. 108–109 (J. Chitty et al. transl. and ed. 1883).

Second, the Federalists responded that the expulsion of aliens “did not touch life, liberty, or property.” Virginia Debates 34. The founding generation understood the phrase “life, liberty, or property” to refer to a relatively narrow set of core private rights that did not depend on the will of the government. See *Wellness Int’l Network, Ltd. v. Sharif*, 575 U. S. 665, 713–714 (2015) (THOMAS, J., dissenting); Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 566–568 (2007) (Nelson). Quasi-private rights—“privileges” or “franchises” bestowed by the government on individuals—did not qualify and could be taken away without judicial process. See *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U. S. 138, 172 (2015) (THOMAS, J., dissenting); Nelson 567–569. The Federalists argued that an alien’s right to reside in this country was one such privilege. See, e.g., Virginia Debates 34 (arguing that “ordering away an alien . . . was not a matter of right, but of favour,” which did not require a jury trial); Report of the Select Committee of the House of Representatives, Made to the House of Representatives on Feb. 21, 1799, 9 Annals of Cong. 2987 (1799) (stating that aliens “remain in the country . . . merely as matter of favor and permission” and can be removed at any time without a criminal trial); Charge to the Grand Juries 11–13 (similar). According to the Minority Address of the

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Virginia Legislature (anonymously drafted by John Marshall), “[T]he right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn” without judicial process. Address of the Minority in the Virginia Legislature to the People of that State 9–10 (1799) (Virginia Minority Address). Unlike “a grant of land,” the “[a]dmission of an alien to residence . . . is revocable, like a permission.” A. Addison, Analysis of the Report of the Committee of the Virginia Assembly 23 (1800). Removing a resident alien from the country did not affect “life, liberty, or property,” the Federalists argued, until the alien became a naturalized citizen. See *id.*, at 23–24; Charge to the Grand Juries 11–13. That the alien’s permanent residence was conferred by statute would not have made a difference. See Nelson 571, 580–582; *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 344, n. 2 (2015) (THOMAS, J., dissenting).

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, see G. Neuman, *Strangers to the Constitution* 19–43 (1996), and I am aware of no decision questioning the legality of these statutes under state due process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress’ removal laws, it initially rejected them for many of the same reasons that Marshall and the Federalists had cited in defense of the Alien Friends Act. Although the Court rejected the Federalists’ argument that resident aliens do not enjoy constitutional rights, see *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), it agreed that civil deportation statutes do not implicate “life, liberty, or property,” see, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 584–585 (1952) (“[T]hat admission for permanent resi-

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dence confers a ‘vested right’ on the alien [is] not founded in precedents of this Court”); *United States ex rel. Turner v. Williams*, 194 U. S. 279, 290 (1904) (“[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law”); *Fong Yue Ting*, 149 U. S., at 730 (“[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with [statutory] conditions He has not, therefore, been deprived of life, liberty, or property without due process of law”); *id.*, at 713–715 (similar). Consistent with this understanding, “federal immigration laws from 1891 until 1952 made no express provision for judicial review.” *Demore*, 538 U. S., at 538 (opinion of O’Connor, J.).

It was not until the 20th century that this Court held that nonpenal removal statutes could violate the Due Process Clause. See *Wong Yang Sung v. McGrath*, 339 U. S. 33, 49 (1950). That ruling opened the door for the Court to apply the then-nascent vagueness doctrine to immigration statutes. But the Court upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes. See, e. g., *Boutilier v. INS*, 387 U. S. 118, 122 (1967) (“‘psychopathic personality’”); *Jordan v. De George*, 341 U. S. 223, 232 (1951) (“‘crime involving moral turpitude’”); cf. *Mahler v. Eby*, 264 U. S. 32, 40 (1924) (“‘undesirable residents’”). Until today, this Court has never held that an immigration statute is unconstitutionally vague.

Thus, for more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors” protected by the Fifth Amendment’s Due Process Clause. *Murray’s Lessee*, 18 How., at 277.

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B

Instead of a longstanding procedure under *Murray's Lessee*, perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012) (“Vague statutes have the effect of delegating lawmaking authority to the executive”). Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. See Madison’s Report 369–371. And this Court’s precedents have occasionally described the vagueness doctrine in terms of nondelegation. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972) (“A vague law impermissibly delegates basic policy matters”). But they have not been consistent on this front. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964) (“The objectionable quality of vagueness . . . does not depend upon . . . unchanneled delegation of legislative powers’”); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice”).

I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. See *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 68 (2015) (*AAR*) (THOMAS, J., concurring in judgment) (“Congress improperly ‘delegates’ legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power”); accord, *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 487 (2001) (THOMAS, J., concurring). But I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause. *AAR*, *supra*, at 67–69 (opinion of THOMAS, J.); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 123 (1976) (Rehnquist, J., dissenting) (“[T]hat there was an improper delegation of authority . . .

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has not previously been thought to depend upon the procedural requirements of the Due Process Clause”). In my view, impermissible delegations of legislative power violate this principle, not just delegations that deprive individuals of “life, liberty, or property,” Amdt. 5.

Respondent does not argue that § 16(b), as incorporated by the INA, is an impermissible delegation of power. See Brief for Respondent 50 (stating that “there is no delegation question” in this case). I would not reach that question here, because this case can be resolved on narrower grounds. See Part I–C, *infra*. But at first blush, it is not at all obvious that the nondelegation doctrine would justify wholesale invalidation of § 16(b).

If § 16(b) delegates power in this context, it delegates power primarily to the Executive Branch entities that administer the INA—namely, the Attorney General, immigration judges, and the Board of Immigration Appeals (BIA). But Congress does not “delegate” when it merely authorizes the Executive Branch to exercise a power that it already has. See *AAR*, *supra*, at 68 (opinion of THOMAS, J.). And there is some founding-era evidence that “the executive Power,” Art. II, § 1, includes the power to deport aliens.

Blackstone—one of the political philosophers whose writings on executive power were “most familiar to the Framers,” Prakash & Ramsey, *The Executive Power Over Foreign Affairs*, 111 *Yale L. J.* 231, 253 (2001)—described the power to deport aliens as executive and located it with the King. Alien friends, Blackstone explained, are “liable to be sent home whenever the king sees occasion.” 1 *Commentaries on the Laws of England* 252 (1765). When our Constitution was ratified, moreover, “[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the . . . expulsion, by the executive authority of a colony, of aliens.” *Demore*, 538 U. S., at 538 (opinion of O’Connor, J.) (quoting *Fong Yue Ting*, 149 U. S., at 709). Some of the Federalists defending the Alien Friends Act

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similarly argued that the President had the power to remove aliens. See, *e. g.*, Virginia Debates 35 (statement of George K. Taylor) (arguing that the power to remove aliens is “most properly entrusted” with the President, since “[h]e, by the Constitution, was bound to execute the laws” and is “the executive officer, with whom all persons and bodies whatever were accustomed to communicate”); Virginia Minority Address 9 (arguing that the removal of aliens “is a measure of general safety, in its nature political and not forensic, the execution of which is properly trusted to the department which represents the nation in all its interior relations”); Charge to the Grand Juries 29–30 (“As a measure of national defence, this discretion, of expulsion or indulgence, seems properly vested in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition”). More recently, this Court recognized that “[r]emoval decisions” implicate “our customary policy of deference to the President in matters of foreign affairs” because they touch on “our relations with foreign powers and require consideration of changing political and economic circumstances.” *Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (internal quotation marks omitted). Taken together, this evidence makes it difficult to confidently conclude that the INA, through § 16(b), delegates core legislative power to the Executive.

Instead of the Executive, perhaps § 16(b) impermissibly delegates power to the Judiciary, since the courts of appeals often review the BIA’s application of § 16(b). I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it “would simply be making up a law—that is, exercising legislative power.” Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 339 (2002); see *id.*, at 339–340 (providing examples such as a gibberish-filled statute or a statute that requires “‘goodness

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and niceness’”). But I am not confident that our modern vagueness doctrine—which focuses on whether regulations of individual conduct provide “fair warning,” are “clearly defined,” and do not encourage “arbitrary and discriminatory enforcement,” *Grayned, supra*, at 108; *Kolender*, 461 U. S., at 357—accurately demarcates the line between legislative and judicial power. The Founders understood that the interpretation of legal texts, even vague ones, remained an exercise of core judicial power. See *Perez v. Mortgage Bankers Assn.*, 575 U. S. 92, 119–120 (2015) (THOMAS, J., concurring in judgment); Hamburger, *The Constitution’s Accommodation of Social Change*, 88 Mich. L. Rev. 239, 303–310 (1989). Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. See *id.*, at 309–310; Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 526 (2003). Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power. See *Johnson*, 576 U. S., at 615–616, and n. 3 (opinion of THOMAS, J.).

C

1

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity. See *id.*, at 615–616. And that is how early American courts addressed constitutional challenges to statutes more generally. See *id.*, at 615 (“[T]here is good evidence that [antebellum] courts . . . 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

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“‘striking down’ legislation’” (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010)).

2

This Court’s precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See *Holder v. Humanitarian Law Project*, 561 U. S. 1, 18–19 (2010); *United States v. Williams*, 553 U. S. 285, 304 (2008); *Maynard*, 486 U. S., at 361; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495, and n. 7 (1982) (collecting cases). *Johnson* did not overrule these precedents. While *Johnson* weakened the principle that a facial challenge requires a statute to be vague “in all applications,” 576 U. S., at 603 (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA’s residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See *id.*, at 600.

In my view, § 16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was “sufficiently forewarned . . . that the statutory consequence . . . is deportation.” *De George*, 341 U. S., at 232. At the time, courts had “unanimous[ly]” concluded that residential burglary is a crime of violence, and not “a single opinion . . . ha[d] held that [it] is not.” *United States v. M. C. E.*, 232 F. 3d 1252, 1255–1256 (CA9 2000); see also *United States v. Davis*, 881 F. 2d 973, 976 (CA11 1989) (explaining that treating residential burglary as a crime of violence was “[i]n accord with common law tradition and the settled law of the federal circuits”). Residential burglary “ha[d] been considered a violent offense for hundreds of years . . . because of the potential for mayhem if burglar encounters resident.” *United States v. Pinto*, 875 F. 2d 143, 144 (CA7 1989). The Model Penal Code had recognized that risk, see ALI, Model

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Penal Code § 221.1, Comment 3(c), p. 75 (1980); the Sentencing Commission had recognized that risk; see United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2006); and this Court had repeatedly recognized that risk, see, e. g., *James v. United States*, 550 U. S. 192, 203 (2007); *Taylor v. United States*, 495 U. S. 575, 588 (1990). In *Leocal v. Ashcroft*, 543 U. S. 1 (2004), this Court unanimously agreed that burglary is the “classic example” of a crime of violence under § 16(b), because it “involves a substantial risk that the burglar will use force against a victim in completing the crime.” *Id.*, at 10.

That same risk is present with respect to respondent’s statute of conviction—first-degree residential burglary, Cal. Penal Code Ann. §§ 459, 460(a) (West 1999). The California Supreme Court has explained that the State’s burglary laws recognize “the dangers to personal safety created by the usual burglary situation.” *People v. Davis*, 18 Cal. 4th 712, 721, 958 P. 2d 1083, 1089 (1998) (emphasis added). “[T]he fact that a building is used as a home . . . increases such danger,” which is why California elevates residential burglary to a first-degree offense. *People v. Rodriguez*, 122 Cal. App. 4th 121, 133, 18 Cal. Rptr. 3d 550, 558 (2004); see also *People v. Wilson*, 208 Cal. App. 3d 611, 615, 256 Cal. Rptr. 422, 425 (1989) (“[T]he higher degree . . . is intended to prevent those situations which are most dangerous, most likely to cause personal injury” (emphasis deleted)). Although unlawful entry is not an element of the offense, courts “unanimous[ly]” agree that the offense still involves a substantial risk of physical force. *United States v. Avila*, 770 F. 3d 1100, 1106 (CA4 2014); accord, *United States v. Maldonado*, 696 F. 3d 1095, 1102, 1104 (CA10 2012); *United States v. Scanlan*, 667 F. 3d 896, 900 (CA7 2012); *United States v. Echeverria-Gomez*, 627 F. 3d 971, 976 (CA5 2010); *United States v. Becker*, 919 F. 2d 568, 573 (CA9 1990). First-degree residential burglary requires entry into an inhabited dwelling, with the intent to commit a felony, against the will

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of the homeowner—the key elements that create the risk of violence. See *United States v. Park*, 649 F. 3d 1175, 1178–1180 (CA9 2011); *Avila*, *supra*, at 1106–1107; *Becker*, *supra*, at 571, n. 5. As this Court has explained, “[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another’s property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party.” *James*, *supra*, at 203.

Drawing on *Johnson* and the decision below, the Court suggests that residential burglary might not be a crime of violence because “‘only about seven percent of burglaries actually involve violence.’” *Ante*, at 160, n. 3 (citing *Dimaya v. Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015)); see Bureau of Justice Statistics, S. Catalano, National Crime Victimization Survey: Victimization During Household Burglary 1 (Sept. 2010), <https://www.bjs.gov/content/pub/pdf/vdhib.pdf> (as last visited Apr. 13, 2018). But this statistic—which measures actual violence against a member of the household, see *id.*, at 1, 12—is woefully underinclusive. It excludes other potential victims besides household members—for example, “a police officer, or a bystander[r] who comes to investigate,” *James*, *supra*, at 203. And § 16(b) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, *Johnson* is not conclusive because, unlike ACCA’s residual clause, § 16(b) covers offenses that involve a substantial risk of physical force “against the person or property of another.” (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (*e.g.*, breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. See Bureau of Justice Statistics, *supra*, at 2 (Table 1). Thus, under any metric, respondent’s convictions for first-degree residential burglary are crimes of violence under § 16(b).

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3

Finally, if facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague “[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.” *Morales*, 527 U. S., at 112 (THOMAS, J., dissenting) (quoting *Kolender*, 461 U. S., at 370–371 (White, J., dissenting)). The residual clause of ACCA had such a core. See *Johnson*, 576 U. S., at 602; *id.*, at 636–637 (ALITO, J., dissenting). And § 16(b) has an even wider core, as THE CHIEF JUSTICE explains. Thus, the Court should not have invalidated § 16(b), either on its face or as applied to respondent.

II

Even taking the vagueness doctrine and *Johnson* at face value, I disagree with the Court’s decision to invalidate § 16(b). The sole reason that the Court deems § 16(b) unconstitutionally vague is because it reads the statute as incorporating the categorical approach—specifically, the “ordinary case” approach from ACCA’s residual clause. Although the Court mentions “[t]wo features” of § 16(b) that make it vague—the ordinary-case approach and an imprecise risk standard—the Court admits that the second feature is problematic only in combination with the first. *Ante*, at 161. Without the ordinary-case approach, the Court “‘do[es] not doubt’” the constitutionality of § 16(b). *Ibid.*

But if the categorical approach renders § 16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien’s offense presents a substantial risk of physical force, courts should ask whether the alien’s actual underlying conduct presents a substantial risk of physical force. I will briefly discuss the

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origins of the categorical approach and then explain why the Court should abandon it for § 16(b).

A

1

The categorical approach originated with Justice Blackmun's opinion for the Court in *Taylor v. United States*, 495 U.S. 575 (1990). The question in *Taylor* was whether ACCA's reference to "burglary" meant burglary as defined by state law or burglary in the generic sense. After "devoting 10 pages of [its] opinion to legislative history," *id.*, at 603 (Scalia, J., concurring in part and concurring in judgment), and finding that Congress had made "an inadvertent casualty in [the] complex drafting process," *id.*, at 589–590 (majority opinion), the Court concluded that ACCA referred to burglary in the generic sense, *id.*, at 598. The Court then addressed how the Government would prove that a defendant was convicted of generic burglary, as opposed to another offense. *Id.*, at 599–602. *Taylor* rejected the notion that the Government could introduce evidence about the "particular facts" of the defendant's underlying crime. *Id.*, at 600. Instead, the Court adopted a "categorical approach," which focused primarily on the "statutory definition of the prior offense." *Id.*, at 602.

Although *Taylor* was interpreting one of ACCA's enumerated offenses, this Court later extended the categorical approach to ACCA's residual clause. See *James*, 550 U.S., at 208. That extension required some reworking. Because ACCA's enumerated-offenses clause asks whether a prior conviction "is burglary, arson, or extortion," 18 U.S.C. § 924(e)(2)(B)(ii), *Taylor* instructed courts to focus on the definition of the underlying crime. The residual clause, by contrast, asks whether a prior conviction "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). Thus, the Court held that the categorical approach for the residual clause asks "whether

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the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another.” *James, supra*, at 208 (emphasis added). This “ordinary case” approach allowed courts to apply the residual clause without inquiring into the individual facts of the defendant’s prior crime.

Taylor gave a few reasons why the categorical approach was the correct reading of ACCA, see 495 U. S., at 600–601, but the “heart of the decision” was the Court’s concern with limiting the amount of evidence that the parties could introduce at sentencing. *Shepard v. United States*, 544 U. S. 13, 23 (2005). Specifically, the Court was worried about potential violations of the Sixth Amendment. If the parties could introduce evidence about the defendant’s underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by the judge instead of the jury. See *id.*, at 24–26; *Taylor, supra*, at 601. While this Court’s decision in *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), allows judges to find facts about a defendant’s prior convictions, a full-blown minitrial would look “too much like” the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U. S., at 25. By construing ACCA to require a categorical approach, then, the Court was following “[t]he rule of reading statutes to avoid serious risks of unconstitutionality.” *Ibid.*

2

I disagreed with the Court’s decision to extend the categorical approach to ACCA’s residual clause. See *James*, 550 U. S., at 231–232 (dissenting opinion). The categorical approach was an “unnecessary exercise,” I explained, because it created the same Sixth Amendment problem that it tried to avoid. *Id.*, at 231. Absent waiver, a defendant has the right to have a jury find “every fact that is by law a basis for imposing or increasing punishment,” including the fact of a prior conviction. *Apprendi v. New Jersey*, 530 U. S. 466,

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501 (2000) (THOMAS, J., concurring). The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. See *Mathis v. United States*, 579 U. S. 500, 521–522 (2016) (THOMAS, J., concurring); *Shepard, supra*, at 27–28 (THOMAS, J., concurring in part and concurring in judgment). In my view, if the Government wants to enhance a defendant’s sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.⁶

B

My objection aside, the ordinary-case approach soon created problems of its own. The Court’s attempt to avoid the Scylla of the Sixth Amendment steered it straight into the Charybdis of the Fifth. The ordinary-case approach that was created to honor the individual right to a jury is now, according to the Court, so vague that it deprives individuals of due process.

I see no good reason for the Court to persist in reading the ordinary-case approach into § 16(b). The text of § 16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for § 16(b).

⁶The Sixth Amendment is, thus, not a reason to maintain the categorical approach in criminal cases. Contra, *ante*, at 164 (plurality opinion). Even if it were, the Sixth Amendment does not apply in immigration cases like this one. See Part II–B–2, *infra*. The plurality contends that, if it must contort the text of § 16(b) to avoid a Sixth Amendment problem in criminal cases, then it must also contort the text of § 16(b) in immigration cases, even though the Sixth Amendment problem does not arise in the immigration context. See *ante*, at 164–166. But, as I have explained elsewhere, this “lowest common denominator” approach to constitutional avoidance is both ahistorical and illogical. See *Clark v. Martinez*, 543 U. S. 371, 395–401 (2005) (dissenting opinion).

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1

The text of § 16(b) does not require a categorical approach. The INA declares an alien deportable if he is “convicted of an aggravated felony” after he is admitted to the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). Aggravated felonies include “crime[s] of violence” as defined in § 16. § 1101(a)(43)(F). Section 16, in turn, defines crimes of violence as follows:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

At first glance, § 16(b) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical “nature” of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words “by its nature,” “substantial risk,” and “may” would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation. See *Nijhawan v. Holder*, 557 U. S. 29, 33–34 (2009) (“[I]n ordinary speech words such as ‘crime,’ ‘felony,’ ‘offense,’ and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion”). It is entirely natural to use words like “nature” and “offense” to refer to an offender’s actual underlying conduct.⁷

⁷ See, e.g., 18 U.S.C. § 3553(a)(2) (directing sentencing judges to consider “the nature and circumstances of the offense”); *Schwartz v. Board of Bar Examiners of N. M.*, 353 U. S. 232, 243 (1957) (describing “the nature

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Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, § 16(b) asks whether an offense “involves” a substantial risk of force. The word “involves” suggests that the offense must *necessarily* include a substantial risk of force. See New Oxford Dictionary of English 962 (2001) (“include (something) as a necessary part or result”); Random House Dictionary of the English Language 1005 (2d ed. 1987) (“1. to include as a necessary circumstance, condition, or consequence”); Oxford American Dictionary 349 (1980) (“1. to contain within itself, to make

of the offense” committed by a bar applicant as “recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War”); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 482 (1993) (O’Connor, J., dissenting) (describing “the nature of the offense at issue” as not “involving grave physical injury” but rather as a “business dispute between two companies in the oil and gas industry”); *United States v. Broce*, 488 U.S. 563, 585–587 (1989) (Blackmun, J., dissenting) (describing “the nature of the charged offense” in terms of the specific facts alleged in the indictment); *People v. Golba*, 273 Mich. App. 603, 611, 729 N.W.2d 916, 922 (2007) (“[T]he underlying factual basis for a conviction governs whether the offense ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age’” (quoting Mich. Comp. Laws § 28.722(e)(xi) (2006))); A Fix for Animal Abusers, *Boston Herald*, Nov. 22, 2017, p. 16 (“prosecutors were so horrified at the nature of his offense—his torture of a neighbor’s dog”); Ward, Attorney of Convicted Ex-Official Accuses Case’s Judge, *Pittsburgh Post-Gazette*, Nov. 10, 2015, p. B1 (identifying the “nature of his offense” as “taking money from an elderly, widowed client, and giving it to campaign funds”); Cross-Burning—Article Painted an Inaccurate Picture of Young Man in Question, *Seattle Times*, Aug. 12, 1991, p. A9 (“[The defendant] took no steps to prevent the cross that was burned from being constructed on his family’s premises and later . . . assisted in concealing a second cross This was the nature of his offense”); Libman, A Parole/Probation Officer Talks With Norma Libman, *Chicago Tribune*, May 29, 1988, p. I31 (describing “the nature of the offense” as “not serious” if “there was no definitive threat on life” or if “the dollar-and-cents amount was not great”); Walsh, District—U.S. Argument Delays Warrant for Escapee’s Arrest, *Washington Post*, May 29, 1986, p. C1 (describing “the nature of Murray’s alleged offenses” as “point[ing] at two officers a gun that was later found to contain one round of ammunition”).

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necessary as a condition or result”). That condition is always satisfied if the Government must prove that the alien’s underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the “ordinary case” involves such a risk. See *Johnson*, 576 U. S., at 635–636 (ALITO, J., dissenting). Tellingly, the other aggravated felonies in the INA that use the word “involves” employ the underlying-conduct approach. See 8 U. S. C. § 1101(a)(43)(M)(i) (“an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000”); § 1101(h)(3) (“any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another”). As do the similarly worded provisions of the Comprehensive Crime Control Act of 1984, the bill that contained § 16(b). See, e. g., 98 Stat. 2059 (elevating the burden of proof for the release of “a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage”); *id.*, at 2068 (establishing the sentence for drug offenses “involving” specific quantities and types of drugs); *id.*, at 2137 (defining violent crimes in aid of racketeering to include “attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury”).

A comparison of § 16(b) and § 16(a) further highlights why the former likely adopts an underlying-conduct approach. Section 16(a) covers offenses that have the use, attempted use, or threatened use of physical force “as an element.” Because § 16(b) covers “other” offenses and is separated from § 16(a) by the disjunctive word “or,” the natural inference is that § 16(b) asks a different question. In other words, § 16(b) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to de-

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termine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien's crime and then assess its riskiness. This approach would provide a definitive answer in every case. And courts are already familiar with this kind of inquiry. Cf. *Johnson, supra*, at 603 (noting that “dozens” of similarly worded laws ask courts to assess “the riskiness of conduct in which an individual defendant engages *on a particular occasion*”). Nothing suggests that Congress imposed a more limited inquiry when it enacted § 16(b) in 1984. At the time, Congress had not yet enacted ACCA's residual clause, this Court had not yet created the categorical approach, and this Court had not yet recognized a Sixth Amendment limit on judicial fact-finding at sentencing, see *Chambers v. United States*, 555 U. S. 122, 132 (2009) (ALITO, J., concurring in judgment).

The second option is to imagine the “ordinary case” of the alien's crime and then assess the riskiness of that hypothetical offense. But the phrase “ordinary case” does not appear in the statute. And imagining the ordinary case, the Court reminds us, is “hopeless[ly] indeterminat[e],” “wholly ‘speculative,’” and mere “guesswork.” *Ante*, at 158, 174 (quoting *Johnson, supra*, at 597, 598, 600); see also *Chambers, supra*, at 133 (opinion of ALITO, J.) (observing that the categorical approach is “nearly impossible to apply consistently”). Because courts disfavor interpretations that make a statute impossible to apply, see A. Scalia & B. Garner, *Reading Law* 63 (2012), this Court should reject the ordinary-case approach for § 16(b) and adopt the underlying-facts approach instead. See *Johnson, supra*, at 633 (ALITO, J., dissenting) (“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”).

2

That the categorical approach is not the better reading of § 16(b) should not be surprising, since the categorical ap-

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proach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant's past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. "[T]he provisions of the Constitution securing the right of trial by jury have no application" in a removal proceeding. *Turner*, 194 U. S., at 290. And, in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant's prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. See *Johnson*, 576 U. S., at 635 (ALITO, J., dissenting). Nothing in § 16(b) prohibits the Government from proceeding this way, so the plurality is wrong to suggest that the underlying-conduct approach would necessarily "ping-pong us from one constitutional issue to another." *Ante*, at 164.

If constitutional avoidance applies here at all, it requires us to *reject* the categorical approach for § 16(b). According to the Court, the categorical approach is unconstitutionally vague. And, all agree that the underlying-conduct approach would not be. See *Johnson*, *supra*, at 603–604 (majority opinion) ("[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct"). Thus, if the underlying-conduct approach is a "reasonabl[e]" interpretation of § 16(b), it is our "plain duty" to adopt it. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). And it is reasonable, as explained above.

In *Johnson*, the Court declined to adopt the underlying-conduct approach for ACCA's residual clause. See 576 U. S., at 604–605. The Court concluded that the categorical approach was the only reasonable reading of ACCA because the residual clause uses the word "convictions." *Ibid.* The Court also stressed the "utter impracticability of requir-

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ing a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.” *Id.*, at 605.

Neither of these arguments is persuasive with respect to the INA. Moreover, this Court has already rejected them. In *Nijhawan*, this Court unanimously concluded that one of the aggravated felonies in the INA—“an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,” § 1101(a)(43)(M)(i)—applies the underlying-conduct approach, not the categorical approach. 557 U. S., at 32. Although the INA also refers to “convict[ions],” § 1227(a)(2)(A)(iii), the Court was not swayed by that argument. The word “convict[ion]” means only that the defendant’s underlying conduct must “‘be tied to the specific counts covered by the conviction,’” not “‘acquitted or dismissed counts or general conduct.’” *Id.*, at 42. As for the supposed practical problems with proving an alien’s prior conduct, the Court did not find that argument persuasive either. “[T]he ‘sole purpose’ of the ‘aggravated felony’ inquiry,” the Court explained, “‘is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.’” *Ibid.* And because the INA places the burden on the Government to prove an alien’s conduct by clear and convincing evidence, § 1229a(c)(3)(A), “uncertainties caused by the passage of time are likely to count in the alien’s favor,” *id.*, at 42.

There are additional reasons why the practical problems identified in *Johnson* should not matter for § 16(b)—even assuming they should have mattered for ACCA’s residual clause, see *Lewis v. Chicago*, 560 U. S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted”). In a removal proceeding, any difficulties with identifying an alien’s past conduct will fall on immigration judges, not federal courts. But those judges are already accustomed to

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finding facts about the conduct underlying an alien's prior convictions, since some of the INA's aggravated felonies employ the underlying-conduct approach. The BIA has instructed immigration judges to determine such conduct based on "any evidence admissible in removal proceedings," not just the elements of the offense or the record of conviction. See *Matter of Babaisakov*, 24 I. & N. Dec. 306, 307 (2007). No one has submitted any evidence that the BIA's approach has been "utter[ly] impracticab[le]" or "daunting[ly] difficul[t]" in practice. *Ante*, at 166. And even if it were, "how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself." *Ali v. Mukasey*, 521 F. 3d 737, 741 (CA7 2008). Hypothetical burdens on the BIA should not influence how this Court interprets § 16(b).

In short, we should not blithely assume that the reasons why this Court adopted the categorical approach for ACCA's residual clause also apply to the INA's list of aggravated felonies. As *Nijhawan* explained, "the 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed." 557 U. S., at 38. "The question" in each case is "to which category [the aggravated felony] belongs." *Ibid*. As I have explained, § 16(b) belongs in the underlying-conduct category. Because that is the better reading of § 16(b)'s text—or at least a reasonable reading—the Court should have adopted it here.

3

I see no prudential reason for maintaining the categorical approach for § 16(b). The Court notes that the Government "explicitly acknowledges" that § 16(b) employs the categorical approach. *Ante*, at 160. But we cannot permit the Government's concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coor-

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dinate branch. See *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 446–447 (1993); *Young v. United States*, 315 U. S. 257, 258–259 (1942). This Court’s “traditional practice” is to “refus[e] to decide constitutional questions” when other grounds of decision are available, “whether or not they have been properly raised before us by the parties.” *Neese v. Southern R. Co.*, 350 U. S. 77, 78 (1955) (*per curiam*); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1948–1949 (1997) (explaining that courts commonly “decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim”). This Court has raised potential saving constructions “on our own motion” when they could avoid a ruling on constitutional vagueness grounds, even in cases where the Government was a party. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 88 (1921). We should have followed that established practice here.

Nor should *stare decisis* prevent us from rejecting the categorical approach for § 16(b). This Court has never held that § 16(b) incorporates the ordinary-case approach. Although *Leocal* held that § 16(b) incorporates a version of the categorical approach, the Court must not feel bound by that decision, as it largely overrules it today. See *ante*, at 172, n. 7. Surely the Court cannot credibly invoke *stare decisis* to defend the categorical approach—the same approach it says only a “lunatic” would continue to apply. *Ante*, at 174. If the Court views the categorical approach that way—the same way *Johnson* viewed it—then it must also agree that “[s]tanding by [the categorical approach] would undermine, rather than promote, the goals that *stare decisis* is meant to serve.” 576 U. S., at 606. That is especially true if the Court’s decision leads to the invalidation of scores of similarly worded state and federal statutes, which seems even more likely after today than it did after *Johnson*. Instead of adhering to an interpretation that it thinks unconstitutional and then using that interpretation to strike down an-

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other statute, the Court should have taken this opportunity to abandon the categorical approach for § 16(b) once and for all.

* * *

The Court's decision today is triply flawed. It unnecessarily extends our incorrect decision in *Johnson*. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.

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UNITED STATES *v.* MICROSOFT CORP.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 17–2. Argued February 27, 2018—Decided April 17, 2018

Federal law enforcement agents sought a warrant under 18 U. S. C. § 2703, requiring respondent Microsoft Corp. to disclose all e-mails and other information associated with a customer’s account that the agents believed was being used to further illegal drug trafficking. A Magistrate Judge issued the warrant, which Microsoft moved to quash with respect to account information stored at its datacenter in Dublin, Ireland. The Magistrate Judge denied the motion. The District Court affirmed and held Microsoft in contempt for failing to fully comply with the warrant. The Second Circuit reversed, holding that such disclosure would be an unauthorized extraterritorial application of § 2703. Congress subsequently enacted the Clarifying Lawful Overseas Use of Data Act which required service providers to disclose customer information under § 2703, regardless whether such information is located outside the United States. The Government then obtained a new warrant covering the information at issue.

Held: Because no live dispute remains between the parties over the issue on which certiorari was granted, this case is moot. The judgment below is vacated, and the case is remanded to the Second Circuit with instructions to vacate the District Court’s contempt finding and denial of Microsoft’s motion to quash, and to direct the District Court to dismiss the case as moot.

829 F. 3d 197, vacated and remanded.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Francisco, Acting Assistant Attorney General Cronan, Morgan L. Goodspeed, and Ross B. Goldman.*

E. Joshua Rosenkranz argued the cause for respondent. With him on the brief were *Robert M. Loeb, Brian P. Goldman, Evan M. Rose, Bradford L. Smith, David M. Howard, James M. Garland, and Alexander A. Berengaut.**

*A brief of *amici curiae* urging reversal was filed for the State of Vermont et al. by *Thomas J. Donovan*, Attorney General of Vermont, *Benjamin D. Battles*, Solicitor General, and *Eleanor L. P. Spottswood and Evan*

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PER CURIAM.

The Court granted certiorari in this case to decide whether, when the Government has obtained a warrant under 18 U. S. C. §2703, a U. S. provider of e-mail services

P. Meenan, Assistant Attorneys General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General of their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Christopher S. Porrino* of New Jersey, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Wanda Vasquez-Garced* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Mark R. Herring* of Virginia, and *Peter K. Michael* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Brennan Center for Justice at NYU School of Law et al. by *Brett J. Williamson*, *Nathaniel Asher*, *David K. Lukmire*, *Faiza Patel*, *Michael W. Price*, *David D. Cole*, *Jennifer Stisa Granick*, *Arthur Rizer*, *Charles Duan*, *Lee Tien*, *Andrew Crocker*, and *Mahesha P. Subbaraman*; for Bundesverband der Deutschen Industrie e. V. et al. by *Saad Gul*; for the Competitive Enterprise Institute et al. by *Jim Harper*, *Ilya Shapiro*, and *Manuel S. Klausner*; for the Council of Bars and Law Societies of Europe by *Nowell D. Bamberger*; for DIGITALEUROPE et al. by *Ilana H. Eisenstein* and *Ethan H. Townsend*; for Digital Rights Ireland Limited et al. by *Owen C. Pell* and *Susan L. Grace*; for Electronic Privacy Information Center et al. by *Marc Rotenburg* and *Alan Butler*; for EU Data Protection and Privacy Scholars by *Daniel M. Sullivan*, *Vincent Levy*, and *Matthew V. H. Noller*; for the European Company Lawyers Association by *Jonathan I. Blackman* and *Jared Gerber*; for Fourth Amendment Scholars by *Michael Vatis*; for Gesellschaft für Freiheitsrechte e. V. by *Mr. Pell* and *Ms. Grace*; for International and Extraterritorial Law Scholars by *J. Carl Cecere*; for International Business Machines Corporation by *Paul D. Clement*, *George W. Hicks, Jr.*, and *Damon C. Andrews*; for InternetLab Law and Technology Center by *Amy Neuhardt* and *Jessica Phillips*; for Ireland by *Thomas J. Goodwin* and *Charles D. Ray*; for Members of Congress by *Michael E.*

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must disclose to the Government electronic communications within its control even if the provider stores the communications abroad. 583 U.S. 931 (2017).

In December 2013, federal law enforcement agents applied to the United States District Court for the Southern District of New York for a § 2703 warrant requiring Microsoft to disclose all e-mails and other information associated with the account of one of its customers. Satisfied that the agents had demonstrated probable cause to believe that the account was being used to further illegal drug trafficking, a Magistrate Judge issued the requested § 2703 warrant. App. 22–26. The warrant directed Microsoft to disclose to the Government the contents of a specified e-mail account and all other records or information associated with the account “[t]o the extent that the information . . . is within [Microsoft’s] possession, custody, or control.” *Id.*, at 24.

Bern; for the Policing Project at New York University School of Law by *Eric Citron* and *Barry Friedman*; for Privacy International et al. by *Brian M. Willen*; for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Laura R. Handman*, *Alison Schary*, *Richard A. Bernstein*, *Kevin M. Goldberg*, *David M. Giles*, *David Bralow*, *Marcia Hofmann*, *Barbara W. Wall*, *George Freeman*, *James Cregan*, *Mickey H. Osterreicher*, *Jonathan Hart*, *Micah Ratner*, *Barbara L. Camens*, *Bruce W. Sanford*, and *Lauren Fisher*; for Technology Companies by *Marc J. Zwillinger* and *Catherine M. A. Carroll*; for the Washington Legal Foundation by *Richard A. Samp* and *Cory L. Andrews*; for Jan Philipp Albrecht et al. by *Mr. Pell* and *Ms. Grace*; for 12 Business and Consumer Associations by *Andrew J. Pincus* and *Paul W. Hughes*; and for 51 Computer Scientists by *John D. Vandenberg* and *Klaus H. Hamm*.

Briefs of *amici curiae* were filed for the E-Discovery Institute et al. by *David Kessler*; for the European Commission on Behalf of the European Union by *Adam G. Unikowsky* and *Patrick W. Pearsall*; for Former Law Enforcement, National Security, and Intelligence Officials by *Gus P. Coldebella*; for the Government of the United Kingdom of Great Britain et al. by *Donald I. Baker*, *W. Todd Miller*, and *Ishai Mooreville*; for the New Zealand Privacy Commissioner by *Allyson N. Ho* and *William R. Peterson*; and for Joseph Cannataci by *Vivek Krishnamurthy*.

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After service of the § 2703 warrant, Microsoft determined that the account's e-mail contents were stored in a sole location: Microsoft's datacenter in Dublin, Ireland. *Id.*, at 34. Microsoft moved to quash the warrant with respect to the information stored in Ireland. The Magistrate Judge denied Microsoft's motion. *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (SDNY 2014). The District Court, after a hearing, adopted the Magistrate Judge's reasoning and affirmed his ruling. See *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F. 3d 197, 204–205 (CA2 2016). Soon after, acting on a stipulation submitted jointly by the parties, the District Court held Microsoft in civil contempt for refusing to comply fully with the warrant. *Id.*, at 205. On appeal, a panel of the Court of Appeals for the Second Circuit reversed the denial of the motion to quash and vacated the civil contempt finding, holding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of § 2703. *Id.*, at 222.

The parties now advise us that on March 23, 2018, Congress enacted and the President signed into law the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), as part of the Consolidated Appropriations Act, 2018, Pub. L. 115–141. The CLOUD Act amends the Stored Communications Act, 18 U. S. C. § 2701 *et seq.*, by adding the following provision:

“A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States.” CLOUD Act § 103(a)(1).

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Soon thereafter, the Government obtained, pursuant to the new law, a new §2703 warrant covering the information requested in the §2703 warrant at issue in this case.

No live dispute remains between the parties over the issue with respect to which certiorari was granted. See *Department of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galisto*, 477 U. S. 556, 559 (1986). Further, the parties agree that the new warrant has replaced the original warrant. This case, therefore, has become moot. Following the Court's established practice in such cases, the judgment on review is accordingly vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions first to vacate the District Court's contempt finding and its denial of Microsoft's motion to quash, then to direct the District Court to dismiss the case as moot.

It is so ordered.

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Syllabus

JESNER ET AL. *v.* ARAB BANK, PLCCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 16–499. Argued October 11, 2017—Decided April 24, 2018

Petitioners filed suits under the Alien Tort Statute (ATS), alleging that they, or the persons on whose behalf they assert claims, were injured or killed by terrorist acts committed abroad, and that those acts were in part caused or facilitated by respondent Arab Bank, PLC, a Jordanian financial institution with a branch in New York. They seek to impose liability on the bank for the conduct of its human agents, including high-ranking bank officials. They claim that the bank used its New York branch to clear dollar-denominated transactions that benefited terrorists through the Clearing House Interbank Payments System (CHIPS) and to launder money for a Texas-based charity allegedly affiliated with Hamas. While the litigation was pending, this Court held, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, that the ATS does not extend to suits against foreign corporations when “all the relevant conduct took place outside the United States,” *id.*, at 124, but it left unresolved the Second Circuit’s broader holding in its *Kiobel* decision: that foreign corporations may not be sued under the ATS. Deeming that broader holding binding precedent, the District Court dismissed petitioners’ ATS claims and the Second Circuit affirmed.

Held: The judgment is affirmed.

808 F. 3d 144, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, concluding that foreign corporations may not be defendants in suits brought under the ATS. Pp. 253–257, 264–265, and 270–272.

(a) The Judiciary Act of 1789 included what is now known as the ATS, which provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. § 1350. The ATS is “strictly jurisdictional” and does not by its own terms provide or delineate the definition of a cause of action for international-law violations. *Sosa v. Alvarez-Machain*, 542 U. S. 692, 713–714. It was enacted against the backdrop of the general common law, which in 1789 recognized a limited category of “torts in violation of the law of nations,” *id.*, at 714; and one of its principal objectives was to avoid foreign

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entanglements by ensuring the availability of a federal forum where the failure to have one might cause another nation to hold the United States responsible for an injury to a foreign citizen, see *id.*, at 715–719. The ATS was invoked but a few times over its first 190 years, but with the evolving recognition—*e. g.*, in the Nuremberg trials—that certain crimes against humanity violate basic precepts of international law, courts began to give some redress for violations of clear and unambiguous international human-rights protections. After the Second Circuit first permitted plaintiffs to bring ATS actions based on modern human-rights laws, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), creating an express cause of action for victims of torture and extrajudicial killing in violation of international law. ATS suits became more frequent; and modern ATS litigation has the potential to involve groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. In *Sosa*, the Court held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, 542 U. S., at 732, but it explicitly held that ATS litigation implicates serious separation-of-powers and foreign-relations concerns, *id.*, at 727–728. The Court subsequently held in *Kiobel* that “the presumption against extraterritoriality applies to [ATS] claims,” 569 U. S., at 124, and that even claims that “touch and concern the territory of the United States . . . must do so with sufficient force to displace” that presumption, *id.*, at 124–125. Pp. 253–257.

(b) *Sosa* is consistent with this Court’s general reluctance to extend judicially created private rights of action. Recent precedents cast doubt on courts’ authority to extend or create private causes of action, even in the realm of domestic law, rather than leaving such decisions to the Legislature, which is better positioned “to consider if the public interest would be served by imposing a new substantive legal liability,” *Ziglar v. Abbasi*, 582 U. S. 120, 136 (internal quotation marks omitted). This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations. Thus, in *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 72, the Court concluded that Congress, not the courts, should decide whether corporate defendants could be held liable in actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388.

Neither the language of the ATS nor precedent supports an exception to these general principles in this context. Separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS, which implicates foreign-

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policy concerns that are the province of the political branches. And courts must exercise “great caution” before recognizing new forms of liability under the ATS. *Sosa, supra*, at 728. The question whether a proper application of *Sosa* would preclude courts from ever recognizing new ATS causes of action need not be decided here, for either way it would be inappropriate for courts to extend ATS liability to foreign corporations absent further action from Congress. Pp. 264–265.

(c) The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring. Petitioners are foreign nationals seeking millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank’s New York branch and a brief allegation about a charity in Texas. At a minimum, the relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank.

For 13 years, this litigation has caused considerable diplomatic tensions with Jordan, a critical ally that considers the litigation an affront to its sovereignty. And this is not the first time that a foreign sovereign has raised objections to ATS litigation in this Court. See *Sosa, supra*, at 733, n. 21. These are the very foreign-relations tensions the First Congress sought to avoid.

Nor are the courts well suited to make the required policy judgments implicated by foreign corporate liability. Like the presumption against extraterritoriality, judicial caution under *Sosa* “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.” *Kiobel, supra*, at 124. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS. Pp. 270–272.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded in Parts II–A, II–B–2, II–B–3, and III:

(a) Before recognizing an ATS common-law action, federal courts must apply the two-part test announced in *Sosa*. The threshold question is whether a plaintiff can demonstrate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U. S., at 732. Assuming that such a norm can control, it must be determined whether allowing the case to proceed under the ATS is a proper exercise

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of judicial discretion or whether caution requires the political branches to grant specific authority before corporate liability can be imposed. *Id.*, at 732–733, and nn. 20–21. With regard to the first *Sosa* question, the Court need not resolve whether corporate liability is a question governed by international law or whether that law imposes liability on corporations, because, as shown by the parties’ opposing arguments, there is at least sufficient doubt on the point to turn to *Sosa*’s second question: whether the Judiciary must defer to Congress to determine in the first instance whether that universal norm has been recognized and, if so, whether it should be enforced in ATS suits. Pp. 257–263.

(b) Especially here, in the realm of international law, it is important to look to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. The logical statutory analogy for an ATS common-law action is the TVPA—the only ATS cause of action created by Congress rather than the courts. Drafted as “an unambiguous and modern basis for [an ATS] cause of action,” H. R. Rep. No. 102–367, p. 3, the TVPA reflects Congress’ considered judgment of the proper structure for such an action. Absent a compelling justification, courts should not deviate from that model. Relevant here, the TVPA limits liability to “individuals,” a term which unambiguously limits liability to natural persons, *Mohamad v. Palestinian Authority*, 566 U. S. 449, 453–456. Congress’ decision to exclude liability for corporations in TVPA actions is all but dispositive in this case. Pp. 265–268.

(c) Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent congressional instructions. Corporate liability under the ATS has not been shown to be essential to serving that statute’s goals, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable, and plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions for the international community and for Congress. And this complexity makes it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal court. Pp. 268–270.

(d) In making its determination, Congress might decide that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that compensation for injured persons will be a cost of doing business. Or Congress could conclude that neutral judicial safeguards may not be ensured in every country and that, as a reciprocal matter, ATS liability for foreign corporations should be subject to some limitations or preconditions. Finally, Congress might find that corporate lia-

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bility should be limited to cases where a corporation's management was actively complicit in the crime. Pp. 272–274.

JUSTICE ALITO concluded that the outcome in this case is justified not only by “judicial caution” but also by the separation of powers. Assuming that *Sosa v. Alvarez-Machain*, 542 U. S. 692, correctly held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action under the ATS, this Court should not create such causes of action against foreign corporate defendants. The objective for courts in any case requiring the creation of federal common law must be “to find the rule that will best effectuate the federal policy.” *Textile Workers v. Lincoln Mills of Ala.*, 353 U. S. 448, 457. The First Congress enacted the ATS to help the United States avoid diplomatic friction. Putting that objective together with the rules governing federal common law generally, the following principle emerges: Federal courts should decline to create federal common law causes of action whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife. Applying that principle here, it is clear that courts should not create causes of action under the ATS against foreign corporate defendants. Customary international law does not generally require corporate liability, so declining to create it under the ATS cannot give other nations just cause for complaint against the United States. To the contrary, creating causes of action against foreign corporations under the ATS may instead provoke exactly the sort of diplomatic strife inimical to the statute's fundamental purpose. Pp. 274–280.

JUSTICE GORSUCH concluded that there are two more fundamental reasons why this lawsuit should be dismissed. Pp. 280–292.

(a) This Court has suggested that Congress originally enacted the ATS to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conducts extended to aliens, interference with ambassadors, and piracy. *Sosa v. Alvarez-Machain*, 542 U. S. 692, 715. Here, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute's adoption, one that Congress has never authorized. They find support in a passage suggesting that the ATS may afford federal judges “discretion [to] conside[r] [creating] new cause[s] of action” if they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three specified] 18th-century” torts. *Id.*, at 725. This is doubtful, for the people's elected representatives, not judges, make the laws that govern them. But even accepting *Sosa's* framework, a proper application of that framework would preclude courts from recognizing any

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new causes of action under the ATS. When courts are confronted with a request to fashion a new cause of action, “separation-of-powers principles are or should be central to the analysis.” *Ziglar v. Abbasi*, 582 U.S. 120, 135. The first and most important question is whether Congress or the courts should decide, and the right answer “most often will be Congress.” *Ibid.* There is no reason to make a special exception for the ATS, which was designed as “a jurisdictional statute creating no new causes of action.” *Sosa*, 542 U.S., at 724. The context in which any *Sosa* discretion would be exercised confirms the wisdom of restraint. The “practical consequences” that might follow a decision to create a new ATS cause of action, see *id.*, at 732–733, would likely involve questions of foreign affairs and national security—matters implicating the expertise and authority not of the Judiciary but of the political branches. Pp. 281–285.

(b) Another independent problem is that this suit is by foreigners against a foreigner over the meaning of international norms. The original understanding of the ATS, which was but one clause in one section of the Judiciary Act of 1789, likely would have required a domestic defendant in order to comply with the requirements of the diversity-of-citizenship clause of Article III. Precedent interpreting a neighboring provision of the Judiciary Act confirms that conclusion. See *Mossmann v. Higginson*, 4 Dall. 12, 14. In any event, separation-of-powers limits on the judicial function and deference to the political branches should lead federal courts to require a domestic defendant before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit. Pp. 285–292.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B-1, and II-C, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined, and an opinion with respect to Parts II-A, II-B-2, II-B-3, and III, in which ROBERTS, C. J., and THOMAS, J., joined. THOMAS, J., filed a concurring opinion, *post*, p. 274. ALITO, J., *post*, p. 274, and GORSUCH, J., *post*, p. 280, filed opinions concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 293.

Jeffrey L. Fisher argued the cause for petitioners. With him on the briefs were *David T. Goldberg*, *Pamela S. Karlan*, *Jenny S. Martinez*, *Michael E. Elsner*, *John M. Eubanks*, *Jodi Westbrook Flowers*, and *Mark Werbner*.

Counsel

Brian H. Fletcher argued the cause for the United States as *amicus curiae* urging vacatur. On the brief were *Deputy Solicitor General Kneeder, Acting Assistant Attorney General Readler, Deputy Assistant Attorney General Mooppan, Eric J. Feigin, Douglas N. Letter, Sharon Swingle, and Melissa N. Patterson.*

Paul D. Clement argued the cause for respondent. With him on the brief were *Erin E. Murphy, Edmund G. LaCour, Jr., and Jonathan Siegfried.**

*Briefs of *amici curiae* urging reversal were filed for Canadian International and National Security Law Scholars by *Carey R. D'Avino*; for Comparative Law Scholars et al. by *Agnieszka M. Fryszman*; for the Constitutional Accountability Center by *Brianne J. Gorod, Elizabeth B. Wydra, and David H. Gans*; for Earthrights International by *Richard L. Herz and Marco B. Simons*; for Financial Regulation Scholars et al. by *Deepak Gupta*; for Former U. S. Counterterrorism and National Security Officials by *Hyland Hunt, Ruthanne M. Deutsch, and Elizabeth J. Cabraser*; for the Interfaith Center on Corporate Responsibility et al. by *Daniel M. Rosenthal, Nicole G. Berner, and Claire Prestel*; for International Law Scholars by *William S. Dodge*; for Nuremberg Scholars by *Elizabeth Van Schaack*; for Procedural and Corporate Law Professors by *Amy J. Wildermuth and Burt Neuborne*; for the Yale Law School Center for Global Legal Challenges by *Oona A. Hathaway*; for Barbara Aronstein Black et al. by *Sarah P. Alexander, Tyler R. Giannini, and Susan H. Farbstein*; for Jack Bloom et al. by *Jerry S. Goldman, Bruce Strong, and Jeffrey E. Glen*; for David J. Scheffer by *Mr. Scheffer, pro se*; and for Thomas Schoenbaum et al. by *George Rutherglen, Toby J. Heytens, Daniel R. Ortiz, Mr. Schoenbaum, and Joel Samuels, all pro se*; and for Sen. Sheldon Whitehouse et al. by *Peter Margulies.*

Briefs of *amici curiae* urging affirmance were filed for the Central Bank of Jordan by *William E. White*; for Former State Department Officials by *Michael K. Kellogg and Geoffrey M. Klineberg*; for the Hashemite Kingdom of Jordan by *Neal Kumar Katyal and Jessica L. Ellsworth*; for the Institute of International Bankers by *Richard C. Pepperman II and H. Rodgin Cohen*; for Professors of International Law et al. by *Samuel Estreicher, pro se*; and for the Union of Arab Banks by *Douglas Hallward-Driemeier.*

Briefs of *amici curiae* were filed for the Center for Constitutional Rights et al. by *Katherine Gallagher, Baher Azmy, and Beth Stephens;*

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JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B-1, and II-C, and an opinion with respect to Parts II-A, II-B-2, II-B-3, and III, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

Petitioners in this case, or the persons on whose behalf petitioners now assert claims, allegedly were injured or killed by terrorist acts committed abroad. Those terrorist acts, it is contended, were in part caused or facilitated by a foreign corporation. Petitioners now seek to impose liability on the foreign corporation for the conduct of its human agents, including its then-chairman and other high-ranking management officials. The suits were filed in a United States District Court under the Alien Tort Statute, commonly referred to as the ATS. See 28 U. S. C. § 1350.

The foreign corporation charged with liability in these ATS suits is Arab Bank, PLC; and it is respondent here. Some of Arab Bank's officials, it is alleged, allowed the bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing the deaths or injuries for which petitioners now seek compensation. Petitioners seek to prove Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.

It is assumed here that those individuals who inflicted death or injury by terrorism committed crimes in violation of well-settled, fundamental precepts of international law, precepts essential for basic human-rights protections. It is assumed as well that individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes under the same international-law prohibitions.

and for the Chamber of Commerce of the United States of America et al. by *Jonathan D. Hacker* and *Anton Metlitsky*.

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Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.

The answer turns upon the proper interpretation and implementation of the ATS. The statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” §1350. The Court must first ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees. The Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so.

I

A

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-terrorism Act of 1990, 18 U. S. C. §2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. Ac-

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According to the Kingdom of Jordan, Arab Bank “accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange.” Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 2. Petitioners allege that Arab Bank helped finance attacks by Hamas and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners’ allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

Foreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another. Arab Bank and certain *amici* point out that CHIPS transactions are enormous both in volume and in dollar amounts. The transactions occur predominantly in the United States but are used by major banks both in the United States and abroad. The CHIPS system is used for dollar-denominated transactions and for transactions where the dollar is used as an intermediate currency to facilitate a currency exchange. Brief for Institute of International Bankers as *Amicus Curiae* 12–13, and n. 8. In New York each day, on average, about 440,000 of these transfers occur, in dollar amounts totaling about \$1.5 trillion. *Id.*, at 14. The “clearance activity is an entirely mechanical function; it occurs without human intervention in the proverbial ‘blink of an eye.’” *Ibid.* There seems to be no dispute that the speed and volume of these transactions are such that individual supervision is simply not a systemic reality. As noted below, substantial regulations govern these transactions, both in the United States and in Jordan.

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In addition to the dollar-clearing transactions, petitioners allege that Arab Bank's New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010). That suit worked its way through the trial court and the Court of Appeals for the Second Circuit. The *Kiobel* litigation did not involve banking transactions. Its allegations were that holding companies incorporated in the Netherlands and the United Kingdom had, through a Nigerian subsidiary, aided and abetted the Nigerian Government in human-rights abuses. *Id.*, at 123. In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. *Id.*, at 120. This Court granted certiorari. *Kiobel v. Royal Dutch Petroleum Co.*, 565 U. S. 961 (2011).

After additional briefing and reargument, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 114, 124–125 (2013). The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that “all the relevant conduct took place outside the United States.” *Id.*, at 124. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the

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ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners'-ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F. 3d 144 (2015). This Court granted certiorari in the instant case. 581 U.S. 904 (2017).

Since the Court of Appeals relied on its *Kiobel* holding in the instant case, it is instructive to begin with an analysis of that decision. The majority opinion in *Kiobel*, written by Judge Cabranes, held that the ATS does not apply to alleged international-law violations by a corporation. 621 F. 3d, at 120. Judge Cabranes relied in large part on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons. *Id.*, at 132–137.

Judge Leval filed a separate opinion. He concurred in the judgment on other grounds but disagreed with the proposition that the foreign corporation was not subject to suit under the ATS. *Id.*, at 196. Judge Leval conceded that “international law, of its own force, imposes no liabilities on corporations or other private juridical entities.” *Id.*, at 186. But he reasoned that corporate liability for violations of international law is an issue of “civil compensatory liability” that international law leaves to individual nations. *Ibid.* Later decisions in the Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under the ATS. See *Flomo v. Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011); *Doe I v. Nestle USA, Inc.*, 766 F. 3d 1013, 1020–1022 (CA9 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F. 3d 11, 40–55 (CA DC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CA DC 2013). The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it.

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With this background, it is now proper to turn to the history of the ATS and the decisions interpreting it.

B

Under the Articles of Confederation, the Continental Congress lacked authority to “‘cause infractions of treaties, or of the law of nations to be punished.’” *Sosa v. Alvarez-Machain*, 542 U. S. 692, 716 (2004) (quoting J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893)). The Continental Congress urged the States to authorize suits for damages sustained by foreign citizens as a result of violations of international law; but the state courts’ vindication of the law of nations remained unsatisfactory. Concerns with the consequent international-relations tensions “persisted through the time of the Constitutional Convention.” 542 U. S., at 717.

Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems. In 1784, the French Minister lodged a protest with the Continental Congress after a French adventurer, the Chevalier de Longchamps, assaulted the Secretary of the French Legation in Philadelphia. See *Kiobel*, 569 U. S., at 120. A few years later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants. *Ibid.* Under the Articles of Confederation, there was no national forum available to resolve disputes like these under any binding laws that were or could be enacted or enforced by a central government.

The Framers addressed these matters at the 1787 Philadelphia Convention; and, as a result, Article III of the Constitution extends the federal judicial power to “all Cases affecting Ambassadors, other public ministers and Consuls,” and “to controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” §2. The First Congress passed a statute to implement these provisions: The Judiciary Act of 1789 authorized federal jurisdic-

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tion over suits involving disputes between aliens and United States citizens and suits involving diplomats. §§9, 11, 1 Stat. 76–79.

The Judiciary Act also included what is now the statute known as the ATS. §9, *id.*, at 76. As noted, the ATS is central to this case and its brief text bears repeating. Its full text is: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350.

The ATS is “strictly jurisdictional” and does not by its own terms provide or delineate the definition of a cause of action for violations of international law. *Sosa*, 542 U. S., at 713–714. But the statute was not enacted to sit on a shelf awaiting further legislation. *Id.*, at 714. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of “torts in violation of the law of nations.” *Ibid.*

In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances it governed individual conduct occurring outside national borders (for example, “disputes relating to prizes, to shipwrecks, to hostages, and ransom bills”). *Id.*, at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which “rules binding individuals for the benefit of other individuals overlapped with” the rules governing the relationships between nation-states. *Id.*, at 715. As understood by Blackstone, this domain included “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Ibid.* (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS.” 542 U. S., at 715.

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This history teaches that Congress drafted the ATS “to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” *Id.*, at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. See *id.*, at 715–719; *Kiobel*, 569 U. S., at 123–124.

Over the first 190 years or so after its enactment, the ATS was invoked but a few times. Yet with the evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international human-rights protections that are clear and unambiguous. In the modern era this began with the decision of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980).

In *Filartiga*, it was alleged that a young man had been tortured and murdered by Paraguayan police officers, and that an officer named Pena-Irala was one of the supervisors and perpetrators. Some members of the victim’s family were in the United States on visas. When they discovered that Pena-Irala himself was living in New York, they filed suit against him. The action, seeking damages for the suffering and death he allegedly had caused, was filed in the United States District Court for the Eastern District of New York. The Court of Appeals found that there was jurisdiction under the ATS. For this holding it relied upon the universal acknowledgment that acts of official torture are contrary to the law of nations. *Id.*, at 890. This Court did not review that decision.

In the midst of debates in the courts of appeals over whether the court in *Filartiga* was correct in holding that plaintiffs could bring ATS actions based on modern human-rights laws absent an express cause of action created by an

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additional statute, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. § 1350. H. R. Rep. No. 102–367, pp. 3–4 (1991) (H. R. Rep.) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CA DC 1984)); S. Rep. No. 102–249, pp. 3–5 (1991) (S. Rep.) (same). The TVPA—which is codified as a note following the ATS—creates an express cause of action for victims of torture and extrajudicial killing in violation of international law.

After *Filartiga* and the TVPA, ATS lawsuits became more frequent. Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. For example, in *Kiobel* the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for alleged crimes in Nigeria. 569 U. S., at 111–112. The extent and scope of this litigation in United States courts have resulted in criticism here and abroad. See *id.*, at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

In *Sosa*, the Court considered the question whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U. S., at 730–731. The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the “historical paradigms familiar when § 1350 was enacted.” 542 U. S., at 732. The Court was quite explicit, however, in holding that ATS litigation implicates serious separation-of-powers and foreign-relations concerns. *Id.*, at 727–728. Thus, ATS claims must be “subject to vigilant doorkeeping.” *Id.*, at 729.

This Court next addressed the ATS in *Kiobel*, the case already noted. There, this Court held that “the presumption against extraterritoriality applies to claims under the

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ATS, and that nothing in the statute rebuts the presumption.” 569 U. S., at 124. The Court added that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Id.*, at 124–125.

II

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court’s holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various *amici* urge this as a rationale to affirm here, while the Government argues that the Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa*. An initial, threshold question is whether a plaintiff can demon-

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strate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U. S., at 732 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See *id.*, at 732–733, and nn. 20–21. “[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.*, at 727.

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law.

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The dispute centers on a footnote in *Sosa*. In the course of holding that international norms must be “sufficiently definite to support a cause of action,” the Court in *Sosa* noted that a “related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Id.*, at 732, and n. 20.

In the Court of Appeals’ decision in *Kiobel*, the majority opinion by Judge Cabranes interpreted footnote 20 to mean that corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law. 621 F. 3d, at 127. In Judge Cabranes’ view, “[i]nternational law is not silent on the question of the *subjects* of international law—that is, those that, to varying extents, have legal status, personality, rights, and *duties* under international law,” “[n]or does international law leave to individual States the responsibility of defining those subjects.” *Id.*, at 126 (internal quotation marks omitted). There is considerable force and weight to the position articulated by Judge Cabranes. And, assuming the Court of Appeals was correct that under *Sosa* corporate liability is a question of international law, there is an equally strong argument that petitioners cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations. Indeed, Judge Leval agreed with the conclusion that international law does “not provide for any form of liability of corporations.” *Kiobel*, 621 F. 3d, at 186.

1

In modern times, there is no doubt, of course, that “the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights,” leading “the nations of the world to recognize that respect for fundamental human rights is in their individual

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and collective interest.” *Filartiga*, 630 F. 2d, at 890. That principle and commitment support the conclusion that human-rights norms must bind the individual men and women responsible for committing humanity’s most terrible crimes, not just nation-states in their interactions with one another. “The singular achievement of international law since the Second World War has come in the area of human rights,” where international law now imposes duties on individuals as well as nation-states. *Kiobel*, 621 F. 3d, at 118.

It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.

The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. See Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, Aug. 8, 1945, 59 Stat. 1547, E. A. S. No. 472. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, pp. 11–60 (1952) (*The Farben Case*). Among other crimes, Farben’s employees had operated a slave-labor camp at Auschwitz and “knowingly and intentionally manufactured and provided” the poison gas used in the Nazi death chambers. *Kiobel*, 621 F. 3d, at 135. Although the Military Tribunal “used the term ‘Farben’ as descriptive of the instrumentality of cohesion in the name of which” the crimes were committed, the Tribunal noted that “corporations act through individuals.” 8 *The Farben Case*, at 1153. Farben itself was not held liable. See *ibid.*

The jurisdictional reach of more recent international tribunals also has been limited to “natural persons.” See Statute

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of the International Criminal Tribunal for the Former Yugoslavia, S. C. Res. 827 (May 25, 1993), adopting U. N. Secretary-General Rep. Pursuant to Paragraph 2 of Security Council Resolution 808, Art. 6, U. N. Doc. S/25704 (May 3, 1993); Statute of the International Tribunal for Rwanda, Art. 5, S. C. Res. 955, Art. 5 (Nov. 8, 1994). The Rome Statute of the International Criminal Court, for example, limits that tribunal's jurisdiction to "natural persons." See Rome Statute of the International Criminal Court, Art. 25(1), July 17, 1998, 2187 U. N. T. S. 105. The drafters of the Rome Statute considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations. Eser, *Individual Criminal Responsibility*, in 1 *Rome Statute of the International Criminal Court* 767, 778–779 (A. Cassese et al. eds. 2002).

The international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.

2

In light of the sources just discussed, the sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position.

Petitioners first point to the International Convention for the Suppression of the Financing of Terrorism. This Convention imposes an obligation on "Each State Party" "to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity," violated the Convention. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 232. But by its terms the Convention imposes its obligations only on nation-

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states “to enable” corporations to be held liable in certain circumstances under domestic law. The United States and other nations, including Jordan, may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions. See, *e. g.*, 18 U. S. C. § 2333(a) (private right of action under the Antiterrorism Act); 31 U. S. C. § 5311 *et seq.* (Bank Secrecy Act); 31 CFR pt. 595 (2017) (Terrorism Sanctions Regulations); Brief for Central Bank of Jordan as *Amicus Curiae* 5 (describing Jordan’s “comprehensive approach to preventing money laundering and terrorist financing”). The Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention’s text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.

In addition, petitioners and their *amici* cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. *E. g.*, Brief for Petitioners 50–51. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.

It must be remembered that international law is distinct from domestic law in its domain as well as its objectives. International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators “enem[ies] of all mankind.” *Sosa*, 542 U. S., at 732 (internal quotation marks omitted). In the American legal system, of course, corporations are often subject to liability for the conduct of their human employees, and so it may seem necessary and natural

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that corporate entities are liable for violations of international law under the ATS. It is true, furthermore, that the enormity of the offenses that can be committed against persons in violation of international human-rights protections can be cited to show that corporations should be subject to liability for the crimes of their human agents. But the international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*. Indeed, there is precedent to the contrary in the statement during the Nuremberg proceedings that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *The Nurnberg Trial*, 6 F. R. D. 69, 110 (1946).

Petitioners also contend that international law leaves questions of remedies open for determination under domestic law. As they see it, corporate liability is a remedial consideration, not a substantive principle that must be supported by a universal and obligatory norm if it is to be implemented under the ATS. According to petitioners, footnote 20 in *Sosa* does no more than recognize the distinction in international law between state and private actors. But, as just explained, there is a similar distinction in international law between corporations and natural persons. And it is far from obvious why the question whether corporations may be held liable for the international crimes of their employees is a mere question of remedy.

In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to *Sosa*’s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

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B

1

Sosa is consistent with this Court’s general reluctance to extend judicially created private rights of action. The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” 542 U. S., at 727 (citing *Correc-tional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U. S. 275, 286–287 (2001)). That is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Ziglar v. Abbasi*, 582 U. S. 120, 136 (2017) (internal quotation marks omitted). Thus, “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress.” *Id.*, at 137.

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. Thus, in *Malesko* the Court held that corporate defendants may not be held liable in *Bivens* actions. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Allowing corporate liability would have been a “marked extension” of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for “engaging in unconstitutional wrongdoing.” *Malesko*, 534 U. S., at 74. Whether corporate defendants should be subject to suit was “a question for Congress, not us, to decide.” *Id.*, at 72.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns

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that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See *infra*, at 270–272. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See *Kiobel*, 569 U. S., at 116–117. That the ATS implicates foreign relations “is itself a reason for a high bar to new private causes of action for violating international law.” *Sosa*, *supra*, at 727.

In *Sosa*, the Court emphasized that federal courts must exercise “great caution” before recognizing new forms of liability under the ATS. 542 U. S., at 728. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress, it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. See, e. g., *Miles v. Apex Marine Corp.*, 498 U. S. 19, 24 (1990); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 736 (1975). Doing so is even more important in the realm of international law, where “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” *Sosa*, *supra*, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to “establish an unambiguous and modern basis for a cause of action” under the ATS. H. R. Rep., at 3; S. Rep., at 4. Congress took care to delineate the TVPA’s boundaries. In

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doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. *Kiobel*, 569 U. S., at 117. In *Kiobel*, the Court recognized that “[e]ach of these decisions carries with it significant foreign policy implications.” *Ibid.* The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to “individuals,” which, the Court has held, unambiguously limits liability to natural persons. *Mohamad v. Palestinian Authority*, 566 U. S. 449, 453–456 (2012). Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it “would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.” *Sosa*, *supra*, at 726.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to “individuals” out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation’s employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

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At least two flaws inhere in this argument. First, in *Mohamad* the Court unanimously rejected petitioners' account of the TVPA's legislative history. 566 U. S., at 453, 458–460. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id.*, at 459–460 (citing Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U. S., at 461–462 (BREYER, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for “aiding and abetting the Nigerian Government in committing,” among other things, “crimes against humanity.” 569 U. S., at 114; see also, *e. g.*, *Sarei v. Rio Tinto, PLC*, 671 F. 3d 736, 761–763 (CA9 2011) (en banc) (corporate defendant allegedly used Papua New Guinea's military to commit genocide), vacated and remanded, 569 U. S. 945 (2013).

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Antiterrorism Act. That Act does permit suits against corporate entities. See 18 U. S. C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Antiterrorism Act. But the Antiterrorism Act provides a cause of action only to “national[s] of the United States” and their “estate, survivors, or heirs.” § 2333(a). In contrast, the ATS is available only for claims brought by “an alien.” 28 U. S. C. § 1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Antiterrorism Act is relevant, it suggests that there should be no common-law

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action under the ATS for allegations like petitioners'. Otherwise, foreign plaintiffs could bypass Congress' express limitations on liability under the Antiterrorism Act simply by bringing an ATS lawsuit. The Antiterrorism Act, as mentioned above, is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing. The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

In any event, even if the Antiterrorism Act were a suitable model for an ATS suit, Congress' decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

3

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, *e. g.*, 18 U.S.C. § 1091 (criminal prohibition on genocide); § 1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. If the Court were to hold that foreign corporations have lia-

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bility for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international law by itself forecloses petitioners' claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA's limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle "would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations." *Kiobel*, 569 U. S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc. v. Ntsebeza*, O. T. 2007, No. 07-919, p. 20 (internal quotation marks omitted).

In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including

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in developing economies where the host government might have a history of alleged human-rights violations or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.

It is also true, of course, that natural persons can and do use corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with “the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.” *Kiobel*, 569 U.S., at 116 (internal quotation marks omitted). As noted further below, there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability. And, as the TVPA illustrates, Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way.

C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as *Amicus Curiae* 7. But here, and in similar cases, the opposite is occurring.

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Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to "touch and concern" the United States under *Kiobel*. See 569 U. S., at 124–125.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has "caused significant diplomatic tensions" with Jordan, a critical ally in one of the world's most sensitive regions. Brief for United States as *Amicus Curiae* 30. "Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria." *Id.*, at 31. The United States explains that Arab Bank itself is "a constructive partner with the United States in working to prevent terrorist financing." *Id.*, at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a "grave affront" to its sovereignty. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 3; see *ibid.* ("By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan's economy and undermine its cooperation with the United States").

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. *Sosa*, 542 U. S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland et al. as *Amici Curiae*

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in No. 10–1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

Like the presumption against extraterritoriality, judicial caution under *Sosa* “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.” *Kiobel*, 569 U. S., at 124. If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of *Sosa* would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The political branches can determine, referring to international law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation’s courts and, conversely, that courts in other countries should be able to hold United States corporations liable. Congress might determine that violations of in-

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ternational law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business. If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate.

It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge. These delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would, once again, also be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law. All this underscores the important separation-of-powers concerns that require the Judiciary to refrain from making these kinds of decisions under the ATS. The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.

Finally, Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code § 2.07(1)(c) (1985) (a corporation may be held criminally liable

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where “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment”). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination.

These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full because it correctly applies our precedents. I also agree with the points raised by my concurring colleagues. Courts should not be in the business of creating new causes of action under the Alien Tort Statute, see *post*, at 281–285 (GORSUCH, J., concurring in part and concurring in judgment), especially when it risks international strife, see *post*, at 276–280 (ALITO, J., concurring in part and concurring in judgment). And the Alien Tort Statute likely does not apply to suits between foreign plaintiffs and foreign defendants. See *post*, at 285–292 (opinion of GORSUCH, J.).

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

Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent. As a result, I agree with the Court that we

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should not take that step, and I join Parts I, II–B–1, and II–C of the opinion of the Court. I write separately to elaborate on why that outcome is compelled not only by “judicial caution,” *ante*, at 272 (majority opinion), but also by the separation of powers.

I

The ATS is a jurisdictional statute. It provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. § 1350. By its terms, the ATS does not create any causes of action.

In *Sosa v. Alvarez-Machain*, 542 U. S. 692 (2004), however, this Court nevertheless held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS. That holding takes some explaining.

According to *Sosa*, when the First Congress enacted the ATS in 1789, it assumed that the statute would “have practical effect the moment it became law” because the general common law “would provide a cause of action for [a] modest number of international law violations.” *Id.*, at 724. That assumption, however, depended on the continued existence of the general common law. And in 1938—a century and a half after Congress enacted the ATS—this Court rejected the “fallacy” underlying the general common law, declaring definitively that “[t]here is no federal general common law.” *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, 79 (1938). That left the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more.

In *Sosa*, this Court did its best to resolve that problem. “[I]t would be unreasonable to assume,” the Court explained, “that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the [general] common law might lose

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some metaphysical cachet on the road to modern realism.” 542 U.S., at 730. Although the general common law was gone, the Court concluded, federal courts could still exercise their authority to create so-called “federal common law” for those “‘few and restricted’” areas “in which Congress has given the courts the power to develop substantive law.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). *Sosa* interpreted the ATS as conferring such authorization.

As a result, *Sosa* held that federal courts, subject to certain conditions, may “recognize private causes of action [under the ATS] for certain torts in violation of the law of nations.” 542 U.S., at 724. But before doing so, *Sosa* stressed, courts should follow a two-step process. First, they should ensure that the contemplated cause of action reflects an international law norm that is “‘specific, universal and obligatory.’” *Id.*, at 732. Second, if a suitable norm is identified, federal courts should decide whether there is any other reason to limit “the availability of relief.” *Id.*, at 733, n. 21.

II

For the reasons articulated by Justice Scalia in *Sosa* and by JUSTICE GORSUCH today, I am not certain that *Sosa* was correctly decided. See *id.*, at 739–751 (Scalia, J., dissenting); *post*, at 282–285 (GORSUCH, J., concurring in part and concurring in judgment). But even taking that decision on its own terms, this Court should not create causes of action under the ATS against foreign corporate defendants. As part of *Sosa*’s second step, a court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife. Properly applied, that rule easily resolves the question presented by this case.*

*Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS. And since such a suit may generally be brought in fed-

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Sosa interpreted the ATS to authorize the federal courts to create causes of action as a matter of federal common law. We have repeatedly emphasized that “in fashioning federal [common law] principles to govern areas left open by Congress, our function is to effectuate congressional policy.” *United States v. Kimbell Foods, Inc.*, 440 U. S. 715, 738 (1979). Fidelity to congressional policy is not only prudent but necessary: Going beyond the bounds of Congress’s authorization would mean unconstitutionally usurping part of the “legislative Powers.” U. S. Const., Art. I, § 1. Accordingly, the objective for courts in every case requiring the creation of federal common law must be “to find the rule that will best effectuate the federal policy.” *Textile Workers v. Lincoln Mills of Ala.*, 353 U. S. 448, 457 (1957).

The ATS was meant to help the United States avoid diplomatic friction. The First Congress enacted the law to provide a forum for adjudicating that “narrow set of violations of the law of nations” that, if left unaddressed, “threaten[ed] serious consequences” for the United States. *Sosa*, 542 U. S., at 715; see also Brief for Professors of International Law et al. as *Amici Curiae* 7–12. Specifically, the First Congress was concerned about offenses like piracy, violation of safe conducts, and infringement of the rights of ambassadors, each of which “if not adequately redressed could rise to an issue of war.” *Sosa, supra*, at 715. That threat was existentially terrifying for the young Nation. See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 123–124 (2013). To minimize the danger, the First Congress enacted the ATS, “ensur[ing] that the United States could provide a forum for adjudicating such incidents” and thus helping the Nation avoid further diplomatic imbroglios. *Id.*, at 124; see *ante*, at 270 (majority opinion).

Putting that objective together with the rules governing federal common law generally, the following principle

eral court based on diversity jurisdiction, 28 U. S. C. § 1332(a)(2), it is unclear why ATS jurisdiction would be needed in that situation.

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emerges: Federal courts should decline to create federal common law causes of action under *Sosa*'s second step whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife. And applying that principle here, it is clear that federal courts should not create causes of action under the ATS against foreign corporate defendants. All parties agree that customary international law does not *require* corporate liability as a general matter. See Brief for Petitioners 30; Brief for Respondent 22; see also *ante*, at 263 (plurality opinion); *post*, at 294–296 (SOTOMAYOR, J., dissenting). But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

To the contrary, ATS suits against foreign corporations may provoke—and, indeed, frequently *have* provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS. Some foreign states appear to interpret international law as foreclosing civil corporate liability for violations of the law of nations. See Brief for Government of the United Kingdom et al. as *Amici Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 14. Creating ATS causes of action against foreign corporate defendants would put the United States at odds with these nations. Even when states do not object to this sort of corporate liability as a *legal* matter, they may be concerned about ATS suits against their corporations for political reasons. For example, Jordan considers this suit “a direct affront” to its sovereignty and one that “risks destabilizing Jordan’s economy and undercutting one of the most stable and productive alliances the United States has in the Middle East.” Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 4. Courting these sorts of problems—which seem endemic to ATS litigation—was the opposite of what the First Congress had in mind.

In response, the dissent argues merely that any diplomatic friction “can be addressed with a tool more tailored to the

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source of the problem than a blanket ban on corporate liability.” *Post*, at 310. Even on its own terms, that argument is problematic: Many of the “more tailored” tools offered by the dissent will still be hotly litigated by ATS plaintiffs, and it may be years before incorrect initial decisions about their applicability can be reviewed by the courts of appeals. See *ante*, at 257 (plurality opinion).

In any event, the dissent misunderstands the relevant standard. The question before us is whether the United States would be embroiled in fewer international controversies if we created causes of action under the ATS against foreign corporate defendants. Unless corporate liability would actively *decrease* diplomatic disputes, we have no authority to act. On that score, the dissent can only speculate that declining to create causes of action against foreign corporate defendants “might” lead to diplomatic friction. *Post*, at 321. But the dissent has no real-world examples to support its hunch, and that is not surprising; the ATS already goes further than any other statute in the world in granting aliens the right to sue civilly for violations of international law, especially in light of the many other avenues for relief available. See *ante*, at 268 (plurality opinion). It would be rather rich for any other nation to complain that the ATS does not go far enough. Indeed, no country has.

Finally, the dissent invokes “the considered judgment of the Executive Branch and Congress” that ATS suits against foreign corporations are “necessary ‘to help the United States avoid diplomatic friction.’” *Post*, at 321, n. 13. Tellingly, however, the dissent cannot muster a single source that actually supports that bold contention. Instead, the dissent immediately retreats to two far more modest assertions. First, the dissent observes that the Executive Branch has twice suggested that this Court should allow causes of action against corporate defendants under the ATS. But both times the Executive Branch defended that perspective primarily under the first step of *Sosa*; here, however, we are dealing with *Sosa*’s second step, and with the risk

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of diplomatic friction in particular. Second, the dissent also notes that the Executive Branch and Congress have each taken steps to hold corporations liable for certain acts like terrorism. *Post*, at 321, n. 13. That is, of course, true, but it is also entirely irrelevant. Congress and the Executive Branch may be willing to trade off the risk of some diplomatic friction in exchange for the promotion of other objectives (such as “holding foreign corporations to account for certain egregious conduct,” *ibid.*). That is their prerogative as the political branches. But consistent with the separation of powers, we have neither the luxury nor the right to make such policy decisions ourselves.

Creating causes of action under the ATS against foreign corporate defendants would be a no-win proposition. Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those “serious consequences in international affairs” that the ATS was enacted to avoid. *Sosa*, 542 U.S., at 715. Under those circumstances, federal courts have a duty to refrain from acting. Although that may make it more difficult for aliens to hold foreign corporations liable for human rights abuses, we have repeatedly rejected the view that the ATS was meant to transform the federal courts into forums for the litigation of all human rights suits. See *ante*, at 254–255, 270–272 (majority opinion); *Kiobel*, 569 U.S., at 123–124; *Sosa*, *supra*, at 715–718. Declining to extend the ATS to foreign corporate defendants is thus not about “[i]mmunizing corporations that violate human rights,” *post*, at 324, but rather about furthering the purpose that the ATS was actually meant to serve—avoiding diplomatic strife.

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

I am pleased to join the Court’s judgment and Parts I, II–B–1, and II–C of its opinion. Respectfully, though, I believe there are two more fundamental reasons why this lawsuit

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must be dismissed. A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. And we should not meddle in disputes between foreign citizens over international norms. I write because I am hopeful that courts in the future might pause to consider both of these reasons for restraint before taking up cases like this one. Whatever powers courts may possess in ATS suits, they are powers judges should be doubly careful not to abuse.

I

First adopted in 1789, the current version of the ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. § 1350. More than 200 years later, the meaning of this terse provision has still “proven elusive.” *Sosa v. Alvarez-Machain*, 542 U. S. 692, 719 (2004). At the same time, this Court has suggested that Congress enacted the statute to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conducts extended to aliens, interference with ambassadors, and piracy. *Id.*, at 715; 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (Blackstone); see also Bellia & Clark, *The Alien Tort Statute and the Law of Nations*,

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78 U. Chi. L. Rev. 445 (2011) (arguing that the ATS meant to supply jurisdiction over a slightly larger set of claims involving intentional torts by Americans against aliens).

In this case, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute's adoption, one that Congress has never authorized. While their request might appear inconsistent with *Sosa's* explanation of the ATS's modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may *also* afford federal judges "discretion [to] conside[r creating] new cause[s] of action" if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century" torts the Court already described. 542 U. S., at 725.

I harbor serious doubts about *Sosa's* suggestion. In our democracy the people's elected representatives make the laws that govern them. Judges do not. The Constitution's provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, "separation-of-powers principles are or should be central to the analysis." *Ziglar v. Abbasi*, 582 U. S. 120, 135 (2017). The first and most important question in that analysis "is 'who should decide' . . . , Congress or the courts?" and the right answer "most often will be Congress." *Ibid.* Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts. Adopting new causes of action may have been a "proper function for common-law courts," but it is not appropriate "for

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federal tribunals” mindful of the limits of their constitutional authority. *Alexander v. Sandoval*, 532 U. S. 275, 287 (2001) (internal quotation marks omitted).

Nor can I see any reason to make a special exception for the ATS. As *Sosa* initially acknowledged, the ATS was designed as “a jurisdictional statute creating no new causes of action.” 542 U. S., at 724; accord, *ante*, at 254 (majority opinion). And I would have thought that the end of the matter. A statute that creates no new causes of action . . . creates no new causes of action. To the extent *Sosa* continued on to claim for federal judges the discretionary power to create new forms of liability on their own, it invaded terrain that belongs to the people’s representatives and should be promptly returned to them. 542 U. S., at 747 (Scalia, J., concurring in part and concurring in judgment).¹

But even accepting *Sosa*’s framework does not end the matter. As the Court acknowledges, there is a strong argument that “a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS.” *Ante*, at 265. I believe that argument is correct. For the reasons just described, separation-of-powers considerations ordinarily require us to defer to Congress in the creation of new forms of liability. This Court hasn’t yet used *Sosa*’s assertion of discretionary authority to recognize a new cause of action, and I cannot imagine a sound reason, hundreds of years after the statute’s passage, to start now.

¹The dissent claims that Congress’s decision to give federal courts “jurisdiction over claims based on ‘the law of nations’” necessarily implies the authority to develop that law. *Post*, at 307. That does not follow. Federal courts have *jurisdiction* over all kinds of cases—for example, those arising under the law of torts or contracts. Yet following our decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), federal courts are generally no longer permitted to promulgate new federal common law causes of action in those areas. *Id.*, at 75. I can see no reason to treat the law of nations differently. See *Sosa v. Alvarez-Machain*, 542 U. S. 692, 744–746 (2004) (Scalia, J., concurring in part and concurring in judgment).

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For a court inclined to claim the discretion to enter this field, it is a discretion best exercised by staying out of it.

The context in which any *Sosa* discretion would be exercised confirms the wisdom of restraint. *Sosa* acknowledged that any decision to create a new cause of action would “inevitably [involve] an element of judgment about the practical consequences” that might follow. 542 U. S., at 732. But because the point of such a claim would be to vindicate “a norm of international character,” *id.*, at 725, those “practical consequences” would likely involve questions of foreign affairs and national security—matters that implicate neither judicial expertise nor authority. It is for Congress to “define and punish . . . Offences against the Law of Nations” and to regulate foreign commerce. U. S. Const., Art. I, § 8. And it is for the President to resolve diplomatic disputes and command the Armed Forces. Art. II, §§ 2–3. Foreign policy and national security decisions are “delicate, complex, and involve large elements of prophecy” for which “the Judiciary has neither aptitude, facilities[,] nor responsibility.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948) (Jackson, J.). And I find it difficult to imagine a case in which a federal court might safely conclude otherwise. Take this very lawsuit by way of example. The Kingdom of Jordan considers it to be “a ‘grave affront’ to its sovereignty,” and the State Department worries about its foreign policy implications. *Ante*, at 271. Whether American interests justify the “practical consequence” of offending another nation in this way (or in worse ways yet) is a question that should be addressed “only by those directly responsible to the people whose welfare” such decisions “advance or imperil.” *Waterman S. S. Corp.*, *supra*, at 111. So while I have no quarrel with the dissent’s observation, *post*, at 306–307, that lower federal courts are not free to overrule *Sosa*’s framework or treat it as optional, I do know that the analysis *Sosa* requires should come out the same way in virtually every case. If *Sosa* is right—and I am sure it is—that fed-

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eral courts must “inevitably” exercise “an element of judgment” about delicate questions of foreign affairs when deciding whether to create a new cause of action, then judges should exercise *good* judgment by declining the project before we create real trouble.

II

Another independent problem lurks here. This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts to require a domestic defendant before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit.

Start with the statute. What we call the Alien Tort Statute began as just one clause among many in §9 of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts. 1 Stat. 76–78. The ATS clause gave the district courts “cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”² Like

²“Sec. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on

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today's recodified version, 28 U. S. C. § 1350, the original text of the ATS did not expressly call for a U. S. defendant. But I think it likely would have been understood to contain such a requirement when adopted.

That is because the First Congress passed the Judiciary Act in the shadow of the Constitution. The Act created the federal courts and vested them with statutory authority to entertain claims consistent with the newly ratified terms of Article III. Meanwhile, under Article III, Congress could not have extended to federal courts the power to hear just any suit between two aliens (unless, for example, one was a diplomat). Diversity of citizenship was required. So, because Article III's diversity-of-citizenship clause calls for a U. S. party, and because the ATS clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed.

Precedent confirms this conclusion. In *Mossman v. Higginson*, 4 Dall. 12, 14 (1800), this Court addressed the meaning of a neighboring provision of the Judiciary Act. Section 11 gave the circuit courts power to hear, among other things, civil cases where “an alien is a party.” 1 Stat. 78. As with § 9, you might think § 11's language could be read to permit a suit *between* aliens. Yet this Court held § 11 must instead

land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.” 1 Stat. 76–77 (some emphasis added; footnotes omitted).

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be construed to refer only to cases “where, indeed, an alien is one party, but a citizen is the other.” *Mossman*, 4 Dall., at 14 (internal quotation marks omitted). That was necessary, *Mossman* explained, to give the statute a “constructio[n] consistent” with the diversity-jurisdiction clause of Article III. *Ibid.* And as a matter of precedent, I cannot think of a good reason why we would now read § 9 differently than *Mossman* read § 11. Like cases are, after all, supposed to come out alike. See *Sarei v. Rio Tinto, PLC*, 671 F. 3d 736, 828 (CA9 2011) (Ikuta, J., dissenting) (“*Mossman*’s analysis [of § 11] is equally applicable to [§ 9]. . . . ATS does not give federal courts jurisdiction to hear international law claims between two aliens”), vacated and remanded, 569 U. S. 945 (2013).

Nor does it appear the ATS meant to rely on any other head of Article III jurisdiction. You might wonder, for example, if the First Congress considered a “violation of the law of nations” to be a violation of, and thus “arise under,” federal law. But that does not seem likely. At the founding, the law of nations was considered a distinct “system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world,” 4 Blackstone 66. While this Court has called international law “part of our law,” *The Paquete Habana*, 175 U. S. 677, 700 (1900), and a component of the “law of the land,” *The Nereide*, 9 Cranch 388, 423 (1815), that simply meant international law was no different than the law of torts or contracts—it was “part of the so-called general common law,” but *not* part of federal law. *Sosa*, 542 U. S., at 739–740 (opinion of Scalia, J.). See Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 824, 849–850 (1997); see also Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int’l L. 365, 374–375 (2002). The text of the Constitution appears to recognize just this distinction. Article I speaks of “Offences against the Law of

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Nations,” while both Article III and Article VI’s Supremacy Clause, which defines the scope of pre-emptive federal law, omit that phrase while referring to the “Laws of the United States.” Congress may act to bring provisions of international law into federal law, but they cannot find their way there on their own. “The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States.” *Caperton v. Bowyer*, 14 Wall. 216, 228 (1872).

Even so, that hardly left the ATS without important work to perform. At the time of the founding, “[i]f a nation failed to redress injuries by its citizens upon the citizens of another nation, the perpetrators’ nation violated the ‘perfect rights’ of the other nation,” which “provided the offended nation with just cause for reprisals or war.” Bellia & Clark, 78 U. Chi. L. Rev., at 476.³ This reality posed an existential threat to the new Nation. Under the Articles of Confederation, States regularly refused to redress injuries their citizens caused foreigners. British creditors, for example, often found their efforts to collect debts from American debtors thwarted. *Id.*, at 498–501. Seeking to remedy these and similar problems, the Continental Congress in 1781 passed a resolution encouraging the States, among other things, to establish tribunals for vindicating “offences against the law

³As a leading treatise explained, a sovereign “ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less should he permit them audaciously to offend foreign powers.” 1 E. de Vattel, *The Law of Nations*, bk. II, § 76, p. 145 (1760). Instead, the nation “ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it, to deliver him up to the offended state there to receive justice.” *Ibid.* A sovereign who “refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.” *Id.*, § 77, at 145; see also Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 472–477 (2011).

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of nations” and to “authorise suits to be instituted for damages by the party injured.” *Id.*, at 495–496. But the States did too little, too late. So when the framers gathered to write the Constitution they included among their chief priorities endowing the national government with sufficient power to ensure the country’s compliance with the law of nations. See 1 Records of the Federal Convention of 1787, pp. 24–25 (M. Farrand rev. 1966).

Together with other provisions of the Judiciary Act, the ATS served that purpose. The law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants, whether “through criminal punishment, extradition, or a civil remedy.” Bellia & Clark, 78 U. Chi. L. Rev., at 509. Yet in 1789 this country had no comprehensive criminal code and no extradition treaty with Great Britain. *Id.*, at 509–510. Section 11 achieved a partial solution to the problem by permitting civil diversity suits in federal court between aliens and domestic parties, but that provision required at least \$500 in controversy. 1 Stat. 78; cf. 28 U. S. C. § 1332(a) (today’s minimum is \$75,000). But, as Professors Bellia and Clark have explained, “[h]ad Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that US citizens inflicted upon aliens resulting in less than \$500 in damages.” 78 U. Chi. L. Rev., at 509. So the ATS neatly filled the remaining gap by allowing aliens to sue in federal court for a tort in violation of the law of nations regardless of the amount in controversy. One obvious advantage of this solution “was that it was self-executing—it placed the burden on injured aliens to bring suit and did not require the still-forming US government immediately to marshal the resources necessary to prosecute crimes” or aid extraditions. *Id.*, at 510.

Any attempt to decipher a cryptic old statute is sure to meet with challenges. For example, one could object that this reading of the Act does not assign to the ATS the work

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of addressing assaults by aliens against foreign ambassadors on our soil, even though *Sosa* suggested the statute was enacted partly in response to precisely such a case: the “Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia.” 542 U. S., at 716. Many thought that the States’ failure to provide a forum for relief to the foreign minister was a scandal and part of what prompted the framers of the Constitution to strengthen the national government. *Id.*, at 717; Bellia & Clark, *supra*, at 467 (“The Confederation’s inability to remedy or curtail violations like these was a significant factor precipitating the Federal Convention of 1787”).

But worries along these lines may be misplaced. The ATS was never meant to serve as a freestanding statute, only as one clause in one section of the Judiciary Act. So even if you think *something* in the Judiciary Act must be interpreted to address the Marbois incident, that doesn’t mean it must be the ATS clause. And, as it happens, a different provision of the Act *did* deal expressly with the problem of ambassadorial assaults: Section 13 conferred on this Court “original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party.” 1 Stat. 80–81. That implemented Article III’s provision empowering us to hear suits “affecting Ambassadors, other public ministers and Consuls.” § 2. And given that § 13 deals with the problem of “ambassadors” so directly, it is unclear why we must read § 9 to address that same problem. See Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 855–858 (2006).

Along different but similar lines, some might be concerned that requiring a U. S. defendant in ATS suits would leave the problem of piracy inadequately addressed, given that *Sosa* suggested that piracy was one of the three offenses the ATS may have meant to capture, and many pirates were foreigners. See 542 U. S., at 719. But here the response is much

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the same. A separate clause of §9 gave the district courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.” 1 Stat. 77. That statute has long been given a broad construction covering “all maritime contracts, torts and injuries,” *DeLovio v. Boit*, 7 F. Cas. 418, 442 (No. 3,776) (CC Mass. 1815) (Story, J.), along with “prize jurisdiction, which probably included almost all ‘piracy’ cases after 1789,” Lee, *supra*, at 867. So it is not clear why it’s necessary to cram the problem of piracy into the ATS. If anything, it may be necessary *not* to do so. Structural features of §9 make it at least questionable that both provisions were meant to address the same subject matter: Cases falling within §9’s ATS clause could also be brought in state court or in the circuit courts, 1 Stat. 77, while §9’s admiralty jurisdiction was generally exclusive, *id.*, at 76–77. See Lee, *supra*, at 868. And the two provisions also called for incompatible procedures: Section 9 required jury trials “in all causes *except* civil causes of admiralty and maritime jurisdiction.” 1 Stat. 77 (emphasis added).

If doubt lingers on these historical questions, it is a doubt that should counsel restraint all the same. Even if the ATS might have meant to allow foreign *ambassadors* to sue foreign defendants, or foreign plaintiffs to sue foreign *pirates*, what would that prove about more mine-run cases like ours, where none of those special concerns are implicated? There are at least serious historical arguments suggesting the ATS was not meant to apply to suits like this one. And to the extent *Sosa* affords courts discretion to proceed, these arguments should inform any decision whether to exercise that discretion. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 116–117 (2013), the Court invoked *Sosa* discretion to refuse to hear cases involving foreign conduct. I can see no reason why courts should respond differently when it comes to cases involving foreign defendants.⁴

⁴The dissent is wrong to suggest, *post*, at 308, that *Sosa* “forecloses” the possibility of recognizing a U. S.-defendant requirement in ATS cases. *Sosa* said nothing about the subject. And were *Sosa* taken to preclude

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Any consideration of *Sosa*'s discretion must also account for proper limits on the judicial function. As discussed above, federal courts generally lack the institutional expertise and constitutional authority to oversee foreign policy and national security, and should be wary of straying where they do not belong. See *supra*, at 284–285. Yet there are degrees of institutional incompetence and constitutional evil. It is one thing for courts to assume the task of creating new causes of action to ensure *our* citizens abide by the law of nations and *avoid* reprisals against this country. It is altogether another thing for courts to punish *foreign* parties for conduct that could not be attributed to the United States and thereby *risk* reprisals against this country. If a foreign state or citizen violates an “international norm” in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way. But in all events, the decision to impose sanctions in disputes between foreigners over international norms is not ours to make. It is a decision that belongs to those answerable to the people and assigned by the Constitution to defend this Nation. If they wish our help, they are free to enlist it, but we should not ever be in the business of elbowing our way in.

any future limits on ATS suits it did not itself anticipate, then *Kiobel* must have been wrong to apply the canon against extraterritorial application to that statute. But that is not so. The dissent also observes that *Sosa* “involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico,” and that certain *amici* in *Sosa* filed briefs arguing that the Court lacked authority over the ATS claims for that reason. See *post*, at 308. But *Sosa* did not address those arguments; questions that “merely lurk in the record are not resolved, and no resolution of them may be inferred.” *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citations and internal quotation marks omitted); accord, *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 350–351, n. 10 (2016) (issue present but unaddressed by the Court in a previous case was not implicitly decided).

SOTOMAYOR, J., dissenting

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

The Court today holds that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court’s conclusion and its analytic approach. The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent.

I

The plurality assumes without deciding that whether corporations can be permissible defendants under the ATS turns on the first step of the two-part inquiry set out in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). But by asking whether there is “a specific, universal, and obligatory norm of liability for corporations” in international law, *ante*, at 259, the plurality fundamentally misconceives how international law works and so misapplies the first step of *Sosa*.

A

In *Sosa*, the Court considered whether a Mexican citizen could recover under the ATS for a claim of arbitrary detention by a Mexican national who had been hired by the Drug Enforcement Administration to seize and transport him to the United States. See 542 U.S., at 697–698. The Court held that the ATS permits federal courts to “recognize private causes of action for certain torts in violation of the law of nations,” *id.*, at 724, without the need for any “further

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congressional action,” *id.*, at 712. The Court then articulated a two-step framework to guide that inquiry. First, a court must determine whether the particular international-law norm alleged to have been violated is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” *i. e.*, “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.*, at 724–725. Only if the norm is “‘specific, universal, and obligatory’” may federal courts recognize a cause of action for its violation. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 117 (2013) (quoting *Sosa*, 542 U. S., at 732). Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion. *Id.*, at 727–728, 732–733, 738. Applying that framework, *Sosa* held that the alleged arbitrary detention claim at issue failed at step one because “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” *Id.*, at 738.

Sosa’s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors. See *id.*, at 714–715; 1 Restatement (Third) of Foreign Relations Law of the United States, pt. II, Introductory Note, pp. 70–71 (1987) (Restatement). Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture. See 2 Restatement § 702. Substantive prohibitions like these are the norms at which *Sosa*’s step-one inquiry is aimed and for which *Sosa* requires that there be sufficient international consensus.

Sosa does not, however, demand that there be sufficient international consensus with regard to the mechanisms of

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enforcing these norms, for enforcement is not a question with which customary international law is concerned. Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems. See, *e.g.*, L. Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) (“International law itself . . . does not require any particular reaction to violations of law”); Denza, *The Relationship Between International and National Law*, in *International Law* 423 (M. Evans ed. 2006) (“[I]nternational law does not itself prescribe how it should be applied or enforced at the national level”); 1 Restatement § 111, Comment *h* (“In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations”); Brief for International Law Scholars as *Amici Curiae* 9–10.

In keeping with the nature of international law, *Sosa* consistently used the word “norm” to refer to substantive conduct. For example, *Sosa* commands that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.” 542 U. S., at 732. That statement would make little sense if “norm” encompassed enforcement mechanisms like “corporate liability.” Unlike “the prohibition on genocide,” “corporate liability” cannot be violated. Moreover, “the historical paradigms familiar when § 1350 was enacted” are all prohibitions on conduct, and *Sosa* clearly contemplated that courts should compare the charged conduct with the historical conduct. See *ibid.* (quoting *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980), where the Court of Appeals for the Second Circuit compared a “‘torturer’” to “‘the pirate and slave trader before him,’” *id.*, at 890, and Judge Edwards’ concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CA DC

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1984), which suggested that the “‘limits of section 1350’s reach’” be defined by “‘a handful of heinous actions—each of which violates definable, universal and obligatory norms,’” *id.*, at 781). There is no indication in *Sosa* that the Court also intended for courts to undertake the apples-to-oranges comparison of the conduct proscribed under customary international law and the forms of liability available under domestic law.

The text of the ATS also reflects this distinction between prohibiting conduct and determining enforcement. The statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The phrase “of the law of nations” modifies “violation,” not “civil action.” The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses.

B

1

The plurality nonetheless allies itself with the view that international law supplies the rule of decision in this case based on its reading of footnote 20 in *Sosa*. That footnote sets out “[a] related consideration” to “the determination whether a norm is sufficiently definite to support a cause of action.” 542 U.S., at 732, and n. 20. In full, it states:

“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–795 (CA DC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private

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actors violates international law), with *Kadic v. Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).” *Ibid.*

In the Second Circuit’s decision in *Kiobel v. Royal Dutch Petroleum*, 621 F. 3d 111 (2010), the majority opinion read footnote 20 to “requir[e] that [courts] look to *international law* to determine [their] jurisdiction over ATS claims against a particular class of defendant, such as corporations.” *Id.*, at 127 (emphasis in original). The plurality today accords “considerable force and weight to [that] position,” *ante*, at 259, and so proceeds to assess whether there exists a specific, universal, and obligatory norm of liability for corporations in international law, *ante*, at 259–263. But the Court of Appeals mistook the meaning of footnote 20, which simply draws attention to the fact that, under international law, “the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State.” *Kiobel*, 621 F. 3d, at 177 (Leval, J., concurring in judgment).

The international-law norm against genocide, for example, imposes obligations on all actors. Acts of genocide thus violate the norm irrespective of whether they are committed privately or in concert with the state. See Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 102 Stat. 3045 (defining “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”); see also 18 U. S. C. § 1091(a) (“Whoever” commits genocide “shall be punished as provided in subsection (b)”). In contrast, other norms, like the prohibition on torture, require state action. Conduct thus qualifies as torture and violates the norm only when done “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention

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Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 114 (Torture Convention).¹

Footnote 20 in *Sosa* flags this distinction and instructs courts to consider whether there is “sufficient consensus” that, with respect to the particular conduct prohibited under “a given norm,” the type of defendant being sued can be alleged to have violated that specific norm. 542 U. S., at 732, n. 20. Because footnote 20 contemplates a norm-specific inquiry, not a categorical one, it is irrelevant to the categorical question presented here. Assuming the prohibition against financing of terrorism is sufficiently “specific, universal, and obligatory” to satisfy the first step of *Sosa*, a question on which I would remand to the Court of Appeals, nothing in international law suggests a corporation may not violate it.²

¹This distinction is similar to the state-action doctrine in domestic law. The prohibitions in the Bill of Rights, for instance, apply only to state actors, whereas the Thirteenth Amendment’s prohibition on slavery applies to all actors, state and private. See *United States v. Kozminski*, 487 U. S. 931, 942 (1988).

²At present, the norm-specific query contemplated by footnote 20 is likely resolved simply by considering whether the given international-law norm binds only state actors or state and nonstate actors alike, because there does not appear to be an international-law norm that contemplates a finer distinction between types of private actors. See Brief for United States as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 20 (“At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors”); Dodge, Corporate Liability Under Customary International Law, 43 Geo. J. Int’l L. 1045, 1050 (2012) (“None of the norms that are actionable under *Sosa* distinguish between natural and juridical persons”).

Sosa itself supports the proposition that international law does not distinguish between types of private actors, but rather treats natural persons and corporations alike. Footnote 20 groups corporations and individuals together under the larger category of “private actor.” *Sosa*, 542 U. S., at 732, n. 20 (“if the defendant is a private actor such as a corporation or an

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2

The plurality briefly acknowledges this critique of its reading of footnote 20, but nonetheless assumes the correctness of its approach because of its view that there exists a “distinction in international law between corporations and natural persons.” *Ante*, at 263. The plurality attempts to substantiate this proposition by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument, however, confuses the substance of international law with how it has been enforced in particular contexts.

Again, the question of who must undertake the prohibited conduct for there to be a violation of an international-law norm is one of international law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states. Sometimes, states act collectively and establish international tribunals to punish certain international-law violations. Each such tribunal is individually negotiated, and the limitations placed on its jurisdiction are typically driven by strategic considerations and resource constraints.

For example, the Allies elected not to prosecute corporations at Nuremberg because of pragmatic factors. Those factors included scarce judicial resources, a preference of the occupation governments to swiftly dismantle the most culpa-

individual”); see also *id.*, at 760 (BREYER, J., concurring in part and concurring in judgment) (“The norm must extend liability to the type of perpetrator (*e. g.*, a private actor) the plaintiff seeks to sue” (citing *id.*, at 732, n. 20)). *Sosa* also describes the two Court of Appeals decisions on which it relies as having considered whether there was sufficient consensus that particular conduct—torture or genocide—“violates international law” when undertaken “by private actors.” *Ibid.* (discussing *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CA DC 1984) (Edwards, J., concurring), and *Kadic v. Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995)). Even though the defendant in *Kadic* was a natural person, see *id.*, at 237, and the defendants in *Tel-Oren* were juridical entities, see 726 F. 2d, at 775–776, *Sosa* refers to them all as “private actors,” 542 U. S., at 732, n. 20.

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ble German companies without destroying Germany's post-war economy, and a desire to focus on establishing the principle of nonstate criminal responsibility for human-rights violations. See Brief for Nuremberg Scholars as *Amici Curiae* 4, 11–13.

More recently, the delegations that negotiated the Rome Statute of the International Criminal Court in the 1990's elected not to extend that tribunal's jurisdiction to corporations in part because states had varying domestic practices as to whether and how to impose criminal liability on corporations. See Frulli, Jurisdiction *Ratione Personae*, in 1 Rome Statute of the International Criminal Court 527, 532–533 (A. Cassese et al. eds. 2002); Brief for Ambassador David J. Scheffer as *Amicus Curiae* 8–10.

Taken to its natural conclusion, the plurality's focus on the practice of international criminal tribunals would prove too much. No international tribunal has been created and endowed with the jurisdiction to hold natural persons civilly (as opposed to criminally) liable, yet the majority and respondent accept that natural persons can be held liable under the ATS. See *ante*, at 272; Tr. of Oral Arg. 62. It cannot be persuasive evidence for purposes of ascertaining the availability of corporate civil liability under the ATS, then, that the jurisdiction of the handful of international criminal tribunals that states have seen fit to create in the last 75 years has not extended to corporate defendants.

Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states' collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants.

In fact, careful review of states' collective and individual enforcement efforts makes clear that corporations are subject to certain obligations under international law. For instance, the United States Military Tribunal that prosecuted several corporate executives of IG Farben declared that cor-

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porations could violate international law. See 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10, p. 1132 (1952) (“Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law”).³ Similarly, the International Criminal Tribunal for Rwanda found that three nonnatural entities—a private radio station, newspaper, and political party—were responsible for genocide. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence ¶953 (Dec. 3, 2003). Most recently, the appeals panel of the Special Tribunal for Lebanon held that corporations may be prosecuted for contempt. See *Prosecutor v. New TV S. A. L.*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶74 (Oct. 2, 2014).

In addition, various international agreements require signatory states to impose liability on corporations for certain conduct.⁴ Of particular relevance here, the International Convention for the Suppression of the Financing of Terrorism provides: “Any person commits an offence within the meaning of this Convention if that person by any means, di-

³The Nuremberg Tribunal also was empowered to adjudicate a form of criminal organizational liability, pursuant to which an individual member of a convicted organization would face a rebuttable presumption of guilt in a subsequent proceeding. Brief for Nuremberg Scholars as *Amici Curiae* 4, 20–21 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Arts. 9–10, 59 Stat. 1544, E. A. S. No. 472); see also Brief for Nuremberg Scholars 21–22 (citing *United States v. Goering*, 22 Trial of the Major War Criminals Before the International Military Tribunal 171, 505, 511, 516–517 (Int’l Mil. Trib. 1946) (declaring three organizations criminal)).

⁴See, e.g., United Nations Convention Against Transnational Organized Crime, Art. 10(1), Nov. 15, 2000, T. I. A. S. No. 13127, S. Treaty Doc. No. 108–16; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2, Dec. 17, 1997, 2802 U. N. T. S. 230.

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rectly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” an act of terrorism. Art. 2, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 230. It then requires each signatory state, “in accordance with its domestic legal principles,” to “take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity,” violated the Convention. Art. 5(1), *id.*, at 232. The Convention provides that “[s]uch liability may be criminal, civil, or administrative,” *ibid.*, so long as the penalties, which can include monetary sanctions, are “effective, proportionate and dissuasive.” Art. 5(3), *id.*, at 232. The United States is a party to the Convention, along with 131 other states.⁵

The plurality dismisses the relevance of this Convention because it does not require states parties to hold corporations liable in common-law tort actions, but rather permits them to “fulfill their obligations . . . by adopting detailed regulatory regimes governing financial institutions.” *Ante*, at 262. That critique misses the point. The significance of the Convention is that the international community agreed that financing terrorism is unacceptable conduct and that such conduct violates the Convention when undertaken by corporations. That the Convention leaves up to each state party how to impose liability on corporations, *e. g.*, via erecting a regulatory regime, providing for tort actions, or imposing criminal sanctions, is unremarkable⁶ and simply reflects

⁵See International Convention for the Suppression of the Financing of Terrorism, online at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-11.en.pdf> (all Internet materials as last visited Apr. 16, 2018).

⁶The Genocide Convention also does not specifically require that states parties recognize tort claims for genocide, but federal courts have long permitted such actions under the ATS as a matter of federal common law. See, *e. g.*, *Kadic*, 70 F. 3d, at 236. The same is true of the Torture

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that international law sets out standards of conduct and leaves it to individual states to determine how best to enforce those standards.

Finally, a number of states, acting individually, have imposed criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems. See, e.g., *New TV S. A. L.*, Case No. STL-14-05/PT/AP/AR126.1, ¶¶52–55 (listing more than 40 countries that provide for corporate criminal liability); A. Ramasastry & R. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* 22–24 (2006), available at https://www.biiicl.org/files/4364_536.pdf (noting that 15 of 16 countries surveyed permit civil claims against corporations for human-rights violations); Brief for Comparative Law Scholars and Practitioners as *Amici Curiae* 15–19 (detailing provisions creating corporate civil liability for international-law violations in England, France, the Netherlands, and Canada).

C

Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. As explained above, international law provides no such reason. See *Kiobel*, 621 F. 3d, at 175 (Leval, J., concurring in judgment) (“[T]he answer international law furnishes is that it takes no position on the question”). Nor does domestic law. The text, history, and purpose of the ATS plainly support the conclusion that corporations may be held liable.

Beginning “with the language of the statute itself,” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241

Convention. See, e.g., *Filartiga v. Pena-Irala*, 630 F. 2d 876, 885 (CA2 1980).

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(1989), two aspects of the text of the ATS make clear that the statute allows corporate liability. First, the text confers jurisdiction on federal district courts to hear “civil action[s]” for “tort[s].” 28 U.S.C. § 1350. Where Congress uses a term of art like tort, “it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Corporations have long been held liable in tort under the federal common law. See *Philadelphia, W., & B. R. Co. v. Quigley*, 21 How. 202, 210 (1859) (“At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety”); *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) (“[F]rom the earliest times to the present, corporations have been held liable for torts”). This Court “has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules.” *Meyer v. Holley*, 537 U.S. 280, 285 (2003). The presumption, then, is that, in providing for “tort” liability, the ATS provides for corporate liability.

Second, whereas the ATS expressly limits the class of permissible plaintiffs to “alien[s],” § 1350, it “does not distinguish among classes of defendants,” *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). That silence as to defendants cannot be presumed to be inadvertent. That is because in the same section of the Judiciary Act of 1789 as what is now the ATS, Congress provided the federal district courts with jurisdiction over “all suits against consuls or vice-consuls.” § 9, 1 Stat. 77. Where

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Congress wanted to limit the range of permissible defendants, then, it clearly knew how to do so. *Russello v. United States*, 464 U. S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)).

Nothing about the historical background against which the ATS was enacted rebuts the presumption that the statute incorporated the accepted principle of corporate liability for tortious conduct. Under the Articles of Confederation, the Continental Congress was unable to provide redress to foreign citizens for violations of treaties or the law of nations, which threatened to undermine the United States’ relationships with other nations. See *Kiobel*, 569 U. S., at 123. The First Congress responded with, *inter alia*, the ATS. Although the two incidents that highlighted the need to provide foreign citizens with a federal forum in which to pursue their grievances involved conflicts between natural persons, see *ante*, at 253 (majority opinion) (describing the assault by a French adventurer on the Secretary of the French Legation and the arrest of one of the Dutch Ambassador’s servants by a New York constable), there is “no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i. e., corporations, to do so,” *Doe v. Exxon Mobil Corp.*, 654 F. 3d 11, 47 (CA DC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CA DC 2013); see also Brief for United States as *Amicus Curiae* 6 (“The ATS was enacted to ensure a private damages remedy for incidents with the potential for serious diplomatic consequences, and Congress had no good reason to limit the set of possible defendants in such actions to potentially judgment-proof individuals”). Indeed, foreclosing corporations from

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liability under the ATS would have been at odds with the contemporaneous practice of imposing liability for piracy on ships, juridical entities. See, e. g., *Skinner v. East India Co.*, 6 State Trials 710, 711 (1666); *The Marianna Flora*, 11 Wheat. 1, 40–41 (1826); *Harmony v. United States*, 2 How. 210, 233 (1844).

Finally, the conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. See 26 Op. Atty. Gen. 250, 252 (1907) (stating that citizens of Mexico could bring a claim under the ATS against a corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the United States and Mexico).

D

In his concurrence, JUSTICE GORSUCH urges courts to exercise restraint in recognizing causes of action under the ATS. But whether the ATS provides a cause of action for violations of the norms against genocide, crimes against humanity, and financing of terrorism is not the question the parties have asked the Court to decide. I therefore see no reason why it is necessary to delve into the propriety of creating new causes of action. Nevertheless, because I disagree with the premises on which the concurrence relies, I offer two brief observations.

First, JUSTICE GORSUCH says it “pass[es] understanding” why federal courts have exercised jurisdiction over ATS claims raised by foreign plaintiffs against foreign defendants for breaches of international norms. See *ante*, at 281 (opinion concurring in part and concurring in judgment). Modern ATS cases, however, are not being litigated against a blank slate. The Court held in *Sosa* that Congress authorized the federal courts to “recognize private causes of action for certain torts in violation of the law of nations,” 542 U. S., at 724,

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so long as the underlying norm had no “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted,” *id.*, at 732. That holding was no mere “suggestion,” *ante*, at 282 (opinion of GORSUCH, J.), as this Court has made clear. See *Kiobel*, 569 U. S., at 116–117.

Given that the First Congress authorized suit for violations based on “the law of nations” and “treat[ies] of the United States,” 28 U. S. C. § 1350, it is natural to conclude that Congress intended the district courts to consider new claims under the law of nations as that law and our Nation’s treaty obligations continued to develop. If Congress intended to limit such cases to violations of safe conduct, assaults against ambassadors, piracy, and—as JUSTICE GORSUCH suggests may have been the case—“personal injuries that US citizens inflicted upon aliens resulting in less than \$500 in damages,” *ante*, at 289 (quoting Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 509 (2011)), it easily could have said so. Instead, it granted the federal courts jurisdiction over claims based on “the law of nations,” a body of law that Congress did not understand to be static. See *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (No. 15,551) (CC Mass. 1822) (Story, J.) (“What, therefore, the law of nations is . . . may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations”).

The question for courts considering new ATS claims is, “Who are today’s pirates?” *Kiobel*, 569 U. S., at 129 (BREYER, J., concurring in judgment). Torturers and those who commit genocide are now fairly viewed, like pirates, as “common enemies of all mankind.” *Id.*, at 131 (internal quotation marks omitted). On remand, the Court of Appeals

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would decide whether the financiers of terrorism are the same. The fact that few norms have overcome *Sosa*'s high hurdle is strong evidence that the carefully considered standard set forth in that case is generating exactly the kind of "judicial caution" the Court stressed as necessary. See 542 U. S., at 725.

Second, the concurrence suggests that federal courts may lack jurisdiction to entertain suits between aliens based solely on a violation of the law of nations. It contends that ATS suits between aliens fall under neither the federal courts' diversity jurisdiction nor our federal question jurisdiction. The Court was not unaware of this argument when it decided *Sosa*. As noted, that case involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico, and various *amici* argued that the Court lacked Article III jurisdiction over such suits. See Brief for National Foreign Trade Counsel et al. as *Amici Curiae* in *Sosa v. Alvarez-Machain*, O. T. 2003, No. 03-339, pp. 24-25; see also Brief for Washington Legal Foundation et al. as *Amici Curiae* in No. 03-339, pp. 14-21. The Court nonetheless proceeded to decide the case, which it could not have done had it been concerned about its Article III power to do so. See *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 514 (2006). That decision forecloses the argument the concurrence now makes, as *Sosa* authorized courts to "recognize private claims *under federal common law* for violations of" certain international-law norms. 542 U. S., at 732 (emphasis added); see also *id.*, at 729-730 (explaining that, post-*Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), there are "limited enclaves in which federal courts may derive from substantive law in a common law way," including the law of nations, and that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism"); *Sarei v. Rio Tinto*, 671 F. 3d 736, 749-754 (CA9 2011) (en banc) (discussing *Sosa* and concluding that federal

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courts have Article III jurisdiction to hear ATS cases between aliens), vacated and remanded, 569 U. S. 945 (2013) (remanding for further consideration in light of *Kiobel*).

Sosa was correct as a legal matter. Moreover, our Nation has an interest not only in providing a remedy when our own citizens commit law-of-nations violations but also in preventing our Nation from serving as a safe harbor for today's pirates. See *Kiobel*, 569 U. S., at 133–134 (BREYER, J., concurring in judgment). To that end, Congress has ratified treaties requiring the United States “to punish or extradite offenders, even when the offense was not committed . . . by a national.” 1 Restatement § 404, Reporters’ Note 1, at 255–257; see Torture Convention, Arts. 5, 7; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Art. 3, Dec. 14, 1973, 28 U. S. T. 1975, T. I. A. S. No. 8532; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U. S. T. 565, T. I. A. S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 4, Dec. 16, 1970, 22 U. S. T. 1641, T. I. A. S. No. 7192; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 6 U. S. T. 3316, T. I. A. S. No. 3364. To the extent suits against foreign defendants may lead to international friction, that concern is better addressed under the presumption the Court established in *Kiobel* against extraterritorial application of the ATS, see 569 U. S., at 124–125, than it is by relitigating settled precedent.

II

At its second step, *Sosa* cautions that courts should consider whether permitting a case to proceed is an appropriate exercise of judicial discretion in light of potential foreign-policy implications. See 542 U. S., at 727–728, 732–733, 738. The plurality only assumes without deciding that international law does not impose liability on corporations, so it necessarily proceeds to *Sosa*’s second step. Here, too, its analysis is flawed.

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A

Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions. Each source of diplomatic friction that respondent Arab Bank and the plurality identify can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.

Arab Bank contends that foreign citizens should not be able “to sue a Jordanian corporation in New York for events taking place in the Middle East.” Brief for Respondent 42. The heart of that qualm was already addressed in *Kiobel*, which held that the presumption against extraterritoriality applies to the ATS. 569 U.S., at 124. Only where the claims “touch and concern the territory of the United States . . . with sufficient force” can the presumption be displaced. *Id.*, at 124–125. “[M]ere corporate presence” does not suffice. *Id.*, at 125. Thus, contrary to the majority’s contention, “the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States” does not “well illustrat[e] the perils of extending the scope of ATS liability to foreign multinational corporations,” *ante*, at 271, but merely illustrates the risks of extending the scope of ATS liability extraterritorially absent sufficient connection to the United States.

Arab Bank also bemoans the unfairness of being sued when others—namely, the individuals and organizations that carried out the terrorist attacks—were “the direct cause” of the harm petitioners here suffered. Brief for Respondent 41. That complaint, though, is a critique of the imposition of liability for financing terrorism, not an argument that ATS suits against corporations generally necessarily cause diplomatic tensions.

Arab Bank further expresses concern that ATS suits are being filed against corporations in an effort to recover for the bad acts of foreign governments or officials. See *id.*, at 40. But the Bank’s explanation of this problem reveals that

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the true source of its grievance is the availability of aiding and abetting liability. See *ibid.* (“[N]umerous ATS suits have alleged that a corporation has aided or abetted bad acts committed by a *foreign government and its officials*” (emphasis in original)); *id.*, at 41 (“[A]iding and abetting suits under the ATS have given plaintiffs ‘a clear means for effectively circumventing’ critical limits on foreign sovereign immunity” (quoting Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc. v. Ntsebeza*, O. T. 2007, No. 07–919, p. 15)). The plurality too points to an aiding and abetting case to support its contention that plaintiffs “use corporations as surrogate defendants to challenge the conduct of foreign governments.” *Ante*, at 267 (discussing *Kioibel*, in which plaintiffs sought to hold a corporate defendant liable for “‘aiding and abetting the Nigerian Government in committing’” law-of-nations violations (quoting 569 U.S., at 114)). Yet not all law-of-nations violations asserted against corporations are premised on aiding and abetting liability; it is possible for a corporation to violate international-law norms independent of a foreign state or foreign state officials. In this respect, too, the Court’s rule is ill fitted to the problem identified.

Notably, even the Hashemite Kingdom of Jordan does not argue that there are foreign-policy tensions inherent in suing a corporation generally. Instead, Jordan contends that this particular suit is an affront to its sovereignty because of its extraterritorial character and because of the role that Arab Bank specifically plays in the Jordanian economy. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 6–12.⁷

⁷Jordan does argue that corporate liability is unavailable under the ATS, but that argument is based on its view that there is no universally recognized international-law norm of corporate liability, see Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 12–15, not a contention that corporate status alone presents foreign-policy concerns justifying immunity for all corporations in all ATS suits irrespective of circumstance.

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The majority also cites to instances in which other foreign sovereigns have “appeared in this Court to note [their] objections to ATS litigation,” *ante*, at 271, but none of those objections was about the availability of corporate liability as a general matter. See *Sosa*, 542 U. S., at 733, n. 21 (noting argument of the European Commission that “basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals”); *ibid.* (noting objections by South Africa to “several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid” on the basis that the cases “interfere[d] with the policy embodied by its Truth and Reconciliation Commission”); Brief for Federal Republic of Germany as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1 (“The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens’ claims against foreign defendants for alleged foreign activities that caused injury on foreign soil”); Brief for Government of the United Kingdom of Great Britain and Northern Ireland et al. as *Amici Curiae* in No. 10–1491, p. 3 (“The Governments remain deeply concerned about . . . suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign”).

As the United States urged at oral argument, when international friction arises, a court should respond with the doctrine that speaks directly to the friction’s source. See Tr. of Oral Arg. 28 (acknowledging that “ATS litigation in recent decades has raised international friction” and explaining that “the way to deal with that friction is with a doctrine that speaks directly to the international entanglement . . . as those questions arise”). In addition to the presumption against extraterritoriality, federal courts have at their dis-

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positional a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. See *Daimler AG v. Bauman*, 571 U. S. 117 (2014). Courts also can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department. See *Kiobel*, 569 U. S., at 133 (BREYER, J., concurring in judgment); *Sosa*, 542 U. S., at 733, n. 21.

Several of these doctrines might be implicated in this case, and I would remand for the Second Circuit to address them in the first instance.⁸ The majority, however, prefers to use a sledgehammer to crack a nut. I see no need for such an ill-fitting and disproportionate response. Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.⁹

⁸For instance, the alleged conduct might not sufficiently touch and concern the United States to displace the presumption against extraterritoriality; the prohibition on terrorism financing might not be a specific, universal, and obligatory norm warranting recognition under the ATS; and petitioners might not be able to prove the requisite *mens rea*. In addition, petitioners have asserted direct, rather than vicarious, liability against respondent. A suit based on only vicarious liability may raise different questions not presented here.

⁹The majority's overly blunt rule is also unlikely to resolve any foreign-relations concerns at play in this case. Arab Bank is still being sued under the Antiterrorism Act of 1990 for the exact same conduct as alleged here. It is also hard to imagine that Jordan would have been perfectly content to see the CEO of Arab Bank and high-level officials at the New York branch sued under the ATS.

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B

1

The Court urges that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Ante*, at 265. I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to the fact that the Executive Branch, in briefs signed by the Solicitor General and State Department Legal Advisor, has twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority. See Brief for United States as *Amicus Curiae* 5 (“This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation”); Brief for United States as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 7 (“Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. . . . *Sosa*’s cautionary admonitions provide no reason to depart from the common law on this issue”). At oral argument in this case, the United States told the Court that it saw no “sound reason to categorically exclude corporate liability.” Tr. of Oral Arg. 29. It explained that another country would hold the United States accountable for not providing a remedy against a corporate defendant in a “classic” ATS case, such as one involving a “foreign official injured in the United States,” *id.*, at 32–33, and suggested that foreclosing the ability to recover from a corporation actually would raise “the possibility of friction,” *id.*, at 33. Notably, the Government’s position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.

Likewise, when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the

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rule it now adopts. See Brief for Sen. Sheldon Whitehouse et al. as *Amici Curiae* 7–11; Brief for Former Sen. Arlen Specter et al. as *Amici Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, pp. 17–18. Congress has also never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years. See *Monessen Southwestern R. Co. v. Morgan*, 486 U. S. 330, 338 (1988) (“Congress’ failure to disturb a consistent judicial interpretation of a statute may provide some indication that ‘Congress at least acquiesces in, and apparently affirms, that [interpretation]’” (quoting *Cannon v. University of Chicago*, 441 U. S. 677, 703 (1979))).

Given the deference to the political branches that *Sosa* encourages, I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.

The plurality instead purports to defer to Congress by relying heavily on the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. § 1350, to support its categorical bar. See *ante*, at 265. The TVPA makes available to all individuals, not just foreign citizens, a civil cause of action for torture and extrajudicial killing that may be brought against natural persons. See *Mohamad v. Palestinian Authority*, 566 U. S. 449, 451–452, 454 (2012). The plurality extrapolates from Congress’ decision regarding the scope of liability under the TVPA a rule that it contends should govern all ATS suits. See *ante*, at 265. But there is no reason to think that because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations. The plurality’s contrary conclusion ignores the critical textual differences between the ATS and TVPA, as well as the TVPA’s legisla-

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tive history, which emphasizes Congress' intent to leave the ATS undisturbed.

On its face, the TVPA is different from the ATS in several significant ways: It is focused on only two law-of-nations violations, torture and extrajudicial killing; it makes a cause of action available to all individuals, not just foreign citizens; and it uses the word "individual" to delineate who may be liable. See 28 U.S.C. § 1350 note. The ATS, by contrast, is concerned with all law-of-nations violations generally, makes a cause of action available only to foreign citizens, and is silent as to who may be liable. Because of the textual differences between the two statutes, the Court unanimously concluded in *Mohamad* that the ATS "offers no comparative value" in ascertaining the scope of liability under the TVPA. 566 U.S., at 458. It makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS.

Furthermore, Congress repeatedly emphasized in the House and Senate Reports on the TVPA that the statute was meant to supplement the ATS, not replace or cabin it. See H. R. Rep. No. 102-367, pt. 1, p. 3 (1991) ("Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing"); *id.*, at 4 ("The TVPA . . . would also enhance the remedy already available under section 1350 in an important respect: While the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U. S. citizens who may have been tortured abroad"); *ibid.* ("[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered b[y] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law"); S. Rep. No. 102-249, pp. 4-5 (1991); see also *Sosa*, 542 U.S., at 731 (explaining that the TVPA "supplement[ed] the judicial determination" in *Filartiga*).

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Lacking any affirmative evidence that Congress' decision to limit liability under the TVPA to natural persons indicates a legislative judgment about the proper scope of liability in all ATS suits, the plurality focuses its efforts on dismissing petitioners' argument that Congress limited TVPA liability to natural persons to harmonize the statute with the Foreign Sovereign Immunities Act of 1976 (FSIA), which generally immunizes foreign states from suit. See *ante*, at 266–267.¹⁰ Contrary to the plurality's contention, however, this Court did not reject petitioners' account of the TVPA's legislative history in *Mohamad*. In fact, that decision agreed that the legislative history “clarifi[es] that the Act does not encompass liability against foreign states.” 566 U.S., at 459. What *Mohamad* rejected was the argument that because the TVPA forecloses liability against foreign states, it necessarily permits liability against corporations. In concluding that the TVPA encompasses only natural persons, *Mohamad* took no position on why Congress excluded organizations from its reach.¹¹

To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law. For instance, the

¹⁰ The TVPA requires state action to trigger liability. See 28 U.S.C. § 1350 note (imposing liability on “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” subjects an individual to torture or extrajudicial killing). Absent a limitation on suits against states and state entities, the TVPA arguably would have been in conflict with the FSIA.

¹¹ Petitioners may be right that Congress limited liability under the TVPA to natural persons to harmonize the statute with the FSIA. That Congress thought it necessary to achieve that goal by foreclosing liability against all organizational defendants, not just those operating under the authority of a foreign government, might indicate that Congress thought such line drawing would be difficult or that an expansive approach was the cleanest way to avoid the statute becoming a backdoor to suits against foreign governments.

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Antiterrorism Act of 1990 (ATA) created a civil cause of action for U. S. nationals injured by an act of international terrorism and expressly provides for corporate liability. 18 U. S. C. § 2333. That Congress foreclosed corporate liability for torture and extrajudicial killing claims under the TVPA but permitted corporate liability for terrorism-related claims under the ATA is strong evidence that Congress exercises its judgment as to the appropriateness of corporate liability on a norm-by-norm basis, and that courts should do the same when considering whether to permit causes of action against corporations for law-of-nations violations under the ATS.

The plurality dismisses the ATA as “an inapt analogy” because the ATA “provides a cause of action only to ‘national[s] of the United States,’” whereas the ATS “provides a remedy for foreign nationals only.” *Ante*, at 267 (quoting 18 U. S. C. § 2333(a)). But if encompassing different groups of plaintiffs is what makes two statutes poor comparators for each other, the TVPA, too, is an inapt analogy, for it permits suits by all individuals, U. S. and foreign nationals alike.

The plurality also posits that the ATA “suggests that there should be no common-law action under the ATS for allegations like petitioners’,” *ante*, at 267–268, because permitting such suits would allow foreign plaintiffs to “bypass Congress’ express limitations on liability under the [ATA] simply by bringing an ATS lawsuit,” *ante*, at 268. Yet an ATS suit alleging terrorism-related conduct does not “bypass” or “displace” any “statutory and regulatory structure,” *ibid.*, any more than an ATA suit does. As this case demonstrates, U. S. nationals and foreign citizens may bring ATA and ATS suits in the same court, at the same time, for the same underlying conduct. To the extent the plurality is suggesting that Congress, in enacting the ATA, meant to foreclose ATS suits based on terrorism financing, the plurality offers no evidence to support that hypothesis, and the legislative history suggests that Congress enacted the ATA to provide U. S. citizens with the same remedy already available to foreign citi-

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zens under the ATS. See Hearing on S. 2465 before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 90 (1990) (testimony of Joseph A. Morris) (noting that ATS actions for terrorism “would be preserved”).

At bottom, the ATS and TVPA are related but distinct statutes that coexist independently. There is no basis to conclude that the considered judgment Congress made about who should be liable under the TVPA for torture and extra-judicial killing should restrict who can be held liable under the ATS for other law-of-nations violations, particularly where Congress made a different judgment about the scope of liability under the ATA for terrorism.

C

Finally, the plurality offers a set of “[o]ther considerations relevant to the exercise of judicial discretion” that it concludes “counsel against allowing liability under the ATS for foreign corporations.” *Ante*, at 268. None is persuasive.

First, the plurality asserts that “[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute” because “the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable” and because “plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.” *Ibid.* This Court has never previously required that, to maintain an ATS action, a plaintiff must show that the ATS is the exclusive means by which to hold the alleged perpetrator liable and that no relief can be had from other parties. Such requirements extend far beyond the inquiry *Sosa* contemplated and are without any basis in the statutory text.

Moreover, even if there are other grounds on which a suit alleging conduct constituting a law-of-nations violation can be brought, such as a state-law tort claim, the First Congress created the ATS because it wanted foreign plaintiffs to be

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able to bring their claims in federal court and sue for law-of-nations violations. A suit for state-law battery, even if based on the same alleged conduct, is not the equivalent of a federal suit for torture; the latter contributes to the uptake of international human-rights norms, and the former does not.¹²

Furthermore, holding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned. Consider again the assault on the Secretary of the French Legation in Philadelphia by a French adventurer. See *supra*, at 305; *ante*, at 253 (majority opinion). Would the diplomatic strife that followed really have been any less charged if a corporation had sent its agent to accost the Secretary? Or, consider piracy. If a corporation owned a fleet of vessels and directed them to seize other ships in U. S. waters, there no doubt would be calls to hold the corporation to account. See *Kiobel*, 621 F. 3d, at 156, and n. 10 (observing that “Somali pirates essentially operate as limited partnerships”). Finally, take, for example, a corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees of that business less likely to be able fully to compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will

¹² Counsel for Arab Bank acknowledged the symbolic force of ATS liability at oral argument. See Tr. of Oral Arg. 60 (“[T]he idea of the ATS is . . . not just that you violated a statute but that you have violated some specific universal obligatory norm so you are essentially an enemy of mankind. So, as much as my clients would not like to be an ATA defendant, they would really, really, really not like to be . . . labeled an enemy of mankind”).

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persist unremedied. Immunizing the corporation from suit under the ATS merely because it is a corporation, even though the violations stemmed directly from corporate policy and practice, might cause serious diplomatic friction.¹³

Second, the plurality expresses concern that if foreign corporations are subject to liability under the ATS, other nations could hale American corporations into court and sub-

¹³ JUSTICE ALITO, adopting a more absolutist position than the plurality, asserts without qualification that “federal courts should not create causes of action under the ATS against foreign corporate defendants” because doing so “would precipitate . . . diplomatic strife.” *Ante*, at 274, 278 (opinion concurring in part and concurring in judgment). The conclusion that ATS suits against foreign corporate defendants for law-of-nations and treaty violations always will cause diplomatic friction and that such suits will never be necessary “to help the United States avoid diplomatic friction,” *ante*, at 277, however, is at odds with the considered judgment of the Executive Branch and Congress regarding the importance of holding foreign corporations to account for certain egregious conduct. As noted, see Part II-B-1, *supra*, the Executive Branch has twice urged the Court not to foreclose the ability of foreign nationals to sue foreign corporate defendants under the ATS. The United States also has ratified several international agreements that require it to impose liability on corporations, both foreign and domestic, for certain actions, including the financing of terrorism. See *supra*, at 301–302. Congress, too, has expressly authorized civil suits against corporations for acts related to terrorism. See 18 U. S. C. § 2333. The Executive Branch and Congress surely would not have taken these positions, entered into these obligations, or made available these causes of action if the result were intolerable diplomatic strife.

JUSTICE ALITO also faults the lack of “real-world examples” of instances in which diplomatic friction has resulted from a court’s refusal to permit an individual to bring an ATS suit against a foreign corporation solely because of the defendant’s status as a foreign juridical entity. *Ante*, at 279. Such refusals, though, have been rare, as no other Court of Appeals besides the Second Circuit that has considered the question has imposed a bar on corporate liability. Compare *Doe v. Drummond Co.*, 782 F. 3d 576, 584 (CA11 2015); *Doe I v. Nestle USA, Inc.*, 766 F. 3d 1013, 1022 (CA9 2014); *Doe v. Exxon Mobil Corp.*, 654 F. 3d 11, 39–57 (CA DC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CA DC 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011), with *Kiobel v. Royal Dutch Petroleum*, 621 F. 3d 111, 120 (CA2 2010).

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ject them “to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world,” a prospect that will deter American corporations from investing in developing economies. *Ante*, at 269. The plurality offers no empirical evidence to support these alarmist conjectures, which is especially telling given that plaintiffs have been filing ATS suits against foreign corporations in United States courts for years. It does cite to an *amicus* brief for the United States in *American Isuzu Motors, Inc. v. Ntsebeza*, see *ante*, at 269, but that case was concerned with the availability of civil aiding and abetting liability, not corporate liability generally, and the United States never contended that permitting corporate liability under the ATS would undermine global investment. Instead, it argued that permitting extraterritorial aiding and abetting cases would interfere with foreign relations and deter “the free flow of trade and investment.” See Brief for United States as *Amicus Curiae*, O. T. 2007, No. 07–919, pp. 12–16, 20. Driven by hypothetical worry about besieged American corporations, today’s decision needlessly goes much further, encompassing all ATS suits against all foreign corporations, not just those cases with extraterritorial dimensions premised on an aiding and abetting theory.

* * *

In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of-nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that “foreign corporate

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defendants create unique problems” that necessitate a categorical rule barring all foreign corporate liability. *Ante*, at 272.

Absent any reason to believe that the corporate form in itself raises serious foreign-policy concerns, and given the repeated urging from the Executive Branch and Members of Congress that the Court need not and should not foreclose corporate liability, I would reverse the decision of the Court of Appeals for the Second Circuit and remand for further proceedings, including whether the allegations here sufficiently touch and concern the United States, see *Kiobel*, 569 U. S., at 124–125, and whether the international-law norms alleged to have been violated by Arab Bank—the prohibitions on genocide, crimes against humanity, and financing of terrorism—are of sufficiently definite content and universal acceptance to give rise to a cause of action under the ATS.

III

In categorically barring all suits against foreign corporations under the ATS, the Court ensures that foreign corporations—entities capable of wrongdoing under our domestic law—remain immune from liability for human-rights abuses, however egregious they may be.

Corporations can be and often are a force for innovation and growth. Many of their contributions to society should be celebrated. But the unique power that corporations wield can be used both for good and for bad. Just as corporations can increase the capacity for production, so, too, some can increase the capacity for suffering. Consider the genocide that took upwards of 800,000 lives in Rwanda in 1994, which was fueled by incendiary rhetoric delivered via a private radio station, the Radio Télévision Libre des Mille Collines (RTLM). Men spoke the hateful words, but the RTLM made their widespread influence possible.¹⁴

¹⁴ See, e. g., *Nahimana v. Prosecutor*, Case No. ICTR 99–52–A, Appeals Judgment ¶176 (Nov. 28, 2007) (upholding finding that the RTLM Collines broadcasts “contributed substantially to the killing of Tutsi”); G. Prunier,

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There can be, and sometimes is, a profit motive for these types of abuses. Although the market does not price all externalities, the law does. We recognize as much when we permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake the requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human-rights context.

Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights, see, *e. g.*, *Citizens United v. Federal Election Comm'n*, 558 U. S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014), without having to shoulder attendant fundamental responsibilities.

I respectfully dissent.

The Rwanda Crisis: History of a Genocide 224 (2d ed. 1999) (detailing incitements to murder broadcast on the RTLM, including: “The graves are not yet full. Who is going to do the good work and help us fill them completely”); Yanagizawa-Drott, Propaganda and Conflict: Evidence From the Rwandan Genocide, 129 Q. J. Econ. 1947, 1950 (2014) (analyzing village-level data from Rwanda to estimate that the RTLM’s transmissions caused 10 percent of the total participation in the genocide).

Syllabus

OIL STATES ENERGY SERVICES, LLC *v.* GREENE'S
ENERGY GROUP, LLC, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 16–712. Argued November 27, 2017—Decided April 24, 2018

Inter partes review authorizes the United States Patent and Trademark Office (PTO) to reconsider and cancel an already-issued patent claim in limited circumstances. See 35 U. S. C. §§311–319. Any person who is not the owner of the patent may petition for review. §311(a). If review is instituted, the process entitles the petitioner and the patent owner to conduct certain discovery, §316(a)(5); to file affidavits, declarations, and written memoranda, §316(a)(8); and to receive an oral hearing before the Patent Trial and Appeal Board, §316(a)(10). A final decision by the Board is subject to Federal Circuit review. §§318, 319.

Petitioner Oil States Energy Services, LLC, obtained a patent relating to technology for protecting wellhead equipment used in hydraulic fracturing. It sued respondent Greene's Energy Group, LLC, in Federal District Court for infringement. Greene's Energy challenged the patent's validity in the District Court and also petitioned the PTO for inter partes review. Both proceedings progressed in parallel. The District Court issued a claim-construction order favoring Oil States, while the Board issued a decision concluding that Oil States' claims were unpatentable. Oil States appealed to the Federal Circuit. In addition to its patentability arguments, it challenged the constitutionality of inter partes review, arguing that actions to revoke a patent must be tried in an Article III court before a jury. While the case was pending, the Federal Circuit issued a decision in a separate case, rejecting the same constitutional arguments raised by Oil States. The court then summarily affirmed the Board's decision in this case.

Held:

1. Inter partes review does not violate Article III. Pp. 333–344.

(a) Under this Court's precedents, Congress has significant latitude to assign adjudication of public rights to entities other than Article III courts. *Executive Benefits Ins. Agency v. Arkison*, 573 U. S. 25, 32. Inter partes review falls squarely within the public-rights doctrine. The decision to grant a patent is a matter involving public rights. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration. Pp. 333–337.

(i) The grant of a patent falls within the public-rights doctrine. *United States v. Duell*, 172 U.S. 576, 582–583. Granting a patent involves a matter “arising between the government and others.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 451. Specifically, patents are “public franchises.” *Seymour v. Osborne*, 11 Wall. 516, 533. Additionally, granting patents is one of “the constitutional functions” that can be carried out by “the executive or legislative departments” without “‘judicial determination.’” *Crowell v. Benson*, 285 U.S. 22, 50–51. Pp. 335–336.

(ii) Inter partes review involves the same basic matter as the grant of a patent. It is “a second look at an earlier . . . grant,” *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 279, and it involves the same interests as the original grant, see *Duell, supra*, at 586. That inter partes review occurs after the patent has issued does not make a difference here. Patents remain “subject to [the Board’s] authority” to cancel outside of an Article III court, *Crowell, supra*, at 50, and this Court has recognized that franchises can be qualified in this manner, see, e.g., *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421. Pp. 336–337.

(b) Three decisions that recognize patent rights as the “private property of the patentee,” *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370, do not contradict this conclusion. See also *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609; *Brown v. Duchesne*, 19 How. 183, 197. Nor do they foreclose the kind of post-issuance administrative review that Congress has authorized here. Those cases were decided under the Patent Act of 1870 and are best read as describing the statutory scheme that existed at that time. Pp. 337–339.

(c) Although patent validity was often decided in 18th-century English courts of law, that history does not establish that inter partes review violates the “general” principle that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,’” *Stern v. Marshall*, 564 U.S. 462, 484. Another means of canceling a patent at that time—a petition to the Privy Council to vacate a patent—closely resembles inter partes review. The parties have cited nothing to suggest that the Framers were not aware of this common practice when writing the Patent Clause, or that they excluded the practice from the scope of the Clause. Relatedly, the fact that American courts have traditionally adjudicated patent validity in this country does not mean that they must forever do so. Historical practice is not decisive here because matters governed by the public-rights doctrine may be assigned to the Legislature, the Executive, or the Judiciary. *Ex parte Bakelite Corp., supra*, at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today. Pp. 340–342.

Syllabus

(d) Finally, the similarities between the various procedures used in inter partes review and procedures typically used in courts does not lead to the conclusion that inter partes review violates Article III. This Court has never adopted a “looks like” test to determine if an adjudication has improperly occurred outside an Article III court. See, e. g., *Williams v. United States*, 289 U. S. 553, 563. Pp. 342–343.

(e) This holding is narrow. The Court addresses only the constitutionality of inter partes review and the precise constitutional challenges that Oil States raised here. The decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. P. 344.

2. Inter partes review does not violate the Seventh Amendment. When Congress properly assigns a matter to adjudication in a non-Article III tribunal, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33, 52–53. Thus, the rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge. Pp. 344–345.

639 Fed. Appx. 639, affirmed.

THOMAS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 345. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 346.

Allyson N. Ho argued the cause for petitioner. With her on the briefs were *Judd E. Stone* and *C. Erik Hawes*.

Christopher M. Kise argued the cause for respondent Greene’s Energy Group, LLC. With him on the brief were *Joshua M. Hawkes*, *Pavan K. Agarwal*, *David B. Goroff*, *George E. Quillin*, and *Lawrence J. Dougherty*. *Deputy Solicitor General Stewart* argued the cause for the federal respondent. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Rachel P. Kovner*, *Douglas N. Letter*, *Mark R. Freeman*, *Sarah T. Harris*, *Nathan K. Kelley*, *Thomas W. Krause*, *Farheena Y. Rasheed*, and *Mary Beth Walker*.*

*Briefs of *amici curiae* urging reversal were filed for AbbVie, Inc., et al. by *Lori Alvino McGill* and *Rakesh N. Kilaru*; for Alliacense Limited LLC by *Edward P. Heller III*; for the Biotechnology Innovation Organization

JUSTICE THOMAS delivered the opinion of the Court.

The Leahy-Smith America Invents Act, 35 U.S.C. § 100 *et seq.*, establishes a process called “inter partes review.” Under that process, the United States Patent and Trademark Office (PTO) is authorized to reconsider and to cancel

et al. by *Jonathan S. Massey, Rob Park, and Kenneth M. Goldman*; for the Cato Institute et al. by *Ilya Shapiro*; for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; for Evolutionary Intelligence LLC by *Gene C. Schaerr, S. Kyle Duncan, and Stephen S. Schwartz*; for IEEE-USA by *Maura K. Moran*; for InterDigital, Inc., by *Alexandra A. E. Shapiro, Andrew G. Isztwan, Sriranga Veeraraghavan, and Jeffrey A. Birchak*; for LiquidPower Specialty Products Inc. by *Thomas C. Goldstein and Patricia M. Rice*; for the Pacific Legal Foundation et al. by *Mark F. Hearne II, Stephen S. Davis, Abram J. Pafford, and Brian T. Hodges*; for the Pharmaceutical Research and Manufacturers of America by *Jeffrey A. Lamken, Eric R. Nitz, James C. Stansel, and David E. Korn*; for Security People, Inc., by *Frear Stephen Schmid*; for Thirty-Nine Affected Patent Owners by *Jay Q. Knobloch*; for Unisone Strategic IP, Inc., by *Anton N. Handal and Gabriel G. Hedrick*; for the University of New Mexico by *Alfonso Garcia Chan, Michael W. Shore, and Russell J. DePalma*; for US Inventor, Inc., et al. by *Robert P. Greenspoon*; for J. Kenneth Blackwell et al. by *Roy I. Liebman*; for James W. Ely, Jr., et al. by *Steven J. Lechner*; for Dmitry Karshtedt by *Mr. Karshtedt, pro se*; for Gary Lauder et al. by *J. Carl Cecere*; and for 27 Law Professors by *Sean D. Jordan and Adam W. Aston*.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Barbara A. Jones, William Alvarado Rivera, and Jamaica P. Szeliga*; for ACT!The App Association by *Brian Scarpelli*; for the Alliance of Automobile Manufacturers by *John Thorne and Gregory G. Rapawy*; for America's Health Insurance Plans by *Anna-Rose Mathieson and Julie Simon Miller*; for Apple Inc. by *Douglas Hallward-Driemeier, Scott McKeown, Matthew Rizzolo, Jonathan Ference-Burke, and Samuel Brenner*; for Arris Group, Inc., et al. by *Steffen N. Johnson, Andrew R. Sommer, Michael L. Brody, Jennifer Hightower, and Anthony Baca*; for Askeladden LLC by *Carter G. Phillips, Joseph R. Guerra, and Joshua J. Fougere*; for the Association for Accessible Medicines by *Eric D. Miller and Jeffrey K. Francer*; for BSA!The Software Alliance by *Andrew J. Pincus, Paul W. Hughes, and Matthew A. Waring*; for Dell Inc. et al. by *Theodore B. Olson, Amir C. Tayrani, Krishnendu Gupta, Michele K. Connors, and Thomas A. Brown*; for General Electric Company by *Roy T. Englert, Jr., Daniel N. Lerman, Paul R. Garcia, and Garrick A. Sevilla*; for the Initiative for Medicines, Access & Knowledge by *Daniel B. Ravicher*; for Intel

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an issued patent claim in limited circumstances. In this case, we address whether inter partes review violates Article III or the Seventh Amendment of the Constitution. We hold that it violates neither.

I

A

Under the Patent Act, the PTO is “responsible for the granting and issuing of patents.” 35 U. S. C. § 2(a)(1).

et al. by *Donald B. Verrilli, Jr., Ginger D. Anders, Matthew J. Hult, and Keith R. Weed*; for the Internet Association et al. by *John F. Duffy, James W. Dabney, Richard M. Koehl, and Emma L. Baratta*; for Knowledge Ecology International by *Andrew S. Goldman*; for Mylan Pharmaceuticals Inc. by *William A. Rakoczy*; for Professors of Administrative Law et al. by *Thomas H. Lee*; for Public Knowledge et al. by *Charles Duan and Vera Ranieri*; for the Retail Litigation Center, Inc., et al. by *W. Stephen Cannon, Seth D. Greenstein, and Deborah White*; for SAP America, Inc., et al. by *Andrew M. Mason and John D. Vandenberg*; for Taiwan Semiconductor Manufacturing Co., Ltd., by *Mark S. Davies, Katherine M. Kopp, and Michael Shen*; for Unified Patents Inc. by *William G. Jenks and Jonathan Stroud*; for U. S. Golf Manufacturers Council by *Peter J. Brann, Stacy O. Stitham, Michael J. Kline, and William B. Lacy*; for Volkswagen Group of America, Inc., by *Charles J. Hawkins*; for Lee A. Hollaar by *William R. Hubbard*; and for 72 Professors of Intellectual Property Law by *Mark A. Lemley and Arti K. Rai*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Meredith Martin Addy and Mark L. Whitaker*; for the Association of Amicus Counsel by *Robert J. Rando, Alan M. Sack, and Charles E. Miller*; for the Boston Patent Law Association by *Sophie F. Wang and Margaret E. Ives*; for the Civil Jury Project at New York University School of Law by *Stephen D. Susman, Samuel Issacharoff, and Erwin Chemerinsky*; for the Houston Intellectual Property Law Association by *L. Lee Eubanks IV*; for the Intellectual Property Law Association of Chicago by *John R. Linzer, Robert H. Resis, Charles W. Shifley, and Donald W. Rupert*; for the Intellectual Property Owners Association by *Paul H. Berghoff, Brandon J. Kennedy, Kevin H. Rhodes, Steven W. Miller, and Mark W. Lauroesch*; for the Patent Trial and Appeal Board Bar Association by *Joshua M. Segal, Aaron A. Barlow, and Paul D. Margolis*; for Shire Pharmaceuticals LLC by *Edgar H. Haug, Nicholas F. Giove, Richard F. Kurz, Jonathan A. Herstoff, and James Harrington*; for H. Tomás Gómez-Arostegui et al. by *Mr. Gómez-Arostegui, pro se*; and for 3M Company et al. by *Hyland Hunt and Ruthanne M. Deutsch*.

When an inventor applies for a patent, an examiner reviews the proposed claims and the prior art to determine if the claims meet the statutory requirements. See §§ 112, 131. Those requirements include utility, novelty, and nonobviousness based on the prior art. §§ 101, 102, 103. The Director of the PTO then approves or rejects the application. See §§ 131, 132(a). An applicant can seek judicial review of a final rejection. §§ 141(a), 145.

B

Over the last several decades, Congress has created administrative processes that authorize the PTO to reconsider and cancel patent claims that were wrongly issued. In 1980, Congress established “*ex parte* reexamination,” which still exists today. See Act To Amend the Patent and Trademark Laws, 35 U. S. C. § 301 *et seq.* *Ex parte* reexamination permits “[a]ny person at any time” to “file a request for reexamination.” § 302. If the Director determines that there is “a substantial new question of patentability” for “any claim of the patent,” the PTO can reexamine the patent. §§ 303(a), 304. The reexamination process follows the same procedures as the initial examination. § 305.

In 1999, Congress added a procedure called “*inter partes* reexamination.” See American Inventors Protection Act, §§ 4601–4608, 113 Stat. 1501A–567 to 1501A–572. Under this procedure, any person could file a request for reexamination. 35 U. S. C. § 311(a) (2006 ed.). The Director would determine if the request raised “a substantial new question of patentability affecting any claim of the patent” and, if so, commence a reexamination. §§ 312(a), 313 (2006 ed.). The reexamination would follow the general procedures for initial examination, but would allow the third-party requester and the patent owner to participate in a limited manner by filing responses and replies. §§ 314(a), (b) (2006 ed.). *Inter partes* reexamination was phased out when the America Invents Act went into effect in 2012. See § 6, 125 Stat. 299–305.

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C

The America Invents Act replaced inter partes reexamination with inter partes review, the procedure at issue here. See *id.*, at 299. Any person other than the patent owner can file a petition for inter partes review. 35 U. S. C. § 311(a) (2012 ed.). The petition can request cancellation of “1 or more claims of a patent” on the grounds that the claim fails the novelty or nonobviousness standards for patentability. § 311(b). The challenges must be made “only on the basis of prior art consisting of patents or printed publications.” *Ibid.* If a petition is filed, the patent owner has the right to file a preliminary response explaining why inter partes review should not be instituted. § 313.

Before he can institute inter partes review, the Director must determine “that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged.” § 314(a). The decision whether to institute inter partes review is committed to the Director’s discretion. See *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. 261, 273 (2016). The Director’s decision is “final and nonappealable.” § 314(d).¹

Once inter partes review is instituted, the Patent Trial and Appeal Board—an adjudicatory body within the PTO created to conduct inter partes review—examines the patent’s validity. See 35 U. S. C. §§ 6, 316(c). The Board sits in three-member panels of administrative patent judges. See § 6(c). During the inter partes review, the petitioner and the patent owner are entitled to certain discovery, § 316(a)(5); to file affidavits, declarations, and written memoranda, § 316(a)(8); and to receive an oral hearing before the Board, § 316(a)(10). The petitioner has the burden of proving unpatentability by a preponderance of the evidence. § 316(e). The owner can file a motion to amend the patent by voluntar-

¹The Director has delegated his authority to the Patent Trial and Appeal Board. See 37 CFR § 42.108(c) (2017).

ily canceling a claim or by “propos[ing] a reasonable number of substitute claims.” §316(d)(1)(B). The owner can also settle with the petitioner by filing a written agreement prior to the Board’s final decision, which terminates the proceedings with respect to that petitioner. §317. If the settlement results in no petitioner remaining in the inter partes review, the Board can terminate the proceeding or issue a final written decision. §317(a).

If the proceeding does not terminate, the Board must issue a final written decision no later than a year after it notices the institution of inter partes review, but that deadline can be extended up to six months for good cause. §§316(a)(11), 318(a). If the Board’s decision becomes final, the Director must “issue and publish a certificate.” §318(b). The certificate cancels patent claims “finally determined to be unpatentable,” confirms patent claims “determined to be patentable,” and incorporates into the patent “any new or amended claim determined to be patentable.” *Ibid.*

A party dissatisfied with the Board’s decision can seek judicial review in the Court of Appeals for the Federal Circuit. §319. Any party to the inter partes review can be a party in the Federal Circuit. *Ibid.* The Director can intervene to defend the Board’s decision, even if no party does. See §143; *Cuozzo, supra*, at 279. When reviewing the Board’s decision, the Federal Circuit assesses “the Board’s compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence.” *Randall Mfg. v. Rea*, 733 F. 3d 1355, 1362 (CA Fed. 2013).

II

Petitioner Oil States Energy Services, LLC, and respondent Greene’s Energy Group, LLC, are both oilfield services companies. In 2001, Oil States obtained a patent relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing. In 2012, Oil States sued Greene’s Energy in Federal District Court for infringing

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that patent. Greene’s Energy responded by challenging the patent’s validity. Near the close of discovery, Greene’s Energy also petitioned the Board to institute inter partes review. It argued that two of the patent’s claims were unpatentable because they were anticipated by prior art not mentioned by Oil States in its original patent application. Oil States filed a response opposing review. The Board found that Greene’s Energy had established a reasonable likelihood that the two claims were unpatentable and, thus, instituted inter partes review.

The proceedings before the District Court and the Board progressed in parallel. In June 2014, the District Court issued a claim-construction order. The order construed the challenged claims in a way that foreclosed Greene’s Energy’s arguments about the prior art. But a few months later, the Board issued a final written decision concluding that the claims were unpatentable. The Board acknowledged the District Court’s contrary decision, but nonetheless concluded that the claims were anticipated by the prior art.

Oil States sought review in the Federal Circuit. In addition to its arguments about patentability, Oil States challenged the constitutionality of inter partes review. Specifically, it argued that actions to revoke a patent must be tried in an Article III court before a jury. While Oil States’ case was pending, the Federal Circuit issued an opinion in a different case, rejecting the same constitutional arguments. *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F. 3d 1284, 1288–1293 (2015). The Federal Circuit summarily affirmed the Board’s decision in this case. 639 Fed. Appx. 639 (2016).

We granted certiorari to determine whether inter partes review violates Article III or the Seventh Amendment. 582 U. S. 903 (2017). We address each issue in turn.

III

Article III vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the

Congress may from time to time ordain and establish.” § 1. Consequently, Congress cannot “confer the Government’s ‘judicial Power’ on entities outside Article III.” *Stern v. Marshall*, 564 U.S. 462, 484 (2011). When determining whether a proceeding involves an exercise of Article III judicial power, this Court’s precedents have distinguished between “public rights” and “private rights.” *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32 (2014) (internal quotation marks omitted). Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts. See *ibid.*; *Stern*, *supra*, at 488–492.

This Court has not “definitively explained” the distinction between public and private rights, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion), and its precedents applying the public-rights doctrine have “not been entirely consistent,” *Stern*, 564 U.S., at 488. But this case does not require us to add to the “various formulations” of the public-rights doctrine. *Ibid.* Our precedents have recognized that the doctrine covers matters “which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” *Crowell v. Benson*, 285 U.S. 22, 50 (1932). In other words, the public-rights doctrine applies to matters “‘arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.’” *Ibid.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Inter partes review involves one such matter: reconsideration of the Government’s decision to grant a public franchise.

A

Inter partes review falls squarely within the public-rights doctrine. This Court has recognized, and the parties do not dispute, that the decision to *grant* a patent is a matter involv-

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ing public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO’s authority to conduct that reconsideration. Thus, the PTO can do so without violating Article III.

1

This Court has long recognized that the grant of a patent is a “‘matte[r] involving public rights.’” *United States v. Duell*, 172 U. S. 576, 582–583 (1899) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)). It has the key features to fall within this Court’s longstanding formulation of the public-rights doctrine.

Ab initio, the grant of a patent involves a matter “arising between the government and others.” *Ex parte Bakelite Corp.*, *supra*, at 451. As this Court has long recognized, the grant of a patent is a matter between “‘the public, who are the grantors, and . . . the patentee.’” *Duell*, *supra*, at 586 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 59 (1884)). By “issuing . . . patents,” the PTO “take[s] from the public rights of immense value and bestow[s] them upon the patentee.” *United States v. American Bell Telephone Co.*, 128 U. S. 315, 370 (1888). Specifically, patents are “public franchises” that the Government grants “to the inventors of new and useful improvements.” *Seymour v. Osborne*, 11 Wall. 516, 533 (1871); accord, *Pfaff v. Wells Electronics, Inc.*, 525 U. S. 55, 63–64 (1998). The franchise gives the patent owner “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.” 35 U. S. C. § 154(a)(1). That right “did not exist at common law.” *Gayler v. Wilder*, 10 How. 477, 494 (1851). Rather, it is a “creature of statute law.” *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U. S. 24, 40 (1923).

Additionally, granting patents is one of “the constitutional functions” that can be carried out by “the executive or leg-

islative departments” without “‘judicial determination.’” *Crowell, supra*, at 50–51 (quoting *Ex parte Bakelite Corp., supra*, at 451). Article I gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” §8, cl. 8. Congress can grant patents itself by statute. See, e.g., *Bloomer v. McQuewan*, 14 How. 539, 548–550 (1853). And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability. See 35 U. S. C. §§2(a)(1), 151; see also Act of July 8, 1870, §31, 16 Stat. 202; Act of July 4, 1836, §7, 5 Stat. 119–120; Act of Apr. 10, 1790, ch. 7, §1, 1 Stat. 109–110. When the PTO “adjudicate[s] the patentability of inventions,” it is “exercising the executive power.” *Freytag v. Commissioner*, 501 U. S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment) (emphasis deleted).

Accordingly, the determination to grant a patent is a “matte[r] involving public rights.” *Murray’s Lessee, supra*, at 284. It need not be adjudicated in Article III court.

2

Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.

Inter partes review is “a second look at an earlier administrative grant of a patent.” *Cuozzo*, 579 U. S., at 279. The Board considers the same statutory requirements that the PTO considered when granting the patent. See 35 U. S. C. §311(b). Those statutory requirements prevent the “issuance of patents whose effects are to remove existent knowledge from the public domain.” *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1, 6 (1966). So, like the PTO’s initial review, the Board’s inter partes review protects “the public’s paramount interest in seeing that patent monopolies

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are kept within their legitimate scope,” *Cuozzo, supra*, at 279–280 (internal quotation marks and alterations omitted). Thus, inter partes review involves the same interests as the determination to grant a patent in the first instance. See *Duell, supra*, at 586.

The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs *after* the patent has issued. But that distinction does not make a difference here. Patent claims are granted subject to the qualification that the PTO has “the authority to reexamine—and perhaps cancel—a patent claim” in an inter partes review. *Cuozzo, supra*, at 267. Patents thus remain “subject to [the Board’s] authority” to cancel outside of an Article III court. *Crowell*, 285 U. S., at 50.

This Court has recognized that franchises can be qualified in this manner. For example, Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise. See, e. g., *Louisville Bridge Co. v. United States*, 242 U. S. 409, 421 (1917) (collecting cases). Even after the bridge is built, the Government can exercise its reserved authority through legislation or an administrative proceeding. See, e. g., *id.*, at 420–421; *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 205 (1911); *Bridge Co. v. United States*, 105 U. S. 470, 478–482 (1882). The same is true for franchises that permit companies to build railroads or telegraph lines. See, e. g., *United States v. Union Pacific R. Co.*, 160 U. S. 1, 24–25, 37–38 (1895).

Thus, the public-rights doctrine covers the matter resolved in inter partes review. The Constitution does not prohibit the Board from resolving it outside of an Article III court.

B

Oil States challenges this conclusion, citing three decisions that recognize patent rights as the “private property of the patentee.” *American Bell Telephone Co., supra*, at 370; see

also *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606, 609 (1898) (“[A granted patent] has become the property of the patentee”); *Brown v. Duchesne*, 19 How. 183, 197 (1857) (“[T]he rights of a party under a patent are his private property”). But those cases do not contradict our conclusion.

Patents convey only a specific form of property right—a public franchise. See *Pfaff*, 525 U.S., at 63–64. And patents are “entitled to protection as any other property, consisting of a franchise.” *Seymour*, 11 Wall., at 533 (emphasis added). As a public franchise, a patent can confer only the rights that “the statute prescribes.” *Gayler*, 10 How., at 494; *Wheaton v. Peters*, 8 Pet. 591, 663–664 (1834) (noting that Congress has “the power to prescribe the conditions on which such right shall be enjoyed”). It is noteworthy that one of the precedents cited by Oil States acknowledges that the patentee’s rights are “derived altogether” from statutes, “are to be regulated and measured by these laws, and cannot go beyond them.” *Brown*, *supra*, at 195.²

One such regulation is inter partes review. See *Cuozzo*, 579 U.S., at 267–268. The Patent Act provides that, “[s]ubject to the provisions of this title, patents shall have the attributes of personal property.” 35 U.S.C. § 261. This provision qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act. See *eBay Inc. v. MercExchange, L. L. C.*, 547 U.S. 388, 392 (2006). Those provisions include inter partes review. See §§ 311–319.

²This Court has also recognized this dynamic for state-issued franchises. For instance, States often reserve the right to alter or revoke a corporate charter either “in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted.” *Pennsylvania College Cases*, 13 Wall. 190, 214, and n. † (1872). That reservation remains effective even after the corporation comes into existence, and such alterations do not offend the Contracts Clause of Article I, § 10. See *Pennsylvania College Cases*, *supra*, at 212–214; *e.g.*, *Miller v. State*, 15 Wall. 478, 488–489 (1873).

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Nor do the precedents that Oil States cites foreclose the kind of post-issuance administrative review that Congress has authorized here. To be sure, two of the cases make broad declarations that “[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.” *McCormick Harvesting Machine Co.*, *supra*, at 609; accord, *American Bell Telephone Co.*, 128 U. S., at 364. But those cases were decided under the Patent Act of 1870. See *id.*, at 371; *McCormick Harvesting Machine Co.*, *supra*, at 611. That version of the Patent Act did not include any provision for post-issuance administrative review. Those precedents, then, are best read as a description of the statutory scheme that existed at that time. They do not resolve Congress’ authority under the Constitution to establish a different scheme.³

³The dissent points to *McCormick*’s statement that the Patent Office Commissioner could not invalidate the patent at issue because it would “deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch.” *Post*, at 354 (opinion of GORSUCH, J.) (quoting *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 612 (1898)). But that statement followed naturally from the Court’s determination that, under the Patent Act of 1870, the Commissioner “was *functus officio*” and “had no power to revoke, cancel, or annul” the patent at issue. 169 U. S., at 611–612.

Nor is it significant that the *McCormick* Court “equated invention patents with land patents.” *Post*, at 354. *McCormick* itself makes clear that the analogy between the two depended on the particulars of the Patent Act of 1870. See 169 U. S., at 609–610. Modern invention patents, by contrast, are meaningfully different from land patents. The land-patent cases invoked by the dissent involved a “transaction [in which] ‘all authority or control’ over the lands has passed from ‘the Executive Department.’” *Boesche v. Udall*, 373 U. S. 472, 477 (1963) (quoting *Moore v. Robbins*, 96 U. S. 530, 533 (1878)). Their holdings do not apply when “the Government continues to possess some measure of control over” the right in question. *Boesche*, 373 U. S., at 477; see *id.*, at 477–478 (affirming administrative cancellations of public-land leases). And that is true of modern invention patents under the current Patent Act, which gives the PTO

C

Oil States and the dissent contend that inter partes review violates the “general” principle that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’” *Stern*, 564 U. S., at 484 (quoting *Murray’s Lessee*, 18 How., at 284). They argue that this is so because patent validity was often decided in English courts of law in the 18th century. For example, if a patent owner brought an infringement action, the defendant could challenge the validity of the patent as an affirmative defense. See Lemley, *Why Do Juries Decide If Patents Are Valid?* 99 Va. L. Rev. 1673, 1682, 1685–1686, and n. 52 (2013). Or, an individual could challenge the validity of a patent by filing a writ of *scire facias* in the Court of Chancery, which would sit as a law court when adjudicating the writ. See *id.*, at 1683–1685, and n. 44; Bottomley, *Patent Cases in the Court of Chancery, 1714–58*, 35 J. Legal Hist. 27, 36–37, 41–43 (2014).

But this history does not establish that patent validity is a matter that, “‘from its nature,’” must be decided by a court. *Stern, supra*, at 484 (quoting *Murray’s Lessee, supra*, at 284). The aforementioned proceedings were between private parties. But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent. See Lemley, *supra*, at 1681–1682; Hulme, *Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794* (Pt. I), 33 L. Q. Rev. 63 (1917). The Privy Council was composed of the Crown’s advisers. Lemley, *supra*, at 1681. From the 17th through the 20th centuries, English patents had a standard revocation clause that permitted six or more Privy Counsellors to declare a patent void if they determined the invention was contrary to

continuing authority to review and potentially cancel patents after they are issued. See 35 U. S. C. §§ 261, 311–319.

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law, “prejudicial” or “inconvenient,” not new, or not invented by the patent owner. See 11 W. Holdsworth, *A History of English Law* 426–427, and n. 6 (1938); Davies, *The Early History of the Patent Specification*, 50 L. Q. Rev. 86, 102–106 (1934). Individuals could petition the Council to revoke a patent, and the petition was referred to the Attorney General. The Attorney General examined the petition, considered affidavits from the petitioner and patent owner, and heard from counsel. See, e.g., *Bull v. Lydall*, PC2/81, pp. 180–181 (1706). Depending on the Attorney General’s conclusion, the Council would either void the patent or dismiss the petition. See, e.g., *Darby v. Betton*, PC2/99, pp. 358–359 (1745) (voiding the patent); *Baker v. James*, PC2/103, pp. 320–321, 346–347 (1753) (dismissing the petition).

The Privy Council was a prominent feature of the English system. It had exclusive authority to revoke patents until 1753, and after that, it had concurrent jurisdiction with the courts. See Hulme (Pt. II), 33 L. Q. Rev., at 189–191, 193–194. The Privy Council continued to consider revocation claims and to revoke patents throughout the 18th century. Its last revocation was in 1779. See *id.*, at 192–193. It considered, but did not act on, revocation claims in 1782, 1794, and 1810. See *ibid.*; *Board of Ordinance v. Parr*, PC1/3919 (1810).

The Patent Clause in our Constitution “was written against the backdrop” of the English system. *Graham*, 383 U. S., at 5. Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, “[w]ithin the scope established by the Constitution, Congress

may set out conditions and tests for patentability.” *Id.*, at 6. We conclude that inter partes review is one of those conditions.⁴

For similar reasons, we disagree with the dissent’s assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. See *post*, at 353–354. Historical practice is not decisive here because matters governed by the public-rights doctrine “from their nature” can be resolved in multiple ways: Congress can “reserve to itself the power to decide,” “delegate that power to executive officers,” or “commit it to judicial tribunals.” *Ex parte Bakelite Corp.*, 279 U. S., at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today.

D

Finally, Oil States argues that inter partes review violates Article III because it shares “every salient characteristic associated with the exercise of the judicial power.” Brief for Petitioner 20. Oil States highlights various procedures used in inter partes review: motion practice before the Board; discovery, depositions, and cross-examination of wit-

⁴ Oil States also suggests that inter partes review could be an unconstitutional condition because it conditions the benefit of a patent on accepting the possibility of inter partes review. Cf. *Koontz v. St. Johns River Water Management Dist.*, 570 U. S. 595, 604 (2013) (“[T]he government may not deny a benefit to a person because he exercises a constitutional right” (internal quotation marks omitted)). Even assuming a patent is a “benefit” for purposes of the unconstitutional-conditions doctrine, that doctrine does not apply here. The doctrine prevents the Government from using conditions “to produce a result which it could not command directly.” *Perry v. Sindermann*, 408 U. S. 593, 597 (1972) (internal quotation marks and alterations omitted). But inter partes review is consistent with Article III, see Part III–A, *supra*, and falls within Congress’ Article I authority, see Part III–C, *supra*, so it is something Congress can “command directly,” *Perry, supra*, at 597.

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nesses; introduction of evidence and objections based on the Federal Rules of Evidence; and an adversarial hearing before the Board. See 35 U. S. C. § 316(a); 77 Fed. Reg. 48758, 48761–48763 (2012). Similarly, Oil States cites PTO regulations that use terms typically associated with courts—calling the hearing a “trial,” *id.*, at 48758; the Board members “judges,” *id.*, at 48763; and the Board’s final decision a “judgment,” *id.*, at 48761, 48766–48767.

But this Court has never adopted a “looks like” test to determine if an adjudication has improperly occurred outside of an Article III court. The fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power. See *Freytag*, 501 U. S., at 910 (opinion of Scalia, J.). This Court has rejected the notion that a tribunal exercises Article III judicial power simply because it is “called a court and its decisions called judgments.” *Williams v. United States*, 289 U. S. 553, 563 (1933). Nor does the fact that an administrative adjudication is final and binding on an individual who acquiesces in the result necessarily make it an exercise of the judicial power. See, e. g., *Murray’s Lessee*, 18 How., at 280–281 (permitting the Treasury Department to conduct “final and binding” audits outside of an Article III court). Although inter partes review includes some of the features of adversarial litigation, it does not make any binding determination regarding “the liability of [Greene’s Energy] to [Oil States] under the law as defined.” *Crowell*, 285 U. S., at 51. It remains a matter involving public rights, one “between the government and others, which from [its] nature do[es] not require judicial determination.” *Ex parte Bakelite Corp.*, *supra*, at 451.⁵

⁵ Oil States also points out that inter partes review “is initiated by private parties and implicates no waivers of sovereign immunity.” Brief for Petitioner 30–31. But neither of those features takes inter partes review outside of the public-rights doctrine. That much is clear from *United States v. Duell*, 172 U. S. 576 (1899), which held that the doctrine covers

E

We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial review by the Federal Circuit, see 35 U.S.C. §319, we need not consider whether inter partes review would be constitutional “without any sort of intervention by a court at any stage of the proceedings,” *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 455, n. 13 (1977). Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. See, e.g., *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 (1999); *James v. Campbell*, 104 U.S. 356, 358 (1882).

IV

In addition to Article III, Oil States challenges inter partes review under the Seventh Amendment. The Seventh

interference proceedings—a procedure to “determin[e] which of two claimants is entitled to a patent”—even though interference proceedings were initiated by “‘private interests compet[ing] for preference’” and did not involve a waiver of sovereign immunity. *Id.*, at 582, 586 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 59 (1884)). Also, inter partes review is not initiated by private parties in the way that a common-law cause of action is. To be sure, a private party files the petition for review. 35 U.S.C. §311(a). But the decision to institute review is made by the Director and committed to his unreviewable discretion. See *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 273 (2016).

BREYER, J., concurring

Amendment preserves the “right of trial by jury” in “Suits at common law, where the value in controversy shall exceed twenty dollars.” This Court’s precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33, 53–54 (1989); accord, *Atlas Roofing Co., supra*, at 450–455. No party challenges or attempts to distinguish those precedents. Thus, our rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge. Because inter partes review is a matter that Congress can properly assign to the PTO, a jury is not necessary in these proceedings.

V

Because inter partes review does not violate Article III or the Seventh Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

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

I join the Court’s opinion in full. The conclusion that inter partes review is a matter involving public rights is sufficient to show that it violates neither Article III nor the Seventh Amendment. But the Court’s opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary. *Stern v. Marshall*, 564 U. S. 462, 494 (2011); *Commodity Futures Trading Comm’n v. Schor*, 478 U. S. 833, 853–856 (1986); see also *Stern, supra*, at 513 (BREYER, J., dissenting) (“The presence of ‘private rights’ does not automatically determine the outcome of the question but requires a more ‘searching’ examination of the relevant factors”).

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE joins, dissenting.

After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe \$30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so. Before the Revolution, colonial judges depended on the Crown for their tenure and salary and often enough their decisions followed their interests. The problem was so serious that the founders cited it in their Declaration of Independence (see ¶11). Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced. Under the Constitution, judges "hold their Offices during good Behaviour" and their "Compensation . . . shall not be diminished during the[ir] Continuance in Office." Art. III, §1. The framers knew that "a fixed provision" for judges' financial support would help secure "the independence of the judges," because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). They were convinced, too, that "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence." The Federalist No. 78, at 471 (A. Hamilton).

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Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to clean up problems after the fact, they assure us, promises an efficient solution. And, no doubt, dispensing with constitutionally prescribed procedures is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction—or, yes, a judicial hearing before a property interest is stripped away—the Constitution’s constraints can slow things down. But economy supplies no license for ignoring these—often vitally inefficient—protections. The Constitution “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,” and it is not our place to replace that judgment with our own. *United States v. Stevens*, 559 U. S. 460, 470 (2010).

Consider just how efficient the statute before us is. The Director of the Patent Office is a political appointee who serves at the pleasure of the President. 35 U. S. C. §§3(a)(1), (4). He supervises and pays the Board members responsible for deciding patent disputes. §§1(a), 3(b)(6), 6(a). The Director is allowed to select which of these members, and how many of them, will hear any particular patent challenge. See §6(c). If they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard. See §§6(a), (c); *In re Alappat*, 33 F. 3d 1526, 1535 (CA Fed. 1994) (en banc); *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F. 3d 1013, 1020 (CA Fed. 2017) (Dyk, J., concurring), cert. pending, No. 17–751. Nor has the Director

proven bashful about asserting these statutory powers to secure the “‘policy judgments’” he seeks. Brief for Petitioner 46 (quoting Patent Office Solicitor); see also Brief for Shire Pharmaceuticals LLC as *Amicus Curiae* 22–30.

No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?

Of course, all this invites the question: How do we know which cases independent judges must hear? The Constitution’s original public meaning supplies the key, for the Constitution cannot secure the people’s liberty any less today than it did the day it was ratified. The relevant constitutional provision, Article III, explains that the federal “judicial Power” is vested in independent judges. As originally understood, the judicial power extended to “suit[s] at the common law, or in equity, or admiralty.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). From this and as we’ve recently explained, it follows that, “[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with” Article III judges endowed with the protections for their independence the framers thought so important. *Stern v. Marshall*, 564 U. S. 462, 484 (2011) (internal quotation marks omitted). The Court does not quarrel with this test. See *ante*, at 340–342. We part ways only on its application.¹

¹ Some of our concurring colleagues see it differently. See *ante*, at 345 (BREYER, J., concurring). They point to language in *Commodity Futures Trading Comm’n v. Schor*, 478 U. S. 833 (1986), promoting the notion that

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As I read the historical record presented to us, only courts could hear patent challenges in England at the time of the founding. If facts were in dispute, the matter first had to proceed in the law courts. See, *e. g.*, *Newsham v. Gray*, 2 Atk. 286, 26 Eng. Rep. 575 (Ch. 1742). If successful there, a challenger then had to obtain a writ of *scire facias* in the law side of the Court of Chancery. See, *e. g.*, Pfander, Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals, 78 Texas L. Rev. 1433, 1446, n. 53 (2000); Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1686–1687 (2013) (Lemley, Juries). The last time an executive body (the King's Privy Council) invalidated an invention patent on an ordinary application was in 1745, in *Darby v. Betton*, PC2/99, pp. 358–359; and the last time the Privy Council even *considered* doing so was in 1753, in *Baker v. James*, PC2/103, pp. 320–321. After *Baker v. James*, the Privy Council “divest[ed] itself of its functions” in ordinary patent disputes, Hulme, Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794 (Pt. II), 33 L. Q. Rev. 180, 194 (1917), which “thereafter [were] adjudicated solely by the law courts, as opposed to the [Crown's] prerogative courts,” Mossoff, Rethinking the Development of Patents: An Intellectual History, 1550–1800, 52 Hastings L. J. 1255, 1286–1287 (2001) (Mossoff, Rethinking Patents).²

the political branches may “depart from the requirements of Article III” when the benefits outweigh the costs. *Id.*, at 851. Color me skeptical. The very point of our written Constitution was to prevent the government from “depart[ing]” from its protections for the people and their liberty just because someone later happens to think the costs outweigh the benefits. See *United States v. Stevens*, 559 U. S. 460, 470 (2010).

²See also Brief for H. Tomás Gómez-Arostegui et al. as *Amici Curiae* 6–37; Brief for Alliacense Limited LLC as *Amicus Curiae* 10–11; Gómez-Arostegui & Bottomley, Privy Council and *Scire Facias* 1700–1883, p. 2 (Nov. 6, 2017) (Addendum), <https://ssrn.com/abstract=3054989> (all Internet materials as last visited Apr. 20, 2018); Observations on the Utility of Patents, and on the Sentiments of Lord Kenyon Respecting That Subject

This shift to courts paralleled a shift in thinking. Patents began as little more than feudal favors. *Id.*, at 1261. The Crown both issued and revoked them. Lemley, *Juries 1680–1681*. And they often permitted the lucky recipient the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern. *Ibid.* But by the 18th century, inventors were busy in Britain and invention patents came to be seen in a different light. They came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist. Mossoff, *Rethinking Patents 1288–1289*. The Constitution itself reflects this new thinking, authorizing the issuance of patents precisely because of their contribution to the “Progress of Science and useful Arts.” Art. I, § 8, cl. 8. “In essence, there was a change in perception—from viewing a patent as a contract between the crown and the patentee to viewing it as a ‘social contract’ between the patentee and society.” Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents* (Pt. 3), 77 J. Pat. & Tm. Off. Soc. 771, 793 (1995). And as invention patents came to be seen so differently, it is no surprise courts came to treat them more solicitously.³

23 (2d ed. 1791) (“If persons of the same trade find themselves aggrieved by Patents taken for any thing already in use, their remedy is at hand. It is by a writ of *Scire Facias*”); *Mancius v. Lawton*, 10 Johns. 23, 24 (N.Y. 1813) (Kent, C. J.) (noting the “settled English course” that “[l]etters-patent . . . can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name” (emphasis deleted)).

³See also, *e.g.*, Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 Cornell L. Rev. 953, 967–968 (2007) (Mossoff, *Reevaluating the Patent Privilege*) (“[A]n American patent in the late eighteenth century was radically different from the royal monopoly privilege dispensed by Queen

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Unable to dispute that judges alone resolved virtually all patent challenges by the time of the founding, the Court points to three English cases that represent the Privy Council's dying gasp in this area: *Board of Ordnance v. Wilkinson*, PC2/123 (1779); *Grill [Grice] v. Waters*, PC2/127 (1782); and *Board of Ordnance v. Parr*, PC1/3919 (1810).⁴ Filed in 1779, 1782, and 1810, each involved an effort to override a patent on munitions during wartime, no doubt in an effort to increase their supply. But even then appealing to the Privy Council was seen as a last resort. The 1779 petition (the last Privy Council revocation ever) came only after the patentee twice refused instructions to litigate the patent's validity in a court of law. Gómez-Arostegui & Bottomley, Addendum 6 (citing *Board of Ordnance v. Wilkinson*, PC2/123 (1779), and PC1/11/150 (1779)). The Council did not act on the 1782 petition but instead referred it to the Attorney General where it appears to have been abandoned. Gómez-Arostegui & Bottomley, Addendum 17–18. Meanwhile, in response to the 1810 petition the Attorney General admitted that *scire facias* was the “usual manner” of revoking a patent and so directed the petitioner to proceed at law even as he suggested the Privy Council might be available in the event

Elizabeth or King James in the early seventeenth century. Patents no longer created, and sheltered from competition, manufacturing monopolies—they secured the exclusive control of an inventor over his novel and useful scientific or mechanical invention” (footnote omitted)); Mossoff, Rethinking Patents 1286–1287; H. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* 4 (1947).

⁴The 1794 petition the Court invokes, *ante*, at 341, involved a Scottish patent. *Simpson v. Cunningham*, PC2/141, p. 88 (1794). The English and Scottish patents systems, however, were distinct and enforced by different regimes. Gómez-Arostegui, *Patent and Copyright Exhaustion in England Circa 1800*, pp. 10–16, 37, 49–50 (Feb. 9, 2017), <https://ssrn.com/abstract=2905847>. Besides, even in that case the Scottish Lord Advocate “was of opinion, that the question should be tried in a court of law.” Gómez-Arostegui & Bottomley, Addendum, *supra*, at 23 (citing *Petition of William Cunningham*, p. 5, *Cunningham v. Simpson*, Signet Library Edinburgh, Session Papers 207:3 (Ct. Sess. Feb. 23, 1796)).

of a “very pressing and imminent” danger to the public. *Id.*, at 20 (citing PC1/3919 (1810)).

In the end, these cases do very little to support the Court’s holding. At most, they suggest that the Privy Council might have possessed some residual power to revoke patents to address wartime necessities. Equally, they might serve only as more unfortunate evidence of the maxim that in time of war, the laws fall silent.⁵ But whatever they do, these cases do not come close to proving that patent disputes were routinely permitted to proceed outside a court of law.

Any lingering doubt about English law is resolved for me by looking to our own. While the Court is correct that the Constitution’s Patent Clause “‘was written against the backdrop’” of English practice, *ante*, at 341 (quoting *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1, 5 (1966)), it’s also true that the Clause sought to *reject* some of early English practice. Reflecting the growing sentiment that patents shouldn’t be used for anticompetitive monopolies over “goods or businesses which had long before been enjoyed by the public,” the framers wrote the Clause to protect only pro-competitive invention patents that are the product of hard work and insight and “add to the sum of useful knowledge.” *Id.*, at 5–6. In light of the Patent Clause’s restrictions on this score, courts took the view that when the federal government “grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.” *James v. Campbell*, 104 U.S. 356, 358 (1882) (emphasis added). As Chief Justice Marshall explained, courts treated American invention patents as recognizing an “inchoate property” that exists “from the moment of invention.” *Evans v. Jordan*, 8 F. Cas. 872, 873 (No. 4,564) (CC

⁵ After all, the English statute of monopolies appeared to require the “force and validitie” of all patents to be determined only by “the Comon Lawes of this Realme & not otherwise.” 21 Jac. 1, c. 3, §2 (1624). So the Privy Council cases on which the Court relies may not reflect the best understanding of the British Constitution.

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Va. 1813). American patent holders thus were thought to “hol[d] a property in [their] invention[s] by as good a title as the farmer holds his farm and flock.” *Hovey v. Henry*, 12 F. Cas. 603, 604 (No. 6,742) (CC Mass. 1846) (Woodbury, J.). And just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.

This view held firm for most of our history. In fact, from the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone. The only apparent exception to this rule cited to us was a 4-year period when *foreign* patentees had to “work” or commercialize their patents or risk having them revoked. Hovenkamp, *The Emergence of Classical American Patent Law*, 58 *Ariz. L. Rev.* 263, 283–284 (2016). And the fact that for almost 200 years “earlier Congresses avoided use of [a] highly attractive”—and surely more efficient—means for extinguishing patents should serve as good “reason to believe that the power was thought not to exist” at the time of the founding. *Printz v. United States*, 521 U. S. 898, 905 (1997).

One more episode still underscores the point. When the Executive sought to claim the right to cancel a patent in the 1800s, this Court firmly rebuffed the effort. The Court explained:

“It has been settled by repeated decisions of this court that when a patent has [been issued by] the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. It has become the property of the patentee, and as such is entitled to the same legal protection as other property.” *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 608–609 (1898) (citations omitted).

As a result, the Court held, “[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any

reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.” *Id.*, at 609.

The Court today replies that *McCormick* sought only to interpret certain statutes then in force, not the Constitution. *Ante*, at 339, and n. 3. But this much is hard to see. Allowing the Executive to withdraw a patent, *McCormick* said, “would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.” 169 U. S., at 612. *McCormick* also pointed to “repeated decisions” in similar cases that themselves do not seem to rest merely on statutory grounds. See *id.*, at 608–609 (citing *United States v. Schurz*, 102 U. S. 378 (1880), and *United States v. American Bell Telephone Co.*, 128 U. S. 315 (1888)). And *McCormick* equated invention patents with land patents. 169 U. S., at 609. That is significant because, while the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a “judgment of a court.” *United States v. Stone*, 2 Wall. 525, 535 (1865); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U. S. 665, 715 (2015) (THOMAS, J., dissenting) (“Although Congress could authorize executive agencies to dispose of public rights in land—often by means of adjudicating a claimant’s qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke a patent” (emphasis deleted)).

With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. *Ante*, at 334–337. But that

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doesn't follow. Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it. To reward those who had proven the social utility of their work (and to induce others to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.

Still, the Court asks us to look away in yet another direction. At the founding, the Court notes, the Executive could sometimes both dispense and revoke public franchises. And because, it says, invention patents are a species of public franchises, the Court argues the Executive should be allowed to dispense and revoke them too. *Ante*, at 337. But labels aside, by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises. Many public franchises amounted to little more than favors resembling the original royal patents the framers expressly refused to protect in the Patent Clause. The Court points to a good example: the state-granted exclusive right to operate a toll bridge. *Ibid.* By the founding, courts in this country (as in England) had come to view anticompetitive monopolies like that with disfavor, narrowly construing the rights they conferred. See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 544 (1837). By contrast, courts routinely applied to invention patents protected by the Patent Clause the "liberal common sense construction" that applies to other instruments creating private property rights, like land deeds. *Davis v. Palmer*, 7 F. Cas. 154, 158 (No. 3,645) (CC Va. 1827) (Marshall, C. J.); see also Mossoff, *Reevaluating the Patent Privilege* 990 (listing more differences in treatment). As Justice Story explained, invention patents protected by the Patent Clause were "not to be treated as mere monopolies odious in the eyes of the law, and

therefore not to be favored.” *Ames v. Howard*, 1 F. Cas. 755, 756 (No. 326) (CC Mass. 1833). For precisely these reasons and as we’ve seen, the law traditionally treated patents issued under the Patent Clause very differently than monopoly franchises when it came to governmental invasions. Patents alone required independent judges. Nor can simply invoking a mismatched label obscure that fact. The people’s historic rights to have independent judges decide their disputes with the government should not be a “constitutional Maginot Line, easily circumvented” by such “simpl[e] maneuver[s].” *Bank Markazi v. Peterson*, 578 U. S. 212, 247 (2016) (ROBERTS, C. J., dissenting).

Today’s decision may not represent a rout but it at least signals a retreat from Article III’s guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn’t about protecting judicial authority for its own sake. It’s about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It’s for that reason Hamilton warned the Judiciary to take “all possible care . . . to defend itself against” intrusions by the other branches. *The Federalist* No. 78, at 466. It’s for that reason I respectfully dissent.

Syllabus

SAS INSTITUTE INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL.

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

No. 16–969. Argued November 27, 2017—Decided April 24, 2018

Inter partes review allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office. At the outset, a party must file a petition to institute review, 35 U.S.C. § 311(a), that identifies the challenged claims and the grounds for challenge with particularity, § 312(a)(3). The patent owner, in turn, may file a response. § 313. If the Director of the Patent Office determines “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition,” § 314(a), he decides “whether to institute . . . review . . . pursuant to [the] petition,” § 314(b). “If . . . review is instituted and not dismissed,” at the end of the litigation the Patent Trial and Appeal Board “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” § 318(a).

Petitioner SAS sought review of respondent ComplementSoft’s software patent, alleging that all 16 of the patent’s claims were unpatentable. Relying on a Patent Office regulation recognizing a power of “partial institution,” 37 CFR § 42.108(a), the Director instituted review on some of the claims and denied review on the rest. The Board’s final decision addressed only the claims on which the Director had instituted review. On appeal, the Federal Circuit rejected SAS’s argument that § 318(a) required the Board to decide the patentability of every claim challenged in the petition.

Held: When the Patent Office institutes an inter partes review, it must decide the patentability of all of the claims the petitioner has challenged. The plain text of § 318(a) resolves this case. Its directive is both mandatory and comprehensive. The word “shall” generally imposes a non-discretionary duty, and the word “any” ordinarily implies every member of a group. Thus, § 318(a) means that the Board *must* address *every* claim the petitioner has challenged. The Director’s “partial institution” power appears nowhere in the statutory text. And both text and context strongly counsel against inferring such a power.

The statute envisions an inter partes review guided by the initial petition. See § 312(a)(3). Congress structured the process such that the petitioner, not the Director, defines the proceeding’s contours. The

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ex parte reexamination statute shows that Congress knew exactly how to authorize the Director to investigate patentability questions “[o]n his own initiative, and at any time,” § 303(a). The inter partes review statute indicates that the Director’s decision “whether” to institute review “pursuant to [the] petition” is a yes-or-no choice. § 314(b).

Section 314(a)’s requirement that the Director find “a reasonable likelihood” that the petitioner will prevail on “at least 1 of the claims challenged in the petition” suggests, if anything, a regime where a reasonable prospect of success on a single claim justifies review of them all. Again, if Congress had wanted to adopt the Director’s claim-by-claim approach, it knew how to do so. See § 304. Nor does it follow that, because § 314(a) invests the Director with discretion on the question *whether* to institute review, it also invests him with discretion regarding *what* claims that review will encompass. The rest of the statute confirms, too, that the petitioner’s petition, not the Director’s discretion, should guide the life of the litigation. See, e. g., § 316(a)(8).

The Director suggests that a textual discrepancy between § 314(a)—which addresses whether to institute review based on claims found “in the petition”—and § 318(a)—which addresses the Board’s final resolution of the claims challenged “by the petitioner”—means that the Director enjoys the power to institute a review covering fewer than all of the claims challenged in the petition. However, the statute’s winnowing mechanism—which allows a patent owner to concede one part of a petitioner’s challenge and “[c]ancel any challenged patent claim,” § 316(d)(1)(A)—fully explains why Congress adopted the slightly different language.

The Director’s policy argument—that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others—is properly addressed to Congress, not this Court. And the Director’s asserted “partial institution” power, which is wholly unmentioned in the statute, is not entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837. Finally, notwithstanding § 314(d)—which makes the Director’s determination whether to institute an inter partes review “final and nonappealable”—judicial review remains available consistent with the Administrative Procedure Act to ensure that the Patent Office does not exceed its statutory bounds. *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. 261, distinguished. Pp. 362–371.

825 F. 3d 1341, reversed and remanded.

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

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a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 372. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, and in which KAGAN, J., joined except as to Part III–A, *post*, p. 372.

Gregory A. Castanias argued the cause for petitioner. With him on the briefs were *John A. Marlott* and *David B. Cochran*.

Jonathan C. Bond argued the cause for respondents. With him on the brief for the federal respondent were *Acting Solicitor General Wall*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Joshua M. Salzman*, *Nathan K. Kelley*, *Thomas W. Krause*, *Joseph G. Piccolo*, and *Robert J. McManus*. *Michael Kanovitz* and *Matthew V. Topic* filed a brief for respondent ComplementSoft, LLC.*

JUSTICE GORSUCH delivered the opinion of the Court.

A few years ago Congress created “inter partes review.” The new procedure allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office that mimics civil litigation. Recently, the Court upheld the inter partes review statute against a constitutional challenge. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, *ante*, p. 325. Now we take up a question concerning the statute’s operation. When the Patent Office initiates an inter partes review, must it resolve *all* of the claims in the case, or may it choose to limit its review to only *some* of them? The statute, we find, supplies a clear answer: The Patent Office must “issue a final written decision with respect to the patentability of *any* patent claim challenged by the petitioner.” 35 U. S. C. § 318(a) (emphasis added). In this context, as in so many others, “any” means

**Lauren A. Degnan*, *Kevin H. Rhodes*, and *Steven W. Miller* filed a brief for the Intellectual Property Owners Association as *amicus curiae* urging reversal.

Iftikhar Ahmed filed a brief for the Houston Intellectual Property Law Association as *amicus curiae* urging affirmance.

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“every.” The agency cannot curate the claims at issue but must decide them all.

“To promote the Progress of Science and useful Arts,” Congress long ago created a patent system granting inventors rights over the manufacture, sale, and use of their inventions. U. S. Const., Art. I, §8, cl. 8; see 35 U.S.C. §154(a)(1). To win a patent, an applicant must (among other things) file “claims” that describe the invention and establish to the satisfaction of the Patent Office the invention’s novelty and nonobviousness. See §§102, 103, 112(b), 131; *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 266–267 (2016).

Sometimes, though, bad patents slip through. Maybe the invention wasn’t novel, or maybe it was obvious all along, and the patent owner shouldn’t enjoy the special privileges it has received. To remedy these sorts of problems, Congress has long permitted parties to challenge the validity of patent claims in federal court. See §§282(b)(2)–(3). More recently, Congress has supplemented litigation with various administrative remedies. The first of these was *ex parte* reexamination. Anyone, including the Director of the Patent Office, can seek *ex parte* reexamination of a patent claim. §§302, 303(a). Once instituted, though, an *ex parte* reexamination follows essentially the same inquisitorial process between patent owner and examiner as the initial Patent Office examination. §305. Later, Congress supplemented *ex parte* reexamination with *inter partes* reexamination. *Inter partes* reexamination (since repealed) provided a slightly more adversarial process, allowing a third party challenger to submit comments throughout the proceeding. §314(b)(2) (2006 ed.) (repealed). But otherwise it too followed a more or less inquisitorial course led by the Patent Office. §314(a). Apparently unsatisfied with this approach, in 2011 Congress repealed *inter partes* reexamination and replaced it with *inter partes* review. See §§311–319 (2012 ed.).

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The new inter partes review regime looks a good deal more like civil litigation. At its outset, a party must file “a petition to institute an inter partes review of [a] patent.” §311(a). The petition “may request to cancel as unpatentable 1 or more claims of [the] patent” on the ground that the claims are obvious or not novel. §311(b); see §§ 102 and 103. In doing so, the petition must identify “each claim challenged,” the grounds for the challenge, and the evidence supporting the challenge. §312(a)(3). The patent owner, in turn, may respond with “a preliminary response to the petition” explaining “why no inter partes review should be instituted.” §313. With the parties’ submissions before him, the Director then decides “whether to institute an inter partes review . . . pursuant to [the] petition.” §314(b). (In practice, the agency’s Patent Trial and Appeal Board exercises this authority on behalf of the Director, see 37 CFR § 42.4(a) (2017).) Before instituting review, the Director must determine, based on the parties’ papers, “that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U. S. C. § 314(a).

Once the Director institutes an inter partes review, the matter proceeds before the Board with many of the usual trappings of litigation. The parties conduct discovery and join issue in briefing and at an oral hearing. §§ 316(a)(5), (6), (8), (10), (13). During the course of the case, the patent owner may seek to amend its patent or to cancel one or more of its claims. §316(d). The parties may also settle their differences and seek to end the review. §317. But “[i]f an inter partes review is instituted and not dismissed,” at the end of the litigation the Board “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” §318(a).

Our case arose when SAS sought an inter partes review of ComplementSoft’s software patent. In its petition, SAS alleged that all 16 of the patent’s claims were unpatentable

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for various reasons. The Director (in truth the Board acting on the Director's behalf) concluded that SAS was likely to succeed with respect to at least one of the claims and that an inter partes review was therefore warranted. But instead of instituting review on all of the claims challenged in the petition, the Director instituted review on only some (claims 1 and 3–10) and denied review on the rest. The Director did all this on the strength of a Patent Office regulation that purported to recognize a power of “partial institution,” claiming that “[w]hen instituting *inter partes* review, the [Director] may authorize the review to proceed on all or some of the challenged claims and on all or some or the grounds of unpatentability asserted for each claim.” 37 CFR § 42.108(a). At the end of litigation, the Board issued a final written decision finding claims 1, 3, and 5–10 to be unpatentable while upholding claim 4. But the Board's decision did not address the remaining claims on which the Director had refused review.

That last fact led SAS to seek review in the Federal Circuit. There SAS argued that 35 U.S.C. § 318(a) required the Board to decide the patentability of *every* claim SAS challenged in its petition, not just some. For its part, the Federal Circuit rejected SAS's argument over a vigorous dissent by Judge Newman. *SAS Institute, Inc. v. ComplementSoft, LLC*, 825 F.3d 1341 (2016). We granted certiorari to decide the question ourselves. 581 U.S. 992 (2017).

We find that the plain text of § 318(a) supplies a ready answer. It directs that “[i]f an inter partes review is instituted and not dismissed under this chapter, the [Board] *shall* issue a final written decision with respect to the patentability of *any patent claim challenged by the petitioner . . .*” § 318(a) (emphasis added). This directive is both mandatory and comprehensive. The word “shall” generally imposes a nondiscretionary duty. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). And the word “any” naturally carries “an expansive meaning.”

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United States v. Gonzales, 520 U. S. 1, 5 (1997). When used (as here) with a “singular noun in affirmative contexts,” the word “any” ordinarily “refer[s] to a member of a particular group or class without distinction or limitation” and in this way “impl[ies] *every* member of the class or group.” Oxford English Dictionary (3d ed., Mar. 2016), www.oed.com/view/Entry/8973 (OED) (emphasis added) (all Internet materials as last visited Apr. 20, 2018). So when §318(a) says the Board’s final written decision “shall” resolve the patentability of “any patent claim challenged by the petitioner,” it means the Board *must* address *every* claim the petitioner has challenged.

That would seem to make this an easy case. Where a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer. *Social Security Bd. v. Nierotko*, 327 U. S. 358, 369 (1946). Because SAS challenged all 16 claims of ComplementSoft’s patent, the Board in its final written decision had to address the patentability of all 16 claims. Much as in the civil litigation system it mimics, in an inter partes review the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decisionmaker might wish to address.

The Director replies that things are not quite as simple as they seem. Maybe the Board has to decide every claim challenged by the petitioner in an inter partes review. But, he says, that doesn’t mean every challenged claim gains admission to the review process. In the Director’s view, he retains discretion to decide which claims make it into an inter partes review and which don’t. The trouble is, nothing in the statute says anything like that. The Director’s claimed “partial institution” power appears nowhere in the text of §318, or anywhere else in the statute for that matter. And what can be found in the statutory text and context strongly counsels against the Director’s view.

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Start where the statute does. In its very first provision, the statute says that a party may seek inter partes review by filing “a petition to institute an inter partes review.” §311(a). This language doesn’t authorize the Director to start proceedings on his own initiative. Nor does it contemplate a petition that asks the Director to initiate whatever kind of inter partes review he might choose. Instead, the statute envisions that a petitioner will seek an inter partes review of a particular kind—one guided by a petition describing “each claim challenged” and “the grounds on which the challenge to each claim is based.” §312(a)(3). From the outset, we see that Congress chose to structure a process in which it’s the petitioner, not the Director, who gets to define the contours of the proceeding. And “[j]ust as Congress’ choice of words is presumed to be deliberate” and deserving of judicial respect, “so too are its structural choices.” *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 353 (2013).

It’s telling, too, to compare this structure with what came before. In the ex parte reexamination statute, Congress embraced an inquisitorial approach, authorizing the Director to investigate a question of patentability “[o]n his own initiative, and any time.” §303(a). If Congress had wanted to give the Director similar authority over the institution of inter partes review, it knew exactly how to do so—it could have simply borrowed from the statute next door. But rather than create (another) agency-led, inquisitorial process for reconsidering patents, Congress opted for a party-directed, adversarial process. Congress’s choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard. See *Nassar*, *supra*, at 353–354.

More confirmation comes as we move to the point of institution. Here the statute says the Director must decide “whether to institute an inter partes review . . . pursuant to a petition.” §314(b). The Director, we see, is given only

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the choice “whether” to institute an inter partes review. That language indicates a binary choice—either institute review or don’t. And by using the term “pursuant to,” Congress told the Director what he must say yes or no to: an inter partes review that proceeds “[i]n accordance with” or “in conformance to” the petition. OED, www.oed.com/view/Entry/155073. Nothing suggests the Director enjoys a license to depart from the petition and institute a *different* inter partes review of his own design.

To this the Director replies by pointing to another part of § 314. Section 314(a) provides that the Director may not authorize an inter partes review unless he determines “there is a reasonable likelihood” the petitioner will prevail on “at least 1 of the claims challenged in the petition.” The Director argues that this language requires him to “evaluate claims individually” and so must allow him to institute review on a claim-by-claim basis as well. Brief for Federal Respondent 28. But this language, if anything, suggests just the opposite. Section 314(a) does not require the Director to evaluate every claim individually. Instead, it simply requires him to decide whether the petitioner is likely to succeed on “at least 1” claim. Once that single claim threshold is satisfied, it doesn’t matter whether the petitioner is likely to prevail on any *additional* claims; the Director need not even consider any other claim before instituting review. Rather than contemplate claim-by-claim institution, then, the language anticipates a regime where a reasonable prospect of success on a single claim justifies review of all.

Here again we know that if Congress wanted to adopt the Director’s approach it knew exactly how to do so. The ex parte reexamination statute allows the Director to assess whether a request raises “a substantial new question of patentability affecting any claim” and (if so) to institute reexamination limited to “resolution of *the question*.” § 304 (emphasis added). In other words, that statute allows the Director to institute proceedings on a claim-by-claim and

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ground-by-ground basis. But Congress didn't choose to pursue that known and readily available approach here. And its choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before. See *Nassar, supra*, at 353–354.

Faced with this difficulty, the Director tries another tack. He points to the fact that §314(a) doesn't *require* him to institute an inter partes review even after he finds the “reasonable likelihood” threshold met with respect to one claim. Whether to institute proceedings upon such a finding, he says, remains a matter left to his discretion. See *Cuozzo*, 579 U.S., at 273. But while §314(a) invests the Director with discretion on the question *whether* to institute review, it doesn't follow that the statute affords him discretion regarding *what* claims that review will encompass. The text says only that the Director can decide “whether” to institute the requested review—not “whether *and to what extent*” review should proceed. §314(b).

The rest of the statute confirms, too, that the petitioner's petition, not the Director's discretion, is supposed to guide the life of the litigation. For example, §316(a)(8) tells the Director to adopt regulations ensuring that, “after an inter partes review has been instituted,” the patent owner will file “a response to the petition.” Surely it would have made little sense for Congress to insist on a response *to the petition* if, in truth, the Director enjoyed the discretion to limit the claims under review. What's the point, after all, of answering claims that aren't in the proceeding? If Congress had meant to afford the Director the power he asserts, we would have expected it to instruct him to adopt regulations requiring the patent owner to file a response *to the Director's institution notice* or *to the claims on which the Director instituted review*. Yet we have nothing like that here. And then and again there is §318(a). At the end of the proceeding, §318(a) categorically commands the Board to address in its final written decision “any patent claim challenged by the

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petitioner.” In all these ways, the statute tells us that the petitioner’s contentions, not the Director’s discretion, define the scope of the litigation all the way from institution through to conclusion.

The Director says we can find at least some hint of the discretion he seeks by comparing §314(a) and §318(a). He notes that, when addressing whether to institute review at the beginning of the litigation, §314(a) says he must focus on the claims found “in the petition”; but when addressing what claims the Board must address at the end of the litigation, §318(a) says it must resolve the claims challenged “by the petitioner.” According to the Director, this (slight) linguistic discrepancy means the claims the Board must address in its final decision are not necessarily the same as those identified in the petition. And the only possible explanation for this arrangement, the Director submits, is that he must enjoy the (admittedly implicit) power to institute an inter partes review that covers fewer than all of the claims challenged in the petition.

We just don’t see it. Whatever differences they might display, §314(a) and §318(a) both focus on the *petitioner’s* contentions and, given that, it’s difficult to see how they might be read to give the *Director* power to decide what claims are at issue. Particularly when there’s a much simpler and sounder explanation for the statute’s wording. As we’ve seen, a patent owner may move to “[c]ancel any challenged patent claim” during the course of an inter partes review, effectively conceding one part of a petitioner’s challenge. §316(d)(1)(A). Naturally, then, the claims challenged “in the petition” will not always survive to the end of the case; some may drop out thanks to the patent owner’s actions. And in that light it is plain enough why Congress provided that only claims still challenged “by the petitioner” at the litigation’s end must be addressed in the Board’s final written decision. The statute’s own winnowing mechanism fully explains why Congress adopted slightly different lan-

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guage in § 314(a) and § 318(a). We need not and will not invent an atextual explanation for Congress's drafting choices when the statute's own terms supply an answer. See *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240–241 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute”).

Moving past the statute's text and context, the Director attempts a policy argument. He tells us that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others. Brief for Federal Respondent 35–36; see also *post*, at 372 (GINSBURG, J., dissenting); *post*, at 378–379 (BREYER, J., dissenting). SAS responds that all patent challenges usually end up being litigated *somewhere*, and that partial institution creates inefficiency by requiring the parties to litigate in two places instead of one—the Board for claims the Director chooses to entertain and a federal court for claims he refuses. Indeed, SAS notes, the government itself once took the same view, arguing that partial institution “‘undermine[s] the Congressional efficiency goal’” for this very reason. Brief for Petitioner 30. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed. And whatever its virtues or vices, Congress's prescribed policy here is clear: The petitioner in an inter partes review is entitled to a decision on all the claims it has challenged.*

*JUSTICE GINSBURG suggests the Director might yet avoid this command by refusing to review a petition he thinks too broad while signaling his willingness to entertain one more tailored to his sympathies. *Post*, at 372 (dissenting opinion). We have no occasion today to consider whether this stratagem is consistent with the statute's demands. See *Cuozzo*

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That leaves the Director to suggest that, however this Court might read the statute, he should win anyway because of *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Even though the statute says nothing about his asserted “partial institution” power, the Director says the statute is at least ambiguous on the propriety of the practice and so we should leave the matter to his judgment. For its part, SAS replies that we might use this case as an opportunity to abandon *Chevron* and embrace the “‘impressive body’” of pre-*Chevron* law recognizing that “‘the meaning of a statutory term’” is properly a matter for “‘judicial [rather than] administrative judgment.’” Brief for Petitioner 41 (quoting *Pittston Stevedoring Corp. v. Del-laventura*, 544 F. 2d 35, 49 (CA2 1976) (Friendly, J.)).

But whether *Chevron* should remain is a question we may leave for another day. Even under *Chevron*, we owe an agency’s interpretation of the law no deference unless, after “employing traditional tools of statutory construction,” we find ourselves unable to discern Congress’s meaning. 467 U. S., at 843, n. 9. And after applying traditional tools of interpretation here, we are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands. The statute hinges inter partes review on the filing of a petition challenging specific patent claims; it makes the petition the centerpiece of the proceeding both before and after institution; and it

Speed Technologies, LLC v. Lee, 579 U. S. 261, 275 (2016) (noting that courts may invalidate “‘shenanigans’” by the Director that are “outside [his] statutory limits”); *CAB v. Delta Air Lines, Inc.*, 367 U. S. 316, 328 (1961) (questioning an agency’s “power to do indirectly what it cannot do directly”). But even assuming (without granting) the law would tolerate this tactic, it would show only that a lawful means exists for the Director to achieve his policy aims—not that he “should be allowed to improvise on the powers granted by Congress” by devising an extralegal path to the same goal. *Id.*, at 330. That an agency’s improvisation might be thought by some more expedient than what the law allows, *post*, at 372, does nothing to commend it either, for lawful ends do not justify unlawful means.

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requires the Board's final written decision to address every claim the petitioner presents for review. There is no room in this scheme for a wholly unmentioned "partial institution" power that lets the Director select only some challenged claims for decision. The Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear. See *SEC v. Sloan*, 436 U.S. 103, 116–117 (1978). Neither may we defer to an agency official's preferences because we imagine some "hypothetical reasonable legislator" would have favored that approach. *Post*, at 380 (BREYER, J., dissenting). Our duty is to give effect to the text that 535 *actual* legislators (plus one President) enacted into law.

At this point, only one final question remains to resolve. Even if the statute forbids his partial institution practice, the Director suggests we lack the power to say so. By way of support, he points to §314(d) and our decision in *Cuozzo*, 579 U.S. 261. Section 314(d) says that the "determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." In *Cuozzo*, we held that this provision prevented courts from entertaining an argument that the Director erred in instituting an inter partes review of certain patent claims. *Id.*, at 271–276. The Director reads these authorities as foreclosing judicial review of any legal question bearing on the institution of inter partes review—including whether the statute permits his "partial institution" practice.

But this reading overreads both the statute and our precedent. As *Cuozzo* recognized, we begin with "the 'strong presumption' in favor of judicial review." *Id.*, at 273. To overcome that presumption, *Cuozzo* explained, this Court's precedents require "clear and convincing indications" that Congress meant to foreclose review. *Ibid.* (internal quotation marks omitted). Given the strength of this presumption and the statute's text, *Cuozzo* concluded that §314(d) precludes judicial review only of the Director's "initial determination" under §314(a) that "there is a 'reasonable likeli-

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hood’ that the claims are unpatentable on the grounds asserted” and review is therefore justified. *Ibid.*; see *id.*, at 275 (review unavailable “where a patent holder merely challenges the Patent Office’s ‘determin[ation] that the information presented in the petition . . . shows that there is a reasonable likelihood’ of success ‘with respect to at least 1 of the claims challenged’”); *id.*, at 276 (claim that a “petition was not pleaded ‘with particularity’ under § 312 is little more than a challenge to the Patent Office’s conclusion, under § 314(a), that the ‘information presented in the petition’ warranted review”). In fact, *Cuozzo* proceeded to emphasize that § 314(d) does not “enable the agency to act outside its statutory limits.” *Id.*, at 275. If a party believes the Patent Office has engaged in “‘shenanigans’” by exceeding its statutory bounds, judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action “not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” *Ibid.*; 5 U. S. C. §§ 706(2)(A), (C).

And that, of course, is exactly the sort of question we are called upon to decide today. SAS does not seek to challenge the Director’s conclusion that it showed a “reasonable likelihood” of success sufficient to warrant “institut[ing] an inter partes review.” 35 U. S. C. §§ 314(a), (d). No doubt SAS remains very pleased with the Director’s judgment on that score. Instead, SAS contends that the Director exceeded his statutory authority by limiting the review to fewer than all of the claims SAS challenged. And nothing in § 314(d) or *Cuozzo* withdraws our power to ensure that an inter partes review proceeds in accordance with the law’s demands.

Because everything in the statute before us confirms that SAS is entitled to a final written decision addressing all of the claims it has challenged and nothing suggests we lack the power to say so, the judgment of the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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

Given the Court's wooden reading of 35 U. S. C. § 318(a), and with "no mandate to institute [inter partes] review" at all, *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. 261, 273 (2016), the Patent Trial and Appeal Board could simply deny a petition containing challenges having no "reasonable likelihood" of success, § 314(a). Simultaneously, the Board might note that one or more specified claims warrant reexamination, while others challenged in the petition do not. Petitioners would then be free to file new or amended petitions shorn of challenges the Board finds unworthy of inter partes review. Why should the statute be read to preclude the Board's more rational way to weed out insubstantial challenges? For the reasons stated by JUSTICE BREYER, the Court's opinion offers no persuasive answer to that question, and no cause to believe Congress wanted the Board to spend its time so uselessly.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, and with whom JUSTICE KAGAN joins except as to Part III–A, dissenting.

This case requires us to engage in a typical judicial exercise, construing a statute that is technical, unclear, and constitutes a minor procedural part of a larger administrative scheme. I would follow an interpretive technique that judges often use in such cases. Initially, using "traditional tools of statutory construction," *INS v. Cardoza-Fonseca*, 480 U. S. 421, 446 (1987), I would look to see whether the relevant statutory phrase is ambiguous or leaves a gap that Congress implicitly delegated authority to the agency to fill. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). If so, I would look to see whether the agency's interpretation is reasonable. *Id.*, at 843. Because I believe there is such a gap and because the Patent Office's interpretation of the ambiguous phrase is rea-

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sonable, I would conclude that the Patent Office's interpretation is lawful.

I

The Court sets out the statutory framework that establishes "inter partes review." See *ante*, at 361; 35 U. S. C. §§311–319. An example will help the reader keep that framework in mind. Suppose the Patent Office issues a patent containing, say, 16 different claims. A challenger, believing the patent is invalid, seeks to invoke the inter partes review procedure.

The statutory chapter entitled "Inter partes review" explains just how this is to be done. See §§311–319. First, the challenger files a petition requesting "cancel[lation]" of one or more of the patent claims as "unpatentable" because "prior art" shows, for example, that they are not "novel." §311(b); see §§102, 103. That petition must detail the grounds for the challenge and the supporting evidence, along with providing certain technical information. §312. Second, the patent owner may file a "preliminary response" to the petition. §313.

Third, the Director of the Patent Office will decide whether to "institute" inter partes review. §314. The statute specifies that the Director "may not authorize an inter partes review to be instituted unless the Director determines . . . that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." §314(a). Thus, in my example, if the Director determines that none of the 16 challenges in the petition has likely merit, he cannot institute an inter partes review. Even if there is one potentially meritorious challenge, we have said that the statute contains "no mandate to institute review," so the Director still has discretion to deny a petition. *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. 261, 273 (2016). We have also held that the Director's decision whether to institute review is normally not reviewable. *Id.*, at 275–276.

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The Director, by regulation, has delegated the power to institute review to the Patent Trial and Appeal Board. 37 CFR § 42.4(a) (2017). And the Director has further provided by regulation that where a petition challenges several patent claims (say, all 16 claims in my example), “the Board may authorize the review to proceed on all *or some* of the challenged claims.” § 42.108(a) (emphasis added). Thus, where some, but not all, of the challenges have likely merit (say, 1 of the 16 has likely merit and the others are close to frivolous), the Board is free to conduct inter partes review only as to the challenge with likely merit.

Fourth, the statute next describes the relation of a petition for review and an instituted review to other proceedings involving the challenged patent. 35 U. S. C. § 315. Fifth, the statute describes what happens once the Board begins its inter partes review, including how the Board is to take evidence and make its decisions, § 316, and the nature and effect of settlements, § 317.

Sixth, the statute sets forth the section primarily at issue here, which describes what happens at the end of the process. It says:

“Final Written Decision.—If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of *any patent claim challenged by the petitioner* and any new claim added under section 316(d).” § 318(a) (emphasis added).

Finally, the chapter says that a “party dissatisfied with the final written decision . . . may appeal the decision” to the U. S. Court of Appeals for the Federal Circuit. § 319; see § 141(c).

Thus, going through this process, if a petitioner files a petition challenging 16 claims and the Board finds that the challenges to 15 of the claims are frivolous, the Board may then, as it interprets the statute, begin and proceed through the inter partes review process as to the remaining claim, num-

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ber 16, but not in respect to the other 15 claims. Eventually the Board will produce a “final written decision” as to the patentability of claim number 16, which decision the challenger (or the patentee) can appeal to the Federal Circuit.

II

Now let us return to the question at hand, the meaning of the phrase “any patent claim challenged by the petitioner” in § 318(a). Do those words unambiguously refer, as the majority believes, to “any patent claim challenged by the petitioner” *in the petitioner’s original petition*? The words “in the petitioner’s original petition” do not appear in the statute. And the words that do appear, “any patent claim challenged by the petitioner,” could be modified by using different words that similarly do not appear, for example, the words “in the inter partes review proceeding.” But without added words, the phrase “challenged by the petitioner” does not tell us whether the relevant challenge is one made in the initial petition or only one made in the inter partes review proceeding itself. And, linguistically speaking, there is as much reason to fill that gap with reference to the claims still being challenged in the proceeding itself as there is to fill it with reference to claims that were initially challenged in the petition but which the Board weeded out before the inter partes review proceeding began.

Which reading we give the statute makes a difference. The first reading, the majority’s reading, means that in my example, the Board must consider and write a final, and *appealable*, see § 319, decision in respect to the challenges to all 16 claims, including the 15 frivolous challenges. The second reading requires the Board to write a final, appealable decision only in respect to the challenge to the claim (number 16 in my example) that survived the Board’s initial screening, namely, in my example, the one challenge in respect to which the Board found a “reasonable likelihood that the petitioner would prevail.” § 314(a).

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I cannot find much in the statutory context to support the majority's claim that the statutory words "claim challenged by the petitioner" refer unambiguously to claims challenged initially in the petition. After all, the majority agrees that they do not refer to claims that initially were challenged in the petition but were later settled or withdrawn. *Ante*, at 367; see § 316(d)(1)(A) (allowing the patent owner to cancel a challenged patent claim during inter partes review); § 317 (addressing settlement). The majority says that weeded-out challenges, unlike settled matters or canceled claims, involve claims that are still being "challenged 'by the petitioner' at the litigation's end." *Ante*, at 367. But weeded-out challenges are the same as settled matters and canceled claims in this respect. The petitioner cannot continue to challenge a claim once that challenge is weeded out by the Board at the institution phase. He cannot pursue it before the Board in the inter partes review, and normally he cannot pursue it in a court of appeals. See *Cuozzo*, 579 U. S., at 275–276. The petitioner might bring a totally separate case in court in which he challenges the claim, but that is a different matter that is not the subject of this statutory chapter.

Nor does the chapter's structure help fill the statutory gap. I concede that if we examine the "final written decision" section, § 318(a), just after reading the three initial sections of the statute, §§ 311, 312, and 313, we may be tempted to believe that the words "any patent claim challenged" in § 318(a) must refer to the claims challenged in the petition, just as the words "each claim challenged" in § 312(a)(3) unmistakably do. But once we look at the whole statute, this temptation disappears. The first section, § 311, describing the inter partes review process, does not use the word "challenge." The next section, § 312, describes the requirements for the initial petition, which is filed *before* any inter partes proceeding has been instituted. It is about the petition, so it is not surprising that it refers to the claims challenged in the petition. The next section, § 313, concerns the preliminary response, which is similarly filed before the inter partes re-

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view proceeding has been instituted and is thus similarly focused on the petition, although it does not use the word “challenged.”

The very next section, however, § 314, along with part of § 315, describes preliminary screening and the *institution* of the inter partes review proceeding. The remainder of § 315, and the following sections, §§ 316 and 317, then describe how that proceeding, once instituted, will be conducted (and provide for settlements). Only then does § 318 appear. That statutory provision tells the Board that, at the conclusion of the inter partes review proceeding, it must “issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” § 318(a). And in this context, a context about the inter partes review proceeding itself, it is more than reasonable to think that the phrase “patent claim challenged by the petitioner” refers to challenges made in the proceeding, not challenges made in the petition but never made a part of the proceeding.

I am not helped by examining, as the majority examines, what Congress might have done had it used other language. *Ante*, at 364–366. The majority points out that had Congress meant anything other than “challenged in the petition,” it might have said so more clearly. *Ibid.* But similarly, if Congress had meant “challenged in the petition,” it might have used the words “in the petition.” After all, it used those very words only four sections earlier. See § 314(a) (referring to “claims challenged in the petition”). This argument, like many such arguments, is a wash.

Neither am I helped by analogizing the inter partes review proceeding to civil litigation. Cf. *ante*, at 361, 363. That is because, as this Court said in *Cuozzo*, inter partes review is a “hybrid proceeding.” 579 U. S., at 280. It has some adversarial characteristics, but “in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding.” *Id.*, at 279. Its purposes are not limited to “helping resolve concrete patent-related disputes among parties,” but extend to “reexamin-

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[ing] . . . an earlier administrative grant of a patent” and “protect[ing] the public’s ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” *Id.*, at 279–280 (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945); ellipsis in original); see also *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, *ante*, at 336–337.

Finally, I would turn to the likely purposes of the statutory provision. As the majority points out, §314(a) makes clear that the “Director” (now his delegate, the Board) is to determine whether there is a “reasonable likelihood” of success as to at least one of the claims the petition challenges. If not, he cannot initiate an inter partes review proceeding. If so, §314(a) “invests the Director with discretion on the question whether to institute review.” *Ante*, at 366 (emphasis deleted); *Cuozzo, supra*, at 273. As I have said, Patent Office regulations allow the Board to proceed with inter partes review of some of the claims a petitioner challenges (say, only those where there is a reasonable likelihood of success), but not of others. 37 CFR §42.108(a).

The majority points out that it does not follow from §314(a) that the statute affords the Director discretion regarding *what claims that review will encompass*. The text says only that the Director can decide “whether” to institute the requested review, not “whether and to what extent” review should proceed. *Ante*, at 366 (emphasis deleted). That is certainly so. But I think that when we, as judges, face a difficult text, it is often helpful to ask not just “whether” or “what” but also “why.” Why, asks the Patent Office, would Congress have intended to require the Board to proceed with an inter partes review, take evidence, and hear argument in respect to challenges to claims that the Board had previously determined had no “reasonable likelihood” of success? The statute would seem to give the Director discretion to achieve the opposite, namely, to avoid wasting the Board’s time and effort reviewing challenges that it has already decided have

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no “reasonable likelihood of success.” In my example, why make the Board do further work on the challenges to claims 1 through 15, which the Board has already decided are near frivolous?

More than that, to read § 318(a) as requiring a “final written decision” in respect to those 15 perhaps frivolous challenges would seem to lead to judicial review of the Board’s decision about those frivolous challenges. After all, § 319 of the statute says that a “party dissatisfied with the final written decision of the [Board] under section 318(a),” the provision before us, “may appeal the decision” to the Federal Circuit. And the majority’s interpretation is anomalous in that it is difficult to imagine why Congress, with one hand, would make the agency’s weeding-out decision nonreviewable, see *Cuozzo*, *supra*, at 275–276, yet at the same time would make the decision reviewable via the requirement that the Board issue a “final written” appealable “decision” with respect to that weeded-out challenge.

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III

I end up where I began. Section 318(a) contains a gap just after the words “challenged by the petitioner.” Considerations of context, structure, and purpose do not close the gap. And under *Chevron*, “where a statute leaves a ‘gap’ or is ‘ambigu[ous],’ we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.” *Cuozzo*, *supra*, at 277 (quoting *United States v. Mead Corp.*, 533 U. S. 218, 229 (2001); alteration in original).

A

In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. See *Mead Corp.*, *supra*, at 229–231. Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Con-

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gress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.

B

To answer this question, we have previously held that a “statute’s complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience” normally “lead us to read [a] statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.” *Barnhart v. Walton*, 535 U.S. 212, 225 (2002). These considerations all favor such a reading here. Indeed, the question before us is one of agency administration in respect to detailed matters that an agency working with the statute is particularly likely to understand. In addition, the agency filled the gap here through the exercise of rulemaking authority explicitly given it by Congress to issue regulations “setting forth the standards for the showing of sufficient grounds to institute a review” and “establishing and governing inter partes review.” §§ 316(a)(2), (4); *Cuozzo*, 579 U.S., at 276–277; cf. *Mead Corp.*, *supra*, at 227. Thus, there is a gap, the agency possesses gap-filling authority, and it filled the gap with a regulation that, for reasons I have stated, is a reasonable exercise of that authority.

* * *

I consequently would affirm the judgment of the Federal Circuit. And, with respect, I dissent from the Court’s contrary conclusion.

Syllabus

UNITED STATES *v.* SANCHEZ-GOMEZ ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 17–312. Argued March 26, 2018—Decided May 14, 2018

The judges of the United States District Court for the Southern District of California adopted a districtwide policy permitting the use of full restraints—handcuffs connected to a waist chain, with legs shackled—on most in-custody defendants produced in court for nonjury proceedings by the United States Marshals Service. Respondents Jasmin Morales, Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring challenged the use of such restraints in their respective cases and the restraint policy as a whole. The District Court denied their challenges, and respondents appealed to the Court of Appeals for the Ninth Circuit. Before that court could issue a decision, respondents’ underlying criminal cases ended. The court—viewing the case as a “functional class action” involving “class-like claims” seeking “class-like relief,” 859 F.3d 649, 655, 657–658—held that this Court’s civil class action precedents saved the case from mootness. On the merits, the Court of Appeals held the policy unconstitutional.

Held: This case is moot. Pp. 385–394.

(a) The Federal Judiciary may adjudicate only “actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 71. Such a dispute “must be extant at all stages of review, not merely at the time the complaint is filed.” *Preiser v. Newkirk*, 422 U.S. 395, 401. A case that becomes moot at any point during the proceedings is thus outside the jurisdiction of the federal courts. See *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91. Pp. 385–386.

(b) In concluding that this case was not moot, the Court of Appeals relied upon this Court’s class action precedents, most prominently *Gerstein v. Pugh*, 420 U.S. 103. That reliance was misplaced. *Gerstein* was a class action respecting pretrial detention brought under Federal Rule of Civil Procedure 23. The named class representatives’ individual claims had apparently become moot before class certification. This Court held that the case could nonetheless proceed, explaining that due to the inherently temporary nature of pretrial detention, no named representative might be in custody long enough for a class to be certified. *Gerstein* does not support a freestanding exception to mootness outside the class action context. It belongs to a line of cases that this

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Court has described as turning on the particular traits of Rule 23 class actions. See, e.g., *Sosna v. Iowa*, 419 U.S. 393; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388; *Genesis HealthCare*, 569 U.S. 66. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the civil class action, and this Court has never permitted criminal defendants to band together to seek prospective relief in their individual cases on behalf of a class. Here, the mere presence of allegations that might, if resolved in respondents' favor, benefit other similarly situated individuals cannot save their case from mootness. See *id.*, at 73. That conclusion is unaffected by the Court of Appeals' decision to recast respondents' appeals as petitions for supervisory mandamus. Pp. 386–390.

(c) Respondents do not defend the reasoning of the Court of Appeals, and instead argue that the claims of two respondents—Sanchez-Gomez and Patricio-Guzman—fall within the “exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review.” *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 170 (internal quotation marks omitted). Respondents claim that the exception applies because Sanchez-Gomez and Patricio-Guzman will again violate the law, be apprehended, and be returned to pretrial custody. But this Court has consistently refused to “conclude that the case-or-controversy requirement is satisfied by” the possibility that a party “will be prosecuted for violating valid criminal laws.” *O’Shea v. Littleton*, 414 U.S. 488, 497. Respondents argue that this usual refusal to assume future criminal conduct is unwarranted here given the particular circumstances of Sanchez-Gomez’s and Patricio-Guzman’s offenses. They cite two civil cases—*Honig v. Doe*, 484 U.S. 305, and *Turner v. Rogers*, 564 U.S. 431—in which this Court concluded that the expectation that a litigant would repeat the misconduct that gave rise to his claims rendered those claims capable of repetition. But *Honig* and *Turner* are inapposite because they concerned litigants unable, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct. Sanchez-Gomez and Patricio-Guzman, in contrast, are “able—and indeed required by law”—to refrain from further criminal conduct. *Lane v. Williams*, 455 U.S. 624, 633, n. 13. No departure from the settled rule is warranted. Pp. 390–394.

859 F. 3d 649, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

Allon Kedem argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*,

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Acting Assistant Attorney General Cronan, Deputy Solicitor General Kneedler, and Eric J. Feigin.

Reuben Camper Cahn argued the cause for respondents. With him on the brief were *Shereen J. Charlick, Vincent J. Brunkow, Kara L. Hartzler, and Ellis Murray Johnston III*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Four criminal defendants objected to being bound by full restraints during pretrial proceedings in their cases, but the District Court denied relief. On appeal, the Court of Appeals for the Ninth Circuit held that the use of such restraints was unconstitutional, even though each of the four criminal cases had ended prior to its decision. The question presented is whether the appeals were saved from mootness either because the defendants sought “class-like relief” in a “functional class action,” or because the challenged practice was “capable of repetition, yet evading review.”

I

It is the responsibility of the United States Marshals Service to “provide for the security . . . of the United States District Courts.” 28 U. S. C. § 566(a). To fulfill that duty, the United States Marshal for the Southern District of California requested that the judges of that district permit the use of full restraints on all in-custody defendants during non-jury proceedings. When “full restraints” are applied, “a defendant’s hands are closely handcuffed together, these handcuffs are connected by chain to another chain running around the defendant’s waist, and the defendant’s feet are shackled and chained together.” 859 F. 3d 649, 653 (CA9 2017) (en

*Briefs of *amici curiae* urging affirmance were filed for Former Judges et al. by *Meir Feder, Judith Resnik, and Stephen I. Vladeck*; and for the National Association of Federal Defenders by *Daniel L. Kaplan, Donna F. Coltharp, and Sarah S. Gannett*.

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banc). In support of his proposal, the Marshal cited safety concerns arising from understaffing, past incidents of violence, and the high volume of in-custody defendants produced in the Southern District. The judges agreed to the Marshal's request, with modifications providing that a district or magistrate judge may require a defendant to be produced without restraints, and that a defendant can request that this be done. See App. 78–79.

Respondents Jasmin Morales, Rene Sanchez-Gomez, Moises Patricio-Guzman, and Mark Ring were among the defendants produced by the Marshals Service for pretrial proceedings in full restraints. They raised constitutional objections to the use of such restraints in their respective cases, and to the restraint policy as a whole. They noted that the policy had resulted in the imposition of full restraints on, for example, a woman with a fractured wrist, a man with a severe leg injury, a blind man, and a wheelchair-bound woman. The District Court denied their challenges.

Respondents appealed to the Court of Appeals for the Ninth Circuit, but before the court could issue a decision, their underlying criminal cases came to an end. Morales, Sanchez-Gomez, and Patricio-Guzman each pleaded guilty to the offense for which they were charged: Morales, to felony importation of a controlled substance, in violation of 21 U. S. C. §§ 952 and 960; Sanchez-Gomez, to felony misuse of a passport, in violation of 18 U. S. C. § 1544; and Patricio-Guzman, to misdemeanor illegal entry into the United States, in violation of 8 U. S. C. § 1325. The charges against Ring—for making an interstate threat in violation of 18 U. S. C. § 875(c)—were dismissed pursuant to a deferred-prosecution agreement.

A panel of the Court of Appeals nonetheless concluded that respondents' claims were not moot, and went on to strike down the restraint policy as violating the Due Process Clause of the Fifth Amendment. 798 F. 3d 1204 (CA9 2015). Those rulings were reaffirmed on rehearing en banc. 859

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F. 3d 649. The en banc court understood the “main dispute” before it to be a challenge to the policy itself, not just to the application of that policy to respondents. *Id.*, at 655. The court then construed respondents’ notices of appeal as petitions for mandamus, which invoked the court’s supervisory authority over the Southern District. *Id.*, at 657. The case was, in the court’s view, a “functional class action” involving “class-like claims” seeking “class-like relief.” *Id.*, at 655, 657–658. In light of that understanding, the Court of Appeals held that this Court’s civil class action precedents kept the case alive, even though respondents were no longer subject to the restraint policy. *Id.*, at 657–659 (citing *Gerstein v. Pugh*, 420 U. S. 103, 110–111, n. 11 (1975)). On the merits, the Court of Appeals concluded that the restraint policy violated the Constitution. 859 F. 3d, at 666.

Judge Ikuta, writing in dissent for herself and four colleagues, rejected the majority’s application of class action precedents to the individual criminal cases before the court and would have held the case moot. *Id.*, at 675. She also disagreed with the majority on the merits, concluding that the restraint policy did not violate the Constitution. *Id.*, at 683.

We granted certiorari. 583 U. S. 1036 (2017).

II

To invoke federal jurisdiction, a plaintiff must show a “personal stake” in the outcome of the action. *Genesis Health-Care Corp. v. Symczyk*, 569 U. S. 66, 71 (2013). “This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” *Ibid.* Such a dispute “must be extant at all stages of review, not merely at the time the complaint is filed.” *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975). A case that becomes moot at any point during the proceedings is “no longer a ‘Case’ or ‘Controversy’

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for purposes of Article III,” and is outside the jurisdiction of the federal courts. *Already, LLC v. Nike, Inc.*, 568 U. S. 85, 91 (2013).

A

In concluding that this case was not moot, the Court of Appeals relied upon our class action precedents, most prominently *Gerstein v. Pugh*. That reliance was misplaced.*

Gerstein, a class action brought under Federal Rule of Civil Procedure 23, involved a certified class of detainees raising claims concerning their pretrial detention. 420 U. S., at 106–107. By the time this Court heard the case, the named representatives’ claims were moot, and the record suggested that their interest might have lapsed even before the District Court certified the class. See *id.*, at 110–111, n. 11. Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification. See *ibid.* (citing *Sosna v. Iowa*, 419 U. S. 393, 402, n. 11 (1975)). The Court nevertheless held that the case remained live. As we explained, pretrial custody was inherently temporary and of uncertain length, such that we could not determine “that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.” *Gerstein*, 420 U. S., at 110–111, n. 11. At the same time, it was certain that there would always be some group of detainees subject to the challenged practice. *Ibid.* Given these circumstances,

*Shortly after the panel decision in this case, the Southern District altered its policy to eliminate the routine use of full restraints in pretrial proceedings. The Government represents, however, that the Southern District intends to reinstate its policy once it is no longer bound by the decision of the Court of Appeals. Tr. of Oral Arg. 29. We agree with the Court of Appeals that the rescission of the policy does not render this case moot. A party “cannot automatically moot a case simply by ending its unlawful conduct once sued,” else it “could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends.” *Already, LLC v. Nike, Inc.*, 568 U. S. 85, 91 (2013).

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the Court determined that the class action could proceed. *Ibid.*; see *Swisher v. Brady*, 438 U. S. 204, 213–214, n. 11 (1978) (employing same analysis in a class action challenging juvenile court procedures).

The Court of Appeals interpreted *Gerstein* to cover all “cases sufficiently similar to class actions” in which, “because of the inherently transitory nature of the claims,” the claimant’s “interests would expire before litigation could be completed.” 859 F. 3d, at 658. *Gerstein* was an action brought under Federal Rule of Civil Procedure 23, but the Court of Appeals decided that such “a procedural mechanism to aggregate the claims” was not a “necessary prerequisite” for application of the *Gerstein* rule. 859 F. 3d, at 659 (alteration omitted). Respondents, the court noted, sought “relief [from the restraint policy] not merely for themselves, but for all in-custody defendants in the district.” *Id.*, at 655. Those “class-like claims” seeking “class-like relief” were sufficient to trigger the application of *Gerstein* and save the case from mootness, despite the termination of respondents’ criminal cases. 859 F. 3d, at 655.

We reject the notion that *Gerstein* supports a freestanding exception to mootness outside the class action context. The class action is a creature of the Federal Rules of Civil Procedure. See generally 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1751 *et seq.* (3d ed. 2005). It is an “exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,” and “provides a procedure by which the court may exercise . . . jurisdiction over the various individual claims in a single proceeding.” *Califano v. Yamasaki*, 442 U. S. 682, 700–701 (1979). “The certification of a suit as a class action has important consequences for the unnamed members of the class.” *Sosna*, 419 U. S., at 399, n. 8. Those class members may be “bound by the judgment” and are considered parties to the litigation in many important respects. *Devlin v. Scardelletti*, 536 U. S. 1, 7, 9–10 (2002). A certified

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class thus “acquires a legal status separate from the interest asserted by the named plaintiff.” *Genesis HealthCare*, 569 U. S., at 74 (quoting *Sosna*, 419 U. S., at 399; alterations omitted).

Gerstein belongs to a line of cases that we have described as turning on the particular traits of civil class actions. The first case in this line, *Sosna v. Iowa*, held that when the claim of the named plaintiff becomes moot after class certification, a “live controversy may continue to exist” based on the ongoing interests of the remaining unnamed class members. *Genesis HealthCare*, 569 U. S., at 74 (citing *Sosna*, 419 U. S., at 399–402); see *Franks v. Bowman Transp. Co.*, 424 U. S. 747, 755–756 (1976). The “fact that a putative class acquires an independent legal status once it is certified” was, we later explained, “essential to our decision[] in *Sosna*.” *Genesis HealthCare*, 569 U. S., at 75; see *Kremens v. Bartley*, 431 U. S. 119, 131–133 (1977) (explaining that, under *Sosna*’s rule, “only a ‘properly certified’ class . . . may succeed to the adversary position of a named representative whose claim becomes moot”); *Alvarez v. Smith*, 558 U. S. 87, 92–93 (2009) (same).

Gerstein, announced one month after *Sosna*, provides a limited exception to *Sosna*’s requirement that a named plaintiff with a live claim exist at the time of class certification. The exception applies when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill. See *Sosna*, 419 U. S., at 402, n. 11 (anticipating the *Gerstein* rule as an exception); *Gerstein*, 420 U. S., at 110–111, n. 11 (describing its holding as “a suitable exception” to *Sosna*). We have repeatedly tied *Gerstein*’s rule to the class action setting from which it emerged. See, e. g., *Genesis HealthCare*, 569 U. S., at 71, n. 2 (describing *Gerstein*’s rule as “developed in the context of class actions under Rule 23 to address the circumstance in which a named plaintiff’s claim becomes moot prior to certification of the class”); *United States Parole Comm’n*

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v. *Geraghty*, 445 U. S. 388, 397–399 (1980) (highlighting *Gerstein* as an example of the Court “consider[ing] the application of the ‘personal stake’ requirement in the class-action context”).

In concluding that *Gerstein* reaches further, the Court of Appeals looked to our recent decision in *Genesis HealthCare Corp. v. Symczyk*. But in that case the Court refused to extend *Gerstein* beyond the class action context, even with respect to a procedural device bearing many features similar to a class action. *Genesis HealthCare* addressed whether a “collective action” brought under the Fair Labor Standards Act (FLSA) by a plaintiff on behalf of herself “and other ‘similarly situated’ employees” remained “justiciable when the lone plaintiff’s individual claim bec[ame] moot.” 569 U. S., at 69. In an effort to continue her case on behalf of others, the plaintiff turned to *Sosna* and its progeny, including *Gerstein*. But those cases, we explained, were “inapposite,” not least because “Rule 23 actions are fundamentally different from collective actions under the FLSA.” *Genesis HealthCare*, 569 U. S., at 74. Such collective actions, we stressed, do not “produce a class with an independent legal status, or join additional parties to the action.” *Id.*, at 75.

This case, which does not involve *any* formal mechanism for aggregating claims, is even further removed from Rule 23 and *Gerstein*. The Federal Rules of Criminal Procedure establish for criminal cases no vehicle comparable to the FLSA collective action, much less the class action. And we have never permitted criminal defendants to band together to seek prospective relief in their individual criminal cases on behalf of a class. As we said when declining to apply nonparty preclusion outside the formal class action context, courts may not “recognize . . . a common-law kind of class action” or “create *de facto* class actions at will.” *Taylor v. Sturgell*, 553 U. S. 880, 901 (2008) (alterations omitted); see *Smith v. Bayer Corp.*, 564 U. S. 299, 315–316 (2011) (same); *Pasadena City Bd. of Ed. v. Spangler*, 427 U. S. 424, 430

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(1976) (rejecting in mootness context the idea that “the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless ‘verbal recital’”).

The court below designated respondents’ case a “functional class action” because respondents were pursuing relief “not merely for themselves, but for all in-custody defendants in the district.” 859 F. 3d, at 655, 657–658. But as explained in *Genesis HealthCare*, the “mere presence of . . . allegations” that might, if resolved in respondents’ favor, benefit other similarly situated individuals cannot “save [respondents’] suit from mootness once the[ir] individual claim[s]” have dissipated. 569 U. S., at 73.

Our conclusion is unaffected by the decision of the court below to recast respondents’ appeals as petitions for “supervisory mandamus.” See 859 F. 3d, at 659 (viewing such a petition, like the civil class action, as a procedural vehicle to which the *Gerstein* rule applies). Supervisory mandamus refers to the authority of the Courts of Appeals to exercise “supervisory control of the District Courts” through their “discretionary power to issue writs of mandamus.” *La Buy v. Howes Leather Co.*, 352 U. S. 249, 259–260 (1957). There is no sign in our scant supervisory mandamus precedents that such cases are exempt from the normal mootness rules. See generally *Will v. United States*, 389 U. S. 90 (1967); *Schlagenhauf v. Holder*, 379 U. S. 104 (1964); *La Buy*, 352 U. S. 249. Indeed, as the court below acknowledged, “[s]upervisory mandamus cases require live controversies.” 859 F. 3d, at 657.

B

Respondents do not defend the reasoning of the Court of Appeals. See Brief for Respondents 58 (arguing that this Court need not reach the functional class action issue and should “discard[]” that label); Tr. of Oral Arg. 43 (respondents’ counsel agreeing that they “have not made any effort to defend” the functional class action approach). In respondents’ view, functional class actions and *Gerstein*’s rule

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are beside the point because two respondents—Sanchez-Gomez and Patricio-Guzman—retain a personal stake in the outcome of their appeals.

Sanchez-Gomez and Patricio-Guzman are no longer in pretrial custody. Their criminal cases, arising from their illegal entry into the United States, ended in guilty pleas well before the Court of Appeals issued its decision. Respondents contend, however, that the claims brought by Sanchez-Gomez and Patricio-Guzman fall within the “exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review.” *Kingdomware Technologies, Inc. v. United States*, 579 U. S. 162, 170 (2016) (internal quotation marks omitted). A dispute qualifies for that exception only “if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.” *Turner v. Rogers*, 564 U. S. 431, 439–440 (2011) (alterations and internal quotation marks omitted). The parties do not contest that the claims at issue satisfy the first prong of that test, but they sharply disagree as to the second.

Respondents argue that Sanchez-Gomez and Patricio-Guzman meet the second prong because they will again violate the law, be apprehended, and be returned to pretrial custody. But we have consistently refused to “conclude that the case-or-controversy requirement is satisfied by” the possibility that a party “will be prosecuted for violating valid criminal laws.” *O’Shea v. Littleton*, 414 U. S. 488, 497 (1974). We have instead “assume[d] that [litigants] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct.” *Ibid.*; see, e. g., *Spencer v. Kemna*, 523 U. S. 1, 15 (1998) (reasoning that a claim regarding a parole revocation order was moot following release from custody because any continuing consequences of the order were “contingent upon [the claimant] violating the law, getting caught, and

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being convicted”); *Honig v. Doe*, 484 U.S. 305, 320 (1988) (“[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”); *Lane v. Williams*, 455 U.S. 624, 632–633, n. 13 (1982) (concluding that case was moot where the challenged parole revocation could not “affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole”).

Respondents argue that this usual refusal to assume future criminal conduct is unwarranted here given the particular circumstances of Sanchez-Gomez’s and Patricio-Guzman’s offenses. They cite two civil cases—*Honig v. Doe* and *Turner v. Rogers*—in which this Court concluded that the expectation that a litigant would repeat the misconduct that gave rise to his claims rendered those claims capable of repetition. Neither case, however, supports a departure from the settled rule.

Honig involved a disabled student’s challenge to his suspension from school for disruptive behavior. We found that given his “inability to conform his conduct to socially acceptable norms” or “govern his aggressive, impulsive behavior,” it was “reasonable to expect that [the student would] again engage in the type of misconduct that precipitated this suit” and “be subjected to the same unilateral school action for which he initially sought relief.” 484 U.S., at 320–321. In *Turner*, we determined that an indigent person repeatedly held in civil contempt for failing to make child support payments, who was at the time over \$13,000 in arrears, and whose next hearing was only five months away, was destined to find himself in civil contempt proceedings again. The challenged denial of appointed counsel at his contempt hearing was thus capable of repetition. See 564 U.S., at 440.

Respondents contend that Sanchez-Gomez and Patricio-Guzman, like the challengers in *Honig* and *Turner*, are likely

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to find themselves right back where they started if we dismiss their case as moot. Respondents cite a Sentencing Commission report finding that in 2013 thirty-eight percent of those convicted and sentenced for an illegal entry or illegal reentry offense “were deported and subsequently illegally reentered at least one time.” United States Sentencing Commission, *Illegal Reentry Offenses* 15 (2015) (cited by Brief for Respondents 51). Respondents emphasize the economic and familial pressures that often compel individuals such as Sanchez-Gomez and Patricio-Guzman to repeatedly attempt to enter the United States. And respondents note that both men, after their release, actually *did* cross the border into the United States, were apprehended again, and were charged with new illegal entry offenses. All this, respondents say, adds up to a sufficient showing that Sanchez-Gomez and Patricio-Guzman satisfy the “capable of repetition” requirement. Because the Court of Appeals was not aware that Sanchez-Gomez and Patricio-Guzman had subsequently reentered the United States illegally, respondents invite us to remand this case for further proceedings.

We decline to do so because *Honig* and *Turner* are inapposite. Our decisions in those civil cases rested on the litigants’ inability, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct. In *Honig*, such incapacity was the very reason the school sought to expel the student. And in *Turner*, the indigent individual’s large outstanding debt made him effectively incapable of satisfying his imminent support obligations. Sanchez-Gomez and Patricio-Guzman, in contrast, are “able—and indeed required by law”—to refrain from further criminal conduct. *Lane*, 455 U. S., at 633, n. 13. Their personal incentives to return to the United States, plus the elevated rate of recidivism associated with illegal entry offenses, do not amount to an inability to obey the law. We have consistently refused to find the case or

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controversy requirement satisfied where, as here, the litigants simply “anticipate violating lawful criminal statutes.” *O’Shea*, 414 U. S., at 496.

III

None of this is to say that those who wish to challenge the use of full physical restraints in the Southern District lack any avenue for relief. In the course of this litigation the parties have touched upon several possible options. See, *e. g.*, Tr. of Oral Arg. 12 (indicating circumstances under which detainees could bring a civil suit). Because we hold this case moot, we take no position on the question.

* * *

We vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case to that court with instructions to dismiss as moot.

It is so ordered.

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Syllabus

BYRD *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 16–1371. Argued January 9, 2018—Decided May 14, 2018

Latasha Reed rented a car in New Jersey while petitioner Terrence Byrd waited outside the rental facility. Her signed agreement warned that permitting an unauthorized driver to drive the car would violate the agreement. Reed listed no additional drivers on the form, but she gave the keys to Byrd upon leaving the building. He stored personal belongings in the rental car’s trunk and then left alone for Pittsburgh, Pennsylvania. After stopping Byrd for a traffic infraction, Pennsylvania State Troopers learned that the car was rented, that Byrd was not listed as an authorized driver, and that Byrd had prior drug and weapons convictions. Byrd also stated he had a marijuana cigarette in the car. The troopers proceeded to search the car, discovering body armor and 49 bricks of heroin in the trunk. The evidence was turned over to federal authorities, who charged Byrd with federal drug and other crimes. The District Court denied Byrd’s motion to suppress the evidence as the fruit of an unlawful search, and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

Held:

1. The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. Pp. 402–410.

(a) Reference to property concepts is instructive in “determining the presence or absence of the privacy interests protected by [the Fourth] Amendment.” *Rakas v. Illinois*, 439 U.S. 128, 144, n. 12. Pp. 402–404.

(b) While a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it, see, *e. g.*, *Jones v. United States*, 362 U.S. 257, 259, legitimate presence on the premises, standing alone, is insufficient because it “creates too broad a gauge for measurement of Fourth Amendment rights,” *Rakas*, 439 U.S., at 142. The Court has not set forth a single metric or exhaustive list of relevant considerations, but “[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permit-

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ted by society.” *Id.*, at 144, n. 12. These concepts may be linked. “One of the main rights attaching to property is the right to exclude others,” and “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.” *Ibid.* This general property-based concept guides resolution of the instant case. Pp. 404–405.

(c) The Government’s contention that drivers who are not listed on rental agreements always lack an expectation of privacy in the car rests on too restrictive a view of the Fourth Amendment’s protections. But Byrd’s proposal that a rental car’s sole occupant always has an expectation of privacy based on mere possession and control would, without qualification, include thieves or others who have no reasonable expectation of privacy. Pp. 405–410.

(1) The Government bases its claim that an unauthorized driver has no privacy interest in the vehicle on a misreading of *Rakas*. There, the Court disclaimed any intent to hold that passengers cannot have an expectation of privacy in automobiles, but found that the passengers there had not claimed “any legitimate expectation of privacy in the areas of the car which were searched.” 439 U. S., at 150, n. 17. Byrd, in contrast, was the rental car’s driver and sole occupant. His situation is similar to the defendant in *Jones*, who had a reasonable expectation of privacy in his friend’s apartment because he “had complete dominion and control over the apartment and could exclude others from it.” *Rakas, supra*, at 149. The expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it, much as it did not seem to matter whether the defendant’s friend in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Pp. 406–407.

(2) The Government also contends that Byrd had no basis for claiming an expectation of privacy in the rental car because his driving of that car was so serious a breach of Reed’s rental agreement that the rental company would have considered the agreement “void” once he took the wheel. But the contract says only that the violation may result in coverage, not the agreement, being void and the renter’s being fully responsible for any loss or damage, and the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Pp. 407–408.

(3) Central, though, to reasonable expectations of privacy in these circumstances is the concept of lawful possession, for a “‘wrongful’ presence at the scene of a search would not enable a defendant to object to the legality of the search,” *Rakas, supra*, at 141, n. 9. Thus, a car thief would not have a reasonable expectation of privacy in a stolen car

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no matter the degree of possession and control. The Court leaves for remand the Government's argument that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief. Pp. 409–410.

2. Also left for remand is the Government's argument that, even if Byrd had a right to object to the search, probable cause justified it in any event. The Third Circuit did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car. That court has discretion as to the order in which the remanded questions are best addressed. Pp. 410–411. 679 Fed. Appx. 146, vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 412. ALITO, J., filed a concurring opinion, *post*, p. 413.

Robert M. Loeb argued the cause for petitioner. With him on the briefs were *E. Joshua Rosenkranz*, *Thomas M. Bondy*, *Jeremy Peterman*, *Charles W. Tyler*, *Heidi R. Freese*, and *Frederick W. Ulrich*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Dreeben*, *Frederick Liu*, and *Thomas E. Booth*.*

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Jeffrey T. Green*, *David D. Cole*, *Rachel Wainer Apter*, and *Joshua L. Dratel*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Fourth Amendment Scholars by *Matthew A. Abee* and *A. Mattison Bogan*; for the National Association for Public Defense et al. by *David Debold*, *Janet Moore*, *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett*; for the National Motorists Association by *Aaron M. Panner*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; for Morgan A. Cloud by *Sarah M. Shalf*; and for Lindsey N. Ursua et al. by *Norman M. Garland* and *Michael M. Epstein*, both *pro se*.

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Dominic Draye*, Solicitor General, and *Andrew G. Pappas*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Leslie Rutledge* of Arkansas, *Matt Denn* of Delaware, *Lawrence*

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JUSTICE KENNEDY delivered the opinion of the Court.

In September 2014, Pennsylvania State Troopers pulled over a car driven by petitioner Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin.

The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute in violation of 21 U. S. C. § 841(a)(1) and possession of body armor by a prohibited person in violation of 18 U. S. C. § 931(a)(1). Byrd moved to suppress the evidence as the fruit of an unlawful search. The United States District Court for the Middle District of Pennsylvania denied the motion, and the Court of Appeals for the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, it appears that both the District Court and Court of Appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car.

This Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Court now holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of

G. Wasden of Idaho, Curtis T. Hill, Jr., of Indiana, Andy Beshear of Kentucky, Doug Peterson of Nebraska, Adam Paul Laxalt of Nevada, Christopher S. Porrino of New Jersey, Michael DeWine of Ohio, Mike Hunter of Oklahoma, Josh Shapiro of Pennsylvania, Alan Wilson of South Carolina, Herbert H. Slatery III of Tennessee, and Sean D. Reyes of Utah.

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privacy in it even if the rental agreement does not list him or her as an authorized driver.

The Court concludes a remand is necessary to address in the first instance the Government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, our cases make clear he would lack a legitimate expectation of privacy. It is necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event.

I

On September 17, 2014, petitioner Terrence Byrd and Latasha Reed drove in Byrd's Honda Accord to a Budget car-rental facility in Wayne, New Jersey. Byrd stayed in the parking lot in the Honda while Reed went to the Budget desk and rented a Ford Fusion. The agreement Reed signed required her to certify that she had a valid driver's license and had not committed certain vehicle-related offenses within the previous three years. An addendum to the agreement, which Reed initialed, provides the following restriction on who may drive the rental car:

"I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.

"PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE

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FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES.” App. 19.

In filling out the paperwork for the rental agreement, Reed did not list an additional driver.

With the rental keys in hand, Reed returned to the parking lot and gave them to Byrd. The two then left the facility in separate cars—she in his Honda, he in the rental car. Byrd returned to his home in Patterson, New Jersey, and put his personal belongings in the trunk of the rental car. Later that afternoon, he departed in the car alone and headed toward Pittsburgh, Pennsylvania.

After driving nearly three hours, or roughly half the distance to Pittsburgh, Byrd passed State Trooper David Long, who was parked in the median of Interstate 81 near Harrisburg, Pennsylvania. Long was suspicious of Byrd because he was driving with his hands at the “10 and 2” position on the steering wheel, sitting far back from the steering wheel, and driving a rental car. Long knew the Ford Fusion was a rental car because one of its windows contained a barcode. Based on these observations, he decided to follow Byrd and, a short time later, stopped him for a possible traffic infraction.

When Long approached the passenger window of Byrd’s car to explain the basis for the stop and to ask for identification, Byrd was “visibly nervous” and “was shaking and had a hard time obtaining his driver’s license.” *Id.*, at 37. He handed an interim license and the rental agreement to Long, stating that a friend had rented the car. Long returned to his vehicle to verify Byrd’s license and noticed Byrd was not listed as an additional driver on the rental agreement. Around this time another trooper, Travis Martin, arrived at the scene. While Long processed Byrd’s license, Martin conversed with Byrd, who again stated that a friend had rented the vehicle. After Martin walked back to Long’s patrol car, Long commented to Martin that Byrd was “not on the renter agreement,” to which Martin replied, “yeah, he

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has no expectation of privacy.” 3 App. to Brief for Appellant in No. 16–1509 (CA3), at 21:40.

A computer search based on Byrd’s identification returned two different names. Further inquiry suggested the other name might be an alias and also revealed that Byrd had prior convictions for weapons and drug charges as well as an outstanding warrant in New Jersey for a probation violation. After learning that New Jersey did not want Byrd arrested for extradition, the troopers asked Byrd to step out of the vehicle and patted him down.

Long asked Byrd if he had anything illegal in the car. When Byrd said he did not, the troopers asked for his consent to search the car. At that point Byrd said he had a “blunt” in the car and offered to retrieve it for them. The officers understood “blunt” to mean a marijuana cigarette. They declined to let him retrieve it and continued to seek his consent to search the car, though they stated they did not need consent because he was not listed on the rental agreement. The troopers then opened the passenger and driver doors and began a thorough search of the passenger compartment.

Martin proceeded from there to search the car’s trunk, including by opening up and taking things out of a large cardboard box, where he found a laundry bag containing body armor. At this point, the troopers decided to detain Byrd. As Martin walked toward Byrd and said he would be placing him in handcuffs, Byrd began to run away. A third trooper who had arrived on the scene joined Long and Martin in pursuit. When the troopers caught up to Byrd, he surrendered and admitted there was heroin in the car. Back at the car, the troopers resumed their search of the laundry bag and found 49 bricks of heroin.

In pretrial proceedings Byrd moved to suppress the evidence found in the trunk of the rental car, arguing that the search violated his Fourth Amendment rights. Although Long contended at a suppression hearing that the troopers

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had probable cause to search the car after Byrd stated it contained marijuana, the District Court denied Byrd's motion on the ground that Byrd lacked "standing" to contest the search as an initial matter, 2015 WL 5038455, *2 (MD Pa., Aug. 26, 2015) (citing *United States v. Kennedy*, 638 F.3d 159, 165 (CA3 2011)). Byrd later entered a conditional guilty plea, reserving the right to appeal the suppression ruling.

The Court of Appeals affirmed in a brief summary opinion. 679 Fed. Appx. 146 (CA3 2017). As relevant here, the Court of Appeals recognized that a "circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement"; but it noted that Circuit precedent already had "spoken as to this issue . . . and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle." *Id.*, at 150 (citing *Kennedy, supra*, at 167–168). The Court of Appeals did not reach the probable-cause question.

This Court granted Byrd's petition for a writ of certiorari, 582 U. S. 966 (2017), to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car. Compare *United States v. Seeley*, 331 F.3d 471, 472 (CA5 2003) (*per curiam*); *United States v. Wellons*, 32 F.3d 117, 119 (CA4 1994); *United States v. Roper*, 918 F.2d 885, 887–888 (CA10 1990), with *United States v. Smith*, 263 F.3d 571, 581–587 (CA6 2001); *Kennedy, supra*, at 165–168, and with *United States v. Thomas*, 447 F.3d 1191, 1196–1199 (CA9 2006); *United States v. Best*, 135 F.3d 1223, 1225 (CA8 1998).

II

Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions

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of privacy wrought by “general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.” *Chimel v. California*, 395 U. S. 752, 761 (1969). Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit “police officers unbridled discretion to rummage at will among a person’s private effects.” *Arizona v. Gant*, 556 U. S. 332, 345 (2009).

This concern attends the search of an automobile. See *Delaware v. Prouse*, 440 U. S. 648, 662 (1979). The Court has acknowledged, however, that there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search. See, e. g., *California v. Acevedo*, 500 U. S. 565, 579 (1991).

Whether a warrant is required is a separate question from the one the Court addresses here, which is whether the person claiming a constitutional violation “has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.” *Rakas v. Illinois*, 439 U. S. 128, 133 (1978). Answering that question requires examination of whether the person claiming the constitutional violation had a “legitimate expectation of privacy in the premises” searched. *Id.*, at 143. “Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.” *Id.*, at 144, n. 12. Still, “property concepts” are instructive in “determining the presence or absence of the privacy interests protected by that Amendment.” *Ibid.*

Indeed, more recent Fourth Amendment cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived from the second Justice Harlan’s concurrence in *Katz v. United States*, 389 U. S. 347 (1967), supplements, rather than displaces, “the traditional property-based understanding of the Fourth Amend-

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ment.” *Florida v. Jardines*, 569 U. S. 1, 11 (2013). Perhaps in light of this clarification, Byrd now argues in the alternative that he had a common-law property interest in the rental car as a second bailee that would have provided him with a cognizable Fourth Amendment interest in the vehicle. But he did not raise this argument before the District Court or Court of Appeals, and those courts did not have occasion to address whether Byrd was a second bailee or what consequences might follow from that determination. In those courts he framed the question solely in terms of the *Katz* test noted above. Because this is “a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), it is generally unwise to consider arguments in the first instance, and the Court declines to reach Byrd’s contention that he was a second bailee.

Reference to property concepts, however, aids the Court in assessing the precise question here: Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?

III

A

One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. More difficult to define and delineate are the legitimate expectations of privacy of others.

On the one hand, as noted above, it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it. See *Jones v. United States*, 362 U. S. 257, 259 (1960); *Katz, supra*, at 352; *Mancusi v. DeForte*, 392 U. S. 364, 368 (1968); *Minnesota v. Olson*, 495 U. S. 91, 98 (1990).

On the other hand, it is also clear that legitimate presence on the premises of the place searched, standing alone, is not

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enough to accord a reasonable expectation of privacy, because it “creates too broad a gauge for measurement of Fourth Amendment rights.” *Rakas*, 439 U. S., at 142; see also *id.*, at 148 (“We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one’s expectation of privacy, but it cannot be deemed controlling”); *Minnesota v. Carter*, 525 U. S. 83, 91 (1998).

Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Rakas*, 439 U. S., at 144, n. 12. The two concepts in cases like this one are often linked. “One of the main rights attaching to property is the right to exclude others,” and, in the main, “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.” *Ibid.* (citing 2 W. Blackstone, *Commentaries on the Laws of England*, ch. 1). This general property-based concept guides resolution of this case.

B

Here, the Government contends that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company’s lack of authorization alone. This *per se* rule rests on too restrictive a view of the Fourth Amendment’s protections. Byrd, by contrast, contends that the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control. There is more to recommend Byrd’s proposed rule than the Government’s; but, without qualification, it would include within its ambit thieves and others who, not least because of their lack of any property-based

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justification, would not have a reasonable expectation of privacy.

1

Stripped to its essentials, the Government's position is that only authorized drivers of rental cars have expectations of privacy in those vehicles. This position is based on the following syllogism: Under *Rakas*, passengers do not have an expectation of privacy in an automobile glove compartment or like places; an unauthorized driver like Byrd would have been the passenger had the renter been driving; and the unauthorized driver cannot obtain greater protection when he takes the wheel and leaves the renter behind. The flaw in this syllogism is its major premise, for it is a misreading of *Rakas*.

The Court in *Rakas* did not hold that passengers cannot have an expectation of privacy in automobiles. To the contrary, the Court disclaimed any intent to hold "that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it." 439 U. S., at 150, n. 17 (internal quotation marks omitted). The Court instead rejected the argument that legitimate presence alone was sufficient to assert a Fourth Amendment interest, which was fatal to the petitioners' case there because they had "claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." *Ibid.*

What is more, the Government's syllogism is beside the point, because this case does not involve a passenger at all but instead the driver and sole occupant of a rental car. As Justice Powell observed in his concurring opinion in *Rakas*, a "distinction . . . may be made in some circumstances between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an auto-

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mobile or of its locked compartments.” *Id.*, at 154. This situation would be similar to the defendant in *Jones*, *supra*, who, as *Rakas* notes, had a reasonable expectation of privacy in his friend’s apartment because he “had complete dominion and control over the apartment and could exclude others from it,” 439 U. S., at 149. Justice Powell’s observation was also consistent with the majority’s explanation that “one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude,” *id.*, at 144, n. 12, an explanation tied to the majority’s discussion of *Jones*.

The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude. Indeed, the Government conceded at oral argument that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a car-jacker. Tr. of Oral Arg. 48–49.

2

The Government further stresses that Byrd’s driving the rental car violated the rental agreement that Reed signed, and it contends this violation meant Byrd could not have had any basis for claiming an expectation of privacy in the rental car at the time of the search. As anyone who has rented a car knows, car-rental agreements are filled with long lists of restrictions. Examples include prohibitions on driving the car on unpaved roads or driving while using a handheld cell-phone. Few would contend that violating provisions like

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these has anything to do with a driver's reasonable expectation of privacy in the rental car—as even the Government agrees. Brief for United States 32.

Despite this concession, the Government argues that permitting an unauthorized driver to take the wheel of a rental car is a breach different in kind from these others, so serious that the rental company would consider the agreement “void” the moment an unauthorized driver takes the wheel. *Id.*, at 4, 15, 16, 27. To begin with, that is not what the contract says. It states: “Permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement. This may result in any and all coverage otherwise provided by the rental agreement being void and my being fully responsible for all loss or damage, including liability to third parties.” App. 24 (emphasis deleted).

Putting the Government's misreading of the contract aside, there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination. True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.

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3

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas* makes clear that "'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." 439 U. S., at 141, n. 9. "A burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Id.*, at 143–144, n. 12. Likewise, "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." *Id.*, at 141, n. 9. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

On this point, in its merits brief, the Government asserts that, on the facts here, Byrd should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime. This argument is premised on the Government's inference that Byrd knew he would not have been able to rent the car on his own, because he would not have satisfied the rental company's requirements based on his criminal record, and that he used Reed, who had no intention of using the car for her own purposes, to procure the car for him to transport heroin to Pittsburgh.

It is unclear whether the Government's allegations, if true, would constitute a criminal offense in the acquisition of the rental car under applicable law. And it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright.

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The Government did not raise this argument in the District Court or the Court of Appeals, however. It relied instead on the sole fact that Byrd lacked authorization to drive the car. And it is unclear from the record whether the Government's inferences paint an accurate picture of what occurred. Because it was not addressed in the District Court or Court of Appeals, the Court declines to reach this question. The proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court.

IV

The Government argued in its brief in opposition to certiorari that, even if Byrd had a Fourth Amendment interest in the rental car, the troopers had probable cause to believe it contained evidence of a crime when they initiated their search. If that were true, the troopers may have been permitted to conduct a warrantless search of the car in line with the Court's cases concerning the automobile exception to the warrant requirement. See, *e. g.*, *Acevedo*, 500 U. S., at 580. The Court of Appeals did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car.

It is worth noting that most courts analyzing the question presented in this case, including the Court of Appeals here, have described it as one of Fourth Amendment "standing," a concept the Court has explained is not distinct from the merits and "is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas, supra*, at 139.

The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before

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reaching the merits. *Arizona Christian School Tuition Organization v. Winn*, 563 U. S. 125, 129 (2011) (“To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution”); see also *Rakas*, *supra*, at 138–140. Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim. On remand, then, the Court of Appeals is not required to assess Byrd’s reasonable expectation of privacy in the rental car before, in its discretion, first addressing whether there was probable cause for the search, if it finds the latter argument has been preserved.

V

Though new, the fact pattern here continues a well-traveled path in this Court’s Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government’s arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.

* * *

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

It is so ordered.

THOMAS, J., concurring

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

Although I have serious doubts about the “reasonable expectation of privacy” test from *Katz v. United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring), I join the Court’s opinion because it correctly navigates our precedents, which no party has asked us to reconsider. As the Court notes, Byrd also argued that he should prevail under the original meaning of the Fourth Amendment because the police interfered with a property interest that he had in the rental car. I agree with the Court’s decision not to review this argument in the first instance. In my view, it would be especially “unwise” to reach that issue, *ante*, at 404, because the parties fail to adequately address several threshold questions.

The Fourth Amendment guarantees the people’s right to be secure from unreasonable searches of “their persons, houses, papers, and effects.” With this language, the Fourth Amendment gives “*each* person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.” *Minnesota v. Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). The issue, then, is whether Byrd can prove that the rental car was *his* effect.

That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered “their . . . effect[t]” under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?

The parties largely gloss over these questions, but the answers seem vitally important to assessing whether Byrd can

ALITO, J., concurring

claim that the rental car is his effect. In an appropriate case, I would welcome briefing and argument on these questions.

JUSTICE ALITO, concurring.

The Court holds that an unauthorized driver of a rental car is not always barred from contesting a search of the vehicle. Relevant questions bearing on the driver's ability to raise a Fourth Amendment claim may include: the terms of the particular rental agreement, see *ante*, at 407–408; the circumstances surrounding the rental, *ante*, at 409; the reason why the driver took the wheel, *ante*, at 408; any property right that the driver might have, *ante*, at 403–404; and the legality of his conduct under the law of the State where the conduct occurred, *ante*, at 409. On remand, the Court of Appeals is free to reexamine the question whether petitioner may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground. *Ante*, at 411. On this understanding, I join the opinion of the Court.

Syllabus

McCOY *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 16–8255. Argued January 17, 2018—Decided May 14, 2018

Petitioner Robert McCoy was charged with murdering his estranged wife’s mother, stepfather, and son. McCoy pleaded not guilty to first-degree murder, insisting that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. Although he vociferously insisted on his innocence and adamantly objected to any admission of guilt, the trial court permitted his counsel, Larry English, to tell the jury, during the trial’s guilt phase, McCoy “committed [the] three murders.” English’s strategy was to concede that McCoy committed the murders, but argue that McCoy’s mental state prevented him from forming the specific intent necessary for a first-degree murder conviction. Over McCoy’s repeated objection, English told the jury McCoy was the killer and that English “took [the] burden off of [the prosecutor]” on that issue. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. The jury found him guilty of all three first-degree murder counts. At the penalty phase, English again conceded McCoy’s guilt, but urged mercy in view of McCoy’s mental and emotional issues. The jury returned three death verdicts. Represented by new counsel, McCoy unsuccessfully sought a new trial. The Louisiana Supreme Court affirmed the trial court’s ruling that English had authority to concede guilt, despite McCoy’s opposition.

Held: The Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Pp. 421–428.

(a) The Sixth Amendment guarantees to each criminal defendant “the Assistance of Counsel for his defence.” The defendant does not surrender control entirely to counsel, for the Sixth Amendment, in “grant[ing] to the accused personally the right to make his defense,” “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.” *Faretta v. California*, 422 U.S. 806, 819–820. The lawyer’s province is trial management, but some decisions are reserved for the client—including whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs

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in this reserved-for-the-client category. Refusing to plead guilty in the face of overwhelming evidence against her, rejecting the assistance of counsel, and insisting on maintaining her innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the defendant's objectives in fact *are*. See *Weaver v. Massachusetts*, 582 U. S. 286, 295. Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did here. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium attending admission that he killed family members, or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22. Thus, when a client makes it plain that the objective of “his defence” is to maintain innocence of the charged criminal acts and pursue an acquittal, his lawyer must abide by that objective and may not override it by conceding guilt. Pp. 421–424.

(b) *Florida v. Nixon*, 543 U. S. 175, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon “was generally unresponsive” during discussions of trial strategy and “never verbally approved or protested” counsel's proposed approach. *Id.*, at 181. He complained about counsel's admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Citing *Nix v. Whiteside*, 475 U. S. 157, the Louisiana Supreme Court concluded that English's refusal to maintain McCoy's innocence was necessitated by a Louisiana Rule of Professional Conduct that prohibits counsel from suborning perjury. But in *Nix*, the defendant told his lawyer that he intended to commit perjury. Here, there was no avowed perjury. English harbored no doubt that McCoy believed what he was saying; English simply disbelieved that account in view of the prosecution's evidence. Louisiana's ethical rules might have stopped English from presenting McCoy's alibi evidence if English knew perjury was involved, but Louisiana has identified no ethical rule requiring English to admit McCoy's guilt over McCoy's objection. Pp. 424–426.

(c) The Court's ineffective-assistance-of-counsel jurisprudence, see *Strickland v. Washington*, 466 U. S. 668, does not apply here, where the client's autonomy, not counsel's competence, is in issue. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *id.*, at 692. But here, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy has been ranked “structural” error; when present, such an error is not subject to harmless-error re-

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view. See, e. g., *McKaskle v. Wiggins*, 465 U. S. 168, 177, n. 8; *United States v. Gonzalez-Lopez*, 548 U. S. 140; *Waller v. Georgia*, 467 U. S. 39. An error is structural if it is not designed to protect defendants from erroneous conviction, but instead protects some other interest, such as “the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” *Weaver*, 582 U. S., at 295 (citing *Faretta*, 422 U. S., at 834). Counsel’s admission of a client’s guilt over the client’s express objection is error structural in kind, for it blocks the defendant’s right to make a fundamental choice about his own defense. See *Weaver*, 582 U. S., at 295–296. McCoy must therefore be accorded a new trial without any need first to show prejudice. Pp. 426–428.

2014–1449 (La. 10/19/16), 218 So. 3d 535, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which THOMAS and GORSUCH, JJ., joined, *post*, p. 429.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Danielle Spinelli*, *Catherine M. A. Carroll*, *David M. Lehn*, *Jonathan A. Bressler*, *Richard Bourke*, *Joseph W. Vigneri*, *Meghan Shapiro*, *Alan E. Schoenfeld*, and *Michael D. Gottesman*.

Elizabeth B. Murrill, Solicitor General of Louisiana, argued the cause for respondent. With her on the brief were *Jeff Landry*, Attorney General of Louisiana, *Colin Clark*, Deputy Solicitor General, *Andrea Barient*, Assistant Attorney General, and *J. Schuyler Marvin*.*

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Hilarie Bass*, *Michael J. Gottlieb*, *Matthew L. Schwartz*, and *Albert Giang*; for the Cato Institute by *Clark M. Neily III* and *Jay R. Schweikert*; for the Criminal Bar Association of England & Wales by *Jenay Nurse*, *Corrine Irish*, and *George H. Kendall*; for the National Association of Criminal Defense Lawyers by *Clifford M. Sloan*, *Peter M. Kerlin*, and *Barbara E. Bergman*; and for Ten Law School Professors et al. by *Lawrence J. Fox*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Steve Marshall*, Attorney General of Alabama, *Andrew L. Brasher*, Solicitor General, and *Lauren Simpson*, Assistant Attorney

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JUSTICE GINSBURG delivered the opinion of the Court.

In *Florida v. Nixon*, 543 U. S. 175 (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant’s guilt at trial “when [the] defendant, informed by counsel, neither consents nor objects,” *id.*, at 178. In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. *Id.*, at 186. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel’s proposed concession strategy, *id.*, at 181, “[no] blanket rule demand[s] the defendant’s explicit consent” to implementation of that strategy, *id.*, at 192.

In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. App. 286–287, 505–506. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant “committed three murders. . . . [H]e’s guilty.” *Id.*, at 509, 510. We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right “to have the Assistance of Counsel for *his* defence,” the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage,

General, and by the Attorneys General of their respective States as follows: *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming.

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or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

I

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in the Youngs' home in Bossier City, Louisiana. The three victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Several days later, police arrested McCoy in Idaho. Extradited to Louisiana, McCoy was appointed counsel from the public defender's office. A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. McCoy pleaded not guilty. Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. App. 284–286. At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

In December 2009 and January 2010, McCoy told the court his relationship with assigned counsel had broken down irretrievably. He sought and gained leave to represent himself until his parents engaged new counsel for him. In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel. English eventually concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.¹ McCoy, English reported, was "furious" when told,

¹Part of English's strategy was to concede that McCoy committed the murders and to argue that he should be convicted only of second-degree murder, because his "mental incapacity prevented him from forming the requisite specific intent to commit first degree murder." 2014–1449 (La. 10/19/16), 218 So. 3d 535, 570. But the second-degree strategy would have encountered a shoal, for Louisiana does not permit introduction of evidence of a defendant's diminished capacity absent the entry of a plea of not guilty by reason of insanity. *Ibid.*, and n. 35.

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two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders. *Id.*, at 286.² McCoy told English "not to make that concession," and English knew of McCoy's "complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims"; instead of any concession, McCoy pressed English to pursue acquittal. *Id.*, at 286–287.

At a July 26, 2011 hearing, McCoy sought to terminate English's representation, *id.*, at 449, and English asked to be relieved if McCoy secured other counsel, *id.*, at 458. With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record. *Id.*, at 461. "[Y]ou are the attorney," the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and "you have to make the trial decision of what you're going to proceed with." *Id.*, at 469.

At the beginning of his opening statement at the guilt phase of the trial, English told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." *Id.*, at 504. McCoy protested; out of earshot of the jury, McCoy told the court that English was "selling [him] out" by maintaining that McCoy "murdered [his] family." *Id.*, at 505–506. The trial court reiterated that English was "representing" McCoy and told McCoy that the court would not permit "any other outbursts." *Id.*, at 506. Continuing his opening statement, English told the jury the evidence is "unambigu-

²The dissent states that English told McCoy his proposed trial strategy eight months before trial. *Post*, at 431. English did encourage McCoy, "[a] couple of months before the trial," to plead guilty rather than proceed to trial. App. 66–67. But English declared under oath that "the first time [he] told [McCoy] that [he] intended to concede to the jury that [McCoy] was the killer" was July 12, 2011, two weeks before trial commenced. *Id.*, at 286. Encouraging a guilty plea pretrial, of course, is not equivalent to imparting to a defendant counsel's strategic determination to concede guilt should trial occur.

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ous,” “my client committed three murders.” *Id.*, at 509. McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. In his closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he “took [the] burden off of [the prosecutor].” *Id.*, at 647. The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts. At the penalty phase, English again conceded “Robert McCoy committed these crimes,” *id.*, at 751, but urged mercy in view of McCoy’s “serious mental and emotional issues,” *id.*, at 755. The jury returned three death verdicts.

Represented by new counsel, McCoy unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede McCoy “committed three murders,” *id.*, at 509, over McCoy’s objection. The Louisiana Supreme Court affirmed the trial court’s ruling that defense counsel had authority so to concede guilt, despite the defendant’s opposition to any admission of guilt. See 2014–1449 (La. 10/19/16), 218 So. 3d 535. The concession was permissible, the court concluded, because counsel reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence.

We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant’s intransigent and unambiguous objection. 582 U. S. 967 (2017). Compare with the instant case, *e. g.*, *Cooke v. State*, 977 A. 2d 803, 842–846 (Del. 2009) (counsel’s pursuit of a “guilty but mentally ill” verdict over defendant’s “vociferous and repeated protestations” of innocence violated defendant’s “constitutional right to make the fundamental decisions regarding his case”); *State v. Carter*, 270 Kan. 426, 440, 14 P. 3d 1138, 1148 (2000) (counsel’s admission of client’s involvement in murder when client adamantly

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maintained his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial).

II

A

The Sixth Amendment guarantees to each criminal defendant “the Assistance of Counsel for his defence.” At common law, self-representation was the norm. See *Faretta v. California*, 422 U. S. 806, 823 (1975) (citing 1 F. Pollock & F. Maitland, *The History of English Law* 211 (2d ed. 1909)). As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. *Faretta*, 422 U. S., at 824–828. Even now, when most defendants choose to be represented by counsel, see, e. g., Goldschmidt & Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996–2011: An Exploratory Study*, 8 Fed. Cts. L. Rev. 81, 91 (2015) (0.2% of federal felony defendants proceeded *pro se*), an accused may insist upon representing herself—however counterproductive that course may be, see *Faretta*, 422 U. S., at 834. As this Court explained, “[t]he right to defend is personal,” and a defendant’s choice in exercising that right “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Ibid.* (quoting *Illinois v. Allen*, 397 U. S. 337, 350–351 (1970) (Brennan, J., concurring)); see *McKaskle v. Wiggins*, 465 U. S. 168, 176–177 (1984) (“The right to appear *pro se* exists to affirm the dignity and autonomy of the accused.”).

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in “grant[ing] to the accused personally the right to make his defense,” “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.” *Faretta*, 422 U. S., at 819–820; see *Gannett Co.*

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v. *DePasquale*, 443 U.S. 368, 382, n. 10 (1979) (the Sixth Amendment “contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense”). Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant’s own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client’s objectives; they are choices about what the client’s objectives in fact *are*. See *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (self-representation will often increase the likelihood of an unfavorable outcome but “is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty”); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) (“Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.”).

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He

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may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. See Tr. of Oral Arg. 21–22 (it is for the defendant to make the value judgment whether “to take a minuscule chance of not being convicted and spending a life in . . . prison”); Hashimoto, Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case, 90 B. U. L. Rev. 1147, 1178 (2010) (for some defendants, “the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence”); cf. *Jae Lee v. United States*, 582 U. S. 357, 371 (2017) (recognizing that a defendant might reject a plea and prefer “taking a chance at trial” despite “[a]lmost certai[n]” conviction (emphasis deleted)). When a client expressly asserts that the objective of “*his* defence” is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U. S. Const., Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a “lawyer shall abide by a client’s decisions concerning the objectives of representation”).

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel’s, or the court’s, respective trial management roles. See *Gonzalez*, 553 U. S., at 249 (“[n]umerous choices affecting conduct of the trial” do not require client consent, including “the objections to make, the witnesses to call, and the arguments to advance”); cf. *post*, at 436. Counsel, in any case, must still develop a trial strategy and discuss it with her client, see *Nixon*, 543 U. S., at 178, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i. e.*, that McCoy had “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” *Godinez v. Moran*, 509 U. S. 389, 396 (1993)

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(quoting *Dusky v. United States*, 362 U. S. 402 (1960) (*per curiam*)).³ If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection. English could not interfere with McCoy's telling the jury "I was not the murderer," although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction. See Tr. of Oral Arg. 21–23.

B

Florida v. Nixon, see *supra*, at 417, is not to the contrary. Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. 543 U. S., at 181. Nixon complained about the admission of his guilt only after trial. *Id.*, at 185. McCoy, in contrast, opposed English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. See App. 286–287, 456, 505–506. See also *Cooke*, 977 A. 2d, at 847 (distinguishing *Nixon* because, "[i]n stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty"). If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way. See *Gonzalez*, 553 U. S., at 254 (Scalia, J.,

³Several times, English did express his view that McCoy was not, in fact, competent to stand trial. See App. 388, 436.

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concurring in judgment) (“[A]ction taken by counsel over his client’s objection . . . ha[s] the effect of revoking [counsel’s] agency with respect to the action in question.”).

The Louisiana Supreme Court concluded that English’s refusal to maintain McCoy’s innocence was necessitated by Louisiana Rule of Professional Conduct 1.2(d) (2017), which provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” 218 So. 3d, at 564. Presenting McCoy’s alibi defense, the court said, would put English in an “ethical conundrum,” implicating English in perjury. *Id.*, at 565 (citing *Nix v. Whiteside*, 475 U. S. 157, 173–176 (1986)). But McCoy’s case does not resemble *Nix*, where the defendant told his lawyer that he intended to commit perjury. There was no such avowed perjury here. Cf. ABA Model Rule of Professional Conduct 3.3, Comment 8 (“The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false.”). English harbored no doubt that McCoy believed what he was saying, see App. 285–286; English simply disbelieved McCoy’s account in view of the prosecution’s evidence. English’s express motivation for conceding guilt was not to avoid suborning perjury, but to try to build credibility with the jury, and thus obtain a sentence lesser than death. *Id.*, at 287. Louisiana’s ethical rules might have stopped English from presenting McCoy’s alibi evidence if English knew perjury was involved. But Louisiana has identified no ethical rule requiring English to admit McCoy’s guilt over McCoy’s objection. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 11.6(c), p. 935 (4th ed. 2015) (“A lawyer is not placed in a professionally embarrassing position when he is reluctantly required . . . to go to trial in a weak case, since that decision is clearly attributed to his client.”).

The dissent describes the conflict between English and McCoy as “rare” and “unlikely to recur.” *Post*, at 430, 433–434, and n. 2. Yet the Louisiana Supreme Court parted ways

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with three other State Supreme Courts that have addressed this conflict in the past twenty years. *People v. Bergerud*, 223 P. 3d 686, 691 (Colo. 2010) (“Although defense counsel is free to develop defense theories based on reasonable assessments of the evidence, as guided by her professional judgment, she cannot usurp those fundamental choices given directly to criminal defendants by the United States and the Colorado Constitutions.”); *Cooke*, 977 A. 2d 803 (Del. 2009); *Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000). In each of the three cases, as here, the defendant repeatedly and adamantly insisted on maintaining his factual innocence despite counsel’s preferred course: concession of the defendant’s commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses. See *Bergerud*, 223 P. 3d, at 690–691; *Cooke*, 977 A. 2d, at 814; *Carter*, 270 Kan., at 429, 14 P. 3d, at 1141. These were not strategic disputes about whether to concede an element of a charged offense, cf. *post*, at 435; they were intractable disagreements about the fundamental objective of the defendant’s representation. For McCoy, that objective was to maintain “I did not kill the members of my family.” Tr. of Oral Arg. 26. In this stark scenario, we agree with the majority of state courts of last resort that counsel may not admit her client’s guilt of a charged crime over the client’s intransigent objection to that admission.

III

Because a client’s autonomy, not counsel’s competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U. S. 668 (1984), or *United States v. Cronin*, 466 U. S. 648 (1984), to McCoy’s claim. See Brief for Petitioner 43–48; Brief for Respondent 46–52. To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland*, 466 U. S., at 692. Here, however, the violation of McCoy’s protected autonomy right was complete when the court al-

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lowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, e. g., *McKaskle*, 465 U. S., at 177, n. 8 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); *United States v. Gonzalez-Lopez*, 548 U. S. 140, 150 (2006) (choice of counsel is structural); *Waller v. Georgia*, 467 U. S. 39, 49–50 (1984) (public trial is structural). Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U. S. 279, 310 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U. S., at 295 (citing *Faretta*, 422 U. S., at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U. S., at 295–296 (citing *Gonzalez-Lopez*, 548 U. S., at 149, n. 4, and *Sullivan v. Louisiana*, 508 U. S. 275, 279 (1993)).

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See *Cooke*, 977 A. 2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceed-

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ings as a whole.”). Such an admission blocks the defendant’s right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer’s concession of his client’s guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.⁴

* * *

Larry English was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: “I did not murder my family.” App. 506. Once he communicated that to court and counsel, strenuously objecting to English’s proposed strategy, a concession of guilt should have been off the table. The trial court’s allowance of English’s admission of McCoy’s guilt despite McCoy’s insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective.

For the reasons stated, the judgment of the Louisiana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

⁴The dissent suggests that a remand would be in order, so that the Louisiana Supreme Court, in the first instance, could consider the structural-error question. See *post*, at 438–439. “[W]e did not grant certiorari to review” that question. *Post*, at 438. But McCoy raised his structural-error argument in his opening brief, see Brief for Petitioner 38–43, and Louisiana explicitly chose not to grapple with it, see Brief for Respondent 45, n. 5. In any event, “we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.” *Yates v. Evatt*, 500 U. S. 391, 407 (1991) (citing *Rose v. Clark*, 478 U. S. 570, 584 (1986)).

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

The Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result. But that is exactly what the Court does in this case. The Court overturns petitioner’s convictions for three counts of first-degree murder by attributing to his trial attorney, Larry English, something that English never did. The Court holds that English violated petitioner’s constitutional rights by “admit[ting] h[is] client’s guilt of a charged crime over the client’s intransigent objection.” *Ante*, at 426.¹ But English did not admit that petitioner was guilty of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, English admitted that petitioner committed one element of that offense, *i. e.*, that he killed the victims. But English strenuously argued that petitioner

¹When the Court expressly states its holding, it refers to a concession of guilt. See *ante*, at 417 (“We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty”); *ante*, at 426 (“[C]ounsel may not admit her client’s guilt of a charged crime over the client’s intransigent objection to that admission”). The opinion also contains many other references to the confession or admission of guilt. See, *e. g.*, *ante*, at 417 (“confessing guilt”; “admit guilt”); *ante*, at 420 (“admitting guilt”; “concede guilt”); *ante*, at 422 (“maintaining her innocence at the guilt phase”; “concession of guilt”); *ante*, at 423 (“conceding guilt”); *ante*, at 424 (“assertion of his guilt”); *ante*, at 425 (“conceding guilt”; “admit McCoy’s guilt”); *ante*, at 428 (“concession of guilt”; “admission of McCoy’s guilt”).

At a few points, however, the Court refers to the admission of criminal “acts.” *Ante*, at 417, 423, 426. A rule that a defense attorney may not admit the *actus reus* of an offense (or perhaps even any element of the *actus reus*) would be very different from the rule that the Court expressly adopts. I discuss some of the implications of such a broad rule in Part III of this opinion.

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was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. App. 508–512. So the Court’s newly discovered fundamental right simply does not apply to the real facts of this case.

I

The real case is far more complex. Indeed, the real situation English faced at the beginning of petitioner’s trial was the result of a freakish confluence of factors that is unlikely to recur.

Retained by petitioner’s family, English found himself in a predicament as the trial date approached. The evidence against his client was truly “overwhelming,” as the Louisiana Supreme Court aptly noted. 2014–1449 (La. 10/19/16), 218 So. 3d 535, 565 (2016). Among other things, the evidence showed the following. Before the killings took place, petitioner had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, petitioner’s mother-in-law made a 911 call and was heard screaming petitioner’s first name. She yelled: “‘She ain’t here, Robert . . . I don’t know where she is. The detectives have her. Talk to the detectives. She ain’t in there, Robert.’” *Id.*, at 542. Moments later, a gunshot was heard, and the 911 call was disconnected.

Officers were dispatched to the scene, and on arrival, they found three dead or dying victims—petitioner’s mother-in-law, her husband, and the teenage son of petitioner’s wife. The officers saw a man who fit petitioner’s description fleeing in petitioner’s car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone petitioner’s mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims. Petitioner was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims. In addition to all this, a witness testified that peti-

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tioner had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed petitioner purchasing the ammunition on the day of the killings. And two of petitioner's friends testified that he confessed to killing at least one person.

Despite all this evidence, petitioner, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot. App. 509.

Unwilling to go along with this incredible and uncorroborated defense, English told petitioner "some eight months" before trial that the only viable strategy was to admit the killings and to concentrate on attempting to avoid a sentence of death. 218 So. 3d, at 558. At that point—aware of English's strong views—petitioner could have discharged English and sought new counsel willing to pursue his conspiracy defense; under the Sixth Amendment, that was his right. See *United States v. Gonzalez-Lopez*, 548 U. S. 140, 144 (2006). But petitioner stated "several different times" that he was "confident with Mr. English." App. 411, 437.

The weekend before trial, however, petitioner changed his mind. He asked the trial court to replace English, and English asked for permission to withdraw. Petitioner stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared. The court refused these requests and also denied petitioner's last-minute request to represent himself. (Petitioner does not challenge these decisions here.) So petitioner and English were stuck with each other, and petitioner availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?

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The Louisiana Supreme Court held that English could not have put on petitioner's desired defense without violating state ethics rules, see 218 So. 3d, at 564–565, but this Court effectively overrules the state court on this issue of state law, *ante*, at 425. However, even if it is assumed that the Court is correct on this ethics issue, the result of mounting petitioner's conspiracy defense almost certainly would have been disastrous. That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial. As English observed, taking that path would have only “help[ed] the District Attorney send [petitioner] to the death chamber.” App. 396. (In *Florida v. Nixon*, 543 U.S. 175, 191–192 (2004), this Court made essentially the same point.) So, again, what was English supposed to do?

When pressed at oral argument before this Court, petitioner's current counsel eventually provided an answer: English was not required to take any affirmative steps to support petitioner's bizarre defense, but instead of conceding that petitioner shot the victims, English should have ignored that element entirely. Tr. of Oral Arg. 21–23. So the fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

Constitutional: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense.”

Unconstitutional: “First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense.”

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The practical difference between these two statements is negligible. If English had conspicuously refrained from endorsing petitioner's story and had based his defense solely on petitioner's dubious mental condition, the jury would surely have gotten the message that English was essentially conceding that petitioner killed the victims. But according to petitioner's current attorney, the difference is fundamental. The first formulation, he admits, is perfectly fine. The latter, on the other hand, is a violation so egregious that the defendant's conviction must be reversed even if there is no chance that the misstep caused any harm. It is no wonder that the Court declines to embrace this argument and instead turns to an issue that the case at hand does not actually present.

II

The constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come. Why is this so?

First, it is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment. In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach. So the right that the Court has discovered is effectively confined to capital cases.

Second, few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution. Indeed, under such circumstances, the odds are that a rational defendant will plead guilty in exchange for a life sentence. By the same token, an attorney is unlikely to insist on admitting

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guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile. So the right is most likely to arise in cases involving irrational capital defendants.²

Third, where a capital defendant and his retained attorney cannot agree on a basic trial strategy, the attorney and client will generally part ways unless, as in this case, the court is not apprised until the eve of trial. The client will then either search for another attorney or decide to represent himself. So the field of cases in which this right might arise is limited further still—to cases involving irrational capital defendants who disagree with their attorneys' proposed strategy yet continue to retain them.

Fourth, if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.

Finally, even if all the above conditions are met, the right that the Court now discovers will not come into play unless the defendant expressly protests counsel's strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing, or is equivocal, the right is deemed to have been waived. See *Nixon*, 543 U. S., at 192.

In short, the right that the Court now discovers is likely to appear only rarely,³ and because the present case is so

²The Court imagines cases in which a rational defendant prefers even a minuscule chance of acquittal over either the social opprobrium that would result from an admission of guilt or the sentence of imprisonment that would be imposed upon conviction. *Ante*, at 422–423. Such cases are likely to be rare, and in any event, as explained below, the defendant will almost always be able to get his way if he acts in time.

³The Court responds that three State Supreme Courts have “addressed this conflict in the past twenty years.” *Ante*, at 426. Even if true, that would hardly be much of a rebuttal. Moreover, two of the three decisions were not based on the right that the Court discovers and applies here, *i. e.*, “the right to insist that counsel refrain from admitting guilt.” *Ante*,

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unique, it is hard to see how it meets our stated criteria for granting review. See this Court's Rules 10(b)–(c). Review would at least be understandable if the strategy that English pursued had worked an injustice, but the Court does not make that claim—and with good reason. Endorsing petitioner's bizarre defense would have been extraordinarily unwise, and dancing the fine line recommended by petitioner's current attorney would have done no good. It would have had no effect on the outcome of the trial, and it is hard to see how that approach would have respected petitioner's "autonomy," *ante*, at 421, 422, 424, 426, 427, any more than the more straightforward approach that English took. If petitioner is retried, it will be interesting to see what petitioner's current counsel or any other attorney to whom the case is handed off will do. It is a safe bet that no attorney will put on petitioner's conspiracy defense.

III

While the question that the Court decides is unlikely to make another appearance for quite some time, a related—and difficult—question may arise more frequently: When guilt is the sole issue for the jury, is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged? If today's decision were understood to address that question, it would have important implications.

Under current precedent, there are some decisions on which a criminal defendant has the final say. For example, a defendant cannot be forced to enter a plea against his wishes. See *Brookhart v. Janis*, 384 U. S. 1, 5–7 (1966). Similarly,

at 417. In *People v. Bergerud*, 223 P. 3d 686 (Colo. 2010), the court found that defense counsel *did not* admit guilt, and the court's decision (which did not award a new trial) was based on other grounds. *Id.*, at 692, 700, 707. In *State v. Carter*, 270 Kan. 426, 14 P. 3d 1138 (2000), defense counsel did not admit his client's guilt on all charges. Instead, he contested the charge of first-degree murder but effectively admitted the elements of a lesser homicide offense. *Id.*, at 431–433, 14 P. 3d, at 1143.

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no matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense. See *Harris v. New York*, 401 U.S. 222, 225 (1971). And if, as in this case, a defendant and retained counsel do not see eye to eye, the client can always attempt to find another attorney who will accede to his wishes. See *Gonzalez-Lopez*, 548 U.S., at 144. A defendant can also choose to dispense with counsel entirely and represent himself. See *Faretta v. California*, 422 U.S. 806, 819 (1975).

While these fundamental decisions must be made by a criminal defendant, most of the decisions that arise in criminal cases are the prerogative of counsel. (Our adversarial system would break down if defense counsel were required to obtain the client's approval for every important move made during the course of the case.) Among the decisions that counsel is free to make unilaterally are the following: choosing the basic line of defense, moving to suppress evidence, delivering an opening statement and deciding what to say in the opening, objecting to the admission of evidence, cross-examining witnesses, offering evidence and calling defense witnesses, and deciding what to say in summation. See, e.g., *New York v. Hill*, 528 U.S. 110, 114–115 (2000). On which side of the line does conceding some but not all elements of the charged offense fall?

Some criminal offenses contain elements that the prosecution can easily prove beyond any shadow of a doubt. A prior felony conviction is a good example. See 18 U.S.C. § 922(g) (possession of a firearm by a convicted felon). Suppose that the prosecution is willing to stipulate that the defendant has a prior felony conviction but is prepared, if necessary, to offer certified judgments of conviction for multiple prior violent felonies. If the defendant insists on contesting the convictions on frivolous grounds, must counsel go along? Does the same rule apply to all elements? If there are elements that may not be admitted over the defendant's objection, must counsel go further and actually contest those

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elements? Or is it permissible if counsel refrains from expressly conceding those elements but essentially admits them by walking the fine line recommended at argument by petitioner’s current attorney?

What about conceding that a defendant is guilty, not of the offense charged, but of a lesser included offense? That is what English did in this case. He admitted that petitioner was guilty of the noncapital offense of second-degree murder in an effort to prevent a death sentence. App. 651.⁴ Is admitting guilt of a lesser included offense over the defendant’s objection always unconstitutional? Where the evidence strongly supports conviction for first-degree murder, is it unconstitutional for defense counsel to make the decision to admit guilt of any lesser included form of homicide—even manslaughter? What about simple assault?

These are not easy questions, and the fact that they have not come up in this Court for more than two centuries suggests that they will arise infrequently in the future. I would leave those questions for another day and limit our decision to the particular (and highly unusual) situation in the actual case before us. And given the situation in which English found himself when trial commenced, I would hold that he did not violate any fundamental right by expressly acknowledging that petitioner killed the victims instead of engaging in the barren exercise that petitioner’s current counsel now recommends.

IV

Having discovered a new right not at issue in the real case before us, the Court compounds its error by summarily con-

⁴The Court asserts that, under Louisiana law, English’s “second-degree strategy would have encountered a shoal” and necessarily failed. *Ante*, at 418, n. 1. But the final arbiter of Louisiana law—the Louisiana Supreme Court—disagreed. It held that “[t]he jury was left with several choices” after English’s second-degree concession, “including returning a responsive verdict of second degree murder” and “not returning the death penalty.” 2014–1449 (La. 10/19/16), 218 So. 3d 535, 572 (2016).

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cluding that a violation of this right “ranks as error of the kind our decisions have called ‘structural.’” *Ante*, at 427.

The Court concedes that the Louisiana Supreme Court did not decide the structural-error question and that we “‘did not grant certiorari to review’ that question.” *Ante*, at 428, n. 4. We have stated time and again that we are “a court of review, not of first view” and, for that reason, have refused to decide issues not addressed below. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005); see also, *e.g.*, *Jennings v. Rodriguez*, 583 U.S. 281, 312 (2018); *McWilliams v. Dunn*, 582 U.S. 183, 200 (2017); *County of Los Angeles v. Mendez*, 581 U.S. 420, 429, n. (2017); *BNSF R. Co. v. Tyrrell*, 581 U.S. 402, 415 (2017); *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 115 (2017); *McLane Co. v. EEOC*, 581 U.S. 72, 85 (2017); *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017); *Manuel v. Joliet*, 580 U.S. 357, 372 (2017).

In this case, however, the court-of-review maxim does not suit the majority’s purposes, so it is happy to take the first view. And the majority does so without adversarial briefing on the question. See Brief for Respondent 45–46, n. 5.⁵ Under comparable circumstances, we have refrained from taking the lead on the question of structural error. See, *e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 526–527 (1979); *Faretta*, 422 U.S., at 836; *id.*, at 852 (Blackmun, J., dissenting). There is no good reason to take a different approach in this case.

⁵ Indeed, the Court actually *faults* the State for not “grappl[ing] with” an argument raised for the first time in petitioner’s opening brief. *Ante*, at 428, n. 4. But how can it blame the State? This Court has said, time and again, that when “petitioners d[o] not raise [an] issue” until the merits stage, “we will not consider [the] argument.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, n. (1995); see also, *e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–646 (1992). That is also what our Rules say. See *Yee v. Escondido*, 503 U.S. 519, 535–538 (1992). Why is this case any different?

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* * *

The Court ignores the question actually presented by the case before us and instead decides this case on the basis of a newly discovered constitutional right that is not implicated by what really occurred at petitioner’s trial. I would base our decision on what really took place, and under the highly unusual facts of this case, I would affirm the judgment below.

I therefore respectfully dissent.

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Syllabus

DAHDA *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

No. 17–43. Argued February 21, 2018—Decided May 14, 2018*

Under federal law, a judge normally may issue a wiretap order permitting the interception of communications only “within the territorial jurisdiction of the court in which the judge is sitting.” 18 U. S. C. § 2518(3). Here, a judge for the District of Kansas authorized nine wiretap Orders as part of a Government investigation of a suspected drug distribution ring in Kansas. For the most part, the Government intercepted communications from a listening post within Kansas. But each Order also contained a sentence purporting to authorize interception outside of Kansas. Based on that authorization, the Government intercepted additional communications from a listening post in Missouri. Following the investigation, petitioners Los and Roosevelt Dahda were indicted for participating in an illegal drug distribution conspiracy. They moved to suppress the evidence derived from all the wiretaps under subparagraph (ii) of the wiretap statute’s suppression provision because the language authorizing interception beyond the District Court’s territorial jurisdiction rendered each Order “insufficient on its face.” § 2518(10)(a)(ii). The Government agreed not to introduce any evidence arising from its Missouri listening post, and the District Court denied the Dahdas’ motion. On appeal, the Tenth Circuit rejected the Dahdas’ facial-insufficiency argument on the ground that the challenged language did not implicate Congress’ core statutory concerns in enacting the wiretap statute.

Held: Because the Orders were not lacking any information that the statute required them to include and would have been sufficient absent the challenged language authorizing interception outside the court’s territorial jurisdiction, the Orders were not facially insufficient. Pp. 446–452.

(a) The Tenth Circuit applied the “core concerns” test from *United States v. Giordano*, 416 U. S. 505, and held that subparagraph (ii) applies only where the insufficiency reflects an order’s failure to satisfy the “statutory requirements that directly and substantially implement the congressional intention to limit the use of” wiretapping, *id.*, at 527.

*Together with *Dahda v. United States* (see this Court’s Rule 12.4), also on certiorari to the same court.

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The court identified two such core concerns and concluded that neither applies to the statute's territorial limitation. But *Giordano* involved a different suppression provision—subparagraph (i)—which applies only when a “communication was unlawfully intercepted.” §2518(10)(a)(i). The underlying point of *Giordano*'s limitation was to help distinguish subparagraph (i) of §2518(10)(a) from subparagraphs (ii) and (iii). It makes little sense to extend the “core concerns” test to subparagraph (ii) as well. Subparagraph (ii) therefore does not include a *Giordano*-like “core concerns” requirement. Pp. 446–449.

(b) That said, this Court also cannot fully endorse the Dahdas' interpretation of the statute. The Dahdas read subparagraph (ii) as applying to any legal defect that appears within the four corners of an order. Clearly, subparagraph (ii) covers at least an order's failure to include information required by §§2518(4)(a)–(e). But that does not mean that every defect that may conceivably appear in an order results in an insufficiency. Here, the sentence authorizing interception outside Kansas is surplus. Its presence is not connected to any other relevant part of the Orders. Absent the challenged language, every wiretap that produced evidence introduced at the Dahdas' trial was properly authorized under the statute. While the Orders do not specifically list the territorial area where they could lawfully take effect, they clearly set forth the authorizing judge's territorial jurisdiction—the District of Kansas. And the statute itself presumptively limits every Order's scope to the issuing court's territorial jurisdiction. This interpretation of the term “insufficient” does not, as the Dahdas contend, produce bizarre results. Rather, it makes sense of the suppression provision as a whole. Pp. 449–452.

853 F. 3d 1101 (first judgment) and 852 F. 3d 1282 (second judgment), affirmed.

BREYER, J., delivered the opinion of the Court, in which all other Members joined, except GORSUCH, J., who took no part in the consideration or decision of the cases.

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Amy Mason Saharia*, *Allison Jones Rushing*, *Charles L. McCloud*, *J. Liat Rome*, and *Rick E. Bailey*.

Zachary D. Tripp argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solici-*

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tor General Dreeben, Eric J. Feigin, and Finnuuala K. Tessier.[†]

JUSTICE BREYER delivered the opinion of the Court.

A federal statute allows judges to issue wiretap orders authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes. See Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.* The statute requires the judge to find “probable cause” supporting issuance of the order, and it sets forth other detailed requirements governing both the application for a wiretap and the judicial order that authorizes it. See § 2518.

The statute provides for the suppression of “the contents of any wire or oral communication” that a wiretap “intercept[s]” along with any “evidence derived therefrom” if

- “(i) the communication was unlawfully intercepted;
- “(ii) the order of . . . approval under which it was intercepted is insufficient on its face; or
- “(iii) the interception was not made in conformity with the order of authorization or approval.” § 2518(10)(a).

This litigation concerns the second of these provisions—the provision that governs the “insufficien[cy]” of an order “on its face.” § 2518(10)(a)(ii).

Los and Roosevelt Dahda—defendants in the trial below and petitioners here—sought to suppress evidence derived from nine wiretap Orders used to obtain evidence of their participation in an unlawful drug distribution conspiracy. They argue that each Order is “insufficient on its face” be-

[†]Briefs of *amici curiae* urging reversal were filed for the Electronic Frontier Foundation et al. by *Ilana H. Eisenstein, Jason D. Gerstein, Jeffrey T. Green, Jennifer Lynch, and Andrew Crocker*; for the Electronic Privacy Information Center by *Marc Rotenberg and Alan Butler*; and for The Rutherford Institute by *Erin Glenn Busby, Lisa R. Eskow, and John W. Whitehead*.

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cause each contains a sentence authorizing interception “*outside* the territorial jurisdiction” of the authorizing judge, App. 97 (emphasis added), even though the statute normally allows a judge to authorize wiretaps only *within* his or her “territorial jurisdiction,” § 2518(3).

In deciding whether each Order was “insufficient on its face,” we assume that the Dahdas are right about the “territorial” requirement. That is to say, we assume the relevant sentence exceeded the judge’s statutory authority. But none of the communications unlawfully intercepted outside the judge’s territorial jurisdiction were introduced at trial, so the inclusion of the extra sentence had no significant adverse effect upon the Dahdas. Because the remainder of each Order was itself legally sufficient, we conclude that the Orders were not “insufficient” on their “face.”

I

A

As we just said, the relevant statute permits a judge to issue an order authorizing the Government to intercept wire communications for an initial (but extendable) period of 30 days. § 2518(5). To obtain that order, the Government must submit an application that describes the particular offense being investigated as well as the type of communications it seeks to intercept; that sets forth the basis for an appropriate finding of “probable cause”; that explains why other less intrusive methods are inadequate, have failed, or are too dangerous to try; and that meets other requirements, showing, for example, authorization by a specified governmental official. § 2518(1). If the judge accepts the application, finds probable cause, and issues an authorizing order, that order must itself contain specified information, including, for example, the identity of the “person” whose “communications are to be intercepted”; the “nature and location of the [relevant] communications facilities”; a “particular description of the type of communication sought to be inter-

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cepted”; a statement of the “particular offense” to which the intercept “relates”; the “identity of the agency authorized to intercept”; the identity of the “person authorizing the application”; and “the period of time during which” the “interception is authorized.” §§2518(4)(a)–(e).

A judge’s authorizing authority normally extends only within statutorily defined bounds. The statute specifies that an order can permit the interception of communications “within the territorial jurisdiction of the court in which the judge is sitting.” §2518(3). (There is an exception allowing interception beyond the judge’s territorial jurisdiction if the judge authorizes a “mobile interception device,” *ibid.*, but the parties now agree that exception does not apply to these Orders.) The Government here adds (without the Dahdas’ disagreement) that an intercept takes place *either* where the tapped telephone is located *or* where the Government’s “listening post” is located. See §2510(4) (defining “intercept” as “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device”); see also Brief for Petitioners 11; Brief for United States 6. As so interpreted, the statute generally requires that one or the other or both of these locations must be found within the authorizing judge’s “territorial jurisdiction.”

B

In 2011, the Government began investigating a suspected drug distribution ring based in Kansas. It submitted an application asking a federal judge for the District of Kansas to issue nine related wiretap Orders, and the judge issued them. For present purposes we assume, see *infra*, at 451, that all nine Orders met all statutory requirements with one exception. Each Order contained a sentence that read as follows:

“Pursuant to Title 18, United States Code §2518(3), it is further Ordered that, in the event TARGET TELE-

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PHONE #1, TARGET TELEPHONE #3 and TARGET TELEPHONE #4, are transported *outside the territorial jurisdiction of the court*, interception may take place in any other jurisdiction within the United States.” App. 105 (under seal) (emphasis added); see also *id.*, at 97, 114, 123, 132, 140, 149, 158, 166, 174 (Orders containing identical language but targeting different telephones).

Although they disputed it below, the parties now agree that this sentence could not lawfully allow a wiretap of a phone that was located outside Kansas in instances where the Government’s listening post was also located outside of Kansas.

Pursuant to these Orders, the Government listened from a listening post within Kansas to conversations on mobile phones that were located within Kansas and conversations on mobile phones that were located outside of Kansas. But, in one instance, the Government listened from a listening post *outside* of Kansas (in Missouri) to conversations on a mobile phone that was also outside of Kansas (in California). That one instance concerned a mobile phone (Target Telephone #7) belonging to Philip Alarcon.

In 2012, the Government indicted the Dahdas and several others, charging them with conspiracy to buy illegal drugs in California and sell them in Kansas. Prior to trial, the Dahdas moved to suppress all evidence derived from the wiretaps authorized by the nine Orders on the ground that the District Court could not authorize the interception of calls from the Missouri listening post to and from Alarcon’s mobile phone in California. In its response, the Government said it would not introduce any evidence arising from its Missouri listening post. A Magistrate Judge and subsequently the District Court denied the Dahdas’ suppression motion. App. to Pet. for Cert. 59a–76a.

The Dahdas appealed. They argued that, even though the Government did not use any wiretap information from the Missouri listening post, the court should have suppressed all

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evidence derived from any of the Orders. That, they said, is because each Order was “insufficient on its face” given the extra sentence authorizing interception outside Kansas. Hence the second subparagraph of the statute’s suppression provision required the evidence to be suppressed. § 2518(10)(a)(ii).

The U. S. Court of Appeals for the Tenth Circuit rejected this argument on the ground that the claimed insufficiency concerned the statute’s territorial requirement. 853 F. 3d 1101, 1114–1116 (2017). That requirement, in its view, did not “implemen[t]” Congress’ core statutory concerns in enacting the wiretap statute. *Id.*, at 1114 (quoting *United States v. Giordano*, 416 U. S. 505, 527 (1974)). And for that reason a violation of the territorial requirement did not warrant suppression. See also 852 F. 3d 1282, 1290 (2017).

The Dahdas filed a petition for certiorari, seeking review of the Tenth Circuit’s determination. And, in light of different related holdings among the Circuits, we granted that petition. Compare 853 F. 3d, at 1114–1116 (suppression was not required for orders authorizing suppression beyond the District Court’s territorial jurisdiction), and *Adams v. Lankford*, 788 F. 2d 1493, 1500 (CA11 1986) (same), with *United States v. Glover*, 736 F. 3d 509, 515 (CAD9 2013) (suppression required for territorial defect).

II

A

The question before us concerns the interpretation of the suppression provision’s second subparagraph, which requires suppression where a wiretap order is “insufficient on its face.” § 2518(10)(a)(ii). The Dahdas ask us to read subparagraph (ii) as applying to any legal defect that appears within the four corners of the order. The Government replies that the Dahdas’ approach would require suppression of evidence of serious criminal behavior due to the most

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minor of technical failures, including those that have little or no relation to any statutory objective.

The Tenth Circuit, agreeing with the Government, held that subparagraph (ii) applies only where the “insufficiency” constitutes an order’s failure to satisfy a “‘statutory requiremen[t] that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.’” 853 F. 3d, at 1114 (quoting *Giordano*, *supra*, at 527; second alteration in original). The court identified two such core concerns—“(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized”—and concluded that neither applies to the statute’s territorial limitation. 853 F. 3d, at 1114 (quoting S. Rep. No. 90–1097, p. 66 (1968)).

Like the *Dahdas*, we believe that the Tenth Circuit’s interpretation of this provision is too narrow. The Tenth Circuit took the test it applied from this Court’s decision in *Giordano*, *supra*, at 527. But *Giordano* involved a different provision. Keep in mind that the statute sets forth three grounds for suppression:

- “(i) the communication was unlawfully intercepted;
- “(ii) the order of . . . approval under which it was intercepted is insufficient on its face; or
- “(iii) the interception was not made in conformity with the order of authorization or approval.” § 2518(10)(a).

Giordano focused not, as here, on the second subparagraph but on the first subparagraph, which calls for the suppression of “unlawfully intercepted” communications.

In *Giordano*, a criminal defendant sought suppression of wiretap-gathered information on the ground that the wiretap application was unlawfully authorized. 416 U. S., at 525. A provision of the wiretap statute that has since been

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amended required an application to be approved by either the Attorney General or a designated Assistant Attorney General. See 18 U.S.C. § 2516(1) (1970 ed.). But, in *Giordano's* case, an executive assistant to the Assistant Attorney General—not the Assistant Attorney General himself—had approved the application. 416 U.S., at 510.

The Government argued that this statutory violation did not violate the first subparagraph, *i. e.*, it did not lead to an “unlawfu[l] intercept[ion],” 18 U.S.C. § 2518(10)(a)(i), because that subparagraph covers only violations of the Constitution, not statutes. *Giordano*, 416 U.S., at 525–526. Otherwise, the Government added, subparagraphs (ii) and (iii)—which clearly cover some statutory violations—would be superfluous. *Id.*, at 526. But this Court held that the first subparagraph *did* cover certain statutory violations, namely, violations of those statutory provisions that “implemented” the wiretap-related congressional concerns the Tenth Circuit mentioned in its opinion. *Id.*, at 527. So construed, the suppression provision left room for the second and third subparagraphs to have separate legal force. The Court went on to hold that a violation of the approval-by-the-Attorney-General provision implicated Congress’ core concerns. Subparagraph (i) thus covered that particular statutory provision. And, finding the provision violated, it ordered the wiretap evidence suppressed. *Id.*, at 527–528.

Here, by contrast, we focus upon subparagraph (ii), which requires suppression when an order is facially insufficient. And in respect to this subparagraph, we can find no good reason for applying *Giordano's* test. The underlying point of *Giordano's* limitation was to help give independent meaning to each of § 2518(10)(a)'s subparagraphs. It thus makes little sense to extend the core concerns test to subparagraph (ii) as well. Doing so would “actually treat that paragraph as ‘surplusage’—precisely what [this] Court tried to avoid in *Giordano*.” *Glover*, 736 F.3d, at 514. We consequently conclude that subparagraph (ii) does not contain a *Giordano*-

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like “core concerns” requirement. The statute means what it says. That is to say, subparagraph (ii) applies where an order is “insufficient on its face.” § 2518(10)(a)(ii).

B

Although we believe the Tenth Circuit erred in applying *Giordano*’s core concerns test to subparagraph (ii), we cannot fully endorse the Dahdas’ reading of the statute either. In our view, subparagraph (ii) does not cover each and every error that appears in an otherwise sufficient order. It is clear that subparagraph (ii) covers at least an order’s failure to include information that § 2518(4) specifically requires the order to contain. See §§ 2518(4)(a)–(e) (requiring an order to specify, *e. g.*, the “identity of the person, if known, whose communications are to be intercepted,” “a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates”); Brief for United States 17. An order lacking that information would deviate from the uniform authorizing requirements that Congress explicitly set forth, while also falling literally within the phrase “insufficient on its face.”

But the Dahdas would have us go further and conclude that any defect that may appear on an order’s face would render it insufficient. The lower courts in various contexts have debated just which kinds of defects subparagraph (ii) covers. See, *e. g.*, *United States v. Moore*, 41 F. 3d 370, 375–376 (CA8 1994) (order missing judge’s signature); *United States v. Joseph*, 519 F. 2d 1068, 1070 (CA5 1975) (order identifying the wrong Government official as authorizing the application); *United States v. Vigi*, 515 F. 2d 290, 293 (CA6 1975) (same). We need not, however, resolve the questions that these many different cases raise. We need only determine whether the defects in the Orders before us render them “insufficient.” We conclude that they do not.

We rest that conclusion upon an argument that the Government did not make below but which it did set forth in its

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response to the petition for certiorari and at the beginning of its brief on the merits. That argument is closely related to the arguments the Government did make below. It has been fully briefed by both sides. And as we may “affir[m]” a lower court judgment “on any ground permitted by the law and record,” *Murr v. Wisconsin*, 582 U. S. 383, 404 (2017), we see little to be gained by remanding this litigation for further consideration.

The argument is simply this: Subparagraph (ii) refers to an order that is “insufficient on its face.” An order is “insufficient” insofar as it is “deficient” or “lacking in what is necessary or requisite.” 5 Oxford English Dictionary 359 (1933); accord, Webster’s New International Dictionary 1288 (2d ed. 1957). And, looking, as the Dahdas urge us to do, at “the four corners of the order itself,” Reply Brief 4, we cannot find any respect in which the Orders are deficient or lacking in anything necessary or requisite.

The Orders do contain a defect, namely, the sentence authorizing interception outside Kansas, which we set forth above. See *supra*, at 444–445. But not every defect results in an insufficiency. In that sentence, the District Court “further” ordered that interception may take place “outside the territorial jurisdiction of the court.” App. 97. The sentence is without legal effect because, as the parties agree, the Orders could not legally authorize a wiretap outside the District Court’s “territorial jurisdiction.” But, more importantly, the sentence itself is surplus. Its presence is not connected to any other relevant part of the Orders. Were we to remove the sentence from the Orders, they would then properly authorize wiretaps within the authorizing court’s territorial jurisdiction. As we discussed above, a listening post within the court’s territorial jurisdiction could lawfully intercept communications made to or from telephones located within Kansas or outside Kansas. See *supra*, at 444. Consequently, every wiretap that produced evidence intro-

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duced at the Dahdas’ trial was properly authorized under the statute.

The Dahdas argue that, without the offending sentence, the Orders are “insufficient” because they then do not specifically list the territorial area where they could lawfully take effect. Reply Brief 6. The Orders, however, clearly set forth the authorizing judge’s territorial jurisdiction: the “District of Kansas.” See App. 100. And the statute itself presumptively limits every Order’s scope to the issuing court’s territorial jurisdiction. See §2518(3). We consequently fail to see how the additional language here at issue could render the Orders facially insufficient.

The Dahdas add that interpreting the term “insufficient” as we have just done will produce “bizarre results.” Reply Brief 5. They claim that, under the Government’s logic, an order authorizing interception for 180 days would not be facially insufficient even though the wiretap statute expressly limits the maximum duration of a wiretap order to 30 days. §2518(5). To be sure, a 180-day order may raise problems that the language at issue here does not. On the one hand, it may be argued that such an order would be facially insufficient because without the 180-day provision the order would not contain any time limit at all. See §2518(4)(e). On the other hand, one might argue that such an order merely would be overly broad—not facially insufficient—and that suppression would be warranted only for those communications unlawfully intercepted after 30 days. See §2518(10)(a)(i).

Regardless, we need not now address the Dahdas’ 180-day hypothetical. It is enough to say that the problems that may be associated with such an order are not present in this litigation. Here, the Orders would have been sufficient even if they lacked the language authorizing interception outside Kansas. And the Dahdas cannot seek suppression under subparagraph (i) given that the unlawfully intercepted com-

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munications from the Missouri listening post were not introduced at trial.

Our interpretation of subparagraph (ii) makes sense of the suppression provision as a whole. Where the Government's use of a wiretap is unconstitutional or violates a statutory provision that reflects Congress' core concerns, an aggrieved person may suppress improperly acquired evidence under subparagraph (i) (as "unlawfully intercepted," see *Giordano*, 416 U. S., at 527). Where an order lacks information that the wiretap statute requires it to include, an aggrieved person may suppress the fruits of the order under subparagraph (ii) (as "insufficient on its face"). And where the Government fails to comply with conditions set forth in the authorizing order, an aggrieved person may suppress its fruits under subparagraph (iii) (as an "interception . . . not made in conformity with the order of authorization or approval").

For these reasons, the judgments of the Court of Appeals are affirmed.

It is so ordered.

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

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MURPHY, GOVERNOR OF NEW JERSEY, ET AL. *v.*
NATIONAL COLLEGIATE ATHLETIC ASSOCI-
ATION ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 16–476. Argued December 4, 2017—Decided May 14, 2018*

The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for a State or its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on” competitive sporting events, 28 U. S. C. § 3702(1), and for “a person to sponsor, operate, advertise, or promote” those same gambling schemes if done “pursuant to the law or compact of a governmental entity,” § 3702(2). But PASPA does not make sports gambling itself a federal crime. Instead, it allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. § 3703. “Grandfather” provisions allow existing forms of sports gambling to continue in four States, §§ 3704(a)(1)–(2), and another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City within a year of PASPA’s enactment, § 3704(a)(3).

New Jersey did not take advantage of that option but has since had a change of heart. After voters approved an amendment to the State Constitution giving the legislature the authority to legalize sports gambling schemes in Atlantic City and at horseracing tracks, the legislature enacted a 2012 law doing just that. The National Collegiate Athletic Association and three major professional sports leagues brought an action in federal court against New Jersey’s Governor and other state officials (hereinafter New Jersey), seeking to enjoin the law on the ground that it violates PASPA. New Jersey countered that PASPA violates the Constitution’s “anticommandeering” principle by preventing the State from modifying or repealing its laws prohibiting sports gambling. The District Court found no anticommandeering violation, the Third Circuit affirmed, and this Court denied review.

In 2014, the New Jersey Legislature enacted the law at issue in these cases. Instead of affirmatively authorizing sports gambling schemes,

*Together with No. 16–477, *New Jersey Thoroughbred Horsemen’s Assn., Inc. v. National Collegiate Athletic Assn. et al.*, also on certiorari to the same court.

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this law repeals state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. Plaintiffs in the earlier suit, respondents here, filed a new action in federal court. They won in the District Court, and the Third Circuit affirmed, holding that the 2014 law, no less than the 2012 one, violates PASPA. The court further held that the prohibition does not “commandeer” the States in violation of the Constitution.

Held:

1. When a State completely or partially repeals old laws banning sports gambling schemes, it “authorize[s]” those schemes under PASPA. Pp. 465–470.

(a) Pointing out that one accepted meaning of “authorize” is “permit,” petitioners contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to authorization. Respondents maintain that “authorize” requires affirmative action and that the 2014 law affirmatively acts by empowering a defined group of entities and endowing them with the authority to conduct sports gambling operations. They do not take the position that PASPA bans all modifications of laws prohibiting sports gambling schemes, but just how far they think a modification could go is not clear. Similarly, the United States, as *amicus*, claims that the State’s 2014 law qualifies as an authorization. PASPA, it contends, neither prohibits a State from enacting a complete repeal nor outlaws all partial repeals. But the United States also does not set out any clear rule for distinguishing between partial repeals that constitute the “authorization” of sports gambling and those that are permissible. Pp. 466–467.

(b) Taking into account the fact that all forms of sports gambling were illegal in the great majority of States at the time of PASPA’s enactment, the repeal of a state law banning sports gambling not only “permits” sports gambling but also gives those now free to conduct a sports betting operation the “right or authority to act.” The interpretation adopted by the Third Circuit and advocated by respondents and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. Pp. 467–469.

(c) Respondents and the United States cannot invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. Even if the law

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could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle. Pp. 469–470.

2. PASPA’s provision prohibiting state authorization of sports gambling schemes violates the anticommandeering rule. Pp. 470–480.

(a) As the Tenth Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York v. United States*, 505 U. S. 144, and *Printz v. United States*, 521 U. S. 898, simply represents the recognition of this limitation. Thus, “Congress may not simply ‘commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.’” *New York, supra*, at 161. Adherence to the anticommandeering principle is important for several reasons, including, as significant here, that the rule serves as “one of the Constitution’s structural safeguards of liberty,” *Printz, supra*, at 921, that the rule promotes political accountability, and that the rule prevents Congress from shifting the costs of regulation to the States. Pp. 470–474.

(b) PASPA’s anti-authorization provision unequivocally dictates what a state legislature may and may not do. The distinction between compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event. Pp. 474–475.

(c) Contrary to the claim of respondents and the United States, this Court’s precedents do not show that PASPA’s anti-authorization provision is constitutional. *South Carolina v. Baker*, 485 U. S. 505; *Reno v. Condon*, 528 U. S. 141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264; *FERC v. Mississippi*, 456 U. S. 742, distinguished. Pp. 475–477.

(d) Nor does the anti-authorization provision constitute a valid preemption provision. To preempt state law, it must satisfy two requirements. It must represent the exercise of a power conferred on Congress by the Constitution. And, since the Constitution “confers upon Congress the power to regulate individuals, not States,” *New York, supra*, at 177, it must be best read as one that regulates private actors. There is no way that the PASPA anti-authorization provision can be understood as a regulation of private actors. It does not confer any federal rights on private actors interested in conducting sports gambling operations or impose any federal restrictions on private actors. Pp. 477–480.

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3. PASPA's provision prohibiting state "licens[ing]" of sports gambling schemes also violates the anticommandeering rule. It issues a direct order to the state legislature and suffers from the same defect as the prohibition of state authorization. Thus, this Court need not decide whether New Jersey's 2014 law violates PASPA's anti-licensing provision. Pp. 480–481.

4. No provision of PASPA is severable from the provisions directly at issue. Pp. 481–486.

(a) Section 3702(1)'s provisions prohibiting States from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes cannot be severed. Striking the state authorization and licensing provisions while leaving the state operation provision standing would result in a scheme sharply different from what Congress contemplated when PASPA was enacted. For example, had Congress known that States would be free to authorize sports gambling in privately owned casinos, it is unlikely that it would have wanted to prevent States from operating sports lotteries. Nor is it likely that Congress would have wanted to prohibit such an ill-defined category of state conduct as sponsorship or promotion. Pp. 482–483.

(b) Congress would not want to sever the PASPA provisions that prohibit a private actor from "sponsor[ing]," "operat[ing]," or "promot[ing]" sports gambling schemes "pursuant to" state law. §3702(2). PASPA's enforcement scheme makes clear that §3702(1) and §3702(2) were meant to operate together. That scheme—suited for challenging state authorization or licensing or a small number of private operations—would break down if a State broadly decriminalized sports gambling. Pp. 483–485.

(c) PASPA's provisions prohibiting the "advertis[ing]" of sports gambling are also not severable. See §§3702(1)–(2). If they were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law—something that Congress has rarely done. Pp. 485–486.

832 F. 3d 389, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, KAGAN, and GORSUCH, JJ., joined, and in which BREYER, J., joined as to all but Part VI–B. THOMAS, J., filed a concurring opinion, *post*, p. 486. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 491. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined in part, *post*, p. 493.

Counsel

Theodore B. Olson argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 16–476 were *Christopher S. Porrino*, Attorney General of New Jersey, *Stuart M. Feinblatt*, Assistant Attorney General, *Peter Slocum*, Deputy Attorney General, *Matthew D. McGill*, *Nicole A. Saharsky*, *Ashley E. Johnson*, *Lauren M. Blas*, *Michael R. Griffinger*, *Thomas R. Valen*, and *Jennifer A. Hradil*. *Ronald J. Riccio*, *Elliott Berman*, and *Edward A. Hartnett* filed briefs for petitioner in No. 16–477.

Paul D. Clement argued the cause for respondents. With him on the brief were *Erin E. Murphy*, *Edmund G. LaCour, Jr.*, *Michael D. Lieberman*, *Jeffrey A. Mishkin*, and *Anthony J. Dreyer*.

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Mooppan*, *Brian H. Fletcher*, and *Peter J. Phipps*.[†]

[†]Briefs of *amici curiae* urging reversal in both cases were filed for the American Gaming Association by *Jonathan F. Cohn* and *Joshua J. Fougere*; for the European Sports Security Association et al. by *Jonathan Sherman*, *Joshua I. Schiller*, *A. Jeff Ifrah*, and *David S. Yellin*; for the Pacific Legal Foundation et al. by *Jonathan Wood*, *Sam Kazman*, *Ilya Shapiro*, *Joshua P. Thompson*, and *Richard M. Esenberg*; for John T. Holden by *Anita M. Moorman*; and for Frank J. Pallone, Jr., by *Timothy R. Robinson*.

Briefs of *amici curiae* urging reversal in No. 16–476 were filed for the State of West Virginia et al. by *Patrick Morrissey*, Attorney General of West Virginia, and *Thomas M. Johnson, Jr.*, Deputy Solicitor General; for Gov. Matthew G. Bevin of Kentucky by *Mark Stephen Pitt*; and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Pamela Jo Bondi* of Florida, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Jim Hood* of Mississippi, *Joshua D. Hawley* of Missouri, *Douglas J. Peterson* of Nebraska, *Gordon J. MacDonald* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Peter*

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JUSTICE ALITO delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to “authorize” sports gambling schemes. 28 U.S.C. §3702(1). We must decide whether this provision is compatible with the system of “dual sovereignty” embodied in the Constitution.

I

A

Americans have never been of one mind about gambling, and attitudes have swung back and forth. By the end of the 19th century, gambling was largely banned throughout the country,¹ but beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened.

New Jersey’s experience is illustrative. In 1897, New Jersey adopted a constitutional amendment that barred all gambling in the State.² But during the Depression, the State permitted parimutuel betting on horse races as a way of in-

F. Kilmartin of Rhode Island, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for Constitutional Law Scholars by *William J. Trunk*; and for the National Governors Association et al. by *Richard A. Simpson*, *Tara L. Ward*, and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; and for Stop Predatory Gambling et al. by *Deepak Gupta*.

Briefs of *amici curiae* were filed in both cases for the New Sports Economy Institute by *Christopher Pey*; and for Ryan M. Rodenberg by *Mr. Rodenberg, pro se*.

¹ See Nat. Gambling Impact Study Comm’n, Final Report, p. 2–1 (1999) (Final Report); S. Durham & K. Hashimoto, The History of Gambling in America 34–35 (2010).

² See *Atlantic City Racing Assn. v. Attorney General*, 98 N. J. 535, 539–541, 489 A. 2d 165, 167–168 (1985).

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creasing state revenue,³ and in 1953, churches and other non-profit organizations were allowed to host bingo games.⁴ In 1970, New Jersey became the third State to run a state lottery,⁵ and within five years, 10 other States followed suit.⁶

By the 1960s, Atlantic City, “once the most fashionable resort of the Atlantic Coast,” had fallen on hard times,⁷ and casino gambling came to be seen as a way to revitalize the city.⁸ In 1974, a referendum on statewide legalization failed,⁹ but two years later, voters approved a narrower measure allowing casino gambling in Atlantic City alone.¹⁰ At that time, Nevada was the only other State with legal casinos,¹¹ and thus for a while the Atlantic City casinos had an east coast monopoly. “With 60 million people living within a one-tank car trip away,” Atlantic City became “the most popular tourist destination in the United States.”¹² But that favorable situation eventually came to an end.

With the enactment of the Indian Gaming Regulatory Act in 1988, 25 U. S. C. §2701 *et seq.*, casinos opened on Indian land throughout the country. Some were located within driving distance of Atlantic City,¹³ and nearby States (and many others) legalized casino gambling.¹⁴ But Nevada re-

³See Note, The Casino Act: Gambling’s Past and the Casino Act’s Future, 10 Rutgers-Camden L. J. 279, 287 (1979) (The Casino Act).

⁴*Id.*, at 288; see also N. J. Const., Art. 4, § 7, ¶2(A); Bingo Licensing Law, N. J. Stat. Ann. § 5:8–24 *et seq.* (West 2012).

⁵See State Lottery Law, N. J. Stat. Ann. § 5:9–1 *et seq.*; The Casino Act, at 288; N. J. Const., Art. 4, § 7, ¶2(C); Final Report, at 2–1.

⁶*Id.*, at 2–1.

⁷T. White, The Making of the President 1964, p. 275 (1965).

⁸See D. Clary, Gangsters to Governors 152–153 (2017) (Clary).

⁹See The Casino Act, at 289.

¹⁰See *ibid.*; N. J. Const., Art. 4, § 7, ¶2(D).

¹¹Clary 146.

¹²*Id.*, at 146, 158.

¹³*Id.*, at 208–210.

¹⁴Casinos now operate in New York, Pennsylvania, Delaware, and Maryland. See American Gaming Assn., 2016 State of the States, p. 8, online

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mained the only state venue for legal sports gambling in casinos, and sports gambling is immensely popular.¹⁵

Sports gambling, however, has long had strong opposition. Opponents argue that it is particularly addictive and especially attractive to young people with a strong interest in sports,¹⁶ and in the past gamblers corrupted and seriously damaged the reputation of professional and amateur sports.¹⁷ Apprehensive about the potential effects of sports gambling, professional sports leagues and the National Collegiate Athletic Association (NCAA) long opposed legalization.¹⁸

B

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling,¹⁹ and this sparked federal efforts to stem the tide. Opponents of sports gam-

at https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINAL.pdf (all Internet materials as last visited May 4, 2018).

¹⁵ See, e. g., Brief for American Gaming Assn. as *Amicus Curiae* 1–2.

¹⁶ See, e. g., Final Report, at 3–10; Bradley, The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474, 2 Seton Hall J. Sport L. 5, 7 (1992); Brief for Stop Predatory Gambling et al. as *Amici Curiae* 22–23.

¹⁷ For example, in 1919, professional gamblers are said to have paid members of the Chicago White Sox to throw the World Series, an episode that was thought to have threatened baseball's status as the Nation's pastime. See E. Asinof, *Eight Men Out: The Black Sox and the 1919 World Series* 5, 198–199 (1963). And in the early 1950s, the Nation was shocked when several college basketball players were convicted for shaving points. S. Cohen, *The Game They Played* 183–238 (1977). This scandal is said to have nearly killed college basketball. See generally C. Rosen, *Scandals of '51: How the Gamblers Almost Killed College Basketball* (1978).

¹⁸ See Professional and Amateur Sports Protection, S. Rep. No. 102–248, p. 8 (1991); Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 21, 39, 46–47, 59–60, 227 (1991) (S. Hrg. 102–499) (statements by representatives of major sports leagues opposing sports gambling).

¹⁹ S. Rep. No. 102–248, at 5.

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bling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). 28 U.S.C. §3701 *et seq.* PASPA's proponents argued that it would protect young people, and one of the bill's sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports.²⁰ The Department of Justice opposed the bill,²¹ but it was passed and signed into law.

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions²² "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. §3702(1). In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes²³—but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government).²⁴ Instead, PASPA allows the Attorney General, as well as professional and am-

²⁰ S. Hrg. 102–499, at 10–14.

²¹ App. to Pet. for Cert. in No. 16–476, p. 225a.

²² The statute applies to any "governmental entity," which is defined as "a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States." 28 U.S.C. §3701(2).

²³ PASPA does not define the term "scheme." The United States has not offered a definition of the term but suggests that it encompasses only those forms of gambling having some unspecified degree of organization or structure. See Brief for United States as *Amicus Curiae* 28–29. For convenience, we will use the term "sports gambling" to refer to whatever forms of sports gambling fall within PASPA's reach.

²⁴ The Congressional Budget Office estimated that PASPA would not require the appropriation of any federal funds. S. Rep. No. 102–248, at 10.

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ateur sports organizations, to bring civil actions to enjoin violations. § 3703.

At the time of PASPA's adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos,²⁵ and three States hosted sports lotteries or allowed sports pools.²⁶ PASPA contains “grandfather” provisions allowing these activities to continue. §§ 3704(a)(1)–(2). Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's effective date. § 3704(a)(3).²⁷

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling, Art. IV, § 7, ¶¶ 2(D), (F), and in 2012 the legislature enacted a law doing just that, 2011 N. J. Laws p. 1723 (2012 Act).

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. In response, the State argued, among other things, that PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban. See *National Collegiate Athletic Assn. v. Christie*, 926 F. Supp. 2d 551, 561 (NJ 2013).

In making this argument, the State relied primarily on two cases, *New York v. United States*, 505 U. S. 144 (1992), and *Printz v. United States*, 521 U. S. 898 (1997), in which

²⁵ *Ibid.*

²⁶ *Ibid.*; 138 Cong. Rec. 12973 (1992).

²⁷ Although this provision did not specifically mention New Jersey or Atlantic City, its requirements—permitting legalization only “in a municipality” with an uninterrupted 10-year history of legal casino gaming—did not fit anywhere else.

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we struck down federal laws based on what has been dubbed the “anticommandeering” principle. In *New York*, we held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, we found that another federal statute unconstitutionally compelled state officers to enforce federal law.

Relying on these cases, New Jersey argued that PASPA is similarly flawed because it regulates a State’s exercise of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling. See *National Collegiate Athletic Assn. v. Christie*, 926 F. Supp. 2d, at 561–562. The plaintiffs countered that PASPA is critically different from the commandeering cases because it does not command the States to take any affirmative act. *Id.*, at 562. Without an affirmative federal command to *do* something, the plaintiffs insisted, there can be no claim of commandeering. *Ibid.*

The District Court found no anticommandeering violation, *id.*, at 569–573, and a divided panel of the Third Circuit affirmed, *National Collegiate Athletic Assn. v. Christie*, 730 F. 3d 208 (2013) (*Christie I*). The panel thought it significant that PASPA does not impose any affirmative command. *Id.*, at 231. In the words of the panel, “PASPA does not require or coerce the states to lift a finger.” *Ibid.* (emphasis deleted). The panel recognized that an affirmative command (for example, “Do not repeal”) can often be phrased as a prohibition (“Repeal is prohibited”), but the panel did not interpret PASPA as prohibiting the repeal of laws outlawing sports gambling. *Id.*, at 232. A repeal, it thought, would not amount to “authoriz[ation]” and thus would fall outside the scope of § 3702(1). “[T]he lack of an affirmative prohibition of an activity,” the panel wrote, “does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people.” *Id.*, at 232 (emphasis deleted).

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New Jersey filed a petition for a writ of certiorari, raising the anticommandeering issue. Opposing certiorari, the United States told this Court that PASPA does not require New Jersey “to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA’s enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.” Brief for United States in Opposition in *Christie v. National Collegiate Athletic Assn.*, O. T. 2013, No. 13–967 etc., p. 11. See also Brief for Respondents in Opposition in No. 13–967 etc., p. 23 (“Nothing in that unambiguous language compels states to prohibit or maintain any existing prohibition on sports gambling”). We denied review. *Christie v. National Collegiate Athletic Assn.*, 573 U. S. 931 (2014).

Picking up on the suggestion that a partial repeal would be allowed, the New Jersey Legislature enacted the law now before us. 2014 N. J. Laws p. 602 (2014 Act). The 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling. *Ibid.* Instead, it is framed as a repealer. Specifically, it repeals the provisions of state law prohibiting sports gambling insofar as they concerned the “placement and acceptance of wagers” on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City. *Ibid.* The new law also specified that the repeal was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. *Ibid.*

Predictably, the same plaintiffs promptly commenced a new action in federal court. They won in the District Court, *National Collegiate Athletic Assn. v. Christie*, 61 F. Supp. 3d 488 (NJ 2014), and the case was eventually heard by the Third Circuit sitting en banc. The en banc court affirmed, finding that the new law, no less than the old one, violated PASPA by “author[izing]” sports gambling. *National Collegiate Athletic Assn. v. Governor of N. J.*, 832

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F. 3d 389 (2016) (case below). The court was unmoved by the New Jersey Legislature’s “artfu[l]” attempt to frame the 2014 Act as a repealer. *Id.*, at 397. Looking at what the law “actually does,” the court concluded that it constitutes an authorization because it “selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators.” *Id.*, at 397, 401. The court disavowed some of the reasoning in the *Christie I* opinion, finding its discussion of “the relationship between a ‘repeal’ and an ‘authorization’ to have been too facile.” 832 F. 3d, at 401. But the court declined to say whether a repeal that was more complete than the 2014 Act would still amount to an authorization. The court observed that a partial repeal that allowed only “*de minimis* wagers between friends and family would not have nearly the type of authorizing effect” that it found in the 2014 Act, and it added: “We need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, *if indeed such a line could be drawn.*” *Id.*, at 402 (emphasis added).

Having found that the 2014 Act violates PASPA’s prohibition of state authorization of sports gambling schemes, the court went on to hold that this prohibition does not contravene the anticommandeering principle because it “does not command states to take affirmative actions.” *Id.*, at 401.

We granted review to decide the important constitutional question presented by these cases, *sub nom. Christie v. National Collegiate Athletic Assn.*, 582 U. S. 951 (2017).

II

Before considering the constitutionality of the PASPA provision prohibiting States from “author[izing]” sports gambling, we first examine its meaning. The parties advance dueling interpretations, and this dispute has an important bearing on the constitutional issue that we must decide. Neither respondents nor the United States, appearing as an

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amicus in support of respondents, contends that the provision at issue would be constitutional if petitioners' interpretation is correct. Indeed, the United States expressly concedes that the provision is unconstitutional if it means what petitioners claim. Brief for United States 8, 19.

A

Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. One of the accepted meanings of the term "authorize," they point out, is "permit." Brief for Petitioners in No. 16-476, p. 42 (citing Black's Law Dictionary 133 (6th ed. 1990); Webster's Third New International Dictionary 146 (1992)). They therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization. Brief for Petitioners in No. 16-476, at 42.

Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. Brief for Respondents 39. To authorize, they maintain, means "[t]o empower; to give a right or authority to act; to endow with authority." *Ibid.* (quoting Black's Law Dictionary, at 133). And this, they say, is precisely what the 2014 Act does: It empowers a defined group of entities, and it endows them with the authority to conduct sports gambling operations.

Respondents do not take the position that PASPA bans all modifications of old laws against sports gambling, Brief for Respondents 20, but just how far they think a modification could go is not clear. They write that a State "can also repeal or enhance [laws prohibiting sports gambling] without running afoul of PASPA" but that it "cannot 'partially repeal' a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the

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state.” *Ibid.* Later in their brief, they elaborate on this point:

“If, for example, a state had an existing felony prohibition on all lotteries, it could maintain the law, it could repeal the law, it could downgrade the crime to a misdemeanor or increase the penalty But if the state modified its law, whether through a new authorization or through an amendment partially repealing the existing prohibition, to authorize the state to conduct a sports lottery, that modified law would be preempted.” *Id.*, at 31.

The United States makes a similar argument. PASPA, it contends, does not prohibit a State from enacting a complete repeal because “one would not ordinarily say that private conduct is ‘authorized by law’ simply because the government has not prohibited it.” Brief for United States as *Amicus Curiae* 17. But the United States claims that “[t]he 2014 Act’s selective and conditional permission to engage in conduct that is generally prohibited certainly qualifies” as an authorization. *Ibid.* The United States does not argue that PASPA outlaws *all* partial repeals, but it does not set out any clear rule for distinguishing between partial repeals that constitute the “authorization” of sports gambling and those that are permissible. The most that it is willing to say is that a State could “eliminat[e] prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold.” *Id.*, at 29.

B

In our view, petitioners’ interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it “authorize[s]” that activity. This is clear when the state-law landscape at the time of PASPA’s enactment is taken into account. At that time, all forms of sports gam-

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bling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only “permits” sports gambling (petitioners’ favored definition); it also gives those now free to conduct a sports betting operation the “right or authority to act”; it “empowers” them (respondents’ and the United States’s definition).

The concept of state “authorization” makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State “authorizes” its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.²⁸

The United States counters that, even if the term “authorize,” standing alone, is interpreted as petitioners claim, PASPA contains additional language that precludes that reading. The provision at issue refers to “authoriz[ation] *by law*,” § 3702(1) (emphasis added), and the parallel provision governing private conduct, § 3702(2), applies to conduct done “pursuant to the law . . . of a governmental entity.” The United States maintains that one “would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting ‘pursuant to’ state law.” Brief for United States 18. But one might well say exactly that if the person previously was prohibited from engaging in the activity. (“Now that the State has legalized the sale

²⁸ See, e. g., A. McCullum, Vermont’s Legal Recreational Marijuana Law: What You Should Know, USA Today Network (Jan. 23, 2018), online at <https://www.usatoday.com/story/news/nation-now/2018/01/23/vermont-legal-marijuana-law-what-know/1056869001/> (“Vermont . . . bec[ame] the first [State] in the country to *authorize* the recreational use of [marijuana] by an act of a state legislature” (emphasis added)).

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of marijuana, Joe is able to sell the drug pursuant to state law.”)

The United States also claims to find support for its interpretation in the fact that the authorization ban applies to all “governmental entities.” It is implausible, the United States submits, to think that Congress “commanded every county, district, and municipality in the Nation to prohibit sports betting.” *Ibid.* But in making this argument, the United States again ignores the legal landscape at the time of PASPA’s enactment. At that time, sports gambling was generally prohibited by state law, and therefore a State’s political subdivisions were powerless to legalize the activity. But what if a State enacted a law enabling, but not requiring, one or more of its subdivisions to decide whether to authorize sports gambling? Such a state law would not itself authorize sports gambling. The ban on legalization at the local level addresses this problem.

The interpretation adopted by the Third Circuit and advocated by respondents and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. This is illustrated by the implausible conclusions that all of those favoring alternative interpretations have been forced to reach about the extent to which the provision permits the repeal of laws banning sports gambling.

The Third Circuit could not say which, if any, partial repeals are allowed. 832 F. 3d, at 402. Respondents and the United States tell us that the PASPA ban on state authorization allows complete repeals, but beyond that they identify no clear line. It is improbable that Congress meant to enact such a nebulous regime.

C

Respondents and the United States argue that even if there is some doubt about the correctness of their interpretation of the anti-authorization provision, that interpretation

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should be adopted in order to avoid any anticommandeering problem that would arise if the provision were construed to require States to maintain their laws prohibiting sports gambling. Brief for Respondents 38; Brief for United States 19. They invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. See *Jennings v. Rodriguez*, 583 U. S. 281, 296 (2018). The plausibility of the alternative interpretations is debatable, but even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle, as we now explain.

III

A

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i. e.*, the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority “to do all . . . Acts and Things which Independent States may of right do.” ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.” *Gregory v. Ashcroft*, 501 U. S. 452, 457 (1991).

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. See, *e. g.*, Art. I, § 10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. See, *e. g.*, *Department of*

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Revenue of Ky. v. Davis, 553 U. S. 328 (2008); *American Ins. Assn. v. Garamendi*, 539 U. S. 396 (2003). And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8, while providing in the Supremacy Clause that federal law is the “supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York*, 505 U. S. 144, which concerned a federal law that required a State, under certain circumstances, either to “take title” to low-level radioactive waste or to “regulat[e] according to the instructions of Congress.” *Id.*, at 175. In enacting this provision, Congress issued orders to either the legislative or executive branch of state government (depending on the branch authorized by state law to take the actions demanded). Either way, the Court held, the provision was unconstitutional because “the Constitution does not empower Congress to subject state governments to this type of instruction.” *Id.*, at 176.

Justice O’Connor’s opinion for the Court traced this rule to the basic structure of government established under the

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Constitution. The Constitution, she noted, “confers upon Congress the power to regulate individuals, not States.” *Id.*, at 166. In this respect, the Constitution represented a sharp break from the Articles of Confederation. “Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly.” *Id.*, at 163. Instead, Congress was limited to acting “‘only upon the States.’” *Id.*, at 162 (quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)). Alexander Hamilton, among others, saw this as “[t]he great and radical vice in . . . the existing Confederation.” 505 U. S., at 163 (quoting *The Federalist* No. 15, at 108). The Constitutional Convention considered plans that would have preserved this basic structure, but it rejected them in favor of a plan under which “Congress would exercise its legislative authority directly over individuals rather than over States.” 505 U. S., at 165.

As to what this structure means with regard to Congress’s authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that “no Member of the Court ha[d] ever suggested” that even “a particularly strong federal interest” “would enable Congress to command a state government to enact *state* regulation.” *Id.*, at 178 (emphasis in original). “We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *Id.*, at 166. “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’” *Id.*, at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981)). “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” 505 U. S., at 178.

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Five years after *New York*, the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. *Printz*, 521 U. S. 898. Holding this provision unconstitutional, the Court put the point succinctly: “The Federal Government” may not “command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.*, at 935. This rule applies, *Printz* held, not only to state officers with policy-making responsibility but also to those assigned more mundane tasks. *Id.*, at 929–930.

B

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as “one of the Constitution’s structural protections of liberty.” *Printz*, *supra*, at 921. “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities.” *New York*, 505 U. S., at 181. “To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.” *Ibid.* “[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.” *Id.*, at 181–182 (quoting *Gregory*, 501 U. S., at 458).

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do

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so by Congress, responsibility is blurred. See *New York*, *supra*, at 168–169; *Printz*, *supra*, at 929–930.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis. See, e. g., Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1360–1361 (2001).

IV

A

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. See Brief for Respondents 19; Brief for United States 12. Noting that the laws challenged in *New York* and *Printz* “told states what they must do instead of what they must not do,” respondents contend that commandeering occurs “only when Congress goes beyond precluding state action and affirmatively commands it.” Brief for Respondents 19 (emphasis deleted).

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This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded “affirmative” action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, §3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

B

Respondents and the United States claim that prior decisions of this Court show that PASPA’s anti-authorization provision is constitutional, but they misread those cases. In none of them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.

In *South Carolina v. Baker*, 485 U. S. 505 (1988), the federal law simply altered the federal tax treatment of private investments. Specifically, it removed the federal tax exemption for interest earned on state and local bonds unless they were issued in registered rather than bearer form. This law did not order the States to enact or maintain any existing laws. Rather, it simply had the indirect effect of pressuring States to increase the rate paid on their bearer bonds in order to make them competitive with other bonds paying taxable interest.

In any event, even if we assume that removal of the tax exemption was tantamount to an outright prohibition of the issuance of bearer bonds, see *id.*, at 511, the law would simply treat state bonds the same as private bonds. The anti-commandeering doctrine does not apply when Congress

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evenhandedly regulates an activity in which both States and private actors engage.

That principle formed the basis for the Court's decision in *Reno v. Condon*, 528 U. S. 141 (2000), which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens." *Id.*, at 151.

In *Hodel*, 452 U. S., at 289, the federal law, which involved what has been called "cooperative federalism," by no means commandeered the state legislative process. Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of "either implement[ing]" the federal program "or else yield[ing] to a federally administered regulatory program." *Ibid.* Thus, the federal law *allowed* but did not *require* the States to implement a federal program. "States [were] not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.*, at 288. If a State did not "wish" to bear the burden of regulation, the "full regulatory burden [would] be borne by the Federal Government." *Ibid.*

Finally, in *FERC v. Mississippi*, 456 U. S. 742 (1982), the federal law in question issued no command to a state legislature. Enacted to restrain the consumption of oil and natural gas, the federal law directed state utility regulatory commissions to consider, but not necessarily to adopt, federal "'rate design' and regulatory standards." *Id.*, at 746. The Court held that this modest requirement did not infringe the States' sovereign powers, but the Court warned that it had "never . . . sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*, at 761–762. *FERC* was decided well before our decisions in *New York* and *Printz*, and PASPA, unlike the law in *FERC*, does far more than require States to *consider* Con-

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gress's preference that the legalization of sports gambling be halted. See *Printz*, 521 U. S., at 929 (distinguishing *FERC*).

In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.

V

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides “a rule of decision.” *Armstrong v. Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015). It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution “confers upon Congress the power to regulate individuals, not States,” *New York*, 505 U. S., at 166, the PASPA provision at issue must be best read as one that regulates private actors.

Our cases have identified three different types of preemption—“conflict,” “express,” and “field,” see *English v. General Elec. Co.*, 496 U. S. 72, 78–79 (1990)—but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

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This mechanism is shown most clearly in cases involving “conflict preemption.” A recent example is *Mutual Pharmaceutical Co. v. Bartlett*, 570 U. S. 472 (2013). In that case, a federal law enacted under the Commerce Clause regulated manufacturers of generic drugs, prohibiting them from altering either the composition or labeling approved by the Food and Drug Administration. A State’s tort law, however, effectively required a manufacturer to supplement the warnings included in the FDA-approved label. *Id.*, at 480–486. We held that the state law was preempted because it imposed a duty that was inconsistent—*i. e.*, in conflict—with federal law. *Id.*, at 493.

“Express preemption” operates in essentially the same way, but this is often obscured by the language used by Congress in framing preemption provisions. The provision at issue in *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374 (1992), is illustrative. The Airline Deregulation Act of 1978 lifted prior federal regulations of airlines, and “[t]o ensure that the States would not undo federal deregulation with regulation of their own,” *id.*, at 378, the Act provided that “no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier.” 49 U. S. C. App. § 1305(a)(1) (1988 ed.).

This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. As we recently explained, “we do not require Congress to employ a particular linguistic formulation when preempting state law.” *Coven-try Health Care of Mo., Inc. v. Nevils*, 581 U. S. 87, 99 (2017). And if we look beyond the phrasing employed in the Airline Deregulation Act’s preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities

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(*i. e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

“Field preemption” operates in the same way. Field preemption occurs when federal law occupies a “field” of regulation “so comprehensively that it has left no room for supplementary state legislation.” *R. J. Reynolds Tobacco Co. v. Durham County*, 479 U. S. 130, 140 (1986). In describing field preemption, we have sometimes used the same sort of shorthand employed by Congress in express preemption provisions. See, *e. g.*, *Oneok, Inc. v. Learjet, Inc.*, 575 U. S. 373, 377 (2015) (“Congress has forbidden the State to take action in the *field* that the federal statute pre-empts”). But in substance, field preemption does not involve congressional commands to the States. Instead, like all other forms of preemption, it concerns a clash between a constitutional exercise of Congress’s legislative power and conflicting state law. See *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 372, n. 6 (2000).

The Court’s decision in *Arizona v. United States*, 567 U. S. 387 (2012), shows how this works. Noting that federal statutes “provide a full set of standards governing alien registration,” we concluded that these laws “reflec[t] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.” *Id.*, at 401. What this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements.

In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this

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provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, §3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

In so holding, we recognize that a closely related provision of PASPA, §3702(2), *does* restrict private conduct, but that is not the provision challenged by petitioners. In Part VI-B-2, *infra*, we consider whether §3702(2) is severable from the provision directly at issue in these cases.

VI

Having concluded that §3702(1) violates the anti-commandeering doctrine, we consider two additional questions: first, whether the decision below should be affirmed on an alternative ground and, second, whether our decision regarding the anti-authorization provision dooms the remainder of PASPA.

A

Respondents and the United States argue that, even if we disagree with the Third Circuit's decision regarding the constitutionality of the anti-authorization provision, we should nevertheless affirm based on PASPA's prohibition of state "licens[ing]" of sports gambling. Brief for Respondents 43, n. 10; Brief for United States 34–35. Although New Jersey's 2014 Act does not expressly provide for the licensing of sports gambling operations, respondents and the United

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States contend that the law effectively achieves that result because the only entities that it authorizes to engage in that activity, *i. e.*, casinos and racetracks, are already required to be licensed. *Ibid.*

We need not decide whether the 2014 Act violates PASPA's prohibition of state "licens[ing]" because that provision suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature.²⁹ Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling.³⁰

B

We therefore turn to the question whether, as petitioners maintain, our decision regarding PASPA's prohibition of the authorization and licensing of sports gambling operations dooms the remainder of the Act. In order for other PASPA provisions to fall, it must be "evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Alaska Airlines, Inc. v. Brock*, 480 U. S. 678, 684 (1987) (internal quotation marks omitted). In conducting that inquiry, we ask whether the law remains "fully operative" without the invalid provisions, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509 (2010) (internal quotation marks omitted), but "we cannot rewrite a statute

²⁹ Even if the prohibition of state licensing were not itself unconstitutional, we do not think it could be severed from the invalid provision forbidding state authorization. The provision of PASPA giving New Jersey the option of legalizing sports gambling within one year of enactment applied only to casinos operated "pursuant to a comprehensive system of State regulation." §3704(a)(3)(B). This shows that Congress preferred tightly regulated sports gambling over total deregulation.

³⁰ The dissent apparently disagrees with our holding that the provisions forbidding state authorization and licensing violate the anticommandeering principle, but it provides no explanation for its position.

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and give it an effect altogether different from that sought by the measure viewed as a whole,” *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). We will consider each of the provisions at issue separately.

1

Under 28 U.S.C. § 3702(1), States are prohibited from “operat[ing],” “sponsor[ing],” or “promot[ing]” sports gambling schemes. If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state “operat[ion]” is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted. At that time, Congress knew that New Jersey was considering the legalization of sports gambling in the privately owned Atlantic City casinos and that other States were thinking about the institution of state-run sports lotteries. PASPA addressed both of these potential developments. It gave New Jersey one year to legalize sports gambling in Atlantic City but otherwise banned the authorization of sports gambling in casinos, and it likewise prohibited the spread of state-run lotteries. If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. State-run lotteries, which sold tickets costing only a few dollars, were thought more benign than other forms of gambling, and that is why they had been adopted in many States. Casino gambling, on the other hand, was generally regarded as far more dangerous. A gambler at a casino can easily incur heavy losses, and the legalization of privately owned casinos was known to create the threat of infiltration by organized crime, as Nevada’s early experience had notoriously shown.³¹ To the Congress that adopted PASPA, legalizing sports gambling in privately

³¹ See Clary 84–102.

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owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards.

Prohibiting the States from engaging in commercial activities that are permitted for private parties would also have been unusual, and it is unclear what might justify such disparate treatment. Respondents suggest that Congress wanted to prevent States from taking steps that the public might interpret as the endorsement of sports gambling, Brief for Respondents 39, but we have never held that the Constitution permits the Federal Government to prevent a state legislature from expressing its views on subjects of public importance. For these reasons, we do not think that the provision barring state operation of sports gambling can be severed.

We reach the same conclusion with respect to the provisions prohibiting state “sponsor[ship]” and “promot[ion].” The line between authorization, licensing, and operation, on the one hand, and sponsorship or promotion, on the other, is too uncertain. It is unlikely that Congress would have wanted to prohibit such an ill-defined category of state conduct.

2

Nor do we think that Congress would have wanted to sever the PASPA provisions that prohibit a private actor from “sponsor[ing],” “operat[ing],” or “promot[ing]” sports gambling schemes “pursuant to” state law. § 3702(2). These provisions were obviously meant to work together with the provisions in § 3702(1) that impose similar restrictions on governmental entities. If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone.

The present cases illustrate exactly how Congress must have intended § 3702(1) and § 3702(2) to work. If a State attempted to authorize particular private entities to engage in sports gambling, the State could be sued under § 3702(1), and the private entity could be sued at the same time under

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§ 3702(2). The two sets of provisions were meant to be deployed in tandem to stop what PASPA aimed to prevent: state legalization of sports gambling. But if, as we now hold, Congress lacks the authority to prohibit a State from legalizing sports gambling, the prohibition of private conduct under § 3702(2) ceases to implement any coherent federal policy.

Under § 3702(2), private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling. Under 18 U. S. C. § 1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law. Similarly, § 1953, which criminalizes the interstate transmission of wagering paraphernalia, and § 1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, apply only if the underlying gambling is illegal under state law. See also § 1952 (making it illegal to travel in interstate commerce to further a gambling business that is illegal under applicable state law).

These provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling. By contrast, if § 3702(2) is severed from § 3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of a State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under § 3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.

PASPA's enforcement scheme reinforces this conclusion. PASPA authorizes civil suits by the Attorney General and sports organizations but does not make sports gambling a federal crime or provide civil penalties for violations. This enforcement scheme is suited for challenging state authori-

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zation or licensing or a small number of private operations, but the scheme would break down if a State broadly decriminalized sports gambling. It is revealing that the Congressional Budget Office estimated that PASPA would impose “no cost” on the Federal Government, see S. Rep. No. 102–248, p. 10 (1991), a conclusion that would certainly be incorrect if enforcement required a multiplicity of civil suits and applications to hold illegal bookies and other private parties in contempt.³²

3

The remaining question that we must decide is whether the provisions of PASPA prohibiting the “advertis[ing]” of sports gambling are severable. See §§ 3702(1)–(2). If these provisions were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law, and that is something that Congress has rarely done. For example, the advertising of cigarettes is heavily regulated but not totally banned. See Federal Cigarette Labeling and Advertising Act, 79 Stat. 282; Family Smoking Prevention and Tobacco Control Act, §§ 201–204, 123 Stat. 1842–1848.

It is true that at one time federal law prohibited the use of the mail or interstate commerce to distribute advertisements of lotteries that were permitted under state law, but that is no longer the case. See *United States v. Edge Broadcasting Co.*, 509 U. S. 418, 421–423 (1993). In 1975, Congress passed a new statute, codified at 18 U. S. C. § 1307, that explicitly *exempts* print advertisements regarding a lottery lawfully conducted by States, and in *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U. S. 173, 176 (1999), we held that the First Amendment protects the right

³² Of course, one need not rely on the Senate Report for the common-sense proposition that leaving § 3702(2) in place could wildly change the fiscal calculus, “giv[ing] it an effect altogether different from that sought by the measure viewed as a whole.” *Railroad Retirement Bd. v. Alton R. Co.*, 295 U. S. 330, 362 (1935).

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of a radio or television station in a State with a lottery to run such advertisements. In light of these developments, we do not think that Congress would want the advertising provisions to stand if the remainder of PASPA must fall.

For these reasons, we hold that no provision of PASPA is severable from the provision directly at issue in these cases.

* * *

The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PPASPA “regulate[s] state governments’ regulation” of their citizens, *New York*, 505 U. S., at 166. The Constitution gives Congress no such power.

The judgment of the Third Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court’s opinion in its entirety. I write separately, however, to express my growing discomfort with our modern severability precedents.

I agree with the Court that the Professional and Amateur Sports Protection Act (PASPA) exceeds Congress’ Article I authority to the extent it prohibits New Jersey from “author-

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iz[ing]” or “licens[ing]” sports gambling, 28 U. S. C. § 3702(1). Unlike the dissent, I do “doubt” that Congress can prohibit sports gambling that does not cross state lines. *Post*, at 494 (opinion of GINSBURG, J.); see *License Tax Cases*, 5 Wall. 462, 470–471 (1867) (holding that Congress has “no power” to regulate “the internal commerce or domestic trade of the States,” including the intrastate sale of lottery tickets); *United States v. Lopez*, 514 U. S. 549, 587–601 (1995) (THOMAS, J., concurring) (documenting why the Commerce Clause does not permit Congress to regulate purely local activities that have a substantial effect on interstate commerce). But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling “directly,” it “does not authorize Congress to regulate state governments’ regulation of interstate commerce.” *New York v. United States*, 505 U. S. 144, 166 (1992). The Necessary and Proper Clause does not give Congress this power either, as a law is not “proper” if it “subvert[s] basic principles of federalism and dual sovereignty.” *Gonzales v. Raich*, 545 U. S. 1, 65 (2005) (THOMAS, J., dissenting). Commandeering the States, as PASPA does, subverts those principles. See *Printz v. United States*, 521 U. S. 898, 923–924 (1997).

Because PASPA is at least partially unconstitutional, our precedents instruct us to determine “which portions of the . . . statute we must sever and excise.” *United States v. Booker*, 543 U. S. 220, 258 (2005) (emphasis deleted). The Court must make this severability determination by asking a counterfactual question: “‘Would Congress still have passed’ the valid sections ‘had it known’ about the constitutional invalidity of the other portions of the statute?” *Id.*, at 246 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U. S. 727, 767 (1996) (plurality opinion)). I join the Court’s opinion because it gives the best answer it can to this question, and no party has asked us to apply a different test. But in a future case, we should take another look at our severability precedents.

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Those precedents appear to be in tension with traditional limits on judicial authority. Early American courts did not have a severability doctrine. See Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 769 (2010) (Walsh). They recognized that the judicial power is, fundamentally, the power to render judgments in individual cases. See *id.*, at 755; Baude, The Judgment Power, 96 Geo. L. J. 1807, 1815 (2008). Judicial review was a byproduct of that process. See generally P. Hamburger, Law and Judicial Duty (2008); Prakash & Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003). As Chief Justice Marshall famously explained, “[i]t is emphatically the province and duty of the judicial department to say what the law is” because “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). If a plaintiff relies on a statute but a defendant argues that the statute conflicts with the Constitution, then courts must resolve that dispute and, if they agree with the defendant, follow the higher law of the Constitution. See *id.*, at 177–178; The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Thus, when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them. See Walsh 755–766. “[T]here was no ‘next step’ in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder.” *Id.*, at 777.

Despite this historical practice, the Court’s modern cases treat the severability doctrine as a “remedy” for constitutional violations and ask which provisions of the statute must be “excised.” See, e.g., *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006); *Booker*, *supra*, at 245; *Alaska Airlines, Inc. v. Brock*, 480 U. S. 678, 686 (1987). This language cannot be taken literally. Invalidating a statute is not a “remedy,” like an injunction, a declara-

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tion, or damages. See Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 82–88 (2014) (Harrison). Remedies “operate with respect to specific parties,” not “on legal rules in the abstract.” *Id.*, at 85; see also *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (explaining that the power “to review and annul acts of Congress” is “little more than the negative power to disregard an unconstitutional enactment” and that “the court enjoins . . . not the execution of the statute, but the acts of the official”). And courts do not have the power to “excise” or “strike down” statutes. See 39 Op. Atty. Gen. 22, 22–23 (1937) (“The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute”); Harrison 82 (“[C]ourts do not make [nonseverable] provisions inoperative Invalidity by courts is a figure of speech”); Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018) “The federal courts have no authority to erase a duly enacted law from the statute books”).

Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1333–1334 (2000); Harrison 88. But even under this view, the severability doctrine is still dubious for at least two reasons.

First, the severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make “a nebulous inquiry into hypothetical congressional intent.” *Booker*, *supra*, at 320, n. 7 (THOMAS, J., dissenting in part). It requires judges to determine what Congress would have intended had it known

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that part of its statute was unconstitutional.* But it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. See Walsh 740–741; Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 98 (1937) (Stern). Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. See Walsh 752–753; Stern 112–113. More fundamentally, even if courts could discern Congress’ hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment. See *Wyeth v. Levine*, 555 U.S. 555, 586–588 (2009) (THOMAS, J., concurring in judgment). Because we have “‘a Government of laws, not of men,’” we are governed by “‘legislated text,” not “‘legislators’ intentions”—and especially not legislators’ *hypothetical* intentions. *Zuni Public School Dist. No. 89 v. Department of Education*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting). Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text.

Second, the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions. See Stern 77; Lea, Situational Severability, 103 Va. L. Rev. 735, 788–803 (2017) (Lea). If one provision

*The first court to engage in this counterfactual exploration of legislative intent was the Massachusetts Supreme Judicial Court in *Warren v. Mayor and Aldermen of Charlestown*, 68 Mass. 84, 99 (1854). This Court adopted the *Warren* formulation in the late 19th century, see *Allen v. Louisiana*, 103 U.S. 80, 84 (1881), an era when statutory interpretation privileged Congress’ unexpressed “intent” over the enacted text, see, e.g., *Church of Holy Trinity v. United States*, 143 U.S. 457, 472 (1892); *United States v. Moore*, 95 U.S. 760, 763 (1878).

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of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative; our precedents do not ask whether the plaintiff has standing to challenge those other provisions. See *National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 696–697 (2012) (joint dissent) (citing, as an example, *Williams v. Standard Oil Co. of La.*, 278 U. S. 235, 242–244 (1929)). True, the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only *after* the court has resolved that issue—typically the only live controversy between the parties. In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge. See Lea 789, 751, and nn. 79–80 (citing, as examples, *Davis v. Federal Election Comm’n*, 554 U. S. 724, 733–734 (2008); *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 346, 350–353 (2006)). The severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect. See *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 101 (1998).

In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in these cases has asked us to reconsider these precedents, at some point, it behooves us to do so.

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with JUSTICE GINSBURG that 28 U. S. C. § 3702(2) is severable from the challenged portion of § 3702(1). The challenged part of subsection (1) prohibits a State from “author[izing]” or “licens[ing]” sports gambling schemes; subsection (2) prohibits individuals from “sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports gambling schemes “pursuant to the law . . . of a governmental entity.” The first says that a State cannot authorize sports gambling

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schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. As JUSTICE GINSBURG makes clear, the latter section can live comfortably on its own without the first.

Why would Congress enact both these provisions? The obvious answer is that Congress wanted to “keep sports gambling from spreading.” S. Rep. No. 102–248, pp. 4–6 (1991). It feared that widespread sports gambling would “threate[n] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling.” *Id.*, at 4. And it may have preferred that state authorities enforce state law forbidding sports gambling than require federal authorities to bring civil suits to enforce federal law forbidding about the same thing. Alternatively, Congress might have seen subsection (2) as a backup, called into play if subsection (1)’s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened. Neither of these objectives is unreasonable.

So read, the two subsections both forbid sports gambling but §3702(2) applies federal policy directly to individuals while the challenged part of §3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments). Section 3702(2), addressed to individuals, standing alone seeks to achieve Congress’ objective of halting the spread of sports gambling schemes by “regulat[ing] interstate commerce directly.” *New York v. United States*, 505 U. S. 144, 166 (1992). But the challenged part of subsection (1) seeks the same end indirectly by “regulat[ing] state governments’ regulation of interstate commerce.” *Ibid.* And it does so by addressing the States (not individuals) directly and telling state legislatures what laws they must (or cannot) enact. Under our precedent, the first provision (directly and unconditionally

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telling States what laws they must enact) is unconstitutional, but the second (directly telling individuals what they cannot do) is not. See *ibid.*

As so interpreted, the statutes would make New Jersey's victory here mostly Pyrrhic. But that is because the only problem with the challenged part of §3702(1) lies in its means, not its end. Congress has the constitutional power to prohibit sports gambling schemes, and no party here argues that there is any constitutional defect in §3702(2)'s alternative means of doing so.

I consequently join JUSTICE GINSBURG's dissenting opinion in part, and all but Part VI–B of the Court's opinion.

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

The petition for certiorari filed by the Governor of New Jersey invited the Court to consider a sole question: “Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U. S. 144 (1992)?” Pet. for Cert. in No. 16–476, p. i.

Assuming, *arguendo*, a “yes” answer to that question, there would be no cause to deploy a wrecking ball destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does today. Leaving out the alleged infirmity, *i. e.*, “commandeering” state regulatory action by prohibiting the States from “authoriz[ing]” and “licens[ing]” sports-gambling schemes, 28 U. S. C. §3702(1), two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from “sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]” sports-gambling schemes. *Ibid.* Second, PASPA stops private parties from “sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports-gambling schemes if state law author-

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izes them to do so. §3702(2).¹ Nothing in these §3702(1) and §3702(2) prohibitions commands States to do anything other than desist from conduct federal law proscribes.² Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA. See *Gonzales v. Raich*, 545 U. S. 1, 17 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”).

Surely, the accountability concern that gave birth to the anticommandeering doctrine is not implicated in any federal proscription other than the bans on States’ authorizing and licensing sports-gambling schemes. The concern triggering the doctrine arises only “where the Federal Government compels States to regulate” or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact. *New York v. United States*, 505 U. S. 144, 168 (1992). If States themselves and private parties may not operate sports-gambling schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes, whether state run or privately operated, is chargeable to congressional, not state, legislative action.

When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation: It “limit[s] the solution [to] severing any problematic

¹PASPA was not designed to eliminate any and all sports gambling. The statute targets sports-gambling *schemes*, *i. e.*, organized markets for sports gambling, whether operated by a State or by a third party under state authorization.

²In lieu of a flat ban, PASPA prohibits third parties from operating sports-gambling schemes only if state law permits them to do so. If a state ban is in place, of course, there is no need for a federal proscription.

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portions while leaving the remainder intact.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 508 (2010) (internal quotation marks omitted). The relevant question is whether the Legislature would have wanted unproblematic aspects of the legislation to survive or would want them to fall along with the infirmity.³ As the Court stated in *New York*, “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, . . . the invalid part may be dropped if what is left is fully operative as a law.” 505 U. S., at 186 (internal quotation marks omitted). Here, it is scarcely arguable that Congress “would have preferred no statute at all,” *Executive Benefits Ins. Agency v. Arkison*, 573 U. S. 25, 37 (2014), over one that simply stops States and private parties alike from operating sports-gambling schemes.

The Court wields an ax to cut down § 3702 instead of using a scalpel to trim the statute. It does so apparently in the mistaken assumption that private sports-gambling schemes would become lawful in the wake of its decision. In particular, the Court holds that the prohibition on state “operation” of sports-gambling schemes cannot survive, because it does not believe Congress would have “wanted to prevent States from running sports lotteries” “had [it] known that States would be free to authorize sports gambling in privately owned casinos.” *Ante*, at 482. In so reasoning, the Court shuts § 3702(2), under which private parties are prohibited from operating sports-gambling schemes *precisely when state law authorizes them to do so*.⁴

³Notably, in the two decisions marking out and applying the anticommandeering doctrine to invalidate federal law, the Court invalidated only the offending provision, not the entire statute. *New York v. United States*, 505 U. S. 144, 186–187 (1992); *Printz v. United States*, 521 U. S. 898, 935 (1997).

⁴As earlier indicated, see *supra*, at 494, direct federal regulation of sports-gambling schemes nationwide, including private-party schemes, falls within Congress’ power to regulate activities having a substantial

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This plain error pervasively infects the Court's severability analysis. The Court strikes Congress' ban on state "sponsor[ship]" and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck Congress' prohibition on state "operat[ion]" of such schemes. See *ante*, at 483. It strikes Congress' prohibitions on private "sponsor[ship]," "operat[ion]," and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck those same prohibitions on the States. See *ibid.* And it strikes Congress' prohibition on "advertis[ing]" sports-gambling schemes because it has struck everything else. See *ante*, at 485–486.

* * *

In PASPA, shorn of the prohibition on modifying or repealing state law, Congress permissibly exercised its authority to regulate commerce by instructing States and private parties to refrain from operating sports-gambling schemes. On no rational ground can it be concluded that Congress would have preferred no statute at all if it could not prohibit States from authorizing or licensing such schemes. Deleting the alleged "commandeering" directions would free the statute to accomplish just what Congress legitimately sought to achieve: stopping sports-gambling regimes while making it clear that the stoppage is attributable to federal, not state, action. I therefore dissent from the Court's determination to destroy PASPA rather than salvage the statute.

effect on interstate commerce. See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Indeed, according to the Court, direct regulation is precisely what the anticommandeering doctrine requires. *Ante*, at 470–474.

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EPIC SYSTEMS CORP. *v.* LEWISCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 16–285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its “saving clause” removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board’s general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board’s position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act’s saving clause nor the NLRA suggests otherwise. Pp. 505–525.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§ 2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act’s saving clause—which allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” § 2—recognizes only “‘generally applicable contract defenses, such as fraud, duress, or uncon-

*Together with No. 16–300, *Ernst & Young LLP et al. v. Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

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scionability,” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by “interfer[ing] with fundamental attributes of arbitration,” *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 505–510.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive “to give effect to both.” *Morton v. Mancari*, 417 U.S. 535, 551. To prevail, the employees must show a “‘clear and manifest’” congressional intention to displace one Act with another. *Ibid.* There is a “stron[g] presum[ption]” that disfavors repeals by implication and that “Congress will specifically address” preexisting law before suspending the law’s normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are “concerted activities” protected by § 7 of the NLRA, which guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157. But § 7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in § 7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term “other concerted activities for the purpose of . . . other mutual aid or protection” appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i. e.*, things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA’s structure points to the same conclusion. After speaking of various “concerted activities” in § 7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e. g.*, 29 U.S.C. §§ 216(b), 626,

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or to override the Arbitration Act, see, *e. g.*, 15 U. S. C. § 1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32. The employees' theory also runs afoul of the rule 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, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, *e. g.*, the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. § 102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e. g.*, *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228; and its § 7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e. g.*, *NLRB v. Washington Aluminum Co.*, 370 U. S. 9.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron's* essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.*, at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single posi-

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tion on which the Executive Branch might be held “accountable to the people.” *Id.*, at 865. And after “employing traditional tools of statutory construction,” *id.*, at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 510–521.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, 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. 525. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 526.

Paul D. Clement argued the cause for petitioners in Nos. 16–285 and 16–300 and for respondent Murphy Oil USA, Inc., in No. 16–307. With him on the brief for petitioner in No. 16–285 and for respondent Murphy Oil USA, Inc., in No. 16–307 were *Neal Kumar Katyal, Frederick Liu, Colleen E. Roh Sinzdak, Daniel J. T. Schuker, Thomas P. Schmidt, Noah A. Finkel, Andrew Scroggins, Jeffrey A. Schwartz, and Daniel D. Schudroff*. With him on the briefs for petitioners in No. 16–300 were *Kannon K. Shanmugam, Allison Jones Rushing, Rex S. Heinke, Pratik A. Shah, and Daniel L. Nash*.

Acting Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal in Nos. 16–285 and 16–300 and affirmance in No. 16–307. With him on the brief were *Deputy Solicitor General Stewart and Allon Kedem*.

Richard F. Griffin, Jr., argued the cause for petitioner acting as respondent in No. 16–307. With him on the brief were *Jennifer Abruzzo, John H. Ferguson, Linda Dreeben, Meredith Jason, Kira Dellinger Vol, and Jeffrey W. Burritt. Harold Craig Becker, Richard P. Rouco, and Glen M. Connor* filed a brief for respondent Sheila Hobson in support of petitioner in No. 16–307.

Daniel R. Ortiz argued the cause for respondents in Nos. 16–285 and 16–300. With him on the brief in No. 16–

Counsel

285 were *Toby J. Heytens*, *David C. Zoeller*, *William E. Parsons*, *Caitlin M. Madden*, and *Adam Hansen*. *Max Folkenflik*, *Margaret McGerity*, *Ross Libenson*, and *H. Tim Hoffman* filed a brief for respondents in No. 16–300.[†]

[†]Briefs of *amici curiae* urging reversal in Nos. 16–285 and 16–300 and affirmance in No. 16–307 were filed for the American Staffing Association et al. by *John B. Lewis*, *Dustin M. Dow*, *Garrett R. Ferencz*, *Melissa A. Siebert*, *Bonnie K. Del Gobbo*, *Angelo I. Amador*, *Kevin W. Shaughnessy*, and *Joyce Ackerbaum Cox*; for the Atlantic Legal Foundation by *Martin S. Kaufman*; for Bristol Farms by *Steven B. Katz*; for the Business Roundtable by *William M. Jay* and *Andrew Kim*; for the Chamber of Commerce of the United States of America by *Andrew J. Pincus*, *Evan M. Tager*, *Archis A. Parasharami*, *Matthew A. Waring*, *Kate Comerford Todd*, and *Warren Postman*; for the Council on Labor Law Equality et al. by *Christopher C. Murray*, *Ron Chapman, Jr.*, and *Brian E. Hayes*; for DRI–The Voice of the Defense Bar by *David M. Axelrad*, *Felix Shafir*, *John F. Querio*, and *John E. Cuttino*; for the Employers Group by *Beth Heifetz* and *Anthony J. Dick*; for the HR Policy Association by *Sam S. Shaulson*, *Allyson N. Ho*, and *John C. Sullivan*; for the International Association of Defense Counsel by *Mary-Christine Sungaila*; for Law Professors by *Thomas R. McCarthy* and *J. Michael Connolly*; for the Mortgage Bankers Association et al. by *Stephen A. Fogdall* and *Germán A. Salazar*; for the National Association of Manufacturers et al. by *Edward F. Berbarie*, *Robert F. Friedman*, *Sean M. McCrory*, *Henry D. Lederman*, *Michael J. Lotito*, and *Linda E. Kelly*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; for the Retail Litigation Center, Inc., by *Adam G. Unikowsky* and *Deborah R. White*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* urging reversal in No. 16–285 were filed for the Equal Employment Advisory Council by *Rae T. Vann*; and for the Pacific Legal Foundation by *Deborah J. La Fetra*.

Briefs of *amici curiae* urging affirmance in Nos. 16–285 and 16–300 and reversal in No. 16–307 were filed for the State of Maryland et al. by *Brian E. Frosh*, Attorney General of Maryland, *Steven M. Sullivan*, Solicitor General, and *Patrick B. Hughes*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsyl-

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JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees’ suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral

vania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the American Association for Justice by *Deepak Gupta*, *Matthew Wessler*, and *Jeffrey R. White*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianna J. Gorod*, and *Brian R. Frazelle*; for Labor Law Professors by *David C. Frederick*, *Jeremy S. B. Newman*, and *Matthew W. Finkin, pro se*; for the Main Street Alliance et al. by *Samuel R. Bagenstos* and *Kate Andrias*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Sherrilyn Ifill*, *Janai Nelson*, *Samuel Spital*, *Raymond Audain*, *Jocelyn D. Larkin*, *Lindsay Nako*, *Coty Montag*, *Joseph M. Sellers*, and *Christine Webber*; for the National Academy of Arbitrators by *Mr. Finkin, pro se*; for the New York Taxi Workers Alliance by *Jeanne Mirer*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; for Ten International Labor Unions et al. by *Michael Rubin*, *Nicole B. Berner*, *Claire Prestel*, *Judith Rivlin*, *David J. Strom*, *Mark Schneider*, *Bradley T. Raymond*, *Alice O’Brien*, *Catherine K. Ruckelshaus*, *Nicholas W. Clark*, *Richard J. Brean*, and *Cliff Palefsky*; and for Susan Fowler by *Chris Baker*.

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forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties’ agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could “grant any relief that could be granted by . . . a court” in the relevant jurisdiction. App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims “pertaining to different [e]mployees [to] be heard in separate proceedings.” *Id.*, at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA’s collective action provision, 29 U. S. C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F. 3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally

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requires courts to enforce arbitration agreements as written. But the court reasoned that the statute’s “saving clause,” see 9 U.S.C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the “concerted activit[y],” 29 U.S.C. §157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act’s saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F. 3d 1050 (CA8 2013); *Sutherland v. Ernst & Young LLP*, 726 F. 3d 290 (CA2 2013); *D. R. Horton, Inc. v. NLRB*, 737 F. 3d 344 (CA5 2013); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 327 P. 3d 129 (2014); *Tallman v. Eighth Jud. Dist. Court*, 131 Nev. 71, 359 P. 3d 113 (2015); 808 F. 3d 1013 (CA5 2015) (case below in No. 16–307).

The National Labor Relations Board’s general counsel expressed much the same view in 2010. Remarking that employees and employers “can benefit from the relative simplicity and informality of resolving claims before arbitrators,” the general counsel opined that the validity of such agreements “does not involve consideration of the policies of the National Labor Relations Act.” Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

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But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA’s adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board’s conclusion or thought themselves obliged to defer to it under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16–285); 834 F. 3d 975 (case below in No. 16–300); *NLRB v. Alternative Entertainment, Inc.*, 858 F. 3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board’s (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law’s meaning. We granted certiorari to clear the confusion. 580 U. S. 1089 (2017).

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). But in Congress’s judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. *Id.*, at 511. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as “valid, irrevocable, and enforceable.” 9 U. S. C. §2. The Act, this Court has said, establishes “a liberal federal policy favoring arbitration agreements.” *Moses H. Cone Memo-*

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rial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24 (1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)); see *id.*, at 404 (discussing “the plain meaning of the statute” and “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts”).

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties’ chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration “in accordance with the terms of the agreement”); §4 (providing for “an order directing that . . . arbitration proceed in the manner provided for in such agreement”). Indeed, we have often observed that the Arbitration Act requires courts “rigorously” to “enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.” *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 233 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011); *Italian Colors*, *supra*; *DIRECTV, Inc. v. Imburgia*, 577 U. S. 47 (2015). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all

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the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F. 3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. See *Concepcion*, *supra*, at 352–355 (THOMAS, J., concurring); *post*, at 525–526 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L. P. v. Clark*, 581 U. S. 246, 251 (2017). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339. At the same time, the clause offers no refuge for "defenses that apply only to arbitration

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or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by “interfer[ing] with fundamental attributes of arbitration.” *Id.*, at 344; see *Kindred Nursing, supra*, at 252.

This is where the employees’ argument stumbles. They don’t suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U.S., at 338, 341. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This “‘fundamental’” change to the traditional arbitration process, the Court said, would “sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.*, at 347, 348. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class mem-

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bers should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. *Id.*, at 344–351; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662, 684–687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment “manifested itself in a great variety of devices and formulas declaring arbitration against public policy,” *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement “illegal” as a matter of federal statutory law rather than “unconscionable” as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepcion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a

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different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The intention must be "'clear and manifest.'" *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" pre-existing law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988).

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These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

“the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U. S. C. § 157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247, 256–260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like

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that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; *Concepcion*, 563 U. S., at 349; see also *Califano v. Yamasaki*, 442 U. S. 682, 700–701 (1979) (noting that the “usual rule” then was litigation “conducted by and on behalf of individual named parties only”). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term “other concerted activities for the purpose of . . . other mutual aid or protection.” This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of “self-organization,” “form[ing], join[ing], or assist[ing] labor organizations,” and “bargain[ing] collectively.” 29 U. S. C. § 157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to “‘embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 115 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs. v. Department of Defense*, 583 U. S. 109, 121 (2018). All of which suggests that the term “other concerted activities” should, like the terms that precede it, serve to protect things employees “just do” for themselves in the course of exercising their right to free association in the workplace, rather than “the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.” *Alternative Entertainment*, 858 F. 3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (empha-

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sis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U. S. C. § 159, explains employees' and employers' obligation to bargain collectively, § 158(d), and conscribes certain labor organization practices, §§ 158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, § 158(b)(7), and strikes, § 163. It even sets rules for adjudicatory proceedings under the NLRA itself, §§ 160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

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Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving “actions,” “claims,” “charges,” and “cases” in statute after statute. *E. g.*, 29 U.S.C. §§216(b), 626; 42 U.S.C. §§2000e–5(b), (f)(3)–(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, “[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if” certain conditions are met, 15 U.S.C. §1226(a)(2); or that “[n]o predispute arbitration agreement shall be valid or enforceable” in other circumstances, 7 U.S.C. §26(n)(2); 12 U.S.C. §5567(d)(2); or that requiring a party to arbitrate is “unlawful” in other circumstances yet, 10 U.S.C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn’t discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, “on the same terms as [they are] made available to everyone else.” Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn’t say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees’ underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of “themselves and other

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employees similarly situated,” 29 U.S.C. §216(b), and it’s precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that “[e]very circuit to consider the question” has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F.3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It’s a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees’ theory runs afoul of the usual rule that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws,

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flattens the parties' contracted-for dispute resolution procedures, and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§ 102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U. S. 228; *Gilmer*, 500 U. S. 20; *CompuCredit Corp. v. Greenwood*, 565 U. S. 95 (2012); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477 (1989) (overruling *Wilko v. Swan*, 346 U. S. 427 (1953)); *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220 (1987). Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. *Gilmer*, *supra*,

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at 32. And we’ve stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit*, *supra*, at 103–104; *McMahon*, *supra*, at 227; *Italian Colors*, *supra*, at 234. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made “no mention of class actions” and was adopted before Rule 23 introduced its exception to the “usual rule” of “individual” dispute resolution. 570 U. S., at 234 (internal quotation marks omitted). In *Gilmer*, this Court “had no qualms in enforcing a class waiver in an arbitration agreement even though” the Age Discrimination in Employment Act “expressly permitted collective legal actions.” *Italian Colors*, *supra*, at 237 (citing *Gilmer*, *supra*, at 32). And in *CompuCredit*, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a “right to sue,” “repeated[ly]” used the words “action” and “court” and “class action,” and even declared “[a]ny waiver” of the rights it provided to be “void.” 565 U. S., at 99–100 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court’s cases interpreting Section 7 itself. But, as it turns out, this Court’s Section 7 cases have usually involved just what you would expect from the statute’s plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, e. g., *NLRB v. Washington Aluminum Co.*,

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370 U. S. 9 (1962) (walkout to protest workplace conditions); *NLRB v. Textile Workers*, 409 U. S. 213 (1972) (resignation from union and refusal to strike); *NLRB v. J. Weingarten, Inc.*, 420 U. S. 251 (1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc. v. NLRB*, 437 U. S. 556, 558 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id.*, at 575, and n. 24. In *NLRB v. City Disposal Systems, Inc.*, 465 U. S. 822, 831–832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565–566; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in

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litigation or arbitration. Instead this passage at most suggests only that “resort to administrative and judicial forums” isn’t “entirely unprotected.” *Eastex*, 437 U.S., at 566. Indeed, the Court proceeded to explain that it did not intend to “address . . . the question of what may constitute ‘concerted’ activities in this [litigation] context.” *Ibid.*, n. 15. So even the employees’ dicta, when viewed fairly and fully, doesn’t suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we’ve seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton*, 357 N. L. R. B. 2277; 823 F.3d 1147 (case below in No. 16–285).

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn’t see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency’s interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel’s judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board’s 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc. v. Iancu*, ante, at 369. But even under *Chevron*’s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an “implicit” delegation to an agency to interpret a “statute which it administers.” 467 U.S., at 841, 842. Here, though, the Board hasn’t just

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sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron's* essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon v. New York Stock Exchange, Inc.*, 422 U. S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "bootstrap[ing] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co. v. Barrett*, 494 U. S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U. S. 137, 144 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.

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See Hemel & Nielson, *Chevron* Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) (“If the theory undergirding *Chevron* is that voters should be the judges of the executive branch’s policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)”). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a “court, employing traditional tools of statutory construction,” is left with an unresolved ambiguity. 467 U.S., at 843, n. 9. And that too is missing: The canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today’s interpretive puzzle. Where, as here, the canons supply an answer, “*Chevron* leaves the stage.” *Alternative Entertainment*, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today’s decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. See *Lochner v. New York*, 198 U. S. 45 (1905). The dissent even suggests we have resurrected the long-dead “yellow dog” contract. *Post*, at 527–541, 553 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, *American Constitutional Law* 435 (1978) (“‘*Lochnerizing*’ has become so much an epithet that the very use of the label may obscure attempts at understanding”).

Our decision does nothing to override Congress’s policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at “safeguard[ing], first and foremost, workers’ rights to join unions and to engage in collective bargaining.” *Post*, at 532. Those rights stand every bit as strong today as they did yesterday. And rather than revive “yellow dog” contracts against union organizing

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that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, *post*, at 547. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party has asked us to revisit. Compare *post*, at 542–547, 549 (criticizing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985), *Gilmer*, 500 U. S. 20, *Circuit City*, 532 U. S. 105, *Concepcion*, 563 U. S. 333, *Italian Colors*, 570 U. S. 228, and *CompuCredit*, 565 U. S. 95), with *Mitsubishi*, *supra*, at 645–650 (Stevens, J., dissenting), *Gilmer*, *supra*, at 36, 39–43 (Stevens, J., dissenting), *Circuit City*, *supra*, at 124–129 (Stevens, J., dissenting), *Concepcion*, *supra*, at 357–367 (BREYER, J., dissenting), *Italian Colors*, *supra*, at 240–253 (KAGAN, J., dissenting), and *CompuCredit*, *supra*, at 116–117 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of

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course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. *Post*, at 533. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." *Yates v. United States*, 574 U. S. 528, 537 (2015) (plurality opinion). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. *Post*, at 528–530; see also *post*, at 542–544. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute "[w]e do not inquire what the legislature meant; we ask only what the statute means." *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U. S. 384, 396, 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." *D. R. Horton*, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." *Schwegmann*, *supra*, at 396.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. *Post*, at 549. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly "speaks directly to group action by employees," while the Arbitration

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Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post*, at 550–553. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U. S. C. § 216(b); *Gilmer*, *supra*, at 32. While the dissent is no doubt right that class actions can enhance enforcement by “spread[ing] the costs of litigation,” *post*, at 533, it's also well known that they can unfairly “plac[e] pressure on the defendant to settle even unmeritorious claims,” *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post*, at 551,

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n. 15); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people’s representatives. *That*, we had always understood, was *Lochner*’s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress’s statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern “‘the formation of the arbitration agreement.’” *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 239 (2013) (concurring opinion) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 353 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is

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a public-policy defense. See Restatement (Second) of Contracts §§ 178–179 (1979); *McMullen v. Hoffman*, 174 U. S. 639, 669–670 (1899). Because “[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made,” the saving clause does not apply here. *Concepcion, supra*, at 357. For this reason, and the reasons in the Court’s opinion, the employees’ arbitration agreements must be enforced according to their terms.

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

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. § 201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, *What’s Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1118–1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.*, at 1108–1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. § 1 *et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*, “to engage in . . . concerted activities” for their “mutual aid or protection”? § 157. The answer should be a resounding “No.”

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. § 101 *et seq.*, Congress acted on an

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acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees “to band together in confronting an employer.” *NLRB v. City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.

To explain why the Court’s decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation’s workplaces, and Congress’ aim in the NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA’s protective sphere.

I

It was once the dominant view of this Court that “[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions.” *Adair v. United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage v. Kansas*, 236 U. S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers’ clout in setting terms and

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conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States v. Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, *The Yellow Dog Contract* 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.*, at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59–60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, e.g., *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *Legislation Affecting Labor*

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Injunctions, 38 Yale L. J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers’ and employees’ constitutional right to “liberty of contract.” See *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *supra*, at 890–891. While stating that legislatures could curtail contractual “liberty” in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16–19.

In the 1930’s, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees’ associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

“Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U. S. C. § 102.

Section 3 provides that federal courts shall not enforce “any . . . undertaking or promise in conflict with the public policy declared in [§2].” § 103.¹ In adopting these provisions,

¹ Other provisions of the NLGA further rein in federal-court authority to disturb employees’ concerted activities. See, *e. g.*, 29 U. S. C. § 104(d) (federal courts lack jurisdiction to enjoin a person from “aiding any person participating or interested in any labor dispute who is being proceeded

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Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) (“[o]ne of the objects” of the NLGA was to “out-law” yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting “all manner of concerted activities apart from union membership or support . . . were understood to be ‘yellow dog’ contracts”). While banning court enforcement of contracts proscribing concerted action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, § 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*” 29 U. S. C. § 157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” § 158(a)(1). To oversee the Act’s guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer “labor policy for the Nation.” *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 242 (1959); see 29 U. S. C. § 160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA’s constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-“liberty” decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33–34. The Court recognized that employees have a “fundamental right” to join together to advance their common interests and that

against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State”).

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Congress, in lieu of “ignor[ing]” that right, had elected to “safeguard” it. *Ibid.*

B

Despite the NLRA’s prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one.² When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,³ the employers moved to compel individual arbi-

²The Court’s opinion opens with the question: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?” *Ante*, at 502. Were the “agreements” genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees “continue[d] to work at Epic,” they would “be deemed to have accepted th[e] Agreement.” App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees’ continued employment would indicate their assent to the agreement’s terms. See App. in No. 16–300, p. 37. Epic’s and Ernst & Young’s employees thus faced a Hobson’s choice: accept arbitration on their employer’s terms or give up their jobs.

³The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U. S. C. § 216(b). In particular, it authorizes “one or more employees” to maintain an action “in behalf of himself or themselves and other employees similarly situated.” *Ibid.* “Similarly situated” employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which “[o]ne or more members of a class” may bring an action on behalf of the entire class if specified prerequisites are met.

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tration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum.⁴ They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. § 157 (emphasis added); see, e. g., *NLRB v. Washington Aluminum Co.*, 370 U. S. 9, 14–15 (1962) (§ 7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, *The Developing Labor Law* 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities . . . for mutual aid or protection.'"); 1 N. Lareau, *Labor and Employment Law* § 1.01[1], p. 1–2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negoti-

⁴ Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16–285, at 35a.

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ate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals.” (emphasis added)).

Suits to enforce workplace rights collectively fit comfortably under the umbrella “concerted activities for the purpose of . . . mutual aid or protection.” 29 U. S. C. § 157. “Concerted” means “[p]lanned or accomplished together; combined.” American Heritage Dictionary 381 (5th ed. 2011). “Mutual” means “reciprocal.” *Id.*, at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly “accomplished together.” By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra*, at 550–551.

Recognizing employees’ right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA’s design. Congress expressed its intent, when it enacted the NLRA, to “protect[] the exercise by workers of full freedom of association,” thereby remedying “[t]he inequality of bargaining power” workers faced. 29 U. S. C. § 151; see, e. g., *Eastex, Inc. v. NLRB*, 437 U. S. 556, 567 (1978) (the Act’s policy is “to protect the right of workers to act together to better their working conditions” (internal quotation marks omitted)); *City Disposal*, 465 U. S., at 835 (“[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”). See also *supra*, at 529–530. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act’s earliest days, the Board and federal courts have understood § 7’s “concerted activities” clause to protect

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myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e.g.*, *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (CA2 1942), legislative bodies, *e.g.*, *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e.g.*, *Moss Planing Mill Co.*, 103 N. L. R. B. 414, 418–419, *enf'd*, 206 F. 2d 557 (CA4 1953). “The 74th Congress,” this Court has noted, “knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.” *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g.*, *Spandsco Oil and Royalty Co.*, 42 N. L. R. B. 942, 948–949 (1942) (three employees’ joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen’s Service Corp.*, 41 N. L. R. B. 444, 460–463, and n. 28 (1942) (same with respect to employee’s filing of FLSA suit on behalf of himself and others similarly situated), *enf’d*, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees’ filing class libel suit); *United Parcel Service, Inc.*, 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee’s filing class action regarding break times), *enf’d*, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N. L. R. B. 478, 478–479 (2005) (same with respect to employee’s maintaining class action regarding wages). For decades, federal courts have endorsed the Board’s view, comprehending that “the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7.” *Leviton Mfg. Co. v. NLRB*, 486 F. 2d 686, 689 (CA1 1973); see,

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e. g., *Brady v. National Football League*, 644 F. 3d 661, 673 (CA8 2011) (similar).⁵ The Court pays scant heed to this longstanding line of decisions.⁶

D

In face of the NLRA's text, history, purposes, and long-standing construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante*, at 512. Observing that § 7's "other concerted activities" clause "appears at the end of a detailed list of activi-

⁵ The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See *ante*, at 519, 522, 529. The General Counsel appeared to conclude that employees have a § 7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10-06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a § 7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See *D. R. Horton*, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. *D. R. Horton*, 357 N. L. R. B., at 2282-2283.

⁶ In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D. R. Horton*, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a § 7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their § 7 rights. See *id.*, at 2278, 2280. It broke no new ground. But cf. *ante*, at 503, 519.

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ties,” the Court says the clause should be read to “embrace” only activities “similar in nature” to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i. e.*, “‘self-organization,’ ‘form[ing], join[ing], or assist[ing] labor organizations,’ and ‘bargain[ing] collectively,’” *ibid.* The Court concludes that §7 should, therefore, be read to protect “things employees ‘just do’ for themselves.” *Ibid.* (quoting *NLRB v. Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as “things employees just do for themselves.” In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7’s protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress’ efforts to draft encompassing legislation. See *United States v. Powell*, 423 U.S. 87, 90 (1975) (“[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.”). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i. e.*, to “protec[t] the exercise by workers of full freedom of association.” 29 U.S.C. §151; see *supra*, at 533.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA’s “structure.” *Ante*, at 513. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA “estab-

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lish[es] a regulatory regime” governing each of the activities protected by § 7. *Ibid.* That regime, the Court says, offers “specific guidance” and “rules” regulating each protected activity. *Ibid.* Observing that none of the NLRA’s provisions explicitly regulates employees’ resort to collective litigation, the Court insists that “it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§ 7] yet remain mute about this matter alone—unless, of course, [§ 7] doesn’t speak to class and collective action procedures in the first place.” *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only § 7 activity Congress addressed with any specificity was employees’ selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer “specific guidance” about employees’ rights to “form, join, or assist labor organizations.” Nor did it set forth “specific guidance” for any activity falling within § 7’s “other concerted activities” clause. The only provision that touched upon an activity falling within that clause stated: “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” *Id.*, at 457. That provision hardly offered “specific guidance” regarding employees’ right to strike.

Without much in the original Act to support its “structure” argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding § 8(d) to provide guidance regarding employees’ and employers’ collective-bargaining obligations); 61 Stat. 141–142 (amending § 8(a) and adding § 8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding § 8(b)(7) to place restrictions on labor organizations’ right to picket employers). It is difficult to comprehend why Congress’ later inclusion of specific guidance regarding some of the activities protected by § 7 sheds any light on Congress’ initial conception of § 7’s scope.

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But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court's conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood § 7 to protect numerous activities for which the Act provides no “specific” regulatory guidance. See *supra*, at 533–534.

3

In a related argument, the Court maintains that the NLRA does not “even whispe[r]” about the “rules [that] should govern the adjudication of class or collective actions in court or arbitration.” *Ante*, at 513. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra*, at 531, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, e. g., American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees “really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures.” *Ante*, at 514. The freedom to depart asserted by the Court, as already underscored, is entirely one sided. See *supra*, at 527–529. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enter-

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prise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U. S. C. §§ 151, 157, 158.

4

Further attempting to sow doubt about §7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante*, at 512. In particular, the Court notes, the FLSA's collective-litigation procedure postdated §7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid*.

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed §7 in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U. S. 251, 266 (1975); see *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e. g.*, join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e. g.*, *Wray Electric Contracting, Inc.*, 210 N. L. R. B. 757, 762 (1974) (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, the FLSA's collective-litigation procedure and the

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modern class action were “not written on a clean slate.” 823 F. 3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 38 (1987). And beyond question, “[c]lass suits long have been a part of American jurisprudence.” 7A Wright, *supra*, § 1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5–16 (describing group litigation’s “rich history”). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E. g.*, *Gorley v. Louisville*, 23 Ky. 1782, 65 S. W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano v. Daniel O’Connell’s Sons*, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees’ joining together to engage in collective litigation.⁷

E

Because I would hold that employees’ § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-

⁷ The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante*, at 514–515. But the employees’ reliance on the NLRA is hardly a reason to “raise a judicial eyebrow.” *Ante*, at 515. The NLRA’s guiding purpose is to protect employees’ rights to work together when addressing shared workplace grievances of whatever kind.

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dictated collective-litigation stoppers, *i. e.*, “waivers,” are unlawful. As earlier recounted, see *supra*, at 530, § 8(a)(1) makes it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce” employees in the exercise of their § 7 rights. 29 U. S. C. § 158(a)(1). Beyond genuine dispute, an employer “interfere[s] with” and “restrain[s]” employees in the exercise of their § 7 rights by mandating that they prospectively renounce those rights in individual employment agreements.⁸ The law could hardly be otherwise: Employees’ rights to band together to meet their employers’ superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co. v. NLRB*, 309 U. S. 350, 364 (1940). Properly assessed, then, the “waivers” rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp. v. Mullins*, 455 U. S. 72, 77 (1982) (“[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.”).⁹

⁸ See, *e. g.*, *Bethany Medical Center*, 328 N. L. R. B. 1094, 1105–1106 (1999) (holding employer violated § 8(a)(1) by conditioning employees’ rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc.*, 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated § 8(a)(1) by conditioning employee’s reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would “mind his own business”).

⁹ I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers “shall be free from the interference, restraint, or coercion of employers” when they engage in “concerted activities” for their “mutual aid or protection.” 29 U. S. C. § 102; see *supra*, at 529. Section 3 provides that federal courts shall not enforce any “promise in conflict with the [Act’s] policy.” § 103. Because employer-extracted collective-litigation waivers interfere with employees’ ability to engage in “concerted activities” for their “mutual aid or protection,” see *supra*, at 532–535, the arm-twisted waivers collide with the NLGA’s stated policy; thus, no federal court should enforce them. See Finkin, *The Meaning and*

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II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante*, at 506. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See

Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970), provides no support for the Court's contrary conclusion. See *ante*, at 516. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U.S., at 238–239. When a dispute later arose, the union bypassed arbitration and called a strike. *Id.*, at 239. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U.S.C. § 104, with § 301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U.S.C. § 185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U.S., at 252–253. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

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Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.*, at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, e.g., 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]-force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes).¹⁰

¹⁰ American Bar Association member Julius H. Cohen, credited with drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.*, at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise

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The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.*, at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in §1 of the Act, see Joint Hearings 2; 9 U.S.C. §1, and labor expressed no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).¹¹

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, e.g., 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n. 9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

¹¹ For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124–129 (2001) (Stevens, J., dissenting).

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2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L. Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a “liberal federal policy favoring arbitration.” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E. g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220 (1987). Further, in 1991, the Court concluded in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 23 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace anti-discrimination statute. Then, in 2001, the Court ruled in *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 109 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e. g.*, Economic Policy Institute (EPI), A. Colvin, *The Growing Use of Mandatory Arbitration* 1–2, 4 (Sept. 27, 2017), avail-

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able at <https://www.epi.org/files/pdf/135056.pdf> (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration,¹² employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129; Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton*, 357 N. L. R. B. 2277 (2012), *enf. denied* in relevant part, 737 F. 3d 344 (CA5 2013). Compare *ante*, at 504–505 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration), with *supra*, at 534–535

¹² In *Green Tree Financial Corp. v. Bazzle*, 539 U. S. 444 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 409–410 (2005). In *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at <https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf> (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

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(NLRB decisions recognizing a § 7 right to engage in collective employment litigation), and *supra*, at 541, n. 8 (NLRB decisions finding employer-dictated waivers of § 7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, *The Tempting of America* 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in § 2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U. S. C. § 2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto*, 517 U. S. 681, 687 (1996); see *ante*, at 507.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, *Williston on Contracts* § 12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel*, 455 U. S., at 77 (quoting *McMullen v. Hoffman*, 174 U. S. 639, 654 (1899)). For the reasons stated *supra*, at 532–541, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's

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saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011)—rules out reconciliation of the NLRA and the FAA through the latter’s saving clause. See *ante*, at 507–510. I disagree. True, the Court’s Arbitration Act decisions establish that the saving clause “offers no refuge” for defenses that discriminate against arbitration, “either by name or by more subtle methods.” *Ante*, at 507–508. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate “covertly” against arbitration. *Kindred Nursing Centers L. P. v. Clark*, 581 U. S. 246, 252 (2017). In *Concepcion*, the Court held that the saving clause did not spare the California Supreme Court’s invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer contracts. 563 U. S., at 341–344, 346–352. Class proceedings, the Court said, would “sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.*, at 348. Accordingly, the Court concluded, the California Supreme Court’s rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.*, at 346–352.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that “illegal promises will not be enforced,” *Kaiser Steel*, 455 U. S., at 77, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees’ § 7 rights. See *supra*, at 541, and n. 8; cf.

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Kindred Nursing Centers, 581 U. S., at 254, n. 2 (States may enforce generally applicable rules so long as they do not “single out arbitration” for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as “an implied repeal” of the FAA, to the extent of any genuine conflict. See *Posadas v. National City Bank*, 296 U. S. 497, 503 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 153 (1976) (“a specific statute” generally “will not be controlled or nullified by a general one” (internal quotation marks omitted)).¹³

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante*, at 514. The statutes the Court cites, however, are of recent vintage.¹⁴ Each was enacted during the time this Court’s decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp. v. Greenwood*, 565 U. S. 95, 116 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

¹³ Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees’ ability to engage in concerted activities. See *supra*, at 541, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that “[a]ll acts and parts of acts in conflict with [the Act’s] provisions . . . are repealed.” 29 U. S. C. § 115.

¹⁴ See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

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III

The inevitable result of today's decision will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections*, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 11–16, 21–22 (2009). One study estimated that in Chicago, Los Angeles, and New York City alone, low-wage workers lose nearly \$3 billion in legally owed wages each year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year* 2 (2014), available at <https://www.epi.org/files/2014/wage-theft.pdf>. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29–33; Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1150–1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id.*, at 1184–1185 (because “the FLSA systematically tends to generate low-value claims,” “mechanisms that facilitate the economics of claim-

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ing are required”); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young’s arbitration program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that “private enforcement of small-value claims depends on collective, rather than individual, action”); *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 617 (1997) (class actions help “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” (internal quotation marks omitted)).¹⁵

Fear of retaliation may also deter potential claimants from seeking redress alone. See, e.g., Ruan 1119–1121; Bernhard, *supra*, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano v. Yamasaki*, 442 U. S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established.”). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today’s decision,¹⁶ the Court has repeatedly recognized the centrality of group action to the ef-

¹⁵ Based on a 2015 study, the Bureau of Consumer Financial Protection found that “pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.” 82 Fed. Reg. 33210 (2017).

¹⁶ The Court observes that class actions can be abused, see *ante*, at 524, but under its interpretation, even two employees would be stopped from proceeding together.

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fective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, e. g., *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971); *Automobile Workers v. Johnson Controls, Inc.*, 499 U. S. 187 (1991). In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401 (1968) (*per curiam*) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.”). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra*, at 550–551.

I do not read the Court’s opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a groupwide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19–25, which some courts have concluded cannot be maintained by solo complainants, see, e. g., *Chin v. Port Auth. of N. Y. & N. J.*, 685 F. 3d 135, 147 (CA2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 417, 421 (1975). With fidelity to the Legislature’s will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes

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be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e. g.*, App. to Pet. for Cert. in No. 16–285, p. 34a (Epic’s agreement); App. in No. 16–300, p. 46 (Ernst & Young’s agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motorcars, LLC v. Navarro*, *ante*, p. 79 (Court divides on whether “service advisors” are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called “yellow dog,” and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.” Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

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UPPER SKAGIT INDIAN TRIBE *v.* LUNDGREN ET VIR

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 17–387. Argued March 21, 2018—Decided May 21, 2018

The Upper Skagit Indian Tribe purchased a roughly 40-acre plot of land and then commissioned a boundary survey. The survey convinced the Tribe that about an acre of its land lay on the other side of a boundary fence between its land and land owned by Sharline and Ray Lundgren. The Lundgrens filed a quiet title action in Washington state court, invoking the doctrines of adverse possession and mutual acquiescence, but the Tribe asserted sovereign immunity from the suit. Ultimately, the State Supreme Court rejected the Tribe's immunity claim and ruled for the Lundgrens, reasoning that, under *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, tribal sovereign immunity does not apply to *in rem* suits.

Held: *Yakima* addressed not the scope of tribal sovereign immunity, but a question of statutory interpretation of the Indian General Allotment Act of 1887. That Act authorized the President to allot parcels of reservation land to individual tribal members and directed the United States eventually to issue fee patents to the allottees as private individuals. In 1934, Congress reversed course but made no attempt to withdraw the lands already conveyed. As a result, Indian reservations sometimes contain both trust land held by the United States and fee-patented land held by private parties. *Yakima* concerned the tax consequences of this intermixture. This Court had previously held that §6 of the General Allotment Act could no longer be read as allowing States to impose *in personam* taxes on transactions between Indians on fee-patented land within a reservation. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 479–481. The Court reached a different conclusion in *Yakima* with respect to *in rem* state taxes, holding that the state collection of property taxes on fee-patented land within reservations was still allowed under §6. 502 U. S., at 265. In short, *Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity.

Acknowledging this, the Lundgrens now ask the Court to affirm on an alternative, common-law ground: that the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in Washington State, purchased by the Tribe in the same manner as a

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private individual. Because this alternative argument did not emerge until late in this case, the Washington Supreme Court should address it in the first instance. Pp. 558–561.

187 Wash. 2d 857, 389 P. 3d 569, vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 562. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 564.

David S. Hawkins argued the cause for petitioner. With him on the briefs were *Arthur W. Harrigan, Jr.*, *Tyler L. Farmer*, *Kristin E. Ballinger*, and *John C. Burzynski*.

Ann O’Connell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *William B. Lazarus*, and *Mary Gabrielle Sprague*.

Eric D. Miller argued the cause for respondents. With him on the brief were *Scott M. Ellerby*, *Luke M. Rona*, *Jennifer A. MacLean*, and *Charles G. Curtis, Jr.**

*Briefs of *amici curiae* urging reversal were filed for the Cayuga Nation et al. by *Ian Heath Gershengorn*, *David W. DeBruin*, *Sam Hirsch*, *Martin E. Seneca, Jr.*, *Todd Hembree*, *Chrissi Ross Nimmo*, *Marsha K. Schmidt*, and *Daniel I. S. J. Rey-Bear*; for the Fond du Lac Band of Lake Superior Chippewa Indians et al. by *Douglas B. L. Endreson* and *Frank S. Holleman*; and for the National Congress of American Indians et al. by *Colette Routel*, *Joel West Williams*, and *Dan Lewerenz*.

Briefs of *amici curiae* urging affirmance were filed for Seneca County, New York, by *Brian Laudadio*, *Louis P. DiLorenzo*, and *Mary P. Moore*; for the Village of Union Springs et al. by *David H. Tennant* and *Chad R. Hayden*; and for Public Service Company of New Mexico by *William H. Hurd* and *Siran S. Faulders*.

A brief of *amici curiae* was filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *David L. Franklin*, Solicitor General, and *Brett E. Legner*, Deputy Solicitor General, and by the Attorney Generals of their respective States as follows: *Curtis T. Hill, Jr.*, of Indiana, *Hector Balderas* of New Mexico, and *Ken Paxton* of Texas.

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JUSTICE GORSUCH delivered the opinion of the Court.

Lower courts disagree about the significance of our decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992). Some think it means Indian tribes lack sovereign immunity in *in rem* lawsuits like this one; others don't read it that way at all.* We granted certiorari to set things straight. 583 U.S. 1036 (2017).

Ancestors of the Upper Skagit Tribe lived for centuries along the Skagit River in northwestern Washington State. But as settlers moved across the Cascades and into the region, the federal government sought to make room for them by displacing native tribes. In the treaty that followed with representatives of the Skagit people and others, the tribes agreed to “cede, relinquish, and convey” their lands to the United States in return for \$150,000 and other promises. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; see *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 676 (1979); *United States v. Washington*, 384 F. Supp. 312, 333 (WD Wash. 1974).

Today's dispute stems from the Upper Skagit Tribe's efforts to recover a portion of the land it lost. In 1981, the federal government set aside a small reservation for the Tribe. 46 Fed. Reg. 46681. More recently, the Tribe has sought to purchase additional tracts in market transactions. In 2013, the Tribe bought roughly 40 acres where, it says, tribal members who died of smallpox are buried. The Tribe bought the property with an eye to asking the federal government to take the land into trust and add it to the existing

*Compare 187 Wash. 2d 857, 865–869, 389 P. 3d 569, 573–574 (2017) (case below); *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N. W. 2d 685, 691–693 (conforming to the Washington Supreme Court's interpretation of *Yakima*), with *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017–NMSC–007, 388 P. 3d 977, 986 (2016) (disagreeing); *Cayuga Indian Nation of N. Y. v. Seneca County*, 761 F. 3d 218, 221 (CA2 2014) (same).

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reservation next door. See 25 U. S. C. § 5108; 25 CFR § 151.4 (2013). Toward that end, the Tribe commissioned a survey of the plot so it could confirm the property's boundaries. But then a question arose.

The problem was a barbed wire fence. The fence runs some 1,300 feet along the boundary separating the Tribe's land from land owned by its neighbors, Sharline and Ray Lundgren. The survey convinced the Tribe that the fence is in the wrong place, leaving about an acre of its land on the Lundgrens' side. So the Tribe informed its new neighbors that it intended to tear down the fence; clearcut the intervening acre; and build a new fence in the right spot.

In response, the Lundgrens filed this quiet title action in Washington state court. Invoking the doctrines of adverse possession and mutual acquiescence, the Lundgrens offered evidence showing that the fence has stood in the same place for years, that they have treated the disputed acre as their own, and that the previous owner of the Tribe's tract long ago accepted the Lundgrens' claim to the land lying on their side of the fence. For its part, the Tribe asserted sovereign immunity from the suit. It relied upon the many decisions of this Court recognizing the sovereign authority of Native American tribes and their right to "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community*, 572 U. S. 782, 788 (2014) (internal quotation marks omitted).

Ultimately, the Supreme Court of Washington rejected the Tribe's claim of immunity and ruled for the Lundgrens. The court reasoned that sovereign immunity does not apply to cases where a judge "exercis[es] in rem jurisdiction" to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise *in personam* jurisdiction over the Tribe itself. 187 Wash. 2d 857, 867, 389 P. 3d 569, 573 (2017). In coming to this conclusion, the court relied in part on our decision in *Yakima*. Like some courts before it, the Washington Supreme Court read *Yakima* as distinguish-

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ing *in rem* from *in personam* lawsuits and “establish[ing] the principle that . . . courts have subject matter jurisdiction over *in rem* proceedings in certain situations where claims of sovereign immunity are asserted.” 187 Wash. 2d, at 868, 389 P. 3d, at 574.

That was error. *Yakima* did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887. See 24 Stat. 388.

Some background helps dispel the misunderstanding. The General Allotment Act represented part of Congress’s late 19th-century Indian policy: “to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.” *Yakima*, *supra*, at 254; *In re Heff*, 197 U.S. 488, 499 (1905). It authorized the President to allot parcels of reservation land to individual tribal members. The law then directed the United States to hold the allotted parcel in trust for some years, and afterwards issue a fee patent to the allottee. 24 Stat. 389. Section 6 of the Act, as amended, provided that once a fee patent issued, “each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside” and “all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” 25 U.S.C. § 349.

In 1934, Congress reversed course. It enacted the Indian Reorganization Act, 48 Stat. 984, to restore “the principles of tribal self-determination and self-governance” that prevailed before the General Allotment Act. *Yakima*, 502 U.S., at 255. “Congress halted further allotments and extended indefinitely the existing periods of trust applicable to” parcels that were not yet fee patented. *Ibid.*; see 25 U.S.C. §§ 461–462. But the Legislature made no attempt to withdraw lands already conveyed to private persons through fee patents (and by now sometimes conveyed to non-Indians). As a result, Indian reservations today sometimes contain two

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kinds of land intermixed in a kind of checkerboard pattern: trust land held by the United States and fee-patented land held by private parties. See *Yakima, supra*, at 256.

Yakima concerned the tax consequences of this checkerboard. Recall that the amended version of §6 of the General Allotment Act rendered allottees and their fee-patented land subject to state regulations and taxes. 25 U. S. C. §349. Despite that, in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), this Court held that §6 could no longer be read as allowing States to impose *in personam* taxes (like those on cigarette sales) on transactions between Indians on fee-patented land within a reservation. *Id.*, at 479–481. Among other things, the Court pointed to the impracticality of using the ownership of a particular parcel within a reservation to determine the law governing transactions taking place upon it. See *id.*, at 478–479. Despite *Moe* and some years later, this Court in *Yakima* reached a different conclusion with respect to *in rem* state taxes. The Court held that allowing States to collect property taxes on fee-patented land within reservations was still allowed by §6. *Yakima, supra*, at 265. Unlike the *in personam* taxes condemned in *Moe*, the Court held that imposing *in rem* taxes only on the fee-patented squares of the checkerboard was “not impracticable” because property tax assessors make “parcel-by-parcel determinations” about property tax liability all the time. *Yakima, supra*, at 265. In short, *Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity.

Commendably, the Lundgrens acknowledged all this at oral argument. Tr. of Oral Arg. 36–37. Instead of seeking to defend the Washington Supreme Court’s reliance on *Yakima*, they now ask us to affirm their judgment on an entirely distinct alternative ground. At common law, they say, sovereigns enjoyed no immunity from actions involving immov-

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able property located in the territory of another sovereign. As our cases have put it, “[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual.” *Schooner Exchange v. McFaddon*, 7 Cranch 116, 145 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in “the character of a private individual.”

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998) (“[T]he immunity possessed by Indian tribes is not coextensive with that of the States”). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Ex parte Peru*, 318 U.S. 578, 588 (1943).

We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984), in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an *amicus* brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe’s other *amici* had their say. This Court has often declined to take a “first view” of questions that make their appearance in this posture, and we

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think that course the wise one today. *Cutter v. Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of “hornbook law.” *Post*, at 566–572 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a “grave” decision that “casts uncertainty” over the law and leaves lower courts with insufficient “guidance.” *Post*, at 565–566, 575. Both cannot be true. If the immovable property exception presents such an easy question, then it’s hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in “hornbook law,” and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

The dissent’s other objection to a remand rests on a belief that the immovable property exception was the source of “the disagreement that led us to take this case.” *Post*, at 564. But this too is mistaken. As we’ve explained, the courts below and the certiorari-stage briefs before us said precisely nothing on the subject. Nor do we understand how the dissent might think otherwise—for its essential premise is that *no* disagreement exists, or is even possible, about the exception’s scope. The source of confusion in the lower courts that led to our review was the one about *Yakima*, see *supra*, at 556, n., and we have dispelled it. That is work enough for the day. We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

ROBERTS, C. J., concurring

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court in full.

But that opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

The Tribe suggests that the proper mode of redress is for the Lundgrens—who purchased their property long before the Tribe came into the picture—to negotiate with the Tribe. Although the parties got off on the wrong foot here, the Tribe insists that negotiations would run more smoothly if the Lundgrens “understood [its] immunity from suit.” Tr. of Oral Arg. 61. In other words, once the Court makes clear that the Lundgrens ultimately have no recourse, the parties can begin working toward a sensible settlement. That, in my mind at least, is not a meaningful remedy.

The Solicitor General proposes a different out-of-court solution. Taking up this Court's passing comment that a disappointed litigant may continue to assert his title, see *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 291–292 (1983), the Solicitor General more pointedly suggests that the Lundgrens should steer into the conflict: Go onto the disputed property and chop down some trees, build a shed, or otherwise attempt to “induce [the Tribe] to file a quiet-title action.” Brief for United States as *Amicus Curiae* 23–24. Such brazen tactics may well have the desired effect of causing the Tribe to waive its sovereign immunity. But I am skeptical that the law requires private individuals—who, again, had no prior dealings with the Tribe—to pick a fight in order to vindicate their interests.

ROBERTS, C. J., concurring

The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort. Such a possibility was discussed in the Solicitor General's brief, the Lundgrens' brief, and the Tribe's reply brief, and extensively explored at oral argument—the exception to sovereign immunity for actions to determine rights in immovable property. After all, “property ownership is not an inherently sovereign function.” *Permanent Mission of India to United Nations v. City of New York*, 551 U. S. 193, 199 (2007). Since the 18th century, it has been a settled principle of international law that a foreign state holding real property outside its territory is treated just like a private individual. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 145 (1812). The same rule applies as a limitation on the sovereign immunity of States claiming an interest in land located within other States. See *Georgia v. Chattanooga*, 264 U. S. 472, 480–482 (1924). The only question, as the Solicitor General concedes, Brief for United States as *Amicus Curiae* 25, is whether different principles afford Indian tribes a broader immunity from actions involving off-reservation land.

I do not object to the Court's determination to forgo consideration of the immovable-property rule at this time. But if it turns out that the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case. See *Michigan v. Bay Mills Indian Community*, 572 U. S. 782, 799, n. 8 (2014) (reserving the question whether sovereign immunity would apply if a “plaintiff who has not chosen to deal with a tribe[] has no alternative way to obtain relief for off-reservation commercial conduct”). At the very least, I hope the Lundgrens would carefully examine the full range of legal options for resolving this title dispute with their neighbors, before crossing onto the disputed land and firing up their chainsaws.

THOMAS, J., dissenting

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

We granted certiorari to decide whether “a court’s exercise of *in rem* jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity.” Pet. for Cert. i; 583 U. S. 1036 (2017). State and federal courts are divided on that question, but the Court does not give them an answer. Instead, it holds only that *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992), “resolved nothing about the law of [tribal] sovereign immunity.” *Ante*, at 559. Unfortunately, neither does the decision today—except to say that courts cannot rely on *County of Yakima*. As a result, the disagreement that led us to take this case will persist.

The Court easily could have resolved that disagreement by addressing respondents’ alternative ground for affirmance. Sharline and Ray Lundgren—whose family has maintained the land in question for more than 70 years—ask us to affirm based on the “immovable property” exception to sovereign immunity. That exception is settled, longstanding, and obviously applies to tribal immunity—as it does to every other type of sovereign immunity that has ever been recognized. Although the Lundgrens did not raise this argument below, we have the discretion to reach it. I would have done so. The immovable-property exception was extensively briefed and argued, and its application here is straightforward. Addressing the exception now would have ensured that property owners like the Lundgrens can protect their rights and that States like Washington can protect their sovereignty. Because the Court unnecessarily chooses to leave them in limbo, I respectfully dissent.

I

As the Court points out, the parties did not raise the immovable-property exception below or in their certiorari-stage briefs. See *ante*, at 560. But this Court will resolve

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arguments raised for the first time in the merits briefs when they are a ““predicate to an intelligent resolution” of the question presented” and thus “‘fairly included’ within the question presented.” *Caterpillar Inc. v. Lewis*, 519 U. S. 61, 75, n. 13 (1996) (quoting *Ohio v. Robinette*, 519 U. S. 33, 38 (1996); this Court’s Rule 14.1). The Court agrees that the immovable-property exception is necessary to an intelligent resolution of the question presented, which is why it remands that issue to the Washington Supreme Court. See *ante*, at 560. But our normal practice is to address the issue ourselves, unless there are “good reasons to decline to exercise our discretion.” *Jones v. United States*, 527 U. S. 373, 397, n. 12 (1999) (plurality opinion).

There are no good reasons here. The Court’s only proffered reason is that the applicability of the immovable-property exception is a “grave question” that “will affect all tribes, not just the one before us.” *Ante*, at 560.¹ The exception’s applicability might be “grave,” but it is also clear. And most questions decided by this Court will affect more than the parties “before us”; that is one of the primary reasons why we grant certiorari. See this Court’s Rule 10(c) (explaining that certiorari review is usually reserved for cases involving “an important question of federal law” that has divided the state or federal courts). Moreover, the Court’s decision to forgo answering the question presented is no less “grave.” It forces the Lundgrens to squander additional years and resources litigating their right to litigate.

¹The Court does not question the adequacy of the briefing or identify factual questions that need further development. Nor could it. The immovable-property exception received extensive attention in the parties’ briefs, see Brief for Respondents 9–26; Reply Brief 13–24, and the Government’s *amicus* brief, see Brief for United States 25–33. Most of the oral argument likewise focused on the immovable-property exception. See Tr. of Oral Arg. 14–16, 19–29, 34–51, 54–59. And when asked at oral argument what else it could say about the exception if it had more time, the Tribe had no response. See *id.*, at 19–21.

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And it casts uncertainty over the sovereign rights of States to maintain jurisdiction over their respective territories.

Contrary to the Court's suggestion, *ante*, at 560–561, I have no doubt that our state-court colleagues will faithfully interpret and apply the law on remand. But I also have no doubt that this Court “ha[s] an ‘obligation . . . to decide the merits of the question presented’” in the cases that come before us. *Encino Motorcars, LLC v. Navarro*, 579 U. S. 211, 227 (2016) (THOMAS, J., dissenting). The Court should have discharged that obligation here.

II

I would have resolved this case based on the immovable-property exception to sovereign immunity. That exception is well established. And it plainly extends to tribal immunity, as it does to every other form of sovereign immunity.

A

The immovable-property exception has been hornbook law almost as long as there have been hornbooks. For centuries, there has been “uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.” Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *Brit. Y. B. Int'l Law* 220, 244 (1951).² This immovable-property exception predates both the founding and the

²There is some disagreement about the outer bounds of this exception—for example, whether it applies to tort claims related to the property or to diplomatic embassies. See, *e. g.*, Letter from J. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General P. Perlman (May 19, 1952), 26 *Dept. State Bull.* 984, 984–985 (Tate Letter); see also C. Bynkershoek, *De Foro Legatorum Liber Singularis* 22–23 (G. Laing transl. 2d ed. 1946) (explaining there is “no unanimity” regarding attaching a foreign prince's debts to immovable property). But there is no dispute that it covers suits concerning ownership of a piece of real property used for nondiplomatic reasons. See Tate Letter 984; Brief for United States as *Amicus Curiae* 27–28. In other words, there is no dispute that it applies to *in rem* suits like this one.

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Tribe's treaty with the United States. Cornelius van Bynkershoek, a renowned 18th-century jurist,³ stated that it was "established" that "property which a prince has purchased for himself in the dominions of another . . . shall be treated just like the property of private individuals." *De Foro Legatorum Liber Singularis* 22 (G. Laing transl. 2d ed. 1946). His conclusion echoed the 16th-century legal scholar Oswald Hilliger. See *ibid.* About a decade after Bynkershoek, Emer de Vattel explained that, when "sovereigns have fiefs and other possessions in the territory of another prince; in such cases they hold them after the manner of private individuals." 3 *The Law of Nations* §83, p. 139 (C. Fenwick transl. 1916); see also E. de Vattel, *The Law of Nations* §115, p. 493 (J. Chitty ed. 1872) ("All landed estates, all immovable property, by whomsoever possessed, are subject to the jurisdiction of the country").⁴

The immovable-property exception is a corollary of the ancient principle of *lex rei sitae*. Sometimes called *lex situs* or *lex loci rei sitae*, the principle provides that "land is governed by the law of the place where it is situated." F. Wharton, 1 *Conflict of Laws* §273, p. 607 (G. Parmele ed., 3d ed. 1905). It reflects the fact that a sovereign "cannot suffer its own laws . . . to be changed" by another sovereign. H.

³ Considered "a jurist of great reputation" by Chief Justice Marshall, *Schooner Exchange v. McFaddon*, 7 Cranch 116, 144 (1812), "Bynkershoek's influence in the eighteenth century [w]as enormous," Adler, *The President's Recognition Power*, in *The Constitution and the Conduct of American Foreign Policy* 133, 153, n. 19 (G. Adler & L. George eds. 1996) (internal quotation marks omitted). Madison, for example, consulted Bynkershoek's works (on the recommendation of Jefferson) while preparing to draft the Constitution. See Letter from T. Jefferson to J. Madison (Feb. 20, 1784), in 4 *The Works of Thomas Jefferson* 239, 248 (P. Ford ed. 1904); Letter from J. Madison to T. Jefferson (Mar. 16, 1784), in 2 *The Writings of James Madison* 34, 43 (G. Hunt ed. 1901).

⁴ De Vattel's work was "a leading treatise" of its era. *Jesner v. Arab Bank, PLC*, ante, at 288, n. 3 (GORSUCH, J., concurring in part and concurring in judgment).

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Wheaton, Elements of International Law § 81, p. 114 (G. Wilson ed. 1936). As then-Judge Scalia explained, it is “self-evident” that “[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain.” *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1521 (CADC 1984). And because “land is so indissolubly connected with the territory of a State,” a State “cannot permit” a foreign sovereign to displace its jurisdiction by purchasing land and then claiming “immunity.” Competence of Courts in Regard to Foreign States, 26 Am. J. Int’l L. Supp. 451, 578 (1932) (Competence of Courts). An assertion of immunity by a foreign sovereign over real property is an attack on the sovereignty of “the State of the situs.” *Ibid.*

The principle of *lex rei sitae* was so well established by the 19th century that Chancellor James Kent deemed it “too clear for discussion.” 2 Commentaries on American Law 429, n. a (4th ed. 1840). The medieval jurist Bartolus of Sassoferrato had recognized the principle 500 years earlier in his commentary on conflicts of law under the Justinian Code. See Bartolus, Conflict of Laws 29 (J. Beale transl. 1914).⁵ Bartolus explained that, “when there is a question of any right growing out of a thing itself, the custom or statute of the place where the thing is should be observed.” *Ibid.* Later authorities writing on conflicts of law consistently agreed that *lex rei sitae* determined the governing law in real-property disputes.⁶ And this Court likewise held,

⁵In the foreword to his translation of Bartolus, Joseph Henry Beale described him as “the most imposing figure among the lawyers of the middle ages,” whose work was “the first and standard statement of the doctrines of the Conflict of Laws.” Bartolus, Conflict of Laws, at 9.

⁶See, e. g., F. von Savigny, Conflict of Laws 130 (W. Guthrie transl. 1869) (“This principle [of *lex rei sitae*] has been generally accepted from a very early time”); G. Bowyer, Commentaries on Universal Public Law 160 (1854) (“[W]here the matter in controversy is the right and title to land or other immovable property, the judgment pronounced in the *forum rei sitae* is held conclusive in other countries”); H. Wheaton, Elements of

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nearly 200 years ago, that “the nature of sovereignty” requires that “[e]very government” have “the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries.” *Green v. Biddle*, 8 Wheat. 1, 12 (1823) (Story, J.).

The acceptance of the immovable-property exception has not wavered over time. In the 20th century, as nations increasingly owned foreign property, it remained “well settled in international law that foreign state immunity need not be extended in cases dealing with rights to interests in real property.” Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 *Yale Stud. in World Pub. Order* 1, 33 (1976). Countries around the world continued to recognize the exception in their statutory and decisional law. See *Competence of Courts* 572–590 (noting support for the exception in statutes from Austria, Germany, Hungary, and Italy, as well as decisions from the United States, Austria, Chile, Czechoslovakia, Egypt, France, Germany, and Romania). “All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals.” C. Hyde, 2 *International Law* 848, n. 33 (rev. 2d ed. 1945) (internal quotation marks omitted).

International Law §81, p. 114 (G. Wilson ed. 1936) (“[T]he law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property”); J. Story, *Commentaries on the Conflict of Laws* §424, p. 708 (rev. 3d ed. 1846) (“The title . . . to real property can be acquired, passed, and lost only according to the *Lex rei sitae*”); J. Westlake, *Private International Law* *56 (“The right to the possession of land can only be tried in the courts of the *situs*”); L. Bar, *International Law: Private and Criminal* 241–242 (G. Gillespie transl. 1883) (noting that, in “the simpler case of immoveables,” “[t]he *lex rei sitae* is the rule”); F. Wharton, 1 *Conflict of Laws* §273, p. 607 (G. Parmelee ed., 3d ed. 1905) (“Jurists of all schools, and courts of all nations, are agreed in holding that land is governed by the law of the place where it is situated”).

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The Restatement of Foreign Relations Law reflects this unbroken consensus. Every iteration of the Restatement has deemed a suit concerning the ownership of real property to be “outside the scope of the principle of [sovereign] immunity of a foreign state.” Restatement of Foreign Relations Law of the United States (Proposed Official Draft) § 71, Comment *c*, p. 228 (1962); see also Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965) (similar); Restatement (Third) of Foreign Relations Law of the United States § 455(1)(c) (1986) (denying that immunity exists for “claims . . . to immovable property in the state of the forum”); Restatement (Fourth) of Foreign Relations Law of the United States § 456(2) (Tent. Draft No. 2, Mar. 22, 2016) (recognizing “jurisdiction over a foreign state in any case in which rights in immovable property situated in the United States are in issue”). Sovereign immunity, the First Restatement explains, does not bar “an action to obtain possession of or establish an ownership interest in immovable property located in the territory of the state exercising jurisdiction.” § 71(b), at 226.

Given the centuries of uniform agreement on the immovable-property exception, it is no surprise that all three branches of the United States Government have recognized it. Writing for a unanimous Court and drawing on Bynkershoek and De Vattel, Chief Justice Marshall noted that “the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual.” *Schooner Exchange v. McFaddon*, 7 Cranch 116, 144–145 (1812). Thus, “[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction . . . and assuming the character of a private individual.” *Id.*, at 145.⁷

⁷The Skagit Tribe entered into its treaty with the United States four decades later. See Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. The treaty does not mention sovereignty or otherwise alter the rule laid out in *Schooner Exchange*.

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The Court echoed this reasoning over a century later, holding that state sovereign immunity does not extend to “[l]and acquired by one State in another State.” *Georgia v. Chattanooga*, 264 U. S. 472, 480 (1924). In 1952, the State Department acknowledged that “[t]here is agreement[,] supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property.” Tate Letter 984.⁸ Two decades later, Congress endorsed the immovable-property exception by including it in the Foreign Sovereign Immunities Act of 1976. See 28 U. S. C. § 1605(a)(4) (“A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue”). This statutory exception was “meant to codify . . . the *pre-existing* real property exception to sovereign immunity recognized by international practice.” *Permanent Mission of India to United Nations v. City of New York*, 551 U. S. 193, 200 (2007) (emphasis added; internal quotation marks omitted).

The Court does not question any of the foregoing authorities. Nor did the parties provide any reason to do so. The Government, when asked to identify its “best authority for the proposition that the baseline rule of common law was total immunity, including *in rem* actions,” pointed to just two sources. See Tr. of Oral Arg. 29; Brief for United States as *Amicus Curiae* 10, 26. The first was Hamilton’s statement that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”

⁸This declaration has long been “the official policy of our Government.” *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U. S. 682, 698 (1976). The State Department has reaffirmed it on several occasions. See, e. g., Dept. of State, J. Sweeney, Policy Research Study: The International Law of Sovereign Immunity 24 (1963) (“The immunity from jurisdiction of a foreign state does not extend to actions for the determination of an interest in immovable—or real—property in the territory. This limitation on the immunity of the state is of long standing”).

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The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (emphasis deleted). Yet “property ownership is not an inherently sovereign function,” *Permanent Mission*, *supra*, at 199, and Hamilton’s general statement does not suggest that immunity is automatically available or is not subject to longstanding exceptions. The Government also cited *Schooner Exchange*. But as explained above, that decision expressly acknowledges the immovable-property exception. The Government’s unconvincing arguments cannot overcome more than six centuries of consensus on the validity of the immovable-property exception.

B

Because the immovable-property exception clearly applies to both state and foreign sovereign immunity, the only question is whether it also applies to tribal immunity. It does.

Just last Term, this Court refused to “exten[d]” tribal immunity “beyond what common-law sovereign immunity principles would recognize.” *Lewis v. Clarke*, 581 U. S. 155, 163–164 (2017). Tribes are “domestic dependent nations,” *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831), that “no longer posses[s] the full attributes of sovereignty,” *United States v. Wheeler*, 435 U. S. 313, 323 (1978) (internal quotation marks omitted). Given the “limited character” of their sovereignty, *ibid.*, Indian tribes possess only “the common-law immunity from suit traditionally enjoyed by sovereign powers,” *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 58 (1978). That is why this Court recently declined an invitation to make tribal immunity “broader than the protection offered by state or federal sovereign immunity.” *Lewis*, 581 U. S., at 164. Accordingly, because States and foreign countries are subject to the immovable-property exception, Indian tribes are too. “There is no reason to depart from these general rules in the context of tribal sovereign immunity.” *Id.*, at 163.

In declining to reach the immovable-property exception, the Court highlights two counterarguments that the Tribe

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and the United States have raised for why the exception should not extend to tribal immunity. Neither argument has any merit.

First, the Court notes that “immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes.” *Ante*, at 560 (citing *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998)). But the Court’s authority for that proposition merely states that tribal immunity “is not coextensive with that of *the States*.” *Id.*, at 756 (emphasis added). Even assuming that is so, it does not mean that the Tribe’s immunity can be more expansive than any recognized form of sovereign immunity, including the immunity of the United States and foreign countries. See *Lewis, supra*, at 163–164. And the Tribe admits that this Court has previously limited tribal immunity to conform with analogous “limitations . . . in suits against the United States.” Reply Brief 22. No one argues that the United States could claim sovereign immunity if it wrongfully asserted ownership of private property in a foreign country—the equivalent of what the Tribe did here. The United States plainly would be subject to suit in that country’s courts. See *Competence of Courts* 572–590.

Second, the Court cites two decisions for the proposition that “since the founding . . . the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country.” *Ante*, at 560 (citing *Verlinden B. V. v. Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943)). But those cases did not involve tribal immunity. They were admiralty suits in which foreign sovereigns sought to recover ships they allegedly owned. See *Verlinden, supra*, at 486 (citing cases involving ships allegedly owned by Italy, Peru, and Mexico); *Ex parte Peru, supra*, at 579 (mandamus action by Peru regarding its steamship). Those decisions were an extension of the common-law principle, recognized in *Schooner Exchange*, that sovereign immunity applies to vessels owned by a

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foreign sovereign. See *Berizzi Brothers Co. v. S. S. Pesaro*, 271 U.S. 562, 571–576 (1926). These cases encourage deference to the political branches on sensitive questions of foreign affairs. But they do not suggest that courts can ignore longstanding limits on sovereign immunity, such as the immovable-property exception. And they do not suggest that courts can abdicate their judicial duty to decide the scope of tribal immunity—a duty this Court exercised just last Term. See *Lewis*, *supra*, at 161–164.⁹

In fact, those present at “the founding,” *ante*, at 560, would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State’s jurisdiction.¹⁰ Tribal immunity is “a judicial doctrine” that is not mandated by the Constitution. *Kiowa*, 523 U.S., at 759. It “developed almost by accident,” was reiterated “with little analysis,” and does not reflect the realities of modern-day Indian tribes. See *id.*, at 756–758. The doctrine has become quite “exorbitant,” *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 831 (2014) (GINSBURG, J., dissenting), and it has been implausibly “extended . . . to bar suits arising out of an Indian tribe’s commercial activities

⁹These decisions about ships, even on their own terms, undercut the Tribe’s claim to immunity here. The decisions acknowledge a “distinction between possession and title” that is “supported by the overwhelming weight of authority” and denies immunity to a foreign sovereign that has “title . . . without possession.” *Republic of Mexico v. Hoffman*, 324 U.S. 30, 37–38 (1945); see, e.g., *Long v. The Tampico*, 16 F. 491, 493–501 (SDNY 1883). That distinction would defeat the Tribe’s claim to immunity because the Lundgrens have possession of the land. See 187 Wash. 2d 857, 861–864, 389 P. 3d 569, 571–572 (2017).

¹⁰Their shock would not be assuaged by the Government’s proposed remedy. The Government suggests that the Lundgrens should force a showdown with the Tribe by chopping down trees or building some structure on the land. See Brief for United States as *Amicus Curiae* 23–24. If the judge-made doctrine of tribal immunity has come to a place where it forces individuals to take the law into their own hands to keep their own land, then it will have crossed the threshold from mistaken to absurd.

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conducted outside its territory,” *id.*, at 814 (THOMAS, J., dissenting).

Extending it even further here would contradict the bedrock principle that each State is “entitled to the sovereignty and jurisdiction over all the territory within her limits.” *Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845); accord, *Texas v. White*, 7 Wall. 700, 725 (1869); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9 (1888) (collecting cases). Since 1812, this Court has “entertain[ed] no doubt” that “the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate[d].” *United States v. Crosby*, 7 Cranch 115, 116 (1812) (Story, J.). Justice Bushrod Washington declared it “an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated.” *Kerr v. Devises of Moon*, 9 Wheat. 565, 570 (1824). This Court has been similarly emphatic ever since. See, e.g., *Munday v. Wisconsin Trust Co.*, 252 U. S. 499, 503 (1920) (“long ago declared”); *Arndt v. Griggs*, 134 U. S. 316, 321 (1890) (“held repeatedly”); *United States v. Fox*, 94 U. S. 315, 320 (1877) (“undoubted”); *McCormick v. Sullivant*, 10 Wheat. 192, 202 (1825) (“an acknowledged principle of law”). Allowing the judge-made doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution’s design, which “‘leaves to the several States a residuary and inviolable sovereignty.’” *New York v. United States*, 505 U. S. 144, 188 (1992) (quoting *The Federalist* No. 39, at 245).

* * *

The Court’s failure to address the immovable-property exception in this case is difficult to justify. It leaves our colleagues in the state and federal courts with little more guidance than they had before. It needlessly delays relief for the Lundgrens, who must continue to litigate the threshold question whether they can litigate their indisputable right

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to their land. And it does not address a clearly erroneous tribal-immunity claim: one that asserts a sweeping and absolute immunity that no other sovereign has ever enjoyed—not a State, not a foreign nation, and not even the United States.

I respectfully dissent.

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Syllabus

LAGOS *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 16–1519. Argued April 18, 2018—Decided May 29, 2018

Petitioner Sergio Fernando Lagos was convicted of using a company he controlled to defraud a lender of tens of millions of dollars. After the fraudulent scheme came to light and Lagos' company went bankrupt, the lender conducted a private investigation of Lagos' fraud and participated as a party in the company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, the lender spent nearly \$5 million in legal, accounting, and consulting fees related to the fraud. After Lagos pleaded guilty to federal wire fraud charges, the District Court ordered him to pay restitution to the lender for those fees. The Fifth Circuit affirmed, holding that such restitution was required by the Mandatory Victims Restitution Act of 1996, which requires defendants convicted of certain federal offenses, including wire fraud, to, among other things, "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," 18 U. S. C. § 3663A(b)(4).

Held:

1. The words "investigation" and "proceedings" in subsection (b)(4) of the Mandatory Victims Restitution Act are limited to government investigations and criminal proceedings and do not include private investigations and civil or bankruptcy proceedings. The word "investigation" appears in the phrase "the investigation or prosecution." Because the word "prosecution" must refer to a government's criminal prosecution, this suggests that the word "investigation" refers to a government's criminal investigation. Similar reasoning suggests that the immediately following reference to "proceedings" refers to criminal proceedings. Furthermore, the statute refers to the victim's "participation" in the "investigation," and "attendance" at "proceedings," which would be odd ways to describe a victim's role in its own private investigation and as a party in noncriminal court proceedings, but which are natural ways to describe a victim's role in a government's investigation and in the criminal proceedings that a government conducts.

Moreover, the statute lists three specific items that must be reimbursed: lost income, child care expenses, and transportation expenses. These are precisely the kind of expenses that a victim is likely to incur

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when missing work and traveling to participate in a government investigation or to attend criminal proceedings. In contrast, the statute says nothing about the kinds of expenses a victim would often incur during private investigations or noncriminal proceedings, namely, the costs of hiring private investigators, attorneys, or accountants. This supports the Court's more limited reading of the statute.

A broad reading would also require district courts to resolve difficult, fact-intensive disputes about whether particular expenses "incurred during" participation in a private investigation were in fact "necessary," and about whether proceedings such as a licensing proceeding or a Consumer Products Safety Commission hearing were sufficiently "related to the offense." The Court's narrower interpretation avoids such controversies, which are often irrelevant to the victim because over 90% of criminal restitution is never collected.

The Court's interpretation means that some victims will not receive restitution for all of their losses from a crime, but that is consistent with the Mandatory Victims Restitution Act's enumeration of limited categories of covered expenses, in contrast with the broader language that other federal restitution statutes use, see, *e. g.*, 18 U. S. C. §§ 2248(b), 2259(b), 2264(b), 2327(b). Pp. 580–584.

2. That the victim shared the results of its private investigation with the Government does not make the costs of conducting the private investigation "necessary . . . other expenses incurred during participation in the investigation . . . of the offense." § 3663A(b)(4). That language does not cover the costs of a private investigation that the victim chooses on its own to conduct, which are not "incurred during" participation in a government's investigation. Pp. 584–585.

864 F. 3d 320, reversed and remanded.

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

Daniel L. Geyser argued the cause for petitioner. With him on the briefs were *Peter K. Stris*, *Douglas D. Geyser*, and *Randolph L. Schaffer, Jr.*

Michael R. Huston argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Eric J. Feigin*, and *William A. Glaser*.*

*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *Stuart Banner* and *Barbara E. Bergman*; and for Shon Hopwood by *Gregory M. Lipper*.

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JUSTICE BREYER delivered the opinion of the Court.

The Mandatory Victims Restitution Act of 1996 requires defendants convicted of a listed range of offenses to

“reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.*” 18 U.S.C. §3663A(b)(4) (emphasis added).

We must decide whether the words “investigation” and “proceedings” are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings. In our view, they are limited to government investigations and criminal proceedings.

I

The petitioner, Sergio Fernando Lagos, was convicted of using a company that he controlled (Dry Van Logistics) to defraud a lender (General Electric Capital Corporation, or GE) of tens of millions of dollars. The fraud involved generating false invoices for services that Dry Van Logistics had not actually performed and then borrowing money from GE using the false invoices as collateral. Eventually, the scheme came to light. Dry Van Logistics went bankrupt. GE investigated. The Government indicted Lagos. Lagos pleaded guilty to wire fraud. And the judge, among other things, ordered him to pay GE restitution.

The issue here concerns the part of the restitution order that requires Lagos to reimburse GE for expenses GE incurred during its own investigation of the fraud and during its participation in Dry Van Logistics’ bankruptcy proceedings. The amounts are substantial (about \$5 million), and primarily consist of professional fees for attorneys, accountants, and consultants. The Government argued that the District Court must order restitution of these amounts under

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the Mandatory Victims Restitution Act because these sums were “necessary . . . other expenses incurred during participation in the investigation . . . of the offense or attendance at proceedings related to the offense.” §3663A(b)(4). The District Court agreed, as did the U. S. Court of Appeals for the Fifth Circuit. 864 F. 3d 320, 323 (2017).

Lagos filed a petition for certiorari. And in light of a division of opinion on the matter, we granted the petition. Compare *United States v. Papagno*, 639 F. 3d 1093, 1100 (CA DC 2011) (subsection (b)(4) of the Mandatory Victims Restitution Act does not cover private investigation costs), with *United States v. Elson*, 577 F. 3d 713, 726–729 (CA6 2009) (statute not so limited); *United States v. Hosking*, 567 F. 3d 329, 331–332 (CA7 2009) (same); *United States v. Stennis-Williams*, 557 F. 3d 927, 930 (CA8 2009) (same); *United States v. Amato*, 540 F. 3d 153, 159–163 (CA2 2008) (same); *United States v. Gordon*, 393 F. 3d 1044, 1056–1057 (CA9 2004) (same).

II

The Mandatory Victims Restitution Act is one of several federal statutes that govern federal court orders requiring defendants convicted of certain crimes to pay their victims restitution. It concerns “crime[s] of violence,” “offense[s] against property . . . , including any offense committed by fraud or deceit,” and two specific offenses, one concerning tampering with a consumer product and the other concerning theft of medical products. 18 U.S.C. §3663A(c)(1)(A). It requires, in the case of property offenses, return of the property taken or its value, §3663A(b)(1); in the case of bodily injury, the payment of medical expenses and lost income, §3663A(b)(2); in the case of death, the payment of funeral expenses, §3663A(b)(3); and, as we have said, *supra*, at 579, in all cases, “reimburse[ment]” to

“the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution of the*

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offense or attendance at proceedings related to the offense.” § 3663A(b)(4) (emphasis added).

We here consider the meaning of that italicized phrase. Specifically, we ask whether the scope of the words “investigation” and “proceedings” is limited to government investigations and criminal proceedings, or whether it includes private investigations and civil or bankruptcy litigation. We conclude that those words are limited to government investigations and criminal proceedings.

Our conclusion rests in large part upon the statute’s wording, both its individual words and the text taken as a whole. The individual words suggest (though they do not demand) our limited interpretation. The word “investigation” is directly linked by the word “or” to the word “prosecution,” with which it shares the article “the.” This suggests that the “investigation[s]” and “prosecution[s]” that the statute refers to are of the same general type. And the word “prosecution” must refer to a government’s criminal prosecution, which suggests that the word “investigation” may refer to a government’s criminal investigation. A similar line of reasoning suggests that the immediately following reference to “proceedings” also refers to criminal proceedings in particular, rather than to “proceedings” of any sort.

Furthermore, there would be an awkwardness about the statute’s use of the word “participation” to refer to a victim’s role in its own private investigation, and the word “attendance” to refer to a victim’s role as a party in noncriminal court proceedings. A victim opting to pursue a private investigation of an offense would be more naturally said to “provide for” or “conduct” the private investigation (in which he may, or may not, actively “participate”). And a victim who pursues civil or bankruptcy litigation does not merely “atten[d]” such other “proceedings related to the offense” but instead “participates” in them as a party. In contrast, there is no awkwardness, indeed it seems perfectly natural, to say that a victim “participat[es] in the investiga-

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tion” or “attend[s] . . . proceedings related to the offense” if the investigation at issue is a government’s criminal investigation, and if the proceedings at issue are criminal proceedings conducted by a government.

Moreover, to consider the statutory phrase as a whole strengthens these linguistic points considerably. The phrase lists three specific items that must be reimbursed, namely, lost income, child care, and transportation; and it then adds the words, “and other expenses.” §3663A(b)(4). Lost income, child care expenses, and transportation expenses are precisely the kind of expenses that a victim would be likely to incur when he or she (or, for a corporate victim like GE, its employees) misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a grand jury or attend a criminal trial. At the same time, the statute says nothing about the kinds of expenses a victim would often incur when private investigations or, say, bankruptcy proceedings are at issue, namely, the costs of hiring private investigators, attorneys, or accountants. Thus, if we look to *noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep, we find here both the presence of company that suggests limitation and the absence of company that suggests breadth. See, e.g., *Yates v. United States*, 574 U.S. 528, 543 (2015).

We add a practical fact: A broad reading would create significant administrative burdens. The statute provides for mandatory restitution, and the portion we construe is limited to “*necessary . . . other expenses.*” §3663A(b)(4) (emphasis added). The word “necessary” would, if the statute is broadly interpreted, invite disputes as to whether particular expenses “incurred during” participation in a private investigation or attendance at, say, a bankruptcy proceeding were in fact “necessary.” Such disputes may become burdensome in cases involving multimillion dollar investigation expenses for teams of lawyers and accountants. A district court

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might, for example, need to decide whether each witness interview and each set of documents reviewed was really “necessary” to the investigation. Similarly, the statute also limits restitution to expenses incurred only during “attendance at *proceedings related to the offense*,” *ibid.* (emphasis added), inviting disputes as to whether, say, a licensing proceeding, a human resources review, an in-house disciplinary proceeding, a job interview, a Consumer Product Safety Commission hearing, or a neighborhood watch meeting qualified as “proceedings” sufficiently “related to the offense” so as to be eligible for restitution.

To interpret the statute broadly is to invite controversy on those and other matters; our narrower construction avoids it. And one begins to doubt whether Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing—particularly once one realizes that few victims are likely to benefit because more than 90% of criminal restitution is never collected. See GAO, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 25 (GAO-18-203, 2018) (explaining that the Justice Department considers 91% of outstanding criminal restitution to be “uncollectible”).

There are, of course, contrary arguments—arguments favoring a broad interpretation. The Government points out, in particular, that our narrow interpretation will sometimes leave a victim without a restitution remedy sufficient to cover some expenses (say, those related to his private investigation) which he undoubtedly incurred as a result of the offense. Leaving the victim without that restitution remedy, the Government adds, runs contrary to the broad purpose of the Mandatory Victims Restitution Act, namely, “to ensure that victims of a crime receive full restitution.” *Dolan v. United States*, 560 U. S. 605, 612 (2010).

But a broad general purpose of this kind does not always require us to interpret a restitution statute in a way that favors an award. After all, Congress has enacted many dif-

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ferent restitution statutes with differing language, governing different circumstances. Some of those statutes specifically require restitution for the “full amount of the victim’s losses,” defined to include “any . . . losses suffered by the victim as a proximate result of the offense.” See 18 U. S. C. §§ 2248(b), 2259(b), 2264(b), 2327(b). The Mandatory Victims Restitution Act, however, contains no such language; it specifically lists the kinds of losses and expenses that it covers. Moreover, in at least one other statute Congress has expressly provided for restitution of “the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.” § 3663(b)(6). Again the Mandatory Victims Restitution Act has no similar provision. And given those differences between the Mandatory Victims Restitution Act and other restitution statutes, we conclude that the considerations we have mentioned, particularly those based on a reading of the statute as a whole, tip the balance in favor of our more limited interpretation.

We add that this interpretation does not leave a victim such as GE totally without a remedy for additional losses not covered by the Mandatory Victims Restitution Act. GE also brought a civil lawsuit against Lagos for the full extent of its losses, and obtained an over-\$30 million judgment against him. The Government says that GE has largely been unable to collect on that judgment, but there is no reason to think that collection efforts related to a criminal restitution award would prove any more successful.

The Government makes one additional argument. It points out that GE shared with the Government the information that its private investigation uncovered. And that fact, the Government says, should bring the expenses of that investigation within the terms of the statute even if the “investigation” referred to by the statute is a government’s criminal investigation. The short, conclusive answer to that claim, however, lies in the fact that the statute refers to “nec-

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essary child care, transportation, and other expenses incurred *during* participation in the investigation or prosecution of the offense.” §3663A(b)(4) (emphasis added). It does not refer to expenses incurred *before* the victim’s participation in a government’s investigation began. And the Government does not deny that it is those preparticipation expenses—the expenses of conducting GE’s investigation, not those of sharing the results from it—that are at issue here. We therefore need not address in this case whether this part of the Mandatory Victims Restitution Act would cover similar expenses incurred during a private investigation that was pursued at a government’s invitation or request. It is enough to hold that it does not cover the costs of a private investigation that the victim chooses on its own to conduct.

* * *

For the reasons stated, we conclude that the words “investigation” and “proceedings” in the Mandatory Victims Restitution Act refer to government investigations and criminal proceedings. Consequently Lagos is not obliged to pay the portion of the restitution award that he here challenges. We reverse the Court of Appeals’ judgment to the contrary, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

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COLLINS *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 16–1027. Argued January 9, 2018—Decided May 29, 2018

During the investigation of two traffic incidents involving an orange and black motorcycle with an extended frame, Officer David Rhodes learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. Officer Rhodes discovered photographs on Collins’ Facebook profile of an orange and black motorcycle parked in the driveway of a house, drove to the house, and parked on the street. From there, he could see what appeared to be the motorcycle under a white tarp parked in the same location as the motorcycle in the photograph. Without a search warrant, Officer Rhodes walked to the top of the driveway, removed the tarp, confirmed that the motorcycle was stolen by running the license plate and vehicle identification numbers, took a photograph of the uncovered motorcycle, replaced the tarp, and returned to his car to wait for Collins. When Collins returned, Officer Rhodes arrested him. The trial court denied Collins’ motion to suppress the evidence on the ground that Officer Rhodes violated the Fourth Amendment when he trespassed on the house’s curtilage to conduct a search, and Collins was convicted of receiving stolen property. The Virginia Court of Appeals affirmed. The State Supreme Court also affirmed, holding that the warrantless search was justified under the Fourth Amendment’s automobile exception.

Held: The automobile exception does not permit the warrantless entry of a home or its curtilage in order to search a vehicle therein. Pp. 591–601.

(a) This case arises at the intersection of two components of the Court’s Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home. In announcing each of the automobile exception’s justifications—*i. e.*, the “ready mobility of the automobile” and “the pervasive regulation of vehicles capable of traveling on the public highways,” *California v. Carney*, 471 U. S. 386, 390, 392—the Court emphasized that the rationales applied only to automobiles and not to houses, and therefore supported their different treatment as a constitutional matter. When these justifications are present, officers may search an automobile without a warrant so long as they have probable cause. Curtilage—“the area ‘immediately surrounding and associated with the home’”—is considered “‘part of the home itself for Fourth Amendment purposes.’” *Florida v. Jardines*, 569 U. S. 1, 6. Thus, when an officer physically intrudes on the curtilage to gather evidence, a Fourth Amendment

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search has occurred and is presumptively unreasonable absent a warrant. Pp. 591–593.

(b) As an initial matter, the part of the driveway where Collins’ motorcycle was parked and subsequently searched is curtilage. When Officer Rhodes searched the motorcycle, it was parked inside a partially enclosed top portion of the driveway that abuts the house. Just like the front porch, side garden, or area “outside the front window,” that enclosure constitutes “an area adjacent to the home and ‘to which the activity of home life extends.’” *Jardines*, 569 U. S., at 6, 7.

Because the scope of the automobile exception extends no further than the automobile itself, it did not justify Officer Rhodes’ invasion of the curtilage. Nothing in this Court’s case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Such an expansion would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and “‘untether’” the exception “‘from the justifications underlying’” it. *Riley v. California*, 573 U. S. 373, 386. This Court has similarly declined to expand the scope of other exceptions to the warrant requirement. Thus, just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant—see *Horton v. California*, 496 U. S. 128, 136–137—and just as an officer must have a lawful right of access in order to arrest a person in his home—see *Payton v. New York*, 445 U. S. 573, 587–590—so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. To allow otherwise would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Pp. 593–598.

(c) Contrary to Virginia’s claim, the automobile exception is not a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. *Scher v. United States*, 305 U. S. 251; *Pennsylvania v. Labron*, 518 U. S. 938, distinguished. Also unpersuasive is Virginia’s proposed bright-line rule for an automobile exception that would not permit warrantless entry only of the house itself or another fixed structure, *e. g.*, a garage, inside the curtilage. This Court has long been clear that curtilage is afforded constitutional protection, and creating a carveout for certain types of curtilage seems more likely to create confusion than does uniform application of the Court’s doctrine. Virginia’s rule also rests on a mistaken premise, for the ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant to search for information not otherwise accessible. Finally, Virginia’s rule automatically would grant constitutional rights to those persons with the

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financial means to afford residences with garages but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. Pp. 598–601.

292 Va. 486, 790 S. E. 2d 611, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 601. ALITO, J., filed a dissenting opinion, *post*, p. 609.

Matthew A. Fitzgerald argued the cause for petitioner. With him on the briefs were *Brian D. Schmalzbach*, *Travis C. Gunn*, and *Charles L. Weber, Jr.*

Trevor S. Cox, Acting Solicitor General of Virginia, argued the cause for respondent. With him on the brief were *Mark R. Herring*, Attorney General of Virginia, *Matthew R. McGuire*, Acting Deputy Solicitor General, and *Christopher P. Schandavel*, Assistant Attorney General.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not.

*Briefs of *amici curiae* urging reversal were filed for the American Motorcyclist Association by *William R. Peterson*; for the Cato Institute by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Paul W. Hughes*, *Michael B. Kimberly*, *Eugene R. Fidell*, *Ilya Shapiro*, and *Jay R. Schweikert*; for the Conservative Legal Defense and Education Fund et al. by *Herbert W. Titus*, *Robert J. Olson*, *William J. Olson*, *Jeremiah L. Morgan*, *Joseph W. Miller*, and *Michael Boos*; for Fourth Amendment Scholars by *Leslie A. Shoebottom*; for the Institute for Justice by *Anthony Sanders* and *Robert P. Frommer*; for the National Association of Criminal Defense Lawyers by *Douglas Hallward-Driemeier* and *Jonathan Hacker*; for the National Rifle Association Freedom Action Foundation by *David H. Thompson* and *Peter A. Patterson*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; and for The Rutherford Institute by *Anand Agneshwar*, *Paige Hester Sharpe*, and *John W. Whitehead*.

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I

Officer Matthew McCall of the Albemarle County Police Department in Virginia saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded Officer McCall's attempt to stop the motorcycle. A few weeks later, Officer David Rhodes of the same department saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes and concluded that the two incidents involved the same motorcyclist.

Upon further investigation, the officers learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. After discovering photographs on Collins' Facebook profile that featured an orange and black motorcycle parked at the top of the driveway of a house, Officer Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week.¹

From his parked position on the street, Officer Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photograph. Officer Rhodes, who did not have a warrant, exited his car and walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. In order "to investigate further," App. 80, Officer Rhodes pulled off the tarp, revealing a motorcycle that looked like the one from the speeding incident. He then ran a search of the license plate and vehicle identification numbers, which con-

¹ Virginia does not dispute that Collins has Fourth Amendment standing. See *Minnesota v. Olson*, 495 U. S. 91, 96–100 (1990).

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firmed that the motorcycle was stolen. After gathering this information, Officer Rhodes took a photograph of the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins.

Shortly thereafter, Collins returned home. Officer Rhodes walked up to the front door of the house and knocked. Collins answered, agreed to speak with Officer Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Officer Rhodes then arrested Collins.

Collins was indicted by a Virginia grand jury for receiving stolen property. He filed a pretrial motion to suppress the evidence that Officer Rhodes had obtained as a result of the warrantless search of the motorcycle. Collins argued that Officer Rhodes had trespassed on the curtilage of the house to conduct an investigation in violation of the Fourth Amendment. The trial court denied the motion and Collins was convicted.

The Court of Appeals of Virginia affirmed. It assumed that the motorcycle was parked in the curtilage of the home and held that Officer Rhodes had probable cause to believe that the motorcycle under the tarp was the same motorcycle that had evaded him in the past. It further concluded that Officer Rhodes' actions were lawful under the Fourth Amendment even absent a warrant because "numerous exigencies justified both his entry onto the property and his moving the tarp to view the motorcycle and record its identification number." 65 Va. App. 37, 46, 773 S. E. 2d 618, 623 (2015).

The Supreme Court of Virginia affirmed on different reasoning. It explained that the case was most properly resolved with reference to the Fourth Amendment's automobile exception. 292 Va. 486, 496–501, 790 S. E. 2d 611, 616–618 (2016). Under that framework, it held that Officer Rhodes had probable cause to believe that the motorcycle was contraband, and that the warrantless search therefore was justified. *Id.*, at 498–499, 790 S. E. 2d, at 617.

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We granted certiorari, 582 U.S. 966 (2017), and now reverse.

II

The Fourth Amendment provides in relevant part that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” This case arises at the intersection of two components of the Court’s Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

A

1

The Court has held that the search of an automobile can be reasonable without a warrant. The Court first articulated the so-called automobile exception in *Carroll v. United States*, 267 U.S. 132 (1925). In that case, law enforcement officers had probable cause to believe that a car they observed traveling on the road contained illegal liquor. They stopped and searched the car, discovered and seized the illegal liquor, and arrested the occupants. *Id.*, at 134–136. The Court upheld the warrantless search and seizure, explaining that a “necessary difference” exists between searching “a store, dwelling house or other structure” and searching “a ship, motor boat, wagon or automobile” because a “vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” *Id.*, at 153.

The “ready mobility” of vehicles served as the core justification for the automobile exception for many years. *California v. Carney*, 471 U.S. 386, 390 (1985) (citing, *e. g.*, *Cooper v. California*, 386 U.S. 58, 59 (1967); *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970)). Later cases then introduced an additional rationale based on “the pervasive regulation of vehicles capable of traveling on the public highways.” *Carney*, 471 U.S., at 392. As the Court explained in *South Dakota v. Opperman*, 428 U.S. 364 (1976):

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“Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.” *Id.*, at 368.

In announcing each of these two justifications, the Court took care to emphasize that the rationales applied only to automobiles and not to houses, and therefore supported “treating automobiles differently from houses” as a constitutional matter. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

When these justifications for the automobile exception “come into play,” officers may search an automobile without having obtained a warrant so long as they have probable cause to do so. *Carney*, 471 U.S., at 392–393.

2

Like the automobile exception, the Fourth Amendment’s protection of curtilage has long been black letter law. “[W]hen it comes to the Fourth Amendment, the home is first among equals.” *Florida v. Jardines*, 569 U.S. 1, 6 (2013). “At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” *Ibid.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage—“the area ‘immediately surrounding and associated with the home’”—to be “‘part of the home itself for Fourth Amendment purposes.’” *Jardines*, 569 U.S., at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). “The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to

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the home, both physically and psychologically, where privacy expectations are most heightened.” *California v. Ciraolo*, 476 U. S. 207, 212–213 (1986).

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, 569 U. S., at 11. Such conduct thus is presumptively unreasonable absent a warrant.

B

1

With this background in mind, we turn to the application of these doctrines in the instant case. As an initial matter, we decide whether the part of the driveway where Collins’ motorcycle was parked and subsequently searched is curtilage.

According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.

The “‘conception defining the curtilage’ is . . . familiar enough that it is ‘easily understood from our daily experience.’” *Jardines*, 569 U. S., at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12). Just like the front porch, side garden, or area “outside the front window,” *Jardines*, 569 U. S., at 6, the driveway enclosure where Officer Rhodes searched the mo-

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motorcycle constitutes “an area adjacent to the home and ‘to which the activity of home life extends,’” and so is properly considered curtilage, *id.*, at 7 (quoting *Oliver*, 466 U. S., at 182, n. 12).

2

In physically intruding on the curtilage of Collins’ home to search the motorcycle, Officer Rhodes not only invaded Collins’ Fourth Amendment interest in the item searched, *i. e.*, the motorcycle, but also invaded Collins’ Fourth Amendment interest in the curtilage of his home. The question before the Court is whether the automobile exception justifies the invasion of the curtilage.² The answer is no.

Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

The reason is that the scope of the automobile exception extends no further than the automobile itself. See, *e. g.*, *Pennsylvania v. Labron*, 518 U. S. 938, 940 (1996) (*per curiam*) (explaining that the automobile exception “permits police to search the vehicle”); *Wyoming v. Houghton*, 526 U. S. 295, 300 (1999) (“[T]he Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile”). Virginia asks the Court to expand the scope of the automobile exception to

² Helpfully, the parties have simplified matters somewhat by each making a concession. Petitioner concedes “for purposes of this appeal” that Officer Rhodes had probable cause to believe that the motorcycle was the one that had eluded him, Brief for Petitioner 5, n. 3, and Virginia concedes that “Officer Rhodes searched the motorcycle,” Brief for Respondent 12.

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permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and “‘untether’” the automobile exception “‘from the justifications underlying’” it. *Riley v. California*, 573 U. S. 373, 386 (2014) (quoting *Arizona v. Gant*, 556 U. S. 332, 343 (2009)).

The Court already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home. The reasoning behind those decisions applies equally well in this context. For instance, under the plain-view doctrine, “any valid warrantless seizure of incriminating evidence” requires that the officer “have a lawful right of access to the object itself.” *Horton v. California*, 496 U. S. 128, 136–137 (1990); see also *id.*, at 137, n. 7 (“‘[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure’”); *G. M. Leasing Corp. v. United States*, 429 U. S. 338, 354 (1977) (“It is one thing to seize without a warrant property resting in an open area . . . , and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer”). A plain-view seizure thus cannot be justified if it is effectuated “by unlawful trespass.” *Soldal v. Cook County*, 506 U. S. 56, 66 (1992). Had Officer Rhodes seen illegal drugs through the window of Collins’ house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant.

Similarly, it is a “settled rule that warrantless arrests in public places are valid,” but, absent another exception such

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as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Payton v. New York*, 445 U. S. 573, 587–590 (1980). That is because being “‘arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.’” *Id.*, at 588–589 (quoting *United States v. Reed*, 572 F. 2d 412, 423 (CA2 1978)). Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.

Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person’s separate and substantial Fourth Amendment interest in his home and curtilage.

As noted, the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house. See Part II–A–1, *supra*. The rationales thus take account only of the balance between the intrusion on an individual’s Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle; they do not account for the distinct privacy interest in one’s home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and

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transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.³

³The dissent concedes that “the degree of the intrusion on privacy” is relevant in determining whether a warrant is required to search a motor vehicle “located on private property.” *Post*, at 614 (opinion of ALITO, J.). Yet it puzzlingly asserts that the “privacy interests at stake” here are no greater than when a motor vehicle is searched “on public streets.” *Post*, at 612. “An ordinary person of common sense,” *post*, at 611, however, clearly would understand that the privacy interests at stake in one’s private residential property are far greater than on a public street. Contrary to the dissent’s suggestion, it is of no significance that the motorcycle was parked just a “short walk up the driveway.” *Post*, at 610–611. The driveway was private, not public, property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture, in an area “intimately linked to the home, . . . where privacy expectations are most heightened.” *California v. Ciraolo*, 476 U. S. 207, 213 (1986). Nor does it matter that Officer Rhodes “did not damage any property,” *post*, at 611, for an officer’s care in conducting a search does not change the character of the place being searched. And, as we explain, see *infra*, at 600–601, it is not dispositive that Officer Rhodes did not “observe anything along the way” to the motorcycle “that he could not have seen from the street,” *post*, at 611. Law enforcement officers need not “shield their eyes when passing by a home on public thoroughfares,” *Ciraolo*, 476 U. S., at 213, but the ability visually to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it. See *Florida v. Jardines*, 569 U. S. 1, 7–8 (2013). It certainly does not permit an officer physically to intrude on curtilage, remove a tarp to reveal license plate and vehicle identification numbers, and use those numbers to confirm that the defendant committed a crime.

The dissent also mistakenly relies on a law enacted by the First Congress and mentioned in *Carroll v. United States*, 267 U. S. 132, 150–151 (1925), that authorized the warrantless search of vessels. *Post*, at 613, n. 3. The dissent thinks it implicit in that statute that “officers could cross private property such as wharves in order to reach and board those vessels.” *Ibid.* Even if it were so that a police officer could have entered a private wharf to search a vessel, that would not prove he could enter the curtilage of a home to do so. To the contrary, whereas the statute relied upon in *Carroll* authorized warrantless searches of vessels, it ex-

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Given the centrality of the Fourth Amendment interest in the home and its curtilage and the disconnect between that interest and the justifications behind the automobile exception, we decline Virginia's invitation to extend the automobile exception to permit a warrantless intrusion on a home or its curtilage.

III

A

Virginia argues that this Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. Specifically, Virginia points to two decisions that it contends resolve this case in its favor. Neither is dispositive or persuasive.

First, Virginia invokes *Scher v. United States*, 305 U. S. 251 (1938). In that case, federal officers received a confidential tip that a particular car would be transporting bootleg liquor at a specified time and place. The officers identified and followed the car until the driver "turned into a garage a few feet back of his residence and within the curtilage." *Id.*, at 253. As the driver exited his car, an officer approached and stated that he had been informed that the car was carrying contraband. The driver acknowledged that there was liquor in the trunk, and the officer proceeded to open the trunk, find the liquor, arrest the driver, and seize both the car and the liquor. *Id.*, at 253–254. Although the officer did not have a search warrant, the Court upheld the officer's actions as reasonable. *Id.*, at 255.

Scher is inapposite. Whereas Collins' motorcycle was parked and unattended when Officer Rhodes intruded on the curtilage to search it, the officers in *Scher* first encountered the vehicle when it was being driven on public streets, approached the curtilage of the home only when the driver

pressly required warrants to search houses. See 267 U. S., at 150–157; Act of July 31, 1789, § 24, 1 Stat. 43. Here, Officer Rhodes did not invade a private wharf to undertake a search; he invaded the curtilage of a home.

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turned into the garage, and searched the vehicle only after the driver admitted that it contained contraband. *Scher* by no means established a general rule that the automobile exception permits officers to enter a home or its curtilage absent a warrant. The Court's brief analysis referenced *Carroll*, but only in the context of observing that, consistent with that case, the "officers properly could have stopped" and searched the car "just before [petitioner] entered the garage," a proposition the petitioner did "not seriously controvert[t]." *Scher*, 305 U. S., at 254–255. The Court then explained that the officers did not lose their ability to stop and search the car when it entered "the open garage closely followed by the observing officer" because "[n]o search was made of the garage." *Id.*, at 255. It emphasized that "[e]xamination of the automobile accompanied an arrest, without objection and upon admission of probable guilt," and cited two search-incident-to-arrest cases. *Ibid.* (citing *Agnello v. United States*, 269 U. S. 20, 30 (1925); *Wisniewski v. United States*, 47 F. 2d 825, 826 (CA6 1931)). *Scher*'s reasoning thus was both case specific and imprecise, sounding in multiple doctrines, particularly, and perhaps most appropriately, hot pursuit. The decision is best regarded as a factbound one, and it certainly does not control this case.

Second, Virginia points to *Labron*, 518 U. S. 938, where the Court upheld under the automobile exception the warrantless search of an individual's pickup truck that was parked in the driveway of his father-in-law's farmhouse. *Id.*, at 939–940; *Commonwealth v. Kilgore*, 544 Pa. 439, 444, 677 A. 2d 311, 313 (1995). But *Labron* provides scant support for Virginia's position. Unlike in this case, there was no indication that the individual who owned the truck in *Labron* had any Fourth Amendment interest in the farmhouse or its driveway, nor was there a determination that the driveway was curtilage.

B

Alternatively, Virginia urges the Court to adopt a more limited rule regarding the intersection of the automobile ex-

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ception and the protection afforded to curtilage. Virginia would prefer that the Court draw a bright line and hold that the automobile exception does not permit warrantless entry into “the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage.” Brief for Respondent 46. Requiring officers to make “case-by-case curtilage determinations,” Virginia reasons, unnecessarily complicates matters and “raises the potential for confusion and . . . error.” *Id.*, at 46–47 (internal quotation marks omitted).

The Court, though, has long been clear that curtilage is afforded constitutional protection. See *Oliver*, 466 U. S., at 180. As a result, officers regularly assess whether an area is curtilage before executing a search. Virginia provides no reason to conclude that this practice has proved to be unadministrable, either generally or in this context. Moreover, creating a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others, seems far more likely to create confusion than does uniform application of the Court’s doctrine.

In addition, Virginia’s proposed rule rests on a mistaken premise about the constitutional significance of visibility. The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible. Cf. *Ciraolo*, 476 U. S., at 213–214 (holding that “physically nonintrusive” warrantless aerial observation of the curtilage of a home did not violate the Fourth Amendment, and could form the basis for probable cause to support a warrant to search the curtilage). So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage.

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Finally, Virginia’s proposed bright-line rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. See *United States v. Ross*, 456 U. S. 798, 822 (1982) (“[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion”).

IV

For the foregoing reasons, we conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein. We leave for resolution on remand whether Officer Rhodes’ warrantless intrusion on the curtilage of Collins’ house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement. The judgment of the Supreme Court of Virginia is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court’s opinion because it correctly resolves the Fourth Amendment question in this case. Notably, the only reason that Collins asked us to review this question is because, if he can prove a violation of the Fourth Amendment, our precedents require the Virginia courts to apply the exclusionary rule and potentially suppress the incriminating evidence against him. I write separately because I have serious doubts about this Court’s authority to impose that rule on the States. The assumption that state courts must apply the federal exclusionary rule is legally dubious, and many jurists have complained that it encourages “distort[ions]” in

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substantive Fourth Amendment law, *Rakas v. Illinois*, 439 U. S. 128, 157 (1978) (White, J., dissenting); see also *Coolidge v. New Hampshire*, 403 U. S. 443, 490 (1971) (Harlan, J., concurring); Calabresi, The Exclusionary Rule, 26 Harv. J. L. & Pub. Pol’y 111, 112 (2003).

The Fourth Amendment, as relevant here, protects the people from “unreasonable searches” of “their . . . houses.” As a general rule, warrantless searches of the curtilage violate this command. At the founding, curtilage was considered part of the “hous[e]” itself. See 4 W. Blackstone, Commentaries on the Laws of England 225 (1769) (“[T]he capital house protects and privileges all its branches and appurtenants, if within the curtilage”). And except in circumstances not present here, house searches required a specific warrant. See W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, p. 743 (2009) (Cuddihy); Donahue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1237–1240 (2016); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 643–646 (1999). A warrant was required even if the house was being searched for stolen goods or contraband—objects that, unlike cars, are not protected by the Fourth Amendment at all. *Id.*, at 647–650; see also *Carroll v. United States*, 267 U. S. 132, 150–152 (1925) (Taft, C. J.) (discussing founding-era evidence that a search warrant was required when stolen goods and contraband were “concealed in a dwelling house” but not when they were “in course of transportation and concealed in a movable vessel”). Accordingly, the police acted “unreasonabl[y]” when they searched the curtilage of Collins’ house without a warrant.¹

While those who ratified the Fourth and Fourteenth Amendments would agree that a constitutional violation oc-

¹ Collins did not live at the house; he merely stayed there with his girlfriend several times a week. But Virginia does not contest Collins’ assertion that the house is his, so I agree with the Court that Virginia has forfeited any argument to the contrary. See *ante*, at 589, n. 1; *United States v. Jones*, 565 U. S. 400, 404, n. 2 (2012).

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curred here, they would be deeply confused about the posture of this case and the remedy that Collins is seeking. Historically, the only remedies for unconstitutional searches and seizures were “tort suits” and “self-help.” *Utah v. Strieff*, 579 U. S. 232, 237 (2016). The exclusionary rule—the practice of deterring illegal searches and seizures by suppressing evidence at criminal trials—did not exist. No such rule existed in “Roman Law, Napoleonic Law or even the Common Law of England.” Burger, Who Will Watch the Watchman? 14 Am. U. L. Rev. 1 (1964). And this Court did not adopt the federal exclusionary rule until the 20th century. See *Weeks v. United States*, 232 U. S. 383 (1914). As late as 1949, nearly two-thirds of the States did not have an exclusionary rule. See *Wolf v. Colorado*, 338 U. S. 25, 29 (1949). Those States, as then-Judge Cardozo famously explained, did not understand the logic of a rule that allowed “[t]he criminal . . . to go free because the constable has blundered.” *People v. Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

The Founders would not have understood the logic of the exclusionary rule either. Historically, if evidence was relevant and reliable, its admissibility did not “depend upon the lawfulness or unlawfulness of the mode, by which it [was] obtained.” *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 843 (No. 15,551) (CC Mass. 1822) (Story, J.); accord, 1 S. Greenleaf, *Evidence* § 254a, pp. 825–826 (14th ed. 1883) (“[T]hat . . . subjects of evidence may have been . . . unlawfully obtained . . . is no valid objection to their admissibility if they are pertinent to the issue”); 4 J. Wigmore, *Evidence* § 2183, p. 626 (2d ed. 1923) (“[I]t has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence” (emphasis deleted)). And the common law sometimes reflected the inverse of the exclusionary rule: The fact that someone turned out to be guilty could *justify* an illegal seizure. See *Gelston v. Hoyt*, 3 Wheat. 246, 310 (1818) (Story, J.) (“At common law, any per-

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son may at his peril, seize for a forfeiture to the government; and if the government adopt his seizure, and the property is condemned, he will be completely justified”); 2 W. Hawkins, Pleas of the Crown, ch. 12, § 18, p. 77 (1721) (“And where a Man arrests another, who is actually guilty of the Crime for which he is arrested, . . . he needs not in justifying it, set forth any special Cause of his Suspicion”).

Despite this history, the Court concluded in *Mapp v. Ohio*, 367 U. S. 643 (1961), that the States must apply the federal exclusionary rule in their own courts. *Id.*, at 655.² *Mapp* suggested that the exclusionary rule was required by the Constitution itself. See, e. g., *id.*, at 657 (“[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments”); *id.*, at 655 (“[E]vidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”); *id.*, at 655–656 (“[I]t was . . . constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon”).³ But that suggestion could not withstand

²Twelve years before *Mapp*, the Court declined to apply the federal exclusionary rule to the States. See *Wolf v. Colorado*, 338 U. S. 25 (1949). *Wolf* denied that the Constitution requires the exclusionary rule, since “most of the English-speaking world” does not apply that rule and alternatives such as civil suits and internal police discipline do not “fal[l] below the minimal standards assured by the Due Process Clause.” *Id.*, at 29, 31. In *Mapp*, the Court overruled *Wolf* and applied the exclusionary rule to the States, even though no party had briefed or argued that question. See 367 U. S., at 672–674, and nn. 4–6 (Harlan, J., dissenting); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule, 83 Colum. L. Rev. 1365, 1368 (1983).

³Justice Black, the essential fifth vote in *Mapp*, did not agree that the Fourth Amendment contains an exclusionary rule. See 367 U. S., at 661–662 (concurring opinion) (“[T]he Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred”). But he concluded that, when the police seize private papers, suppression is required by a combination of the Fourth and Fifth Amendments. See *id.*, at 662–666.

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even the slightest scrutiny. The exclusionary rule appears nowhere in the Constitution, postdates the founding by more than a century, and contradicts several longstanding principles of the common law. See *supra*, at 602–604; Cuddihy 759–760; Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786 (1994); Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1030–1031 (1974).

Recognizing this, the Court has since rejected *Mapp*’s “[e]xpansive dicta” and clarified that the exclusionary rule is not required by the Constitution. *Davis v. United States*, 564 U. S. 229, 237 (2011) (quoting *Hudson v. Michigan*, 547 U. S. 586, 591 (2006)). Suppression, this Court has explained, is not “a personal constitutional right.” *United States v. Calandra*, 414 U. S. 338, 348 (1974); accord, *Stone v. Powell*, 428 U. S. 465, 486 (1976). The Fourth Amendment “says nothing about suppressing evidence,” *Davis, supra*, at 236, and a prosecutor’s “use of fruits of a past unlawful search or seizure ‘work[s] no new Fourth Amendment wrong,’” *United States v. Leon*, 468 U. S. 897, 906 (1984) (quoting *Calandra, supra*, at 354).⁴ Instead, the exclusionary rule is a “judicially created” doctrine that is “prudential rather than constitutionally mandated.” *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U. S. 357, 363 (1998); accord, *Herring v. United States*, 555 U. S. 135, 139 (2009);

⁴ The exclusionary rule is not required by the Due Process Clause either. Given its nonexistent historical foundation, the exclusionary rule cannot be a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors.” *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). And the rule “has ‘no bearing on . . . the fairness of the trial.’” *Desist v. United States*, 394 U. S. 244, 254, n. 24 (1969). If anything, the exclusionary rule itself “‘offends basic concepts of the criminal justice system’” and exacts a “‘costly toll upon truth-seeking.’” *Herring v. United States*, 555 U. S. 135, 141 (2009). “The [excluded] evidence is likely to be the most reliable that could possibly be obtained [and thus] exclusion rather than admission creates the danger of a verdict erroneous on the true facts.” H. Friendly, *Benchmarks* 260 (1967).

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Arizona v. Evans, 514 U.S. 1, 10 (1995); *United States v. Janis*, 428 U.S. 433, 459–460 (1976).⁵

Although the exclusionary rule is not part of the Constitution, this Court has continued to describe it as “federal law” and assume that it applies to the States. *Evans, supra*; *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984). Yet the Court has never attempted to justify this assumption. If the exclusionary rule is federal law, but is not grounded in the Constitution or a federal statute, then it must be federal common law. See Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 10 (1975). As federal common law, however, the exclusionary rule cannot bind the States.

Federal law trumps state law only by virtue of the Supremacy Clause, which makes the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . the supreme Law of the Land,” Art. VI, cl. 2. When the Supremacy Clause refers to “[t]he Laws of the United States . . . made in Pursuance [of the Constitution],” it means federal statutes, not federal common law. Ramsey, The Supremacy Clause, Original Meaning, and Modern Law, 74 Ohio St. L. J. 559, 572–599 (2013) (Ramsey); Clark, Separation of Powers as a Safeguard of Federalism, 79 Texas L. Rev. 1321, 1334–1336, 1338–1367 (2001) (Clark); see also *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C. J.) (“The appropriate application of that part of

⁵These statements cannot be dismissed as mere dicta. Cf. *Dickerson v. United States*, 530 U.S. 428, 438–441, and n. 2 (2000) (constitutionalizing the rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), despite earlier precedents to the contrary). The nonconstitutional status of the exclusionary rule is why this Court held in *Stone v. Powell*, 428 U.S. 465, 482–495 (1976), that violations are not cognizable on federal habeas review. Cf. *Dickerson, supra*, at 439, n. 3. And the nonconstitutional status of the rule is why this Court has created more than a dozen exceptions to it, which apply even when the Fourth Amendment is concededly violated. See *United States v. Weaver*, 808 F.3d 26, 49 (CA DC 2015) (Henderson, J., dissenting) (collecting cases); cf. *Dickerson, supra*, at 441.

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the clause which confers . . . supremacy on laws . . . is to . . . the laws of Congress, made in pursuance of the constitution”); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 500 (1954) (“[T]he supremacy clause is limited to those ‘Laws’ of the United States which are passed by Congress pursuant to the Constitution”). By referencing laws “made in Pursuance” of the Constitution, the Supremacy Clause incorporates the requirements of Article I, which force Congress to stay within its enumerated powers, § 8, and follow the cumbersome procedures for enacting federal legislation, § 7. See *Wyeth v. Levine*, 555 U. S. 555, 585–587 (2009) (THOMAS, J., concurring in judgment); 3 J. Story, *Commentaries on the Constitution of the United States* § 1831, pp. 693–694 (1833); Clark 1334. Those procedures—especially the requirement that bills pass the Senate, where the States are represented equally and Senators were originally elected by state legislatures—safeguard federalism by making federal legislation more difficult to pass and more responsive to state interests. See Ramsey 565; Clark 1342–1343. Federal common law bypasses these procedures and would not have been considered the kind of “la[w]” that can bind the States under the Supremacy Clause. See Ramsey 564–565, 568, 574, 581; Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1275 (1985).

True, this Court, without citing the Supremacy Clause, has recognized several “enclaves of federal judge-made law which bind the States.” *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 426 (1964); see, e. g., *id.*, at 427–428 (foreign affairs); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938) (disputes between States); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245 (1942) (admiralty); *Clearfield Trust Co. v. United States*, 318 U. S. 363, 366 (1943) (certain rights and obligations of the United States); *Textile Workers v. Lincoln Mills of Ala.*, 353 U. S. 448, 456–457 (1957) (aspects of federal labor law). To the extent these enclaves are delegations of lawmaking au-

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thority from the Constitution or a federal statute, they do not conflict with the original meaning of the Supremacy Clause (though they might be illegitimate for other reasons). See Ramsey 568–569; Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100, 131–132 (1985). To the extent these enclaves are not rooted in the Constitution or a statute, their preemptive force is questionable. But that is why this Court has “limited” them to a “few” “narrow areas” where “the authority and duties of the United States as sovereign are intimately involved” or where “the interstate or international nature of the controversy makes it inappropriate for state law to control.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 640–641 (1981) (quoting *Wheeldin v. Wheeler*, 373 U. S. 647, 651 (1963)). Outside these narrow enclaves, the general rule is that “[t]here is no federal general common law” and “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78 (1938).

These precedents do not support requiring the States to apply the exclusionary rule. As explained, the exclusionary rule is not rooted in the Constitution or a federal statute. This Court has repeatedly rejected the idea that the rule is in the Fourth and Fourteenth Amendments, expressly or implicitly. See *Davis*, 564 U. S., at 236; *Leon*, 468 U. S., at 905–906; cf. *Ziglar v. Abbasi*, 582 U. S. 120, 135 (2017) (explaining that reading implied remedies into the Constitution is “a ‘disfavored’ judicial activity”). And the exclusionary rule does not implicate any of the special enclaves of federal common law. It does not govern the sovereign duties of the United States or disputes of an interstate or international character. Instead, the rule governs the methods that state police officers use to solve crime and the procedures that state courts use at criminal trials—subjects that the Federal Government generally has no power to regulate. See

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United States v. Morrison, 529 U. S. 598, 618 (2000) (explaining that “[t]he regulation” and “vindication” of intrastate crime “has always been the province of the States”); *Smith v. Phillips*, 455 U. S. 209, 221 (1982) (“Federal courts hold no supervisory authority over state judicial proceedings”). These are not areas where federal common law can bind the States.⁶

* * *

In sum, I am skeptical of this Court’s authority to impose the exclusionary rule on the States. We have not yet revisited that question in light of our modern precedents, which reject *Mapp*’s essential premise that the exclusionary rule is required by the Constitution. We should do so.

JUSTICE ALITO, dissenting.

The Fourth Amendment prohibits “unreasonable” searches. What the police did in this case was entirely reasonable. The Court’s decision is not.

On the day in question, Officer David Rhodes was standing at the curb of a house where petitioner, Ryan Austin Collins, stayed a couple of nights a week with his girlfriend. From his vantage point on the street, Rhodes saw an object covered with a tarp in the driveway, just a car’s length or two from the curb. It is undisputed that Rhodes had probable cause to believe that the object under the tarp was a motor-

⁶Of course, the States are free to adopt their own exclusionary rules as a matter of state law. But nothing in the Federal Constitution requires them to do so. Even assuming the Constitution requires particular state-law remedies for federal constitutional violations, it does not require the exclusionary rule. The “sole purpose” of the exclusionary rule is “to deter future Fourth Amendment violations”; it does not “‘redress’” or “‘repair’” past ones. *Davis v. United States*, 564 U. S. 229, 236–237 (2011). This Court has noted the lack of evidence supporting its deterrent effect, see *United States v. Janis*, 428 U. S. 433, 450, n. 22 (1976), and this Court has recognized the effectiveness of alternative deterrents such as state tort law, state criminal law, internal police discipline, and suits under 42 U. S. C. § 1983, see *Hudson v. Michigan*, 547 U. S. 586, 597–599 (2006).

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cycle that had been involved a few months earlier in a dangerous highway chase, eluding the police at speeds in excess of 140 mph. See Tr. of Oral Arg. 22; App. to Pet. for Cert. 67. Rhodes also had probable cause to believe that petitioner had been operating the motorcycle¹ and that a search of the motorcycle would provide evidence that the motorcycle had been stolen.²

If the motorcycle had been parked at the curb, instead of in the driveway, it is undisputed that Rhodes could have searched it without obtaining a warrant. See Tr. of Oral Arg. 9; Reply Brief 1. Nearly a century ago, this Court held that officers with probable cause may search a motor vehicle without obtaining a warrant. *Carroll v. United States*, 267 U. S. 132, 153, 155–156 (1925). The principal rationale for this so-called automobile or motor-vehicle exception to the warrant requirement is the risk that the vehicle will be moved during the time it takes to obtain a warrant. *Id.*, at 153; *California v. Carney*, 471 U. S. 386, 390–391 (1985). We have also observed that the owner of an automobile has a diminished expectation of privacy in its contents. *Id.*, at 391–393.

So why does the Court come to the conclusion that Officer Rhodes needed a warrant in this case? Because, in order to reach the motorcycle, he had to walk 30 feet or so up the driveway of the house rented by petitioner’s girlfriend, and by doing that, Rhodes invaded the home’s “curtilage.” *Ante*, at 594–595. The Court does not dispute that the motorcycle, when parked in the driveway, was just as mobile as it would have been had it been parked at the curb. Nor does the Court claim that Officer Rhodes’s short walk up the

¹Petitioner had a photo on his Facebook profile of a motorcycle that resembled the unusual motorcycle involved in the prior highway chase. See *ante*, at 589 (majority opinion).

²Rhodes suspected the motorcycle was stolen based on a conversation he had with the man who had sold the motorcycle to petitioner. See App. 57–58.

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driveway did petitioner or his girlfriend any harm. Rhodes did not damage any property or observe anything along the way that he could not have seen from the street. But, the Court insists, Rhodes could not enter the driveway without a warrant, and therefore his search of the motorcycle was unreasonable and the evidence obtained in that search must be suppressed.

An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, "the law is a ass—a idiot." C. Dickens, *Oliver Twist* 277 (1867).

The Fourth Amendment is neither an "ass" nor an "idiot." Its hallmark is reasonableness, and the Court's strikingly unreasonable decision is based on a misunderstanding of Fourth Amendment basics.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects." A "house," for Fourth Amendment purposes, is not limited to the structure in which a person lives, but by the same token, it also does not include all the real property surrounding a dwelling. See, e. g., *Florida v. Jardines*, 569 U. S. 1, 6 (2013); *United States v. Dunn*, 480 U. S. 294, 300–301 (1987). Instead, a person's "house" encompasses the dwelling and a circumscribed area of surrounding land that is given the name "curtilage." *Oliver v. United States*, 466 U. S. 170, 180 (1984). Land outside the curtilage is called an "open field," and a search conducted in that area is not considered a search of a "house" and is therefore not governed by the Fourth Amendment. *Ibid.* Ascertaining the boundaries of the curtilage thus determines only whether a search is governed by the Fourth Amendment. The concept plays no other role in Fourth Amendment analysis.

In this case, there is no dispute that the search of the motorcycle was governed by the Fourth Amendment, and

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therefore whether or not it occurred within the curtilage is not of any direct importance. The question before us is not whether there was a Fourth Amendment search but whether the search was reasonable. And the only possible argument as to why it might not be reasonable concerns the need for a warrant. For nearly a century, however, it has been well established that officers do not need a warrant to search a motor vehicle on public streets so long as they have probable cause. *Carroll*, *supra*, at 153, 156; see also, e. g., *Pennsylvania v. Labron*, 518 U. S. 938, 940 (1996) (*per curiam*); *Carney*, *supra*, at 394; *South Dakota v. Opperman*, 428 U. S. 364, 367–368 (1976); *Chambers v. Maroney*, 399 U. S. 42, 50–51 (1970). Thus, the issue here is whether there is any good reason why this same rule should not apply when the vehicle is parked in plain view in a driveway just a few feet from the street.

In considering that question, we should ask whether the reasons for the “automobile exception” are any less valid in this new situation. Is the vehicle parked in the driveway any less mobile? Are any greater privacy interests at stake? If the answer to those questions is “no,” then the automobile exception should apply. And here, the answer to each question is emphatically “no.” The tarp-covered motorcycle parked in the driveway could have been uncovered and ridden away in a matter of seconds. And Officer Rhodes’s brief walk up the driveway impaired no real privacy interests.

In this case, the Court uses the curtilage concept in a way that is contrary to our decisions regarding other, exigency-based exceptions to the warrant requirement. Take, for example, the “emergency aid” exception. See *Brigham City v. Stuart*, 547 U. S. 398 (2006). When officers reasonably believe that a person inside a dwelling has urgent need of assistance, they may cross the curtilage and enter the building without first obtaining a warrant. *Id.*, at 403–404. The same is true when officers reasonably believe that a person in a dwelling is destroying evidence. See *Kentucky v. King*,

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563 U.S. 452, 460 (2011). In both of those situations, we ask whether “‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.” *Brigham City*, *supra*, at 403 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). We have not held that the need to cross the curtilage independently necessitates a warrant, and there is no good reason to apply a different rule here.³

It is no answer to this argument that the emergency-aid and destruction-of-evidence exceptions require an inquiry into the practicality of obtaining a warrant in the particular circumstances of the case. Our precedents firmly establish that the motor-vehicle exception, unlike these other exceptions, “has no separate exigency requirement.” *Maryland v. Dyson*, 527 U.S. 465, 466–467 (1999) (*per curiam*). It is settled that the mobility of a motor vehicle categorically obviates any need to engage in such a case-specific inquiry. Requiring such an inquiry here would mark a substantial alteration of settled Fourth Amendment law.

³Indeed, I believe that the First Congress implicitly made the same judgment in enacting the statute on which *Carroll v. United States*, 267 U.S. 132 (1925), relied when the motor-vehicle exception was first recognized. Since the First Congress sent the Bill of Rights to the States for ratification, we have often looked to laws enacted by that Congress as evidence of the original understanding of the meaning of those Amendments. See, *e.g.*, *id.*, at 150–151; *Town of Greece v. Galloway*, 572 U.S. 565, 575–576 (2014); *United States v. Villamonte-Marquez*, 462 U.S. 579, 585–586 (1983); *United States v. Ramsey*, 431 U.S. 606, 616–617 (1977). *Carroll* itself noted that the First Congress enacted a law authorizing officers to search vessels without a warrant. 267 U.S., at 150–151. Although this statute did not expressly state that these officers could cross private property such as wharves in order to reach and board those vessels, I think that was implicit. Otherwise, the statute would very often have been ineffective. And when Congress later enacted similar laws, it made this authorization express. See, *e.g.*, An Act Further to Prevent Smuggling and for Other Purposes, §5, 14 Stat. 179. For this reason, Officer Rhodes’s conduct in this case is consistent with the original understanding of the Fourth Amendment, as explicated in *Carroll*.

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This does not mean, however, that a warrant is never needed when officers have probable cause to search a motor vehicle, no matter where the vehicle is located. While a case-specific inquiry regarding *exigency* would be inconsistent with the rationale of the motor-vehicle exception, a case-specific inquiry regarding *the degree of intrusion on privacy* is entirely appropriate when the motor vehicle to be searched is located on private property. After all, the ultimate inquiry under the Fourth Amendment is whether a search is reasonable, and that inquiry often turns on the degree of the intrusion on privacy. Thus, contrary to the opinion of the Court, an affirmance in this case would not mean that officers could perform a warrantless search if a motorcycle were located inside a house. See *ante*, at 594. In that situation, the intrusion on privacy would be far greater than in the present case, where the real effect, if any, is negligible.

I would affirm the decision below and therefore respectfully dissent.

Page Proof Pending Publication

Per Curiam

CITY OF HAYS, KANSAS *v.* VOGTCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

No. 16–1495. Argued February 20, 2018—Decided May 29, 2018
Certiorari dismissed. Reported below: 844 F. 3d 1235.

Toby J. Heytens argued the cause for petitioner. With him on the briefs were *Daniel R. Ortiz*, *David R. Cooper*, and *John T. Bird*.

Elizabeth B. Prelogar argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Blanco*, *Deputy Solicitor General Dreeben*, and *James I. Pearce*.

Kelsi Brown Corkran argued the cause for respondent. With her on the brief were *E. Joshua Rosenkranz*, *Daniel A. Rubens*, *Alison M. Kilmartin*, *Haley Jankowski*, *Morgan L. Roach*, and *Thomas M. Bondy*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Kansas et al. by *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Stephen R. McAllister*, Solicitor General, *Kristafer Ailslieger*, Deputy Solicitor General, and *Natalie Chalmers*, *Dwight R. Carswell*, and *Bryan C. Clark*, Assistant Solicitors General, and by the Attorneys General for their respective jurisdictions as follows: *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Doug Peterson* of Nebraska, *Gordon J. MacDonald* of New Hampshire, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; and for State and Local Government Employers by *Stuart A. Raphael* and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Government Employees et al. by *Andres M. Grajales*, *David A. Borer*, and *David J. Strom*; for Criminal Procedure Scholars by *Elizabeth B. Wydra* and *Brianne J. Gorod*; for the National Association of Criminal Defense Lawyers et al. by *Jeffrey A. Mandell*, *Erika L. Bierma*,

Per Curiam

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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

Page Proof Pending Publication

Barbara E. Bergman, David D. Cole, Rachel Wainer Apter, and Ezekiel Edwards; and for the National Fraternal Order of Police by Larry H. James and Robert C. Buchbinder.

Syllabus

MASTERPIECE CAKESHOP, LTD., ET AL. *v.*
COLORADO CIVIL RIGHTS COMMISSION
ET AL.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 16–111. Argued December 5, 2017—Decided June 4, 2018

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e. g.*, birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.” Under CADA’s administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a State Administrative Law Judge (ALJ), who ruled in the couple’s favor. In so doing, the ALJ rejected Phillips’ First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission’s actions in this case violated the Free Exercise Clause. Pp. 631–640.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell v. Hodges*, 576 U. S. 644, 679–680. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component

and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States v. Windsor*, 570 U. S. 744, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division (Division) concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 631–634.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 634–638.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exer-

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cise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.*, at 540. In view of these factors, the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of his religious beliefs. The Commission gave “every appearance,” *id.*, at 545, of adjudicating his religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it, *id.*, at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips’ religious objection was not considered with the neutrality required by the Free Exercise Clause. The State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners’ comments were inconsistent with that requirement, and the Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. Pp. 638–639.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 640. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 643. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 654. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, *post*, p. 667.

Kristen K. Waggoner argued the cause for petitioners. With her on the briefs were *Jeremy D. Tedesco*, *James A. Campbell*, *Jonathan A. Scruggs*, *David A. Cortman*, *Rory T. Gray*, and *Nicolle H. Martin*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. On the

brief were *Acting Solicitor General Wall*, *Acting Assistant Attorneys General Readler and Gore*, *Deputy Assistant Attorney General Mooppan*, *Morgan L. Goodspeed*, *Eric Treene*, and *Lowell V. Sturgill, Jr.*

Frederick R. Yarger, Solicitor General of Colorado, argued the cause for respondent Colorado Civil Rights Commission. With him on the brief were *Cynthia H. Coffman*, Attorney General of Colorado, *Vincent E. Morscher*, Deputy Attorney General, *Glenn E. Roper*, Deputy Solicitor General, *Stacy L. Worthington*, Senior Assistant Attorney General, and *Grant T. Sullivan*, Assistant Solicitor General. *David D. Cole* argued the cause for respondent Craig et al. With him on the brief were *Ria Tabacco Mar*, *James D. Esseks*, *Leslie Cooper*, *Rachel Wainer Apter*, *Louise Melling*, *Rose A. Saxe*, *Lee Rowland*, *Amanda W. Shanor*, *Daniel Mach*, *Mark Silverstein*, *Sara R. Neel*, and *Paula Greisen*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Michael P. Murphy* and *John C. Sullivan*, Assistant Solicitors General, by *M. Stephen Pitt*, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Lawrence G. Wasden* of Idaho, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Patrick Morrissey* of West Virginia, and *Brad Schimel* of Wisconsin; for Agudath Israel of America by *Jeffrey I. Zuckerman* and *Andrew Weinstock*; for the American College of Pediatricians et al. by *Roger G. Brooks*, *Nikolas T. Nikas*, *Dorinda C. Bordlee*, and *Catherine W. Short*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, *Eric S. Baxter*, *Hannah C. Smith*, *Diana M. Verm*, and *Stephanie Hall Barclay*; for the Billy Graham Evangelistic Association et al. by *Stuart J. Lark*; for the C12 Group et al. by *Richard C. Baker*; for CatholicVote.org by *Scott W. Gaylord*; for the Cato Institute et al. by *Ilya Shapiro* and *Manuel S. Klausner*; for the Center for Constitutional Jurisprudence et al. by *John C. Eastman* and *Anthony T. Caso*; for Christian Business Owners by *Erin Elizabeth Mersino* and *William Wagner*; for the Christian Law Association by *David C. Gibbs*,

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JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado

Jr.; for the Christian Legal Society et al. by *Douglas Laycock* and *Thomas C. Berg*; for Concerned Women for America by *Steven W. Fitschen*; for the Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. by *Michael K. Whitehead*; for the First Amendment Lawyers Association by *Robert Corn-Revere*, *Ronald G. London*, and *D. Gill Sperlein*; for the Foundation for Moral Law by *John Eidsmoe*; for Freedom X et al. by *William J. Becker, Jr.*; for the Independence Law Center by *Randall L. Wenger* and *Jeremy L. Samek*; for the Indiana Family Institute et al. by *James Bopp, Jr.*, and *Richard E. Coleson*; for International Christian Photographers et al. by *Michael J. Norton*; for Law and Economics Scholars et al. by *David A. Shaneyfelt* and *Richard A. Epstein*; for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; for National Black Religious Broadcasters et al. by *David H. Thompson*; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; for the National Legal Foundation et al. by *Frederick W. Claybrook, Jr.*; for the North Carolina Values Coalition et al. by *Deborah J. Dewart* and *Travis Weber*; for Public Advocate of the United States et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, *Robert J. Olson*, *Joseph W. Miller*, and *Michael Boos*; for the Restoring Religious Freedom Project by *David I. Schoen*; for the Southeastern Legal Foundation et al. by *John J. Park, Jr.*, and *Kimberly S. Hermann*; for the Thomas More Society by *Thomas Brejcha* and *Joan M. Mannix*; for the United States Conference of Catholic Bishops et al. by *John J. Bursch*, *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, *Michael F. Moses*, and *Hillary E. Byrnes*; for United States Senators et al. by *Jonathan R. Whitehead*; for Utah Republican State Senators by *Michael K. Erickson* and *William C. Duncan*; for 33 Family Policy Organizations by *David French*; for 34 Legal Scholars by *David R. Langdon*; for 479 Creative Professionals by *Nathan W. Kellum*; for Ryan T. Anderson et al. by *Charles S. LiMandri*, *Paul M. Jonna*, and *Jeffrey M. Trissell*; for Sherif Girgis by *Robert P. George*; for Christopher R. Green et al. by *David R. Upham*; for William Jack et al. by *Michael Lee Francisco*; for Aaron Klein et al. by *Kelly J. Shackelford*, *Hiram*

Civil Rights Commission (or Commission) alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado

S. Sasser III, Kenneth A. Klukowski, and Herbert G. Grey; for Richard Lawrence by Mr. Lawrence, pro se; for Adam J. MacLeod by Robert Tyler and Jennifer Bursch; for Patrick Mahoney et al. by Thomas P. Monaghan and Walter M. Weber; and for Mark Regnerus et al. by Edward H. Trent.

Briefs of *amici curiae* urging affirmance were filed for the State of Massachusetts et al. by *Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, State Solicitor, and *David C. Kravitz, Genevieve C. Nadeau, and Jon Burke*, Assistant Attorneys General, by *Douglas S. Chin*, Attorney General of Hawaii, *Clyde J. Wadsworth*, Solicitor General, and *Kaliko'onalani D. Fernandes*, Deputy Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the County of Santa Clara et al. by *James R. Williams, Greta S. Hansen, Julie Wilensky, Zachary W. Carter, Richard Dearing, Michael N. Feuer, James P. Clark, Blithe Smith Bock, and Shaun Dabby Jacobs*; for the American Bar Association by *Hilarie Bass, Donald B. Verrilli, Jr., Ginger D. Anders, and Chad Golder*; for the American Psychological Association et al. by *Jessica Ring Amunson, Emily L. Chapuis, Nathalie F. P. Gilfoyle, and Deanne M. Ottaviano*; for the American Unity Fund et al. by *Eugene Volokh and Dale Carpenter*, both *pro se*; for Americans United for Separation of Church and State et al. by *Richard B. Katskee, Steven M. Freeman, Elliot M. Mincberg, and Diane Laviolette*; for the Canadian Civil Liberties Association et al. by *Maureen P. Alger*; for the Center for Inquiry et al. by *Edward Tabash*; for the Central Conference of American Rabbis et al. by *Jeffrey S. Trachtman, Norman C. Simon, Jason M. Moff, and Kurt M. Denk*; for Chefs et al. by *Pratik A. Shah*; for Church-State Scholars by *Roberta A. Kaplan*; for the Civil Rights Forum by *Lawrence A. Organ*; for Colorado Organizations et al. by *Melissa Hart, Craig J. Konnoth, Evan Wolfson, and Lino S. Lipinsky de Orlov*; for Corporate

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state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the author-

Law Professors by *Andrew D. Silverman* and *Daniel A. Rubens*; for the Denver Metro Chamber of Commerce et al. by *John F. Walsh*, *Paul R. Q. Wolfson*, and *Alan E. Schoenfeld*; for First Amendment Scholars by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for Former Rep. Tony Coelho et al. by *Sanford Jay Rosen*; for the Freedom From Religion Foundation by *Rebecca S. Markert*; for Freedom of Speech Scholars by *Steven H. Shiffrin*, *pro se*; for the General Synod of the United Church of Christ et al. by *Douglas Hallward-Driemeier*, *K. Hollyn Hollman*, *Jennifer L. Hawks*, *Mary E. Kostel*, and *Donald C. Clark, Jr.*; for GLBTQ Legal Advocates & Defenders et al. by *Mary L. Bonauto*, *Gary D. Buseck*, *Shannon P. Minter*, *Christopher F. Stoll*, *Catherine R. Connors*, and *Nolan L. Reichl*; for the Lambda Legal Defense and Education Fund, Inc., et al. by *Jennifer C. Pizer*; for the Lawyers' Committee for Civil Rights Under Law et al. by *Ilana H. Eisenstein*, *Courtney Gilligan Saleski*, *Ethan H. Townsend*, *Paul Schmitt*, *Kristen Clarke*, *Jon Greenbaum*, and *Dariely Rodriguez*; for Legal Scholars by *Kyle C. Vette* and *Barbara J. Cox*, both *pro se*; for the Main Street Alliance et al. by *Charles C. Sipos*, *Nicola A. Menaldo*, and *Luke Rona*; for the NAACP Legal Defense & Educational Fund, Inc., by *John Paul Schnapper-Casteras*, *Coty Montag*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*; for the National League of Cities et al. by *Lisa E. Soronen*, *D. Bruce La Pierre*, and *Brian C. Walsh*; for the National LGBTQ Task Force et al. by *Marc A. Hearron* and *Ruth N. Borenstein*; for the National Women's Law Center et al. by *Anna P. Engh*, *Fatima Goss Graves*, *Emily J. Martin*, *Gretchen Borchelt*, *Sunu Chandy*, and *Melissa Murray*; for OutServe-SLDN, Inc., et al. by *Michael E. Bern*, *Matthew Peters*, *Peter Perkowski*, and *Nima H. Mohebbi*; for Public Accommodation Law Scholars by *Catherine Weiss*, *Natalie J. Kraner*, and *Rey Lambert*; for Scholars of Behavioral Science et al. by *Adam W. Hofmann*; for Scholars of the Constitutional Rights and Interests of Children by *Catherine E. Smith*, *Lauren Fontana*, and *Barbara Bennett Woodhouse*, all *pro se*; for the Service Employees International Union by *Stacey Leyton*, *Rebecca Lee*, *Nicole G. Berner*, and *Claire Presitel*; for Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders et al. by *Jonathan Jacob Nadler*; for the Tanenbaum Center for Interreligious Understanding by *Daniel Lawrence Greenberg*, *Robert J. Ward*, *Holly H. Weiss*, and *Jennifer M. Opheim*; for Thirty-seven Busi-

ity of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

nesses and Organizations by *Jonathan B. Sallet*; for the Transgender Law Center et al. by *Clifford M. Sloan, Caroline S. Van Zile, Flor Bermudez, and Lynly S. Egyes*; for the Transgender Legal Defense and Education Fund by *John D. Winter, Jeffrey S. Ginsberg, and Sean P. Madden*; for the Washington Lawyers' Committee for Civil Rights and Urban Affairs et al. by *Matthew J. MacLean, Michael S. McNamara, Jennifer R. Clarke, and Aneel Chablani*; for 15 Faith and Civil Rights Organizations by *Jessica L. Ellsworth, Johnathan J. Smith, and Sirine Shebaya*; for 211 Members of Congress by *Peter T. Barbur*; for Floyd Abrams et al. by *Walter Dellinger, pro se, and Meaghan VerGow*; for Ilan H. Meyer et al. by *Stephen B. Kinnaird*; and for Tobias B. Wolff by *Mr. Wolff, pro se*.

Briefs of *amici curiae* were filed for Cake Artists by *Evan A. Young, Aaron M. Streett, and Benjamin A. Geslison*; for the Council for Christian Colleges and Universities et al. by *Gene C. Schaerr*; for the Institute for Justice by *Robert J. McNamara and Paul M. Sherman*; and for David Boyle by *Mr. Boyle, pro se*.

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The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies

to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his “main goal in life is to be obedient to” Jesus Christ and Christ’s “teachings in all aspects of his life.” App. 148. And he seeks to “honor God through his work at Masterpiece Cakeshop.” *Ibid.* One of Phillips’ religious beliefs is that “God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.” *Id.*, at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for “our wedding.” *Id.*, at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not “create” wedding cakes for same-sex weddings. *Ibid.* He explained, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.” *Ibid.* The couple left the shop without further discussion.

The following day, Craig’s mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex mar-

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riages. *Id.*, at 153. He later explained his belief that “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.” *Ibid.* (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed “An Act to Protect All Citizens in Their Civil Rights,” which guaranteed “full and equal enjoyment” of certain public facilities to “all citizens,” “regardless of race, color or previous condition of servitude.” 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to “all other places of public accommodation.” 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the State’s tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” Colo. Rev. Stat. § 24–34–601(2)(a) (2017).

CADA defines “public accommodation” broadly to include any “place of business engaged in any sales to the public and any place offering services . . . to the public,” but excludes

“a church, synagogue, mosque, or other place that is principally used for religious purposes.” § 24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division (or Division). The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a State Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24–34–306(9). Available remedies include, among other things, orders to cease and desist a discriminatory policy, to file regular compliance reports with the Commission, and “to take affirmative action, including the posting of notices setting forth the substantive rights of the public.” § 24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple’s visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied “full and equal service” at the bakery because of their sexual orientation, *id.*, at 35, 48, and that it was Phillips’ “standard business practice” not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that “on multiple occasions,” Phillips

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“turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception” because his religious beliefs prohibited it and because the potential customers “were doing something illegal” at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips’ shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop “had a policy of not selling baked goods to same-sex couples for this type of event.” *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple’s favor. The ALJ first rejected Phillips’ argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips’ actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins’ cake would force Phillips to adhere to “‘an ideological point of view.’” *Id.*, at 75a. Applying CADA to the facts at hand,

in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.*, at 57a. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, *supra*, at 879, the court stated that the Free Exercise Clause "does not relieve an

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individual of the obligation to comply with a valid and neutral law of general applicability’” on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. 929 (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, 576 U. S. 644 (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Id.*, at 679–680. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*); see also *Hurley v. Irish-American Gay, Lesbian and Bisex-*

ual Group of Boston, Inc., 515 U. S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”).

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to

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make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack v. Gateaux, Ltd.*, Charge

No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission’s formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips’ case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” Tr. 23. A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and

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he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.” *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” Tr. 11–12.

To describe a man's faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair

and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 540–542 (1993); *id.*, at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured “language and images [the baker] deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker “deemed as discriminatory,” *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.

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The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . be-

cause of the offensive nature of the requested message.”
Ibid.

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam*, 582 U. S. 218, 243–244 (2017) (opinion of ALITO, J.). The Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs. The court’s footnote does not, therefore, answer the baker’s concern that the State’s practice was to disfavor the religious basis of his objection.

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C

For the reasons just described, the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, supra*, the Court made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “‘subtle departures from neutrality’” on matters of religion. *Id.*, at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention

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stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Id.*, at 547.

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.*, at 540. In view of these factors the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs. The Commission gave “‘every appearance,’” *id.*, at 545, of adjudicating Phillips’ religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. *Id.*, at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante*, at 631. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante*, at 634. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write

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separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the “disparate consideration of Phillips’ case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” *Ante*, at 636, 639. In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. *Ante*, at 636; see *post*, at 669 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante*, at 637. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested “offensive [in] nature.” *Ante*, at 637–638 (internal quotation marks omitted). As the Court states, a “principled rationale for the difference in treatment” cannot be “based on the government’s own assessment of offensiveness.” *Ante*, at 638.

What makes the state agencies’ consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single

out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.*

*JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases “would not sell the requested cakes to anyone.” *Post*, at 646. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a “wedding cake” is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a “cake celebrating same-sex marriage.” *Ibid.*; see *post*, at 645, 648, 650. But that is wrong. The cake requested was not a special “cake celebrating same-sex marriage.” It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 626 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to JUSTICE GORSUCH's view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with “religious significance.” *Post*, at 653. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 631–632. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully dis-

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I read the Court’s opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—“quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished.” *Ante*, at 637. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, “can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 632. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State’s decisions are not infected by religious hostility or bias. I accordingly concur.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. *Id.*, at 878–879. *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: When the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it sat-

criminate: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips’ religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

ifies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante*, at 636–638. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs “offensive.” *Ante*, at 638. That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post*, at 670–671, and n. 3 (GINSBURG, J., dissenting); *ante*, at 642–643, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapprov-

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ing same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. §24–34–601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.*, at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regard-

less of his or her sexual orientation. *Id.*, at 166 (“I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer”). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig’s mother. *Id.*, at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See *post*, at 671, n. 3 (GINSBURG, J., dissenting); *ante*, at 642–643, and n. (KAGAN, J., concurring).) Nonetheless, the Commission held that Mr. Phillips’s conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: Bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there’s no indication the bakers actually *intended* to refuse service *because of* a customer’s protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

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The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e. g.*, ALI, Model Penal Code §§ 1.13, 2.02(2)(a)(i) (1985); 1 W. LaFare, Substantive Criminal Law § 5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e. g.*, Restatement (Second) of Torts § 8A (1964); *Radio Officers v. NLRB*, 347 U. S. 17, 45 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack’s case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from “the offensive nature of the requested message.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 (“Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be ‘offensive’”). Yet, in Mr. Phillips’s case, the Commission dismissed this very same argument as resting on a “distinction without a difference.” App. to Pet. for Cert. 69a. It concluded instead that an “intent to disfavor” a protected class of persons should be “readily . . . presumed” from the knowing failure to serve someone who belongs to that class. *Id.*, at 70a. In its judgment, Mr. Phillips’s intentions were “inextricably tied to the

sexual orientation of the parties involved” and essentially “‘irrational.’” *Ibid.*

Nothing in the Commission’s opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips’s objection is “inextricably tied” to a protected class, then the bakers’ objection in Mr. Jack’s case must be “inextricably tied” to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers’ objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission’s decisions simply reduce to this: It *presumed* that Mr. Phillips harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack’s case even though the effects of the bakers’ conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that “no such showing” of actual “‘animus’”—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips’s case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack’s case), or it is sufficient to “presume” such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips’s case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can’t do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye*, 508 U. S., at 543–544. That is anything but the neutral treatment of religion.

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The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive" message that the bakers in the first case refused to endorse. *Ante*, at 638. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. *Matal v. Tam*, 582 U. S. 218, 246 (2017) (plurality opinion) (citing *United States v. Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye, supra*, at 547; *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 715–716 (1981); *Wisconsin v. Yoder*, 406 U. S. 205, 223–224 (1972); *Cantwell v. Connecticut*, 310 U. S. 296, 308–310 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for exam-

ple, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post*, at 672, and n. 5 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante*, at 642–643, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins “requested that Phillips design and create a *cake to celebrate their same-sex wedding*” (emphasis added)). Like “an emblem or flag,” a cake for a same-sex wedding is a symbol that serves as “a short cut from mind to mind,” signifying approval of a specific “system, idea, [or] institution.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message

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they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether “high or petty,” bear no license to declare what is or should be “orthodox” when it comes to religious beliefs, *id.*, at 642, or whether an adherent has “correctly perceived” the commands of his religion, *Thomas, supra*, at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression,” which are “not a condition of constitutional protection”).

The second suggestion fares no better. Suggesting that this case is only about “wedding cakes”—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips’s case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: Describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn’t play with the level of generality in Mr. Jack’s case in this way. It didn’t declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers’ view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith*, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: It risks denying constitutional protection to religious beliefs that draw distinctions more specific than the govern-

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ment's preferred level of description. To some, all wedding cakes may appear indistinguishable. But to *Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points “[r]epeatedly and in many different contexts” over many years. *Smith*, 494 U. S., at 887. For example, in *Thomas* a faithful Jehovah's Witness and steelmill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.*, at 714–716; see also *United States v. Lee*, 455 U. S. 252, 254–255 (1982); *Smith*, *supra*, at 887 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order “must be set aside.” *Ante*, at 639. Maybe in

some future rulemaking or case the Commission could adopt a new “knowing” standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, “[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission’s order” in *this* case “must be invalidated.” *Ante*, at 640. Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

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

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips’ right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips’ case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips’ religion. See *ante*, at 644–650 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips’ religion. See *ante*, at 634–638. Although the Commissioners’ comments are certainly disturbing, the discriminatory application of Colorado’s public-accommodations law is enough on its own to violate Phillips’ rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante*, at 624. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a pre-made one). But the Colorado Court of Appeals resolved this factual dispute in Phillips’ favor. The court described his conduct as a refusal to “design and create a cake to celebrate

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[a] same-sex wedding.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (2015); see also *id.*, at 286 (“designing and selling a wedding cake”); *id.*, at 283 (“refusing to create a wedding cake”). And it noted that the Commission’s order required Phillips to sell “‘*any* product [he] would sell to heterosexual couples,’” including custom wedding cakes. *Id.*, at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips’ conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado’s public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I
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The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the “freedom of speech.” When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose “incidental burdens” on expression. *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 567 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante*, at 631–632 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995)). “[A]s a general matter,” public-accommodations laws do not “target speech” but instead prohibit “the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services.” *Id.*, at 572 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law “ha[s]

the effect of declaring . . . speech itself to be the public accommodation,” the First Amendment applies with full force. *Id.*, at 573; accord, *Boy Scouts of America v. Dale*, 530 U. S. 640, 657–659 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited “‘any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.’” 515 U. S., at 561 (quoting Mass. Gen. Laws §272:98 (1992); alterations in original). When this law required the sponsor of a St. Patrick’s Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor’s right to free speech. Parades are “a form of expression,” this Court explained, and the application of the public-accommodations law “alter[ed] the expressive content” of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572–573. The addition of that unit compelled the organizer to “bear witness to the fact that some Irish are gay, lesbian, or bisexual”; “suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals”; and imply that their participation “merits celebration.” *Id.*, at 574. While this Court acknowledged that the unit’s exclusion might have been “misguided, or even hurtful,” *ibid.*, it rejected the notion that governments can mandate “thoughts and statements acceptable to some groups or, indeed, all people” as the “antithesis” of free speech, *id.*, at 579; accord, *Dale, supra*, at 660–661.

The parade in *Hurley* was an example of what this Court has termed “expressive conduct.” See 515 U. S., at 568–569. This Court has long held that “the Constitution looks beyond written or spoken words as mediums of expression,” *id.*, at 569, and that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 632 (1943). Thus, a person’s “conduct

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may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’” *Texas v. Johnson*, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.¹

Of course, conduct does not qualify as protected speech simply because “the person engaging in [it] intends thereby to express an idea.” *United States v. O’Brien*, 391 U. S. 367, 376 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was “intended to be communicative” and, “in context, would reasonably be understood by the viewer to be communicative.” *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984). But a “‘particularized message’” is not required, or else the freedom of speech “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the Constitution limits the government’s authority to restrict or compel it. “[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’” and “tailor” the content of his mes-

¹ *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991); *Johnson*, 491 U. S., at 405–406; *Spence v. Washington*, 418 U. S. 405, 406, 409–411 (1974) (*per curiam*); *Schacht v. United States*, 398 U. S. 58, 62–63 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); *Brown v. Louisiana*, 383 U. S. 131, 141–142 (1966) (opinion of Fortas, J.); *Barnette*, 319 U. S., at 633–634; *Stromberg v. California*, 283 U. S. 359, 361, 369 (1931).

sage as he sees fit. *Id.*, at 573 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion)). This rule “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley*, *supra*, at 573. And it “makes no difference” whether the government is regulating the “creati[on], distributi[on], or consum[ption]” of the speech. *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist’s paint palette with a paintbrush and baker’s whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece’s website. See <http://masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding

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cakes. To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, “[w]edding cakes are so packed with symbolism that it is hard to know where to begin.” M. Krondl, *Sweet Invention: A History of Dessert* 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multitiered cake, he would immediately know that he had stumbled upon a wedding. The cake is “so standardised and inevitable a part of getting married that few ever think to question it.” Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 *Man* 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.*, at 98. “A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards.” *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.*, at 95 (“It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings”); *id.*, at 97 (“Nothing is made of the eating itself”); Krondl 320–321 (explaining that wedding cakes have long been described as “inedible”). The cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple.²

²The Colorado Court of Appeals acknowledged that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage,” depending on its “design” and whether it has “written inscriptions.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991), or flying a plain red flag, *Stromberg v. California*, 283 U. S. 359, 369 (1931).³ By forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law “alter[s] the expressive content” of his message. *Hurley*, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on “the context in which it occur[s].” *Johnson*, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, ac-

to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 *Man* 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

³The dissent faults Phillips for not “submitting . . . evidence” that wedding cakes communicate a message. *Post*, at 668, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–570 (1995); *Spence*, 418 U. S., at 410–411; *Barnes*, 501 U. S., at 565–566. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley*, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that “this is a wedding,” see *id.*, at 573–575. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.*, at 569–570. And by forcing him to provide the cake, Colorado is requiring Phillips to be “intimately connected” with the couple's speech, which is enough to implicate his First Amendment rights. See *id.*, at 576.

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knowledge that same-sex weddings are “weddings” and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],” *Hurley*, 515 U. S., at 574, or to “affir[m] . . . a belief with which [he] disagrees,” *id.*, at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips’ conduct was “not sufficiently expressive” to be protected from state compulsion. 370 P. 3d, at 283. It noted that a reasonable observer would not view Phillips’ conduct as “an endorsement of same-sex marriage,” but rather as mere “compliance” with Colorado’s public-accommodations law. *Id.*, at 286–287 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 64–65 (2006) (*FAIR*); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841–842 (1995); *Prune-Yard Shopping Center v. Robins*, 447 U. S. 74, 76–78 (1980)). It also emphasized that Masterpiece could “disassociat[e]” itself from same-sex marriage by posting a “disclaimer” stating that Colorado law “requires it not to discriminate” or that “the provision of its services does not constitute an endorsement.” 370 P. 3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips’ conduct was not expressive because a reasonable observer would think he is merely complying with Colorado’s public-accommodations law. This argument would justify any law that compelled protected speech. And this Court has never accepted it. From the beginning, this Court’s compelled-speech precedents have rejected arguments that “would resolve every issue of power in favor of those in authority.” *Barnette*, 319 U. S., at 636. *Hurley*, for example, held that the application of Massachusetts’ public-

accommodations law “requir[ed] the organizers] to alter the expressive content of their parade.” 515 U. S., at 572–573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts’ public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party’s speech. See *FAIR*, *supra*, at 51 (law school refused to allow military recruiters on campus); *Rosenberger*, *supra*, at 822–823 (public university refused to provide funds to a religious student paper); *PruneYard*, *supra*, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*, *supra*, at 63–65; *Rosenberger*, *supra*, at 841–842; *PruneYard*, *supra*, at 85–88. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.*, 475 U. S., at 12 (“Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner’s exercise of his own right to speak”); *Hurley*, *supra*, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a “for-profit bakery” that “charges its customers.” 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech. See *Pacific Gas & Elec.*, *supra*, at 8, 16 (collecting cases); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761 (1976) (deeming it “beyond serious dispute” that “[s]peech . . . is protected even though it is carried in a form that is ‘sold’ for profit”). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece

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Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips’ conduct is expressive. See *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256–258 (1974); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, 217 (2015).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as “beg[ging] the core question.” *Tornillo*, *supra*, at 256. Because the government cannot compel speech, it also cannot “require speakers to affirm in one breath that which they deny in the next.” *Pacific Gas & Elec.*, 475 U. S., at 16; see also *id.*, at 15, n. 11 (citing *PruneYard*, 447 U. S., at 99 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of “be[ing] compelled to affirm someone else’s belief” or “be[ing] forced to speak when [they] would prefer to remain silent.” *Id.*, at 99.

III

Because Phillips’ conduct (as described by the Colorado Court of Appeals) was expressive, Colorado’s public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes

reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*,⁴ that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, e. g., *Barnes*, 501 U. S., at 566–572 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark*, 468 U. S., at 293 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand “the most exacting scrutiny.” *Johnson*, 491 U. S., at 412; accord, *Holder v. Humanitarian Law Project*, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado’s law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado’s law. According to the individual respondents, Colorado can compel Phillips’ speech to prevent him from “denigrat[ing] the dignity” of same-sex couples, “assert[ing their] inferiority,” and subjecting them to “humiliation, frustration, and embarrassment.” Brief for Respondents Craig et al. 39 (quoting *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 142 (1994); *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undig-

⁴ “[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O'Brien*, 391 U. S. 367, 377 (1968).

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nified. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Johnson, supra*, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse v. Frederick*, 551 U. S. 393, 409 (2007) (“After all, much political and religious speech might be perceived as offensive to some”). As the Court reiterates today, “it is not . . . the role of the State or its officials to prescribe what shall be offensive.” *Ante*, at 638. “‘Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.’” *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55 (1988); accord, *Johnson, supra*, at 408–409. If the only reason a public-accommodations law regulates speech is “to produce a society free of . . . biases” against the protected groups, that purpose is “decidedly fatal” to the law’s constitutionality, “for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.” *Hurley*, 515 U. S., at 578–579; see also *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails”). “[A] speech burden based on audience reactions is simply government hostility . . . in a different guise.” *Matal v. Tam*, 582 U. S. 218, 250 (2017) (KENNEDY, J., concurring in part and concurring in judgment).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, “‘I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.’” App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say “God Hates Fags”—all of which this

Court has deemed protected by the First Amendment. See *Hurley, supra*, at 574–575; *Dale*, 530 U. S., at 644; *Snyder v. Phelps*, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips’ statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about “dignity” and “stigma” did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia v. Black*, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.’s birthday, *Forsyth County v. Nationalist Movement*, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to “‘Bury the niggers,’” *Brandenburg v. Ohio*, 395 U. S. 444, 446, n. 1 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell v. Hodges*, 576 U. S. 644 (2015), somehow diminish Phillips’ right to free speech. “It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted” and unentitled to express a different view. *Id.*, at 712 (ROBERTS, C. J., dissenting). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.*, at 657 (majority opinion). If Phillips’ continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale, supra*, at 660 (“[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view”).

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* * *

In *Obergefell*, I warned that the Court’s decision would “inevitabl[y] . . . come into conflict” with religious liberty, “as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples.” 576 U. S., at 734 (dissenting opinion). This case proves that the conflict has already emerged. Because the Court’s decision vindicates Phillips’ right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.” *Id.*, at 741 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals’ must be rejected.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court’s opinion with which I agree. “[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Ante*, at 631. “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 632. “[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’” *Ante*, at 634. Gay persons may be spared from “indignities when they seek goods and services in an open market.” *Ante*, at 640.¹ I strongly dis-

¹ As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante*, at 654 (opinion concurring in part and concurring in judg-

agree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante*, at 639. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ibid.* The Court also finds

ment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante*, at 657 (citing *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante*, at 658–659 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 *Man* 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.*, at 104–105 (the cake cutting tradition might signify "the bride and groom . . . as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante*, at 659–660, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–579 (1995) (citing previous cases recognizing parades to be expressive); *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence v. Washington*, 418 U. S. 405, 410 (1974) (*per curiam*) (observing the Court's decades-long recognition of the symbolism of flags).

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hostility in statements made at two public hearings on Phillips’ appeal to the Commission. *Ante*, at 634–636. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips’ appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

“made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ died for us. Romans 5:8.’” App. to Pet. for Cert. 319a; see *id.*, at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery “does not discrimi-

nate” and “accept[s] all humans.” *Id.*, at 301a (internal quotation marks omitted). The second bakery owner told Jack he “had done open Bibles and books many times and that they look amazing,” but declined to make the specific cakes Jack described because the baker regarded the messages as “hateful.” *Id.*, at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.*, at 319a.²

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack’s claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.*, at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Anti-Discrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division’s no-probable-cause finding. See *id.*, at 326a–331a.

The Court concludes that “the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.” *Ante*, at 637. See also *ante*, at 647–649 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack’s requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries’ refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips’ refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mul-

²The record provides no ideological explanation for the bakeries’ refusals. Cf. *ante*, at 644, 645, 651, 653 (GORSUCH, J., concurring) (describing Jack’s requests as offensive to the bakers’ “secular” convictions).

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lins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante*, at 645–646, 651 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra*, at 667. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.³

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers⁴ was irrelevant to the issue Craig and Mullins’ case presented. What matters is that Phillips would not provide a good or service to a same-sex

³ JUSTICE GORSUCH argues that the situations “share all legally salient features.” *Ante*, at 646 (concurring opinion). But what critically differentiates them is the role the customer’s “statutorily protected trait,” *ibid.*, played in the denial of service. Change Craig and Mullins’ sexual orientation (or sex), and Phillips would have provided the cake. Change Jack’s religion, and the bakers would have been no more willing to comply with his request. The bakers’ objections to Jack’s cakes had nothing to do with “religious opposition to same-sex weddings.” *Ante*, at 648 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack’s second cake, in particular, where he requested an image of two groomsmen covered by a red “X” and the lines “God loves sinners” and “While we were yet sinners Christ died for us,” the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra*, at 669. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante*, at 646–648 (GORSUCH, J., concurring).

⁴ But see *ante*, at 629 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante*, at 637.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." *Ante*, at 638. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." *Ante*, at 624.⁵ The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distin-

⁵The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question whether speech is involved." *Ante*, at 637. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, <http://www.masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante*, at 650–651 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

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guished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (2015) (“The Division found that the bakeries did not refuse [Jack’s] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack’s] religion . . . [whereas Phillips] discriminat[ed] on the basis of sexual orientation.”). I do not read the Court to suggest that the Colorado Legislature’s decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante*, at 631–632. To repeat, the Court affirms that “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 632.

II

Statements made at the Commission’s public hearings on Phillips’ case provide no firmer support for the Court’s holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decision-making, of which the Commission was but one. See 370 P. 3d, at 277. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties’ cross-motions for summary judgment. Third, the Commission heard Phillips’ appeal. Fourth, after the Commission’s ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips’ case is

thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.*, at 526–528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

Syllabus

HUGHES *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 17–155. Argued March 27, 2018—Decided June 4, 2018

In *Freeman v. United States*, 564 U. S. 522, this Court considered whether a prisoner who had been sentenced under a plea agreement authorized by the Federal Rules of Criminal Procedure could have his sentence reduced under 18 U. S. C. § 3582(c)(2) when his Federal Guidelines sentencing range was lowered retroactively. No single interpretation or rationale commanded a majority, however. Some Courts of Appeals, turning to *Marks v. United States*, 430 U. S. 188, for guidance, adopted the reasoning of JUSTICE SOTOMAYOR’s opinion concurring in the judgment. Others interpreted *Marks* differently and adopted the plurality’s reasoning. Because this Court can now resolve the substantive, sentencing issue discussed in *Freeman*, it is unnecessary to reach questions regarding the proper application of *Marks*.

The Sentencing Reform Act of 1984 authorizes the United States Sentencing Commission to establish, and retroactively amend, Sentencing Guidelines. Though the Guidelines are only advisory, see *United States v. Booker*, 543 U. S. 220, a district court must consult them during sentencing, *id.*, at 264, along with other factors specified in 18 U. S. C. § 3553(a), including “the need to avoid unwarranted sentence disparities,” § 3553(a)(6). When an amendment applies retroactively, district courts may reduce the sentences of prisoners whose sentences were “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” § 3582(c)(2).

This case concerns the issue whether a defendant may seek relief under § 3582(c)(2) if he entered a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) (Type-C agreement), which permits the defendant and the Government to “agree that a specific sentence or sentencing range is the appropriate disposition of the case,” and “binds the court [to the agreed-upon sentence] once [it] accepts the plea agreement.” In making its decision, the district court must consider the Sentencing Guidelines. And it may not accept the agreement unless the sentence is within the applicable Guidelines range, or it is outside that range for justifiable reasons specifically set out.

After petitioner Erik Hughes was indicted on drug and gun charges, he and the Government negotiated a Type-C plea agreement, which stipulated that Hughes would receive a sentence of 180 months but did not refer to a particular Guidelines range. Hughes pleaded guilty. At his

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sentencing hearing, the District Court accepted the agreement and sentenced him to 180 months. In so doing, it calculated Hughes' Guidelines range as 188 to 235 months and determined that the sentence was in accordance with the Guidelines and other factors the court was required to consider. Less than two months later, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing Hughes' sentencing range to 151 to 188 months. The District Court denied Hughes' motion for a reduced sentence under § 3582(c)(2), and the Eleventh Circuit affirmed. Both courts concluded that, under the *Freeman* concurrence, Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range.

Held:

1. A sentence imposed pursuant to a Type-C agreement is “based on” the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement. Pp. 684–690.

(a) A principal purpose of the Sentencing Guidelines is to promote sentencing uniformity. But in the aftermath of *Freeman*, a defendant's eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in which the case arises. Even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on whether a defendant's Type-C agreement has a specific-enough reference to a Guidelines range. This Court's precedents since *Freeman* have confirmed that the Guidelines remain the foundation of federal sentencing decisions. See, e.g., *Peugh v. United States*, 569 U. S. 530; *Molina-Martinez v. United States*, 578 U. S. 189. Pp. 684–685.

(b) A district court imposes a sentence that is “based on” a Guidelines range for purposes of § 3582(c)(2) if the range was a basis for the court's exercise of discretion in imposing a sentence. Given the standard legal definition of “base,” there will be no question in the typical case that the defendant's Guidelines range was a basis for his sentence. A district court is required to calculate and consider a defendant's Guidelines range in every case. § 3553(a). Indeed, the Guidelines are “the starting point for every sentencing calculation in the federal system.” *Peugh, supra*, at 542. Thus, in general, § 3582(c)(2) allows district courts to reconsider a prisoner's sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction is appropriate.

A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant's Guidelines range is the starting point and a basis for his ultimate sentence. The Government and the defendant may agree to a specific sentence, but the Sentencing Guidelines prohibit district courts from accepting Type-C agreements without first evaluating the recommended sentence in light of the defendant's

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Guidelines range. So in the usual case the court’s acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are “based on” the defendant’s Guidelines range. Since the Guidelines are a district court’s starting point, when the Commission lowers the range, the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines.

This interpretation furthers § 3582(c)(2)’s purpose, as well as the broader purposes of the Sentencing Reform Act. It is also reinforced by *Molina-Martinez* and *Peugh*, which both confirm that the Guidelines remain a basis for almost all federal sentences. Experience has shown that, although the interpretation proffered by JUSTICE SOTOMAYOR’s concurring opinion in *Freeman* could be one permissible reading of § 3582(c)(2), as a systemic, structural matter the system Congress put in place is best implemented by the interpretation confirmed in this case. Pp. 685–689.

(c) The Government’s counterarguments—that allowing defendants with Type-C agreements to seek reduced sentences under § 3582(c)(2) would deprive the Government of a benefit of its bargain, namely, the defendant’s agreement to a particular sentence; and that allowing courts to reduce the sentences of defendants like Hughes would be inconsistent with one of the Commission’s policy statements—are unpersuasive. Pp. 689–690.

2. Hughes is eligible for relief under § 3582(c)(2). The District Court accepted his Type-C agreement after concluding that a 180-month sentence was consistent with the Guidelines, and then calculated Hughes’ sentencing range and imposed a sentence it deemed “compatible” with the Guidelines. The sentencing range was thus a basis for the sentence imposed. And that range has since been lowered by the Commission. The District Court has discretion to decide whether to reduce Hughes’ sentence after considering the § 3553(a) factors and the Commission’s relevant policy statements. Pp. 690–691.

849 F. 3d 1008, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 691. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 694.

Eric A. Shumsky argued the cause for petitioner. With him on the briefs were *E. Joshua Rosenkranz*, *Daniel A. Rubens*, *Alison M. Kilmartin*, *Thomas M. Bondy*, *Melanie*

Opinion of the Court

L. Bostwick, Katherine M. Kopp, Benjamin F. Aiken, Stephanie A. Kearns, and Brian Mendelsohn.

Rachel P. Kovner argued the cause for the United States. With her on the brief were *Solicitor General Francisco, Acting Assistant Attorney General Cronan, Eric J. Feigin, and Ross B. Goldman.**

JUSTICE KENNEDY delivered the opinion of the Court.

The proper construction of federal sentencing statutes and the Federal Rules of Criminal Procedure can present close questions of statutory and textual interpretation when implementing the Federal Sentencing Guidelines. Seven Terms ago the Court considered one of these issues in a case involving a prisoner's motion to reduce his sentence, where the prisoner had been sentenced under a plea agreement authorized by a specific Rule of criminal procedure. *Freeman v. United States*, 564 U. S. 522 (2011). The prisoner maintained that his sentence should be reduced under 18 U. S. C. § 3582(c)(2) when his Guidelines sentencing range was lowered retroactively. 564 U. S., at 527–528 (plurality opinion).

No single interpretation or rationale in *Freeman* commanded a majority of the Court. The courts of appeals then confronted the question of what principle or principles considered in *Freeman* controlled when an opinion by four Justices and a concurring opinion by a single Justice had allowed

*Briefs of *amici curiae* urging reversal were filed for Agricultural Interests et al. by *Timothy S. Bishop, Michael B. Kimberly, Ellen Steen, Stacy Linden, William R. Murray, Peter Tolsdorf, Kenneth T. Gear, Thomas J. Ward, Scott Yager, and Michael C. Formica*; for the National Association of Criminal Defense Lawyers et al. by *Nathaniel P. Garrett, Kenton J. Skarin, David M. Porter, Daniel L. Kaplan, Donna F. Coltharp, and Sarah S. Gannett*; for Douglas A. Berman by *Jean-Claude André*; and for Chantelle Sackett et al. by *Brian T. Hodges, Anthony L. Francois, and Damien M. Schiff*.

Briefs of *amici curiae* were filed for Law Professors by *Maxwell L. Stearns, David A. Skeel, and Michael J. Gerhardt*, all *pro se*; and for Richard M. Re, by *Mr. Re, pro se*.

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a majority of this Court to agree on the judgment in *Freeman* but not on one interpretation or rule that courts could follow in later cases when similar questions arose under the same statute and Rule.

For guidance courts turned to this Court's opinion in *Marks v. United States*, 430 U. S. 188 (1977). Some courts interpreted *Marks* as directing them to follow the “narrowest” opinion in *Freeman* that was necessary for the judgment in that case; and, accordingly, they adopted the reasoning of the opinion concurring in the judgment by JUSTICE SOTOMAYOR. See *United States v. Rivera-Martinez*, 665 F. 3d 344, 348 (CA1 2011); *United States v. Thompson*, 682 F. 3d 285, 290 (CA3 2012); *United States v. Brown*, 653 F. 3d 337, 340, n. 1 (CA4 2011); *United States v. Benitez*, 822 F. 3d 807, 811 (CA5 2016); *United States v. Smith*, 658 F. 3d 608, 611 (CA6 2011); *United States v. Dixon*, 687 F. 3d 356, 359 (CA7 2012); *United States v. Browne*, 698 F. 3d 1042, 1045 (CA8 2012); *United States v. Graham*, 704 F. 3d 1275, 1277–1278 (CA10 2013).

In contrast, the Courts of Appeals for the District of Columbia and Ninth Circuits held that no opinion in *Freeman* provided a controlling rule because the reasoning in the concurrence was not a “logical subset” of the reasoning in the plurality. *United States v. Davis*, 825 F. 3d 1014, 1021–1022 (CA9 2016) (en banc); *United States v. Epps*, 707 F. 3d 337, 350 (CA9 2013). Those courts have adopted the plurality's opinion as the most persuasive interpretation of § 3582(c)(2). *Davis, supra*, at 1026; *Epps, supra*, at 351.

To resolve these differences over the proper application of *Marks* and the proper interpretation of § 3582(c)(2), the Court granted certiorari in the present case. 583 U. S. 1036 (2017). The first two questions, relating to *Marks*, are as follows: (1) “Whether this Court's decision in *Marks* means that the concurring opinion in a 4–1–4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the

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other”; and (2) “Whether, under *Marks*, the lower courts are bound by the four-Justice plurality opinion in *Freeman*, or, instead, by JUSTICE SOTOMAYOR’s separate concurring opinion with which all eight other Justices disagreed.” Pet. for Cert. i.

The third question is directed to the underlying statutory issue in this case, the substantive, sentencing issue the Court discussed in the three opinions issued in *Freeman*. That question is: “Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.” Pet. for Cert. ii.

Taking instruction from the cases decided in the wake of *Freeman* and the systemic concerns that have arisen in some Circuits, and considering as well the arguments of the parties as to question three, a majority of the Court in the instant case now can resolve the sentencing issue on its merits. So it will be unnecessary to consider questions one and two despite the extensive briefing and careful argument the parties presented to the Court concerning the proper application of *Marks*. The opinion that follows resolves the sentencing issue in this case; and, as well, it should give the necessary guidance to federal district courts and to the courts of appeals with respect to plea agreements of the kind presented here and in *Freeman*.

With that explanation, the Court now turns to the circumstances of this case and the sentencing issue it presents.

I

A

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission establishes Sentencing Guidelines based on the seriousness of a defendant’s offense and his criminal history. *Dillon v. United States*, 560 U. S. 817, 820 (2010). In combination, these two factors yield a

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range of potential sentences for a district court to choose from in sentencing a particular defendant. “The Sentencing Guidelines provide the framework for the tens of thousands of federal sentencing proceedings that occur each year.” *Molina-Martinez v. United States*, 578 U. S. 189, 192 (2016).

After this Court’s decision in *United States v. Booker*, 543 U. S. 220 (2005), the Guidelines are advisory only. But a district court still “must consult those Guidelines and take them into account when sentencing.” *Id.*, at 264; see also 18 U. S. C. § 3553(a)(4). Courts must also consider various other sentencing factors listed in § 3553(a), including “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” § 3553(a)(6).

The Act requires the Commission to review and revise the Guidelines from time to time. 28 U. S. C. § 994(o). When the Commission amends the Guidelines in a way that reduces the Guidelines range for “a particular offense or category of offenses,” the Commission must “specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” § 994(u). In this way the Act requires the Commission to decide whether amendments to the Guidelines should have retroactive effect.

If an amendment applies retroactively, the Act authorizes district courts to reduce the sentences of prisoners who were sentenced based on a Guidelines range that would have been lower had the amendment been in place when they were sentenced. 18 U. S. C. § 3582(c)(2). Specifically, § 3582(c)(2) provides:

“[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U. S. C. § 994(o), . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that

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they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

B

The controlling issue here is whether a defendant may seek relief under § 3582(c)(2) if he entered a plea agreement specifying a particular sentence under Federal Rule of Criminal Procedure 11(c)(1)(C). This kind of plea agreement is sometimes referred to as a “Type-C agreement.”

In a Type-C agreement the Government and a defendant “agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply,” and “such a recommendation or request binds the court once the court accepts the plea agreement.” Rule 11(c)(1)(C). When the Government and a defendant enter a Type-C agreement, the district court has three choices: It “may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.” Rule 11(c)(3)(A). If the court rejects the agreement, the defendant may withdraw his guilty plea. Rule 11(c)(5)(B).

In deciding whether to accept an agreement that includes a specific sentence, the district court must consider the Sentencing Guidelines. The court may not accept the agreement unless the court is satisfied that “(1) the agreed sentence is within the applicable guideline range; or (2)(A) the agreed sentence is outside the applicable guideline range for justifiable reasons; and (B) those reasons are set forth with specificity.” United States Sentencing Commission, Guidelines Manual § 6B1.2(c) (Nov. 2016) (USSG). “[T]he decision whether to accept the agreement will often be deferred until the sentencing hearing,” which means that “the decision whether to accept the plea agreement will often be made at the same time that the defendant is sentenced.” *United States v. Hyde*, 520 U. S. 670, 678 (1997).

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C

1

In 2013 petitioner Erik Hughes was indicted on drug and gun charges for his participation in a conspiracy to distribute methamphetamine. About four months later, the Government and Hughes negotiated a Type-C plea agreement. Hughes agreed to plead guilty to two of the four charges (conspiracy to distribute methamphetamine and being a felon in possession of a gun); and in exchange the Government agreed to dismiss the other two charges and to refrain from filing an information giving formal notification to the District Court of his prior drug felonies. If the Government had filed the information, Hughes would have been subject to a mandatory sentence of life in prison. See 21 U. S. C. §§ 841(b)(1)(A), 851(a). The agreement stipulated that Hughes would receive a sentence of 180 months, but it did not refer to any particular Guidelines range.

Hughes entered his guilty plea in December 2013. The District Court accepted the plea at that time, but it deferred consideration of the plea agreement (and hence the stipulated 180-month sentence) until sentencing.

Three months later, at the sentencing hearing, the District Court accepted the agreement and sentenced Hughes to 180 months in prison. The court stated that it had “considered the plea agreement [and] the sentencing guidelines, particularly the provisions of [§ 3553(a)],” and that it would “accept and approve the binding plea agreement.” App. to Pet. for Cert. 32a–33a. The court calculated Hughes’ Guidelines range as 188 to 235 months in prison and heard statements from Hughes’ daughter, mother, and Hughes himself. *Id.*, at 37a–43a. When it imposed the agreed 180-month sentence the court reiterated that it was “a reasonable sentence in this case compatible with the advisory United States Sentencing Guidelines but in accordance with the mandatory matters the Court is required to consider in ultimately determining a sentence.” *Id.*, at 44a, 47a.

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2

Less than two months after the District Court sentenced Hughes, the Sentencing Commission adopted amendment 782 to the Guidelines. USSG App. C, Amdt. 782 (Supp. Nov. 2012–Nov. 2016). The amendment reduced the base offense level by two levels for most drug offenses. The Commission later made amendment 782 retroactive for defendants who, like Hughes, already had been sentenced under the higher offense levels. Amdt. 788. Under the revised Guidelines, Hughes’ sentencing range is 151 to 188 months—about three to four years lower than the range in effect when he was sentenced.

Hughes filed a motion for a reduced sentence under § 3582(c)(2). The District Court denied the motion, concluding that Hughes is ineligible for relief; and the Court of Appeals for the Eleventh Circuit affirmed. 849 F. 3d 1008, 1016 (2017); App. to Pet. for Cert. 28a. Both courts concluded that the *Freeman* concurrence stated the holding of this Court under *Marks*, and that under the concurrence’s interpretation Hughes was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range. 849 F. 3d, at 1015; App. to Pet. for Cert. 25a. This Court granted certiorari. 583 U.S. 1036.

II

A principal purpose of the Sentencing Guidelines is to promote “uniformity in sentencing imposed by different federal courts for similar criminal conduct.” *Molina-Martinez*, 578 U.S., at 192 (internal quotation marks and alteration omitted; emphasis deleted). Yet in the aftermath of *Freeman*, a defendant’s eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in which the case arises. Further, even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on the fortuity of whether a defendant’s Type-C agreement

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includes a specific-enough reference to a Guidelines range. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 13–20. In some cases defendants have been held ineligible for relief even where the sentencing hearing makes it crystal clear that the Government and the defendant agreed to a Guidelines sentence and the district court imposed one. See, e.g., *United States v. McNeese*, 819 F. 3d 922, 929 (CA6 2016).

In addition this Court’s precedents since *Freeman* have further confirmed that the Guidelines remain the foundation of federal sentencing decisions. In *Peugh v. United States*, 569 U.S. 530 (2013), for example, the Court held that the *Ex Post Facto* Clause prohibits retroactive application of amended Guidelines that increase a defendant’s sentencing range. *Id.*, at 544. The Court reasoned that, *Booker* notwithstanding, the Guidelines remain “the lodestone of sentencing.” 569 U.S., at 544. And in *Molina-Martinez*, the Court held that in the ordinary case a defendant suffers prejudice from a Guidelines error because of “the systemic function of the selected Guidelines range.” 578 U.S., at 200.

“The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines.” *Peugh*, *supra*, at 541. In this context clarity and consistency are essential. To resolve the uncertainty that resulted from this Court’s divided decision in *Freeman*, the Court now holds that a sentence imposed pursuant to a Type-C agreement is “based on” the defendant’s Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement.

A

As already mentioned, § 3582(c)(2) authorizes a district court to reduce a defendant’s sentence if the defendant “has been sentenced to a term of imprisonment based on a sen-

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tencing range that has subsequently been lowered by the Sentencing Commission.” A district court imposes a sentence that is “based on” a Guidelines range if the range was a basis for the court’s exercise of discretion in imposing a sentence. To “base” means “[t]o make, form, or serve as a foundation for,” or “[t]o use (something) as the thing from which something else is developed.” Black’s Law Dictionary 180 (10th ed. 2014). Likewise, a “base” is “[t]he starting point or foundational part of something,” or “[a] point, part, line, or quantity from which a reckoning or conclusion proceeds.” *Ibid.*; see also *ibid.* (similarly defining “basis”).

In the typical sentencing case there will be no question that the defendant’s Guidelines range was a basis for his sentence. The Sentencing Reform Act requires a district court to calculate and consider a defendant’s Guidelines range in every case. 18 U.S.C. § 3553(a). Indeed, the Guidelines are “the starting point for every sentencing calculation in the federal system.” *Peugh, supra*, at 542; see also *Molina-Martinez*, 578 U.S., at 198 (“The Court has made clear that the Guidelines are to be the sentencing court’s starting point and initial benchmark” (internal quotation marks and alteration omitted)). “Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.” *Id.*, at 199 (internal quotation marks omitted; emphasis deleted). In general, § 3582(c)(2) allows district courts to reconsider a prisoner’s sentence based on a new starting point—that is, a lower Guidelines range—and determine whether a reduction in the prisoner’s sentence is appropriate.

A sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant’s Guidelines range is both the starting point and a basis for his ultimate sentence. Although in a Type-C agreement the Govern-

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ment and the defendant may agree to a specific sentence, that bargain is contingent on the district court accepting the agreement and its stipulated sentence. *Freeman*, 564 U. S., at 529–530. The Sentencing Guidelines prohibit district courts from accepting Type-C agreements without first evaluating the recommended sentence in light of the defendant’s Guidelines range. USSG §6B1.2(c). So in the usual case the court’s acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are “based on” the defendant’s Guidelines range.

To be sure, the Guidelines are advisory only, and so not every sentence will be consistent with the relevant Guidelines range. See *Koons v. United States*, *post*, at 706 (defendants’ Guidelines ranges “clearly did not” form a basis of the ultimate sentences). For example, in *Koons* the Court today holds that five defendants’ sentences were not “‘based on’” subsequently lowered Guidelines ranges because in that case the Guidelines and the record make clear that the sentencing judge “discarded” their sentencing ranges “in favor of mandatory minimums and substantial-assistance factors.” *Ibid.*; see also *Molina-Martinez*, *supra*, at 200 (“The record in a case may show, for example, that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range”).

If the Guidelines range was not “a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement,” *Freeman*, *supra*, at 530, then the defendant’s sentence was not based on that sentencing range, and relief under § 3582(c)(2) is unavailable. And that is so regardless of whether a defendant pleaded guilty pursuant to a Type-C agreement or whether the agreement itself referred to a Guidelines range. The statutory language points to the reasons for the sentence that the district court imposed, not the reasons for the parties’ plea agreement. Still, cases like *Koons* are a narrow exception to the

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general rule that, in most cases, a defendant's sentence will be "based on" his Guidelines range. In federal sentencing the Guidelines are a district court's starting point, so when the Commission lowers a defendant's Guidelines range the defendant will be eligible for relief under § 3582(c)(2) absent clear demonstration, based on the record as a whole, that the court would have imposed the same sentence regardless of the Guidelines. See *Koons, post*, at 705–707.

This interpretation furthers § 3582(c)(2)'s purpose, as well as the broader purposes of the Sentencing Reform Act. "The Act aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U. S., at 533. "Section 3582(c)(2) contributes to that goal by ensuring that district courts may adjust sentences imposed pursuant to a range that the Commission concludes [is] too severe, out of step with the seriousness of the crime and the sentencing ranges of analogous offenses, and inconsistent with the Act's purposes." *Ibid.* And there is no reason a defendant's eligibility for relief should turn on the form of his plea agreement.

Two cases decided after *Freeman* now reinforce this proposition. See *Molina-Martinez, supra*, at 198–201; *Peugh*, 569 U. S., at 541–544. These cases confirm that the Guidelines remain a basis for almost all federal sentences. In *Peugh*, the Court recognized that "[e]ven after *Booker* rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Id.*, at 543. And in *Molina-Martinez*, the Court explained that "[t]he Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." 578 U. S., at 199. In short, experience has shown that, although the interpretation proffered by JUSTICE SOTOMAYOR's concurring opinion in *Freeman* could be one permissible reading of

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§ 3582(c)(2), the system Congress put in place is best implemented, as a systemic, structural matter, by the interpretation confirmed in the instant case.

B

In response, the Government largely recycles arguments that a majority of this Court rejected in *Freeman*. For example, the Government contends that allowing defendants who enter Type-C agreements to seek reduced sentences under § 3582(c)(2) would deprive the Government of one of the benefits of its bargain—namely, the defendant’s agreement to a particular sentence. But that has nothing to do with whether a defendant’s sentence was based on the Sentencing Guidelines under § 3582(c)(2). *Freeman*, 564 U. S., at 531; see also *id.*, at 540 (opinion of SOTOMAYOR, J.). And in any event, “[w]hat is at stake in this case is a defendant’s eligibility for relief, not the extent of that relief.” *Id.*, at 532 (plurality opinion). Even if a defendant is eligible for relief, before a district court grants a reduction it must consider “the factors set forth in section 3553(a) to the extent that they are applicable” and the Commission’s “applicable policy statements.” § 3582(c)(2). The district court can consider the benefits the defendant gained by entering a Type-C agreement when it decides whether a reduction is appropriate (or when it determines the extent of any reduction), “for the statute permits but does not require the court to reduce a sentence.” *Id.*, at 532.

The Government also contends that allowing courts to reduce the sentences of defendants like Hughes would be inconsistent with the Commission’s policy statement in USSG § 1B1.10, which provides that when a district court modifies a sentence under § 3582(c)(2) it “shall substitute only the [retroactive] amendments listed in subsection (d) for the corresponding guidelines provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.” USSG § 1B1.10(b)(1).

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According to the Government, no “guidelines provisions” are “applied” when a defendant enters a Type-C agreement because at the moment of sentencing—that is, after the court has already accepted the agreement—Rule 11 prohibits the court from imposing any sentence other than the one the parties bargained for.

This argument fails for at least two reasons. First, the Government’s interpretation of §1B1.10 depends on an artificial distinction between a court’s decision to accept a Type-C agreement and its decision to impose the agreed-upon sentence. As explained above, a district court must consider the defendant’s “applicable Guidelines range” when it decides whether to accept or reject the agreement, USSG §6B1.2(c)—often, as here, at the sentencing hearing, after the court has reviewed the presentence report. And as the Government itself points out, once the district court accepts the agreement, the agreed-upon sentence is the only sentence the court may impose. Thus, there is no meaningful difference between a court’s decision to accept a Type-C agreement that includes a particular sentence and the court’s decision (sometimes, as here, just minutes later) to impose that sentence.

Second, the Commission’s policy statement “seeks to isolate whatever marginal effect the since-rejected Guideline had on the defendant’s sentence.” *Freeman*, 564 U. S., at 530. Accordingly, relief under §3582(c)(2) should be available to permit the district court to reconsider a prior sentence to the extent the prisoner’s Guidelines range was a relevant part of the framework the judge used to accept the agreement or determine the sentence. *Ibid.* If the district court concludes that it would have imposed the same sentence even if the defendant had been subject to the lower range, then the court retains discretion to deny relief.

C

In this case the District Court accepted Hughes’ Type-C agreement after concluding that a 180-month sentence was

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consistent with the Sentencing Guidelines. App. to Pet. for Cert. 33a. The court then calculated Hughes' sentencing range and imposed a sentence that the court deemed "compatible" with the Guidelines. *Id.*, at 36a, 47a. Thus, the sentencing range was a basis for the sentence that the District Court imposed. That range has "subsequently been lowered by the Sentencing Commission," so Hughes is eligible for relief under § 3582(c)(2). The Court expresses no view as to whether the District Court should exercise its discretion to reduce Hughes' sentence after considering the § 3553(a) factors and the Commission's relevant policy statements. See 18 U. S. C. § 3582(c)(2).

* * *

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

In *Freeman v. United States*, 564 U. S. 522 (2011), this Court confronted the same question it definitively resolves today: whether criminal defendants who enter into plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C) are eligible for sentencing reductions under 18 U. S. C. § 3582(c)(2). *Freeman* ended in a 4–1–4 decision that left lower courts confused as to whether the plurality or the concurring opinion controlled.

The plurality of four Justices in *Freeman* concluded that defendants who plead guilty pursuant to a so-called Type-C agreement may be eligible for a sentence reduction under § 3582(c)(2) because Type-C sentences are "based on the Guidelines" "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." 564 U. S., at 530. Four Justices dissented. *Id.*, at 544–551 (opinion of ROBERTS, C. J.). They would

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have held that a defendant who pleads guilty pursuant to a Type-C agreement is categorically ineligible for a sentence reduction under § 3582(c)(2) because such a sentence is always “based on” the plea agreement, and not on the Guidelines. *Id.*, at 544–548.

Parting ways with all eight of my colleagues, I concurred only in the judgment. *Id.*, at 534–544. I held the view that sentences imposed under Type-C agreements are typically “based on” the agreements themselves, not on the Guidelines. *Id.*, at 535–536. “In the (C) agreement context,” I explained, “it is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced.” *Id.*, at 535. But, in my view, that general rule was not absolute. Rejecting the categorical rule adopted by the dissent, I instead concluded that some Type-C sentences were “based on” the Guidelines and thus eligible for sentencing reductions under § 3582(c)(2). *Id.*, at 538–539. Specifically, I clarified that § 3582(c)(2) relief was available in cases where the Type-C agreement “call[s] for the defendant to be sentenced within a particular Guidelines sentencing range,” or in cases where the “plea agreement . . . provide[s] for a specific term of imprisonment . . . but also make[s] clear that the basis for the specified term is a Guidelines sentencing range.” *Id.*, at 538–539. Because Freeman’s agreement presented one such case, I agreed with the plurality that he was eligible for a sentence reduction under § 3582(c)(2). See *id.*, at 542–544.

I continue to believe that my *Freeman* concurrence sets forth the most convincing interpretation of § 3582(c)(2)’s statutory text. But I also acknowledge that my concurrence precipitated a 4–1–4 decision that left significant confusion in its wake. Because *Freeman*’s fractured disposition provided insufficient guidance, courts of appeals have struggled over whether they should follow the *Freeman* plurality or my separate concurrence. See *ante*, at 679. As a result, “in the aftermath of *Freeman*, a defendant’s eligibility for a reduced sentence under § 3582(c)(2) turns on the Circuit in

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which the case arises.” *Ante*, at 684. And, “even within Circuits that follow the *Freeman* concurrence, unwarranted disparities have resulted depending on the fortuity of whether a defendant’s Type-C agreement includes a specific-enough reference to a Guidelines range.” *Ante*, at 684–685.

The integrity and legitimacy of our criminal justice system depend upon consistency, predictability, and evenhandedness. Regrettably, the divided decisions in *Freeman*, and my concurrence in particular, have done little to foster those foundational principles. Quite the opposite, my individual views, which “[n]o other Justice . . . shares,” have contributed to ongoing discord among the lower courts, sown confusion among litigants, and left “the governing rule uncertain.” *Arizona v. Gant*, 556 U. S. 332, 354 (2009) (Scalia, J., concurring); see Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3–27 (arguing that the *Freeman* concurrence leads to unpredictable and inconsistent results).

I therefore join the majority in full because doing so helps to ensure clarity and stability in the law and promotes “uniformity in sentencing imposed by different federal courts for similar criminal conduct.” *Molina-Martinez v. United States*, 578 U. S. 189, 192 (2016) (internal quotation marks and alteration omitted; emphasis deleted). Today’s majority opinion charts a clear path forward: It mitigates the inconsistencies and disparities occasioned (at least in part) by my concurrence. It ensures that similarly situated defendants are subject to a uniform legal rule. It studiously adheres to “this Court’s precedents since *Freeman*,” which firmly establish “that the Guidelines remain the foundation of federal sentencing decisions.” *Ante*, at 685; see *ante*, at 688–689 (discussing *Molina-Martinez*, 578 U. S. 189; *Peugh v. United States*, 569 U. S. 530 (2013)). And it aligns more closely than the dissent does with the view I articulated in *Freeman*.¹

¹ Unlike the majority, the dissent’s position is incompatible with my view in *Freeman* (and in this case) that criminal defendants who plead guilty under Type-C agreements are not categorically ineligible for relief under

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For all these reasons, I now lend my vote to the majority and accede in its holding “that a sentence imposed pursuant to a Type-C agreement is ‘based on’ the defendant’s Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement.” *Ante*, at 685.²

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Seven years ago, four Justices took the position that a defendant sentenced to a term of imprisonment specified in a binding plea agreement may have been sentenced “based on” a Sentencing Guidelines range, simply because the district court must consider the Guidelines in deciding whether to accept the agreement. *Freeman v. United States*, 564 U. S. 522, 529–530 (2011) (plurality opinion). That view has

§ 3582(c)(2). See 564 U. S., at 538–540 (SOTOMAYOR, J., concurring in judgment). Accordingly, I continue to “reject the categorical rule advanced by the Government and endorsed by the dissent.” *Id.*, at 539.

²I am sensitive to the Government’s contention that allowing criminal defendants to obtain reductions of Type-C sentences under § 3582(c)(2) might deprive the Government of the benefit of its bargain. Brief for United States 52. But, as the majority persuasively explains, that argument “has nothing to do with whether a defendant’s sentence was based on the Sentencing Guidelines under § 3582(c)(2)” and therefore has no bearing on whether a defendant who has entered into a Type-C agreement is eligible for a sentence reduction. *Ante*, at 689; see *Freeman*, 564 U. S., at 532 (plurality opinion) (“What is at stake . . . is a defendant’s eligibility for relief, not the extent of that relief”). All that said, there may be circumstances in which the Government makes substantial concessions in entering into a Type-C agreement with a defendant—*e. g.*, by declining to pursue easily proved and weighty sentencing enhancements—such that there is a compelling case that the agreed-upon sentence in the Type-C agreement would not have been affected if the subsequently lowered Guidelines range had been in place at the relevant time. If such circumstances exist, I expect that district courts will take that into account when deciding whether, and to what extent, a Type-C sentence should be reduced under § 3582(c)(2). See *ante*, at 689.

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since garnered more votes, but has not gotten any more persuasive.

A defendant is eligible for a sentence reduction following a retroactive Guidelines amendment if he was “sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U. S. C. § 3582(c)(2). When a defendant enters into a binding “Type-C” plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), however, the resulting sentence is “dictated by the terms of the agreement entered into by the parties, not the judge’s Guidelines calculation.” *Freeman*, 564 U. S., at 536 (SOTOMAYOR, J., concurring in judgment). Five Justices recognized as much in *Freeman*. See *ibid.*; *id.*, at 544 (ROBERTS, C. J., dissenting).

If a defendant pleads guilty pursuant to a Type-C agreement specifying a particular term of imprisonment, the district court may sentence him only to that term. See Fed. Rule Crim. Proc. 11(c)(1)(C) (the parties’ choice of an “appropriate” sentence “binds the court once the court accepts the plea agreement”). If the judge considers the parties’ chosen sentence to be inappropriate, he does not have discretion to impose a different one. Instead, the court’s only option is to reject the agreement and afford the defendant the opportunity to be released from his guilty plea. See Fed. Rules Crim. Proc. 11(c)(3)(A), (4), (5).

As the Court points out, a district court considering whether to accept a Type-C agreement must consult the Guidelines, as the District Court did here. *Ante*, at 682; see App. to Pet. for Cert. 32a–36a. But “when determining the sentence to impose,” the district court may base its decision on “one thing and one thing only—the plea agreement.” *Freeman*, 564 U. S., at 545 (ROBERTS, C. J., dissenting). The Court characterizes this distinction as “artificial,” arguing that the district court’s ultimate imposition of a sentence often has as much to do with its Guidelines calculation as anything else. *Ante*, at 690; see *ante*, at 686–688. But that is

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not so: With a Type-C agreement, the sentence is set by the parties, not by a judge applying the Guidelines. Far from being “artificial,” that distinction is central to what makes a Type-C plea a Type-C plea. “In the (C) agreement context” it is “the binding plea agreement that is the foundation for the term of imprisonment.” *Freeman*, 564 U. S., at 535 (opinion of SOTOMAYOR, J.). “To hold otherwise would be to contravene the very purpose of (C) agreements—to bind the district court and allow the Government and the defendant to determine what sentence he will receive.” *Id.*, at 536.

That commonsense understanding accords with our reading of the phrase “based upon” in the context of deciding when a cause of action is based upon particular conduct. In *Saudi Arabia v. Nelson*, 507 U. S. 349 (1993), we considered a provision in the Foreign Sovereign Immunities Act of 1976 providing an exception to a foreign state’s immunity when “the action is based upon a commercial activity carried on in the United States by the foreign state.” 28 U. S. C. § 1605(a)(2). We said that the phrase did not encompass a foreign state’s activity that “led to” the tortious conduct. 507 U. S., at 358. Instead, we interpreted the phrase to refer only to the conduct that forms “the ‘basis,’” or “foundation,” of the cause of action—that is, “the ‘gravamen of the complaint.’” *Id.*, at 357. And as we explained, the “torts, and not the arguably commercial activities that preceded their commission, form the basis for the [plaintiffs’] suit.” *Id.*, at 358. So too here: The Type-C agreement, and not the Guidelines calculation that preceded its acceptance, forms the basis for the sentence.

More recently, in *OBB Personenverkehr AG v. Sachs*, 577 U. S. 27 (2015), we found that a cause of action was not “based upon” commercial activity when the activity established just one element of the action. The phrase “based upon,” we explained, instead looks to “the core of [the] suit” and what the claims “turn on.” *Id.*, at 35. Here the sentence that petitioner Hughes received “turned on” the agreement, not the Guidelines or anything else.

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The Court finds new justification for its interpretation in *Peugh v. United States*, 569 U. S. 530 (2013), and *Molina-Martinez v. United States*, 578 U. S. 189 (2016). But those cases—which do not concern the language of § 3582(c)(2) or sentencing pursuant to Type-C agreements—do not inform the distinct question at hand. I agree that when a district court has discretion to select an appropriate sentence, the resulting sentence can often be said to be based on the advisory Guidelines range. See *Peugh*, 569 U. S., at 541 (describing sentences under the post-*Booker* scheme as “anchored by the Guidelines,” see *United States v. Booker*, 543 U. S. 220 (2005)); *Molina-Martinez*, 578 U. S., at 204 (“[i]n the ordinary case” the Guidelines “anchor the court’s discretion in selecting an appropriate sentence”). But there are circumstances where the district court’s discretion is confined such that the Guidelines range does not play a meaningful part in the ultimate determination of the defendant’s sentence. One such scenario is when an applicable mandatory minimum supersedes the Guidelines range. See *Koons v. United States*, *post*, at 702 (a Guidelines range can be “overridden” by “a congressionally mandated minimum sentence”). Another is the situation before us, where Rule 11(c)(1)(C) compels the district court to sentence the defendant to a term chosen by the parties, or none at all.

Finally, as five Members of this Court recognized in *Freeman*, “[a]llowing district courts later to reduce a term of imprisonment simply because the court itself considered the Guidelines in deciding whether to accept the agreement would transform § 3582(c)(2) into a mechanism by which courts could rewrite the terms of (C) agreements in ways not contemplated by the parties.” 564 U. S., at 536–537 (opinion of SOTOMAYOR, J.); see *id.*, at 545 (ROBERTS, C. J., dissenting). The Court dismisses this point as having “nothing to do with whether a defendant’s sentence was based on the Sentencing Guidelines.” *Ante*, at 689. But of course it does. The very purpose of a Type-C agreement is to present the defendant’s sentence to the district court on a

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take-it-or-leave-it basis, preventing the district judge from altering the sentence as he sees fit. The Court's interpretation of § 3582(c)(2) allows for just such revision, possibly many years down the line, when the Government has already fulfilled its side of the bargain.

The Court justifies this result by arguing that its rule ensures that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Ante*, at 688. But that ignores the crucial way in which Type-C defendants are *not* similarly situated to other defendants. They entered into binding agreements—based on the unique facts of their cases and their negotiations with prosecutors—and received benefits (often quite significant ones) that other defendants do not. The facts of this case provide a striking illustration. In exchange for the certainty of a binding 180-month sentence, the Government not only dropped additional charges against Hughes, but also promised not to pursue a recidivist enhancement that would have imprisoned him for life.

The Court stresses that the question presented concerns only a Type-C defendant's *eligibility* under § 3582(c)(2), and that the district court might exercise its discretion to deny a reduction if it "concludes that it would have imposed the same sentence even if the defendant had been subject to the lower range." *Ante*, at 690; see *ante*, at 689 (suggesting that the district court "can consider the benefits the defendant gained by entering a Type-C agreement" in deciding "whether a reduction is appropriate"). But even if the district court ultimately decides against a reduction, the Government will be forced to litigate the issue in the meantime—nullifying another of its benefits from the Type-C agreement. To secure the sentence to which the parties already agreed, the Government likely will have to recreate the state of play from the original plea negotiations and sentencing to make counterfactual "what if" arguments—which, naturally, the defendant will then try to rebut. Settling this

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debate is unlikely to be as straightforward as the Court anticipates.

The point is a very practical one: Hughes pleaded guilty and entered into a binding agreement because he otherwise was looking at life in prison. Although the District Court dutifully performed the required Guidelines calculations, Hughes's sentence was based on the agreement, not the Guidelines range. Hughes should not receive a windfall benefit because that range has been changed.

The Government may well be able to limit the frustrating effects of today's decision in the long run. Going forward, it presumably can add a provision to every Type-C agreement in which the defendant agrees to waive any right to seek a sentence reduction following future Guidelines amendments. See Brief for Petitioner 34–35 (referring to the possibility of such an “explicit waiver”). But that is no comfort when it comes to cases like this one, where the parties understood their choice of sentence to be binding.

I respectfully dissent.

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KOONS ET AL. *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 17–5716. Argued March 27, 2018—Decided June 4, 2018

The five petitioners pleaded guilty to drug conspiracy charges that subjected them to mandatory minimum sentences under 21 U.S.C. § 841(b)(1). Before imposing their sentences, the District Court calculated their advisory Guidelines ranges. But because the top end of the Guidelines ranges fell below the mandatory minimums, the court concluded that the mandatory minimums superseded the Guidelines ranges. After discarding these ranges, the court departed downward from the mandatory minimums under 18 U.S.C. § 3553(e) to reflect petitioners' substantial assistance to the Government in prosecuting other drug offenders. In settling on the final sentences, the court considered the relevant "substantial assistance factors" set out in the Guidelines, but it did not consider the original Guidelines ranges that it had earlier discarded.

After petitioners were sentenced, the Sentencing Commission amended the Guidelines and reduced the base offense levels for certain drug offenses, including those for which petitioners were convicted. Petitioners sought sentence reductions under § 3582(c)(2), which makes defendants eligible if they were sentenced "based on a sentencing range" that was later lowered by the Sentencing Commission. The courts below held that petitioners were not eligible because they could not show that their sentences were "based on" the now-lowered Guidelines ranges.

Held: Petitioners do not qualify for sentence reductions under § 3582(c)(2) because their sentences were not "based on" their lowered Guidelines ranges but, instead, were "based on" their mandatory minimums and on their substantial assistance to the Government. Pp. 704–708.

(a) For a sentence to be "based on" a lowered Guidelines range, the range must have at least played "a relevant part [in] the framework the [sentencing] judge used" in imposing the sentence. *Hughes v. United States*, *ante*, at 690. Petitioners' sentences do not fall into this category because the District Court did not consider the Guidelines ranges in imposing its ultimate sentences. On the contrary, the court scrapped the ranges in favor of the mandatory minimums and never considered the ranges again. Thus, petitioners may not receive § 3582(c)(2) sentence reductions. P. 705.

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(b) Petitioners' four counterarguments are unavailing. First, they insist that because this Court has said that the Guidelines ranges serve as "the starting point for every sentencing calculation in the federal system," *Peugh v. United States*, 569 U. S. 530, 542, *all* sentences are "based on" Guidelines ranges. But that does not follow. Just because district courts routinely calculate defendants' Guidelines ranges does not mean that any sentence subsequently imposed must be regarded as "based on" a Guidelines range. What matters instead is the role that the Guidelines range played in the selection of the sentence eventually imposed. And here the ranges played no relevant role. Second, petitioners argue that even if their sentences were not actually based on the Guidelines ranges, they are eligible under § 3582(c)(2) because their sentences *should have been* based on those ranges. But even assuming that this is the correct interpretation of "based on," petitioners are not eligible because the District Court made no mistake in sentencing them. The court properly discarded their Guidelines ranges and permissibly considered only factors related to substantial assistance when departing downward. Third, petitioners stress that the Sentencing Commission's policy statement shows that defendants in their shoes should be eligible for sentence reductions. Policy statements, however, cannot make defendants eligible when § 3582(c)(2) makes them ineligible. Fourth, petitioners contend that the Court's rule creates unjustifiable sentencing disparities, but, in fact, the rule avoids such disparities. Identically situated defendants sentenced today may receive the same sentences petitioners received, and those defendants, like petitioners, are not eligible for sentence reductions under § 3582(c)(2). Pp. 705–708.

850 F. 3d 973, affirmed.

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

Jeffrey L. Fisher, by appointment of the Court, 583 U. S. 1090, argued the cause for petitioners. With him on the briefs were *David T. Goldberg*, *Pamela S. Karlan*, *James Whalen*, and *Joseph Herrold*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Kneedler*, and *Demetra Lambros*.*

*Briefs of *amici curiae* urging reversal were filed for Families Against Mandatory Minimums by *David DeBold*, *Mary Price*, and *Peter Goldberger*; for the National Association of Criminal Defense Lawyers by *Dan-*

Opinion of the Court

JUSTICE ALITO delivered the opinion of the Court.

Under 18 U. S. C. § 3582(c)(2), a defendant is eligible for a sentence reduction if he was initially sentenced “based on a sentencing range” that was later lowered by the United States Sentencing Commission. The five petitioners in today’s case claim to be eligible under this provision. They were convicted of drug offenses that carried statutory mandatory minimum sentences, but they received sentences below these mandatory minimums, as another statute allows, because they substantially assisted the Government in prosecuting other drug offenders. We hold that petitioners’ sentences were “based on” their mandatory minimums and on their substantial assistance to the Government, not on sentencing ranges that the Commission later lowered. Petitioners are therefore ineligible for § 3582(c)(2) sentence reductions.

I

All five petitioners pleaded guilty before the same sentencing judge to methamphetamine conspiracy offenses that subjected them to mandatory minimum sentences under 21 U. S. C. § 841(b)(1). Before the District Court imposed those sentences, however, it first calculated petitioners’ advisory Guidelines ranges, as district courts do in sentencing proceedings all around the country. These ranges take into account the seriousness of a defendant’s offense and his criminal history in order to produce a set of months as a recommended sentence (*e. g.*, 151 to 188 months for petitioner Koons). But not only are these ranges advisory, they are also tentative: They can be overridden by other considerations, such as a congressionally mandated minimum sentence. Indeed, the Guidelines themselves instruct that “[w]here a statutorily required minimum sentence is greater

iel T. Hansmeier and Jeffrey T. Green; and for the National Association of Federal Defenders by Amy Baron-Evans, Ada A. Phleger, Donna F. Coltharp, Sarah S. Gannett, and Daniel L. Kaplan.

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than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the [final] guideline sentence.” United States Sentencing Commission, Guidelines Manual §5G1.1(b) (Nov. 2016) (USSG); see also §1B1.1(a)(8).

That is what happened here. In each of petitioners’ cases, the top end of the Guidelines range fell below the applicable mandatory minimum sentence, and so the court concluded that the mandatory minimum superseded the Guidelines range. *E. g.*, App. 197; see also *id.*, at 70. Thus, in all five cases, the court discarded the advisory ranges in favor of the mandatory minimum sentences. See *id.*, at 114–115, 148, 174, 197, 216.

When a statute sets out a mandatory minimum sentence, a defendant convicted under that statute will generally receive a sentence at or above the mandatory minimum—but not always. If the defendant has substantially assisted the Government “in the investigation or prosecution of another person,” the Government may move under 18 U. S. C. §3553(e) to allow the district court to “impose a sentence below” the mandatory minimum “so as to reflect [the] defendant’s substantial assistance.”

The Government filed such motions in each of petitioners’ cases, and in each case, the District Court departed downward from the mandatory minimum because of petitioners’ substantial assistance. In settling on the final sentences, the court considered the so-called “substantial-assistance factors” found in §5K1.1(a) of the Guidelines, all of which relate to the assistance defendants supply the Government. App. 80, 197; see, *e. g.*, USSG §§5K1.1(a)(1)–(3), (5) (the “extent,” “timeliness,” “significance[,] and usefulness” of the defendant’s assistance and the “truthfulness, completeness, and reliability of [the] information” provided). In no case did the court consider the original drug Guidelines ranges that it had earlier discarded. See App. 115–116, 148–154, 174–177, 197–198, 216–218. The sentences ultimately imposed in

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these cases represented downward departures from the mandatory minimums of between 25 and 45 percent. See Brief for United States 3.

Years after petitioners' sentences became final, the Sentencing Commission issued amendment 782, which reduced the Guidelines' base offense levels for certain drug offenses, including those for which petitioners were convicted. See USSG App. C, Amdt. 782 (Supp. Nov. 2012–Nov. 2016); see also *Hughes v. United States*, *ante*, at 684. And because the amendment applied retroactively, *ibid.*, it made defendants previously convicted of those offenses potentially eligible for a sentence reduction under § 3582(c)(2).

Petitioners sought such reductions, but in order to qualify, they had to show that their sentences were “based on” the now-lowered drug Guidelines ranges. § 3582(c)(2). The courts below held that petitioners could not make that showing, App. 93–97; 850 F. 3d 973, 977 (CA8 2017), and we granted certiorari to review the question, 583 U.S. 1037 (2017).

II

We hold that petitioners do not qualify for sentence reductions under § 3582(c)(2) because their sentences were not “based on” their lowered Guidelines ranges. Instead, their sentences were “based on” their mandatory minimums and on their substantial assistance to the Government.¹

¹The Government argues that defendants subject to mandatory minimum sentences can never be sentenced “based on a sentencing range” that the Commission has lowered, 18 U.S.C. § 3582(c)(2), because such defendants’ “sentencing range[s]” are the mandatory minimums, which the Commission has no power to lower. See Brief for United States 19–28. We need not resolve the meaning of “sentencing range” today. Even if it referred to the discarded Guidelines range rather than the mandatory minimum—as petitioners contend, see Brief for Petitioners 20–21—petitioners still would not be eligible for sentence reductions: As explained in the text that follows, their sentences were not “based on” even *that* range.

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A

For a sentence to be “based on” a lowered Guidelines range, the range must have at least played “a relevant part [in] the framework the [sentencing] judge used” in imposing the sentence. *Hughes, ante*, at 690; see *ante*, at 687–688. The Guidelines range will often play that part, for district judges must calculate the defendant’s advisory range and then will frequently tie the sentence they impose to that range. See *ante*, at 686–687; see also § 3553(a)(4). But that is not always the case. After all, the Guidelines are advisory, and in some instances they even explicitly call for the ranges to be tossed aside. When that happens—when the ranges play no relevant part in the judge’s determination of the defendant’s ultimate sentence—the resulting sentence is not “based on” a Guidelines range.

Petitioners’ sentences fall into this latter category of cases. Their sentences were not “based on” the lowered Guidelines ranges because the District Court did not consider those ranges in imposing its ultimate sentences. On the contrary, the court scrapped the ranges in favor of the mandatory minimums and never considered the ranges again; as the court explained, the ranges dropped out of the case. App. 114–115, 148, 174, 197, 216. And once out of the case, the ranges could not come close to forming the “basis for the sentence that the District Court imposed,” *Hughes, ante*, at 691, and petitioners thus could not receive § 3582(c)(2) sentence reductions.

B

Petitioners’ four counterarguments do not change our conclusion.

First, petitioners insist that because the Guidelines ranges serve as “the starting point for every sentencing calculation in the federal system,” *Peugh v. United States*, 569 U. S. 530, 542 (2013), *all* sentences are “based on” Guidelines ranges. See Brief for Petitioners 21–22; Reply Brief 16–17. It is

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true that our cases require sentencing judges to calculate the now-advisory Guidelines range in every sentencing proceeding. And it is true that many judges use those ranges as “the foundation of [their] sentencing decisions.” *Hughes, ante*, at 685.

But it does not follow that any sentence subsequently imposed must be regarded as “based on” a Guidelines range. What matters, instead, is the role that the Guidelines range played in the selection of the sentence eventually imposed—not the role that the range played in the initial calculation. And here, while consideration of the ranges may have served as the “starting point” in the sense that the court began by calculating those ranges, the ranges clearly did not form the “foundation” of the sentences ultimately selected. See *Hughes, ante*, at 686–688. In constructing a house, a builder may begin by considering one design but may ultimately decide to use entirely different plans. While the first design would represent the starting point in the builder’s decision-making process, the house finally built would not be “based on” that design. The same is true here. Petitioners’ sentences were not “based on” Guidelines ranges that the sentencing judge discarded in favor of mandatory minimums and substantial-assistance factors.

Second, petitioners argue that even if their sentences were not actually based on their Guidelines ranges, they are eligible under § 3582(c)(2) because their sentences *should have been* based on those ranges. See Brief for Petitioners 25–34.² But even under that reading of “based on,” petitioners are not eligible because the District Court made no mistake at sentencing. Petitioners emphasize that when a court departs downward because of a defendant’s substantial assistance, § 3553(e) requires it to impose a sentence “in accord-

² We assume for argument’s sake that what should have happened at the initial sentencing proceedings, rather than what actually happened, matters for purposes of § 3582(c)(2). But cf. *Dillon v. United States*, 560 U. S. 817, 825–826, 831 (2010).

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ance with the guidelines.’” *Id.*, at 28 (emphasis deleted). But that does not mean “in accordance with the guidelines *range*.” Instead, a court imposes a sentence “in accordance with the guidelines” when it follows the Guidelines—including the parts of the Guidelines that instruct it to disregard the advisory ranges, see USSG §§ 1B1.1(a)(8), 5G1.1(b)—in settling on a sentence. And that is precisely what the court did here. It properly discarded the advisory ranges, *ibid.*, and permissibly considered only factors related to petitioners’ substantial assistance, rather than factors related to the advisory ranges, as a guide in determining how far to depart downward, USSG § 5K1.1. See § 3553(e).³

Third, petitioners stress that the Sentencing Commission’s policy statement makes clear that the Commission wanted defendants in their shoes to be eligible for sentence reductions. Brief for Petitioners 35–38; see USSG § 1B1.10(c) (policy statement). But the Commission’s policy statement cannot alter § 3582(c)(2), which applies only when a sentence was “based on” a subsequently lowered range. The Sentencing Commission may limit the application of its retroactive Guidelines amendments through its “‘applicable policy statements.’” *Dillon v. United States*, 560 U. S. 817, 824–826 (2010). But policy statements cannot make a defendant eligible when § 3582(c)(2) makes him ineligible. See *id.*, at 824–825. In short, because petitioners do not satisfy § 3582(c)(2)’s threshold “based on” requirement, the Commission had no power to enable their sentence reductions.

Fourth and finally, far from creating “unjustifiable sentencing disparities,” Brief for Petitioners 38–42, our rule *avoids*

³ Many courts have held that § 3553(e) *prohibits* consideration of the advisory Guidelines ranges in determining how far to depart downward. See, e. g., *United States v. Spinks*, 770 F. 3d 285, 287–288, and n. 1 (CA4 2014) (collecting cases). We take no view on that issue. All we must decide today is that, at the least, neither § 3553(e) nor the Guidelines *required* the District Court to use the advisory ranges in determining how far to depart downward.

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such disparities. Identically situated defendants sentenced today may receive the same sentences as petitioners received. See App. 89–90. Now, as then, district courts calculate the advisory Guidelines ranges, see USSG § 1B1.1(a)(7); discard them in favor of the mandatory minimum sentences, §§ 1B1.1(a)(8), 5G1.1(b); and then may use the substantial-assistance factors to determine how far to depart downward, §§ 1B1.1(b), 5K1.1(a). See § 3553(e). Those resulting sentences, like the sentences here, are not “based on” a lowered Guidelines range—they are “based on” the defendants’ mandatory minimums and substantial assistance to the Government. And those defendants, like petitioners, are not eligible for sentence reductions under § 3582(c)(2).

* * *

For these reasons, we affirm.

It is so ordered.

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LAMAR, ARCHER & COFRIN, LLP *v.* APPLINGCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 16–1215. Argued April 17, 2018—Decided June 4, 2018

Respondent R. Scott Appling fell behind on his bills owed to petitioner law firm Lamar, Archer & Cofrin, LLP, which threatened to withdraw representation and place a lien on its work product if Appling did not pay. Appling told Lamar that he could cover owed and future legal expenses with an expected tax refund, so Lamar agreed to continue representation. However, Appling used the refund, which was for much less than he had stated, for business expenses. When he met with Lamar again, he told the firm he was still waiting on the refund, so Lamar agreed to complete pending litigation. Appling never paid the final invoice, so Lamar sued him and obtained a judgment. Shortly thereafter, Appling and his wife filed for Chapter 7 bankruptcy. Lamar initiated an adversary proceeding against Appling in Bankruptcy Court, arguing that his debt to Lamar was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), which bars discharge of specified debts arising from “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . . financial condition.” Appling moved to dismiss on the ground that his alleged misrepresentations were “statement[s] respecting the debtor’s . . . financial condition,” which § 523(a)(2)(B) requires to be “in writing.” The Bankruptcy Court disagreed and denied Appling’s motion. Finding that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result, the court concluded that Appling’s debt to Lamar was nondischargeable under § 523(a)(2)(A). The District Court affirmed, but the Eleventh Circuit reversed, holding that a “statement respecting the debtor’s financial condition” may include a statement about a single asset. Because Appling’s statements were not in writing, the court held, § 523(a)(2)(B) did not bar him from discharging his debt to Lamar.

Held: A statement about a single asset can be a “statement respecting the debtor’s financial condition” under § 523(a)(2). Pp. 715–725.

(a) The key word in the relevant statutory phrase here is the preposition “respecting.” In ordinary usage, “respecting” means “concerning; about; regarding; in regard to; relating to.” Lamar contends that the definitions “about,” “concerning,” “with reference to,” and “as regards”

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denote a more limited scope than “related to.” And under that more limited meaning, Lamar asserts, a formal financial statement providing a detailed accounting of one’s assets and liabilities would qualify as “a statement respecting the debtor’s financial condition,” but a statement about a single asset would not. But the overlapping and circular definitions of these words belie the clear distinction Lamar attempts to impose. And the firm gives no example of a phrase in a legal context similar to the one at issue here in which toggling between “related to” and “about” has any pertinent significance.

Use of the word “respecting” in a legal context generally has a broadening effect, ensuring that a provision’s scope covers not only its subject but also matters relating to that subject. Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 539. Indeed, this Court has typically read the phrase “relating to”—one of respecting”’s meanings—expansively. See, e.g., *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95–96. Applying and the United States, as *amicus curiae*, accordingly advance an expansive interpretation here. This Court agrees with them that, given the ordinary meaning of “respecting,” Lamar’s statutory construction must be rejected, for it reads “respecting” out of the statute. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31. Had Congress intended § 523(a)(2)(B) to encompass only statements expressing the balance of a debtor’s assets and liabilities, it could have so specified—e.g., “statement of the debtor’s financial condition.” The Court also agrees that a statement is “respecting” a debtor’s financial condition if it has a direct relation to or impact on the debtor’s overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about that asset bears on a debtor’s overall financial condition and can help indicate whether a debtor is solvent or insolvent. A statement about a single asset, thus, can be a “statement respecting the debtor’s financial condition.” Pp. 715–720.

(b) Lamar’s interpretation would yield incoherent results. For instance, on Lamar’s view, a misrepresentation about a single asset made in the context of a formal financial statement or balance sheet would constitute a “statement respecting the debtor’s financial condition” and trigger § 523(a)(2)(B)’s heightened nondischargeability requirements, but the same misrepresentation made on its own, or in the context of a list of some but not all of the debtor’s assets and liabilities, would not. Lamar does not explain why Congress would draw such seemingly arbitrary distinctions. P. 720.

(c) The statutory history of the phrase “statement respecting the debtor’s financial condition” corroborates this Court’s reading. Between 1926, when the phrase was introduced, and 1978, when Congress

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enacted the Bankruptcy Code, Courts of Appeals consistently construed the phrase to encompass statements addressing just one or some of a debtor's assets or liabilities. When Congress used the materially same language in § 523(a)(2), it presumptively was aware of this longstanding judicial interpretation and intended for the phrase to retain its established meaning. Pp. 720–722.

(d) Lamar's additional arguments are unpersuasive. First, Lamar contends that Appling's construction gives § 523(a)(2)(B) an implausibly broad reach, such that little would be covered by § 523(a)(2)(A)'s general rule rendering nondischargeable debts arising from "false pretenses, a false representation, or actual fraud." But § 523(a)(2)(A) still retains significant function when the phrase "statement respecting the debtor's financial condition" is interpreted to encompass a statement about a single asset. See, e.g., *Husky Int'l Electronics, Inc. v. Ritz*, 578 U. S. 355, 359. Second, Lamar asserts that Appling's interpretation is inconsistent with the overall principle that the Bankruptcy Code exists to afford relief only to the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U. S. 213, 217. The text of § 523(a)(2), however, plainly heightens the bar to discharge when the fraud at issue was effectuated via a "statement respecting the debtor's financial condition." The heightened requirements, moreover, are not a shield for dishonest debtors. Rather, they reflect Congress' effort to balance the potential misuse of such statements by both debtors and creditors. See *Field v. Mans*, 516 U. S. 59, 76–77. Pp. 722–725.

848 F. 3d 953, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which THOMAS, ALITO, and GORSUCH, JJ., joined as to all but Part III–B.

Gregory G. Garre argued the cause for petitioner. With him on the briefs were *Benjamin W. Snyder*, *Robert C. Lamar*, and *David W. Davenport*.

Paul W. Hughes argued the cause for respondent. With him on the brief were *Micheal B. Kimberly*, *Andrew J. Pincus*, *Charles A. Rothfeld*, *Jonathan Weinberg*, and *Eugene R. Fidell*.

Jeffrey E. Sandberg argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Acting Assist-*

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*ant Attorney General Readler, Deputy Solicitor General Stewart, Mark B. Stern, and Karen Schoen.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.†

The Bankruptcy Code prohibits debtors from discharging debts for money, property, services, or credit obtained by “false pretenses, a false representation, or actual fraud,” 11 U. S. C. § 523(a)(2)(A), or, if made in writing, by a materially false “statement . . . respecting the debtor’s . . . financial condition,” § 523(a)(2)(B).

This case is about what constitutes a “statement respecting the debtor’s financial condition.” Does a statement about a single asset qualify, or must the statement be about the debtor’s overall financial status? The answer matters to the parties because the false statements at issue concerned a single asset and were made orally. So, if the single-asset statements here qualify as “respecting the debtor’s financial condition,” § 523(a)(2)(B) poses no bar to discharge because they were not made in writing. If, however, the statements fall into the more general category of “false pretenses, . . . false representation, or actual fraud,” § 523(a)(2)(A), for which there is no writing requirement, the associated debt will be deemed nondischargeable.

The statutory language makes plain that a statement about a single asset can be a “statement respecting the debtor’s financial condition.” If that statement is not in writing, then, the associated debt may be discharged, even if the statement was false.

**Brian D. Schmalzbach, Karen R. Harned, Elizabeth Milito, and Luke A. Wake* filed a brief for the National Federation of Independent Business Small Business Legal Center as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Law Professors et al. by *John Collen* and *Richard Lieb*; and for Eugene Wedoff et al. by *David R. Kuney*.

†JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH join all but Part III–B of this opinion.

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I

Respondent R. Scott Appling hired petitioner Lamar, Archer & Cofrin, LLP (Lamar), a law firm, to represent him in a business litigation. Appling fell behind on his legal bills, and by March 2005, he owed Lamar more than \$60,000. Lamar informed Appling that if he did not pay the outstanding amount, the firm would withdraw from representation and place a lien on its work product until the bill was paid. The parties met in person that month, and Appling told his attorneys that he was expecting a tax refund of “‘approximately \$100,000,’” enough to cover his owed and future legal fees. *In re Appling*, 848 F.3d 953, 955 (CA11 2017). Lamar relied on this statement and continued to represent Appling without initiating collection of the overdue amount.

When Appling and his wife filed their tax return, however, the refund they requested was of just \$60,718, and they ultimately received \$59,851 in October 2005. Rather than paying Lamar, they spent the money on their business.

Appling and his attorneys met again in November 2005, and Appling told them that he had not yet received the refund. Lamar relied on that statement and agreed to complete the pending litigation and delay collection of the outstanding fees.

In March 2006, Lamar sent Appling its final invoice. Five years later, Appling still had not paid, so Lamar filed suit in Georgia state court and obtained a judgment for \$104,179.60. Shortly thereafter, Appling and his wife filed for Chapter 7 bankruptcy.

Lamar initiated an adversary proceeding against Appling in Bankruptcy Court for the Middle District of Georgia. The firm argued that because Appling made fraudulent statements about his tax refund at the March and November 2005 meetings, his debt to Lamar was nondischargeable pursuant to 11 U. S. C. §523(a)(2)(A), which governs debts arising from “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . .

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financial condition.” Appling, in turn, moved to dismiss, contending that his alleged misrepresentations were “statement[s] . . . respecting [his] financial condition” and were therefore governed by § 523(a)(2)(B), such that Lamar could not block discharge of the debt because the statements were not “in writing” as required for nondischargeability under that provision.

The Bankruptcy Court held that a statement regarding a single asset is not a “statement respecting the debtor’s financial condition” and denied Appling’s motion to dismiss. 500 B. R. 246, 252 (MD Ga. 2013). After a trial, the Bankruptcy Court found that Appling knowingly made two false representations on which Lamar justifiably relied and that Lamar incurred damages as a result. It thus concluded that Appling’s debt to Lamar was nondischargeable under § 523(a)(2)(A). 527 B. R. 545, 550–556 (MD Ga. 2015). The District Court affirmed. 2016 WL 1183128 (MD Ga., Mar. 28, 2016).

The Court of Appeals for the Eleventh Circuit reversed. It held that “‘statement[s] respecting the debtor’s . . . financial condition’ may include a statement about a single asset.” 848 F. 3d, at 960. Because Appling’s statements about his expected tax refund were not in writing, the Court of Appeals held that § 523(a)(2)(B) did not bar Appling from discharging his debt to Lamar. *Id.*, at 961.

The Court granted certiorari, 583 U. S. 1088 (2018), to resolve a conflict among the Courts of Appeals as to whether a statement about a single asset can be a “statement respecting the debtor’s financial condition.”¹ We agree with the Eleventh Circuit’s conclusion and affirm.

¹ Compare *In re Bandi*, 683 F. 3d 671, 676 (CA5 2012) (a statement about a single asset is not a statement respecting the debtor’s financial condition); *In re Joelson*, 427 F. 3d 700, 714 (CA10 2005) (same), with *In re Appling*, 848 F. 3d 953, 960 (CA11 2017) (a statement about a single asset can be a statement respecting the debtor’s financial condition); *Engler v. Van Steinburg*, 744 F. 2d 1060, 1061 (CA4 1984) (same).

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II

A

One of the “main purpose[s]” of the federal bankruptcy system is “to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character.” *Stellwagen v. Clum*, 245 U. S. 605, 617 (1918). To that end, the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions. One such exception is found in 11 U. S. C. § 523(a)(2), which provides that a discharge under Chapter 7, 11, 12, or 13 of the Bankruptcy Code “does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by” fraud. This exception is in keeping with the “basic policy animating the Code of affording relief only to an ‘honest but unfortunate debtor.’” *Cohen v. de la Cruz*, 523 U. S. 213, 217 (1998).

More specifically, § 523(a)(2) excepts from discharge debts arising from various forms of fraud. Subparagraph (A) bars discharge of debts arising from “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s . . . financial condition.” Subparagraph (B), in turn, bars discharge of debts arising from a materially false “statement . . . respecting the debtor’s . . . financial condition” if that statement is “in writing.”

B

1

“Our interpretation of the Bankruptcy Code starts ‘where all such inquiries must begin: with the language of the statute itself.’” *Ransom v. FIA Card Services, N. A.*, 562 U. S. 61, 69 (2011). As noted, the relevant statutory text is the phrase “statement respecting the debtor’s financial condition.” Because the Bankruptcy Code does not define the words “statement,” “financial condition,” or “respecting,” we look to their ordinary meanings. See *ibid.*

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There is no dispute as to the meaning of the first two terms. A “statement” is “the act or process of stating, reciting, or presenting orally or on paper; something stated as a report or narrative; a single declaration or remark.” Webster’s Third New International Dictionary 2229 (1976) (Webster’s). As to “financial condition,” the parties agree, as does the United States, that the term means one’s overall financial status. See Brief for Petitioner 23; Brief for Respondent 25; Brief for United States as *Amicus Curiae* 12.

For our purposes, then, the key word in the statutory phrase is the preposition “respecting,” which joins together “statement” and “financial condition.” As a matter of ordinary usage, “respecting” means “in view of: considering; with regard or relation to: regarding; concerning.” Webster’s 1934; see also American Heritage Dictionary 1107 (1969) (“[i]n relation to; concerning”); Random House Dictionary of the English Language 1221 (1966) (“regarding; concerning”); Webster’s New Twentieth Century Dictionary 1542 (2d ed. 1979) (“concerning; about; regarding; in regard to; relating to”).

According to Lamar, these definitions reveal that “‘respecting’ *can* be ‘defined broadly,’” but that the word “isn’t always used that way.” Brief for Petitioner 27. The firm contends that “‘about,’” “‘concerning,’” “‘with reference to,’” and “‘as regards’” denote a more limited scope than “‘related to.’” Brief for Petitioner 3, 18, 27. When “respecting” is understood to have one of these more limited meanings, Lamar asserts, a “statement respecting the debtor’s financial condition” is “a statement that is ‘about,’ or that makes ‘reference to,’ the debtor’s overall financial state or well-being.” *Id.*, at 27–28. Under that formulation, a formal financial statement providing a detailed accounting of one’s assets and liabilities would qualify, as would statements like “‘Don’t worry, I am above water,’” and “‘I am in good financial shape.’” *Id.*, at 19, 28. A statement about a single asset would not.

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The Court finds no basis to conclude, however, at least in this context, that “related to” has a materially different meaning than “about,” “concerning,” “with reference to,” and “as regards.” The definitions of these words are overlapping and circular, with each one pointing to another in the group. “Relate” means “to be in relationship: have reference,” and, in the context of the phrase “in relation to,” “reference, respect.” Webster’s 1916; see also *id.*, at 18a (Explanatory Note 16.2). “About” means “with regard to,” and is the equivalent of “concerning.” *Id.*, at 5. “Concerning” means “relating to,” and is the equivalent of “regarding, respecting, about.” *Id.*, at 470. “Reference” means “the capability or character of alluding to or bearing on or directing attention to something,” and is the equivalent of “relation” and “respect.” *Id.*, at 1907. And “regard” means “to have relation to or bearing upon: relate to,” and is the equivalent of “relation” and “respect.” *Id.*, at 1911. The interconnected web formed by these words belies the clear distinction Lamar attempts to impose. Lamar also fails to put forth an example of a phrase in a legal context similar to the one at issue here in which toggling between “related to” and “about” has any pertinent significance.

Use of the word “respecting” in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject. Cf. *Kleppe v. New Mexico*, 426 U. S. 529, 539 (1976) (explaining that the Property Clause, “in broad terms, gives Congress the power to determine what are ‘needful’ rules ‘respecting’ the public lands,” and should receive an “expansive reading”).

Indeed, when asked to interpret statutory language including the phrase “relating to,” which is one of the meanings of “respecting,” this Court has typically read the relevant text expansively. See, e. g., *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U. S. 87, 95–96 (2017) (describing “‘relate to’” as “expansive” and noting that “Congress characteristi-

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cally employs the phrase to reach any subject that has ‘a connection with, or reference to,’ the topics the statute enumerates”); *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374, 378–390 (1992) (explaining that “‘relating to’” has a “broad” ordinary meaning and accordingly holding that the Airline Deregulation Act of 1978 provision prohibiting the States from enforcing any law “‘relating to rates, routes, or services’” of any air carrier pre-empted any fare advertising guidelines that “would have a significant impact upon the airlines’ ability to market their product, and hence a significant impact upon the fares they charge”); *Ingersoll-Rand Co. v. McClendon*, 498 U. S. 133, 139 (1990) (“‘A law “relates to” an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.’ Under this ‘broad common-sense meaning,’ a state law may ‘relate to’ a benefit plan . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect” (citation omitted)).

Advancing that same expansive approach here, Appling contends that a “statement respecting the debtor’s financial condition” is “a statement that has a direct relation to, or impact on the balance of all of the debtor’s assets and liabilities or the debtor’s overall financial status.” Brief for Respondent 17 (internal quotation marks and citations omitted). “A debtor’s statement describing an individual asset or liability necessarily qualifies,” Appling explains, because it “has a direct impact on the *sum* of his assets and liabilities.” *Ibid.* “Put differently, a debtor’s statement that describes the existence or value of a constituent element of the debtor’s balance sheet or income statement qualifies as a ‘statement respecting financial condition.’” *Ibid.*

The United States as *amicus curiae* supporting Appling offers a slightly different formulation. In its view, a “statement respecting the debtor’s financial condition” includes “a representation about a debtor’s asset that is offered as evidence of ability to pay.” Brief for United States 11. Al-

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though Appling does not include “ability to pay” in his proffered definition, he and the United States agree that their respective formulations are functionally the same and lead to the same results. See Tr. of Oral Arg. 50–52, 58. That is so because to establish the requisite materiality and reliance, a creditor opposing discharge must explain why it viewed the debtor’s false representation as relevant to the decision to extend money, property, services, or credit. If a given statement did not actually serve as evidence of ability to pay, the creditor’s explanation will not suffice to bar discharge. But if the creditor proves materiality and reliance, it will be clear the statement was one “respecting the debtor’s financial condition.” Whether a statement about a single asset served as evidence of ability to pay thus ultimately always factors into the § 523(a)(2) inquiry at some point.

We agree with both Appling and the United States that, given the ordinary meaning of “respecting,” Lamar’s preferred statutory construction—that a “statement respecting the debtor’s financial condition” means only a statement that captures the debtor’s overall financial status—must be rejected, for it reads “respecting” out of the statute. See *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001) (“[A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant” (internal quotation marks omitted)). Had Congress intended § 523(a)(2)(B) to encompass only statements expressing the balance of a debtor’s assets and liabilities, there are several ways in which it could have so specified, *e. g.*, “statement disclosing the debtor’s financial condition” or “statement of the debtor’s financial condition.”² But Congress did not use such narrow language.

² Congress in fact used just such “statement of” language elsewhere in the Bankruptcy Code. See, *e. g.*, 11 U. S. C. § 329(a) (“statement of the compensation paid”); § 521(a)(1)(B)(iii) (“statement of the debtor’s financial affairs”); § 707(b)(2)(C) (“statement of the debtor’s current monthly income”).

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We also agree that a statement is “respecting” a debtor’s financial condition if it has a direct relation to or impact on the debtor’s overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor’s overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a “statement respecting the debtor’s financial condition.”

2

Further supporting the Court’s conclusion is that Lamar’s interpretation would yield incoherent results. On Lamar’s view, the following would obtain: A misrepresentation about a single asset made in the context of a formal financial statement or balance sheet would constitute a “statement respecting the debtor’s financial condition” and trigger § 523(a)(2)(B)’s heightened nondischargeability requirements, but the exact same misrepresentation made on its own, or in the context of a list of some but not all of the debtor’s assets and liabilities, would not. Lamar does not explain why Congress would draw such seemingly arbitrary distinctions, where the ability to discharge a debt turns on the superficial packaging of a statement rather than its substantive content.

In addition, a highly general statement like, “I am above water,” would need to be in writing to foreclose discharge, whereas a highly specific statement like, “I have \$200,000 of equity in my house,” would not. This, too, is inexplicably bizarre.

3

Lastly, the statutory history of the phrase “statement respecting the debtor’s financial condition” corroborates our reading of the text. That language can be traced back to a 1926 amendment to the Bankruptcy Act of 1898 that prohibited discharge entirely to a debtor who had “obtained money or property on credit, or obtained an extension or renewal

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of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition.” Act of May 27, 1926, § 6, 44 Stat. 663–664.

When Congress again amended this provision in 1960, it retained the “statement in writing respecting . . . financial condition” language. See Act of July 12, 1960, Pub. L. 86–621, § 2, 74 Stat. 409. Congress then once more preserved that language when it rewrote and recodified the provision in the modern Bankruptcy Code as § 523(a)(2)(B).

Given the historical presence of the phrase “statement respecting the debtor’s financial condition,” lower courts had ample opportunity to weigh in on its meaning. Between 1926, when the phrase was introduced, and 1978, when Congress enacted the Bankruptcy Code, Courts of Appeals consistently construed the phrase to encompass statements addressing just one or some of a debtor’s assets or liabilities.³ When Congress used the materially same language in

³See, e.g., *Tenn. v. First Hawaiian Bank*, 549 F. 2d 1356, 1358 (CA9 1977) (*per curiam*) (“[A]ppellants’ recordation of the deed which they knew was false for the purpose of obtaining an extension of credit on the basis of an asset that they did not own was a false statement of financial condition” (citing *Scott v. Smith*, 232 F. 2d 188, 190 (CA9 1956))); *In re Butler*, 425 F. 2d 47, 49, 52 (CA3 1970) (affirming holding that a corporation’s false statements as to select accounts receivable qualified as statements respecting financial condition); *Shainman v. Shear’s of Affton, Inc.*, 387 F. 2d 33, 38 (CA8 1967) (“A written statement purporting to set forth the true value of a major asset of a corporation, its inventory, is a statement respecting the financial condition of that corporation. . . . There is nothing in the language or legislative history of this section of the [Bankruptcy] Act to indicate that it was intended to apply only to complete financial statements in the accounting sense”); *Albinak v. Kuhn*, 149 F. 2d 108, 110 (CA6 1945) (“No cases have been cited to us, and none has been found by careful examination, which confines a statement respecting one’s financial condition as limited to a detailed statement of assets and liabilities”); *In re Weiner*, 103 F. 2d 421, 423 (CA2 1939) (holding that a debtor’s false statement about “an asset” that was pledged as collateral was a statement respecting financial condition).

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§ 523(a)(2), it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change”); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well”).

III

In addition to its plain-text arguments discussed and rejected above, see *supra*, at 715–720, Lamar contends that Appling’s rule undermines the purpose of § 523(a)(2) in two ways. Neither argument is persuasive.

A

First, Lamar contends that Appling’s construction gives § 523(a)(2)(B) an implausibly broad reach, such that little would be covered by § 523(a)(2)(A)’s general rule rendering nondischargeable debts arising from “false pretenses, a false representation, or actual fraud.” That is not so. Decisions from this Court and several lower courts considering the application of § 523(a)(2)(A) demonstrate that the provision still retains significant function when the phrase “statement respecting the debtor’s financial condition” is interpreted to encompass a statement about a single asset.

Section 523(a)(2)(A) has been applied when a debt arises from “forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation.” *Husky Int’l Electronics, Inc. v. Ritz*, 578 U.S. 355, 359 (2016).⁴ It

⁴ See also, *e.g.*, *In re Tucker*, 539 B. R. 861, 868 (Bkrtcy. Ct. Idaho 2015) (holding nondischargeable under § 523(a)(2)(A) a debt arising from the overpayment of Social Security disability benefits to an individual who

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also has been used to bar the discharge of debts resulting from misrepresentations about the value of goods, property, and services.⁵

B

Second, Lamar asserts that Appling’s interpretation is inconsistent with the overall principle that the Bankruptcy Code exists to afford relief only to the “‘honest but unfortunate debtor,’” *Cohen*, 523 U. S., at 217, because it leaves “fraudsters” free to “swindle innocent victims for money, property, or services by lying about their finances, then discharge the resulting debt in bankruptcy, just so long as they do so orally.” Brief for Petitioner 35.

This general maxim, however, provides little support for Lamar’s interpretation. The text of § 523(a)(2) plainly heightens the bar to discharge when the fraud at issue was effectuated via a “statement respecting the debtor’s financial condition.”⁶ The heightened requirements, moreover, are not a shield for dishonest debtors. Rather, they reflect Congress’ effort to balance the potential misuse of such

failed to report changes to his employment despite a legal duty to do so); *In re Drummond*, 530 B. R. 707, 710, and n. 3 (Bkrcty. Ct. ED Ark. 2015) (same, and concluding that “the requirement of the debtor to notify [the Social Security Administration] if she returns to work is not a statement that respects the debtor’s financial condition”).

⁵See, e. g., *In re Bocchino*, 794 F. 3d 376, 380–383 (CA3 2015) (holding nondischargeable under § 523(a)(2)(A) civil judgment debts against a debtor-stockbroker who made misrepresentations about investments); *In re Cohen*, 106 F. 3d 52, 54–55 (CA3 1997) (holding that a landlord’s misrepresentations about the rent that legally could be charged for an apartment constituted fraud under § 523(a)(2)(A)); *United States v. Spicer*, 57 F. 3d 1152, 1154, 1161 (CA DC 1995) (holding nondischargeable under § 523(a)(2)(A) a settlement agreement owed to the Government based on an investor’s misrepresentations of downpayment amounts in mortgage applications).

⁶In addition to the writing requirement, § 523(a)(2)(B) requires a creditor to show reasonable reliance. 11 U. S. C. § 523(a)(2)(B)(iii). Section 523(a)(2)(A), by contrast, requires only the lesser showing of “justifiable reliance.” *Field v. Mans*, 516 U. S. 59, 61, 70–75 (1995).

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statements by both debtors and creditors. As the Court has explained previously:

“The House Report on the [Bankruptcy Reform Act of 1978] suggests that Congress wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge.” *Field v. Mans*, 516 U. S. 59, 76–77 (1995).

Specifically, as detailed in *Field*, the House Report noted that consumer finance companies frequently collected information from loan applicants in ways designed to permit the companies to later use those statements as the basis for an exception to discharge. Commonly, a loan officer would instruct a loan applicant “to list only a few or only the most important of his debts” on a form with too little space to supply a complete list of debts, even though the phrase, ““I have no other debts,”” would be printed at the bottom of the form or the applicant would be “instructed to write the phrase in his own handwriting.” *Id.*, at 77, n. 13. If the debtor later filed for bankruptcy, the creditor would contend that the debtor had made misrepresentations in his loan application and the creditor would threaten litigation over excepting the debt from discharge. That threat was “often enough to induce the debtor to settle for a reduced sum,” even where the merits of the nondischargeability claim were weak. H. R. Rep. No. 95–595, p. 131 (1977).

Notably, Lamar’s interpretation of “statement respecting the debtor’s financial condition” would not bring within § 523(a)(2)(B)’s reach the very types of statements the House Report described, because those debts-only statements said nothing about assets and thus did not communicate fully the

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debtor's overall financial status. Yet in *Field*, the Court explained that the heightened requirements for nondischargeability under § 523(a)(2)(B) were intended to address creditor abuse involving such statements. 516 U. S., at 76–77. Lamar's construction also would render § 523(a)(2)(B) subject to manipulation by creditors, frustrating the very end Congress sought to avoid when it set forth heightened requirements for rendering nondischargeable “statements respecting the debtor's financial condition.” *Ibid*.

Finally, although Lamar tries to paint a picture of defenseless creditors swindled by lying debtors careful to make their financial representations orally, creditors are not powerless. They can still benefit from the protection of § 523(a)(2)(B) so long as they insist that the representations respecting the debtor's financial condition on which they rely in extending money, property, services, or credit are made in writing. Doing so will likely redound to their benefit, as such writings can foster accuracy at the outset of a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute.

IV

For the foregoing reasons, the Court holds that a statement about a single asset can be a “statement respecting the debtor's financial condition” under § 523(a)(2) of the Bankruptcy Code. The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

Syllabus

AZAR, II, SECRETARY OF HEALTH AND HUMAN
SERVICES, ET AL. *v.* GARZA, AS GUARDIAN AD LITEM
TO UNACCOMPANIED MINOR J. D.ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 17–654. Decided June 4, 2018

Jane Doe, a minor, was eight weeks pregnant when she unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement (ORR). Doe requested an abortion, but ORR policy generally prohibits shelter personnel from taking any steps to facilitate an abortion without the ORR director's approval. Doe's guardian ad litem, respondent Rochelle Garza, filed a putative class action on behalf of Doe and other similarly situated minors challenging the constitutionality of ORR's policy. The District Court issued a temporary restraining order allowing Doe to obtain an abortion. After a panel of the D. C. Circuit vacated the order, the D. C. Circuit sitting en banc vacated the panel order and remanded. The District Court then ordered the Government to make Doe available to begin the process for obtaining an abortion. Doe's representatives scheduled an appointment at the abortion clinic. The Government planned to seek emergency review in this Court in advance of Doe's appointment, but Doe's appointment was moved up and she had the abortion before the Government was made aware. The Government then filed this petition for certiorari.

Held: This case is moot, and the judgment below is vacated. When a federal civil case becomes moot on its way to this Court, “established practice” is “to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39. One clear example where “[v]acatur is in order” is “when mootness occurs through . . . the ‘unilateral action of the party who prevailed in the lower court.’” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 71–72. Here, it is undisputed that Doe's representative prevailed below, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment. The fact that the relevant claim here became moot before certiorari does not limit this Court's discretion. See, e. g., *LG Electronics, Inc. v. InterDigital Communications, LLC*, 572 U. S.

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1056. In answering the *Munsingwear* question here, the Court does not address allegations of material misrepresentations and omissions designed to impede this Court’s review.

Certiorari granted; 874 F. 3d 735, vacated and remanded.

PER CURIAM.

Jane Doe, a minor, was eight weeks pregnant when she unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement (ORR), part of the Department of Health and Human Services. ORR placed her in a federally funded shelter in Texas. After an initial medical examination, Doe requested an abortion. But ORR did not allow Doe to go to an abortion clinic. Absent “emergency medical situations,” ORR policy prohibits shelter personnel from “taking any action that facilitates an abortion without direction and approval from the Director of ORR.” Plaintiff’s Application for Temporary Restraining Order and Motion for Preliminary Injunction in *Garza v. Hargan*, No. 17-cv-2122 (D DC), Doc. 3–5, p. 2 (decl. of Brigitte Amiri, Exh. A). According to the Government, a minor may “le[ave] government custody by seeking voluntary departure, or by working with the government to identify a suitable sponsor who could take custody of her in the United States.” Pet. for Cert. 18; see also 8 U. S. C. § 1229c; 8 CFR §§ 236.3, 1240.26 (2018).

Respondent Rochelle Garza, Doe’s guardian ad litem, filed a putative class action on behalf of Doe and “all other pregnant unaccompanied . . . minors in ORR custody” challenging the constitutionality of ORR’s policy. Complaint in *Garza v. Hargan*, No. 17-cv-2122 (D DC), Doc. 1, p. 11. On October 18, 2017, the District Court issued a temporary restraining order allowing Doe to obtain an abortion immediately. On October 19, Doe attended preabortion counseling, required by Texas law to occur at least 24 hours in advance with the same doctor who performs the abortion. The clinic she visited typically rotated physicians on a weekly basis.

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The next day, a panel of the Court of Appeals for the District of Columbia Circuit vacated the relevant portions of the temporary restraining order. Noting that the Government had assumed for purposes of this case that Doe had a constitutional right to an abortion, the panel concluded that ORR's policy was not an "undue burden," *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 876 (1992) (plurality opinion).

Four days later, on October 24, the Court of Appeals, sitting en banc, vacated the panel order and remanded the case to the District Court. *Garza v. Hargan*, 874 F. 3d 735, 735–736 (CADDC 2017). The same day, Garza sought an amended restraining order. Garza's lawyers asked the District Court to order the Government to make Doe available "in order to obtain the counseling required by state law and to obtain the abortion procedure." Pet. for Cert. 12 (emphasis deleted). The District Court agreed and ordered the Government to act accordingly. Doe's representatives scheduled an appointment for the next morning and arranged for Doe to be transported to the clinic on October 25 at 7:30 a.m.

The Government planned to ask this Court for emergency review of the en banc order. Believing the abortion would not take place until October 26 after Doe had repeated the state-required counseling with a new doctor, the Government informed opposing counsel and this Court that it would file a stay application early on the morning of October 25. The details are disputed, but sometime over the course of the night both the time and nature of the appointment were changed. The doctor who had performed Doe's earlier counseling was available to perform the abortion after all and the 7:30 a.m. appointment was moved to 4:15 a.m. At 10 a.m., Garza's lawyers informed the Government that Doe "had the abortion this morning." *Id.*, at 15 (internal quotation marks omitted). The abortion rendered the relevant claim moot, so the Government did not file its emergency stay ap-

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plication. Instead, the Government filed this petition for certiorari.

When “a civil case from a court in the federal system . . . has become moot while on its way here,” this Court’s “established practice” is “to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). Because this practice is rooted in equity, the decision whether to vacate turns on “the conditions and circumstances of the particular case.” *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 478 (1916). One clear example where “[v]acatur is in order” is “when mootness occurs through . . . the ‘unilateral action of the party who prevailed in the lower court.’” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 71–72 (1997) (quoting *U. S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U. S. 18, 23 (1994)). “‘It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.’” 520 U. S., at 75 (alterations omitted).

The litigation over Doe’s temporary restraining order falls squarely within the Court’s established practice. Doe’s individual claim for injunctive relief—the only claim addressed by the D. C. Circuit—became moot after the abortion. It is undisputed that Garza and her lawyers prevailed in the D. C. Circuit, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment. And although not every moot case will warrant vacatur, the fact that the relevant claim here became moot before certiorari does not limit this Court’s discretion. See, e. g., *LG Electronics, Inc. v. InterDigital Communications, LLC*, 572 U. S. 1056 (2014) (after the certiorari petition was filed, respondents withdrew the complaint they filed with the Inter-

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national Trade Commission); *United States v. Samish Indian Nation*, 568 U.S. 936 (2012) (after the certiorari petition was filed, respondent voluntarily dismissed its claim in the Court of Federal Claims); *Eisai Co. v. Teva Pharmaceuticals USA, Inc.*, 564 U.S. 1001 (2011) (before the certiorari petition was filed, respondent's competitor began selling the drug at issue, which was the relief that respondent had sought); *Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087 (2009) (before the certiorari petition was filed, respondent completed a court-approved sale of assets, which mooted the appeal). The unique circumstances of this case and the balance of equities weigh in favor of vacatur.

The Government also suggests that opposing counsel made "what appear to be material misrepresentations and omissions" that were "designed to thwart this Court's review." Pet. for Cert. 26. Respondent says this suggestion is "baseless." Brief in Opposition 23. The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer the *Munsingwear* question here.

The petition for a writ of certiorari is granted. The Court vacates the en banc order and remands the case to the United States Court of Appeals for the District of Columbia Circuit with instructions to direct the District Court to dis-

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miss the relevant individual claim for injunctive relief as moot. See *Munsingwear, supra*.

It is so ordered.

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CHINA AGRITECH, INC. *v.* RESH ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 17–432. Argued March 26, 2018—Decided June 11, 2018

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, established that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint and that members of a class that fails to gain certification can timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. *American Pipe*'s tolling rule also applies to putative class members who, after denial of class certification, “prefer to bring an individual suit rather than intervene.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350. The question presented in this case is whether *American Pipe* tolling applies not only to individual claims, but to successive class actions as well.

This suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging materially identical violations of the Securities Exchange Act of 1934. The Act has both a two-year statute of limitations and a five-year statute of repose, 28 U.S.C. § 1658(b). Here, the accrual date for purposes of the Act's limitation period is February 3, 2011, and for the repose period, November 12, 2009. Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011. As required by the Private Securities Litigation Reform Act of 1995 (PSLRA), his counsel posted notice of the action and invited any member of the purported class to move to serve as lead plaintiff. Six shareholders sought lead-plaintiff status. On May 3, 2012, the District Court denied class certification; the action settled in September 2012, and the suit was dismissed. On October 4, Dean's counsel filed a new complaint (*Smyth*), still timely, with a new set of plaintiffs. Eight shareholders sought lead-plaintiff appointment in response to the PSLRA notice, but the District Court again denied class certification. Thereafter, the *Smyth* plaintiffs settled their individual claims and dismissed their suit.

Respondent Michael Resh, who did not seek lead-plaintiff status in the earlier actions, filed the present class action in 2014, a year and a half after the statute of limitations expired. The other respondents moved to intervene in the suit commenced by Resh, seeking lead-plaintiff status. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time

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to initiate class claims. The Ninth Circuit reversed, holding that the reasoning of *American Pipe* extends to successive class claims.

Held: Upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations. Pp. 739–748.

(a) *American Pipe* and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. The “efficiency and economy of litigation” that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions such as the one brought by Resh. Economy of litigation favors delaying individual claims until after a class-certification denial. With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.

Federal Rule of Civil Procedure 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation providing for early notice and lead-plaintiff procedures. There is little reason to allow plaintiffs who passed up opportunities to participate in the first (and second) round of class litigation to enter the fray several years after class proceedings first commenced.

Class representatives who commence suit after expiration of the limitation period are unlikely to qualify as diligent in asserting claims and pursuing relief. See, e. g., *McQuiggin v. Perkins*, 569 U. S. 383, 391. And respondents’ proposed reading would allow extension of the statute of limitations time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*. Pp. 739–744.

(b) If Resh’s suit meets the requirements of Rule 23(a) and (b), respondents assert, the suit should be permitted to proceed as a class action in keeping with *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393. *Shady Grove*, however, addressed a case in which a Rule 23 class action could have been maintained absent a state law proscribing class actions, while Resh’s class action would be

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untimely unless saved by *American Pipe*'s tolling exception. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled.

The clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act by abridging or modifying a substantive right. Plaintiffs have no substantive right to bring claims outside the statute of limitations. Nor is the clarification likely to cause a substantial increase in the number of protective class-action filings. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period, and there is no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings. Multiple filings, moreover, could aid a district court in determining, early on, whether class treatment is warranted, and if so, who would be the best representative. The Federal Rules provide a range of mechanisms to aid district courts in overseeing complex litigation, but they offer no reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims. Pp. 745–748.

857 F. 3d 994, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 748.

Seth Aronson argued the cause for petitioner. With him on the briefs were *William K. Pao*, *Brittany Rogers*, *Michelle C. Leu*, *Abby F. Rudzin*, *Anton Metlitsky*, *Bradley N. Garcia*, and *Jason Zarrow*.

David C. Frederick argued the cause for respondents. With him on the brief were *Jeremy S. B. Newman*, *Matthew M. Guiney*, and *David A. P. Brower*.*

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Mark A. Perry*, *Rachel S. Brass*, *Warren Postman*, and *Deborah R. White*; for DRI—The Voice of the Defense Bar by *Robert L. Wise* and *Susan E. Burnett*; for the Securities Industry and Financial Markets Association by *Lewis J. Liman*, *Jared M. Gerber*, and *Kevin M. Carroll*; and for the Washington Legal Foundation by *George E. Anhang*, *Lyle Roberts*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Julie Nepveu*, *William Alvarado Rivera*, and *Ernest A. Young*; for the

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JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the tolling rule first stated in *American Pipe & Constr. Co. v. Utah*, 414 U. S. 538 (1974). The Court held in *American Pipe* that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, the Court further ruled, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. See *id.*, at 544, 552–553. Later, in *Crown, Cork & Seal Co. v. Parker*, 462 U. S. 345 (1983), the Court clarified *American Pipe*’s tolling rule: The rule is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, “prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available.” 462 U. S., at 350, 353–354; see *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 582 U. S. 497, 512 (2017) (*American Pipe* “permitt[ed] a class action to splinter into individual suits”); *Smith v. Bayer Corp.*, 564 U. S. 299, 313–314, n. 10 (2011) (under *American Pipe* tolling rule, “a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the [existing] suit”).

The question presented in the case now before us: Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an

American Association for Justice et al. by *Deepak Gupta*, *Matthew W. H. Wessler*, and *Jeffrey R. White*; for Law Professors by *Lumen N. Mulligan*, *pro se*, and *Tejinder Singh*; for the National Conference on Public Employee Retirement Systems by *Max W. Berger* and *Robert D. Klausner*; for Plaintiffs in Post-*Dukes* Successor Class Actions by *Joseph M. Sellers*, *Christine Webber*, and *Jocelyn D. Larkin*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; and for Retired Federal Judges by *Andrew N. Goldfarb* and *John J. Connolly*.

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individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

I

The instant suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* In short, the successive complaints each make materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when several reports brought the misconduct to light. See App. 60–100 (*Resh* complaint), 205–235 (*Smyth* complaint), 133–156 (*Dean* complaint). The Exchange Act has a two-year statute of limitations that begins to run upon discovery of the facts constituting the violation. 28 U. S. C. § 1658(b). The Act also has a five-year statute of repose. *Ibid.*¹ The parties agree that the accrual date for purposes of the two-year limitation period is February 3, 2011, and for the five-year repose period, November 12, 2009. Brief for Respondents 8, n. 3.

Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011, at the start of the two-year limitation period. As required by the Pri-

¹ A statute of limitations “begin[s] to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief.” *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 582 U. S. 497, 504–505 (2017) (internal quotation marks omitted). A statute of repose, by contrast, “begin[s] to run on the date of the last culpable act or omission of the defendant.” *Id.*, at 505 (internal quotation marks omitted).

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vate Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, Dean’s counsel posted notice of the action in two “widely circulated national business-oriented publication[s],” 15 U. S. C. § 78u–4(a)(3)(A)(i), and invited any member of the purported class to move to serve as lead plaintiff. App. 274–280. Six shareholders responded to the notice, seeking to be named lead plaintiffs; other shareholders who had filed their own class complaints dismissed them in view of the *Dean* action. On May 3, 2012, after several months of discovery and deferral of a lead-plaintiff ruling, the District Court denied class certification. The plaintiffs, the District Court determined, had failed to establish that China Agritech stock traded on an efficient market—a necessity for proving reliance on a classwide basis. App. 192. Dean’s counsel then published a notice informing shareholders of the certification denial and advising: “You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech.” *Id.*, at 281–282. The *Dean* action settled in September 2012, occasioning dismissal of the suit. See 857 F. 3d 994, 998 (CA9 2017).

On October 4, 2012—within the two-year statute of limitations—Dean’s counsel filed a new complaint (*Smyth*) with a new set of plaintiffs and new efficient-market evidence. Eight shareholders responded to the PSLRA notice, seeking lead-plaintiff appointment. The District Court again denied class certification, this time on typicality and adequacy grounds. See App. 254. Thereafter, the *Smyth* plaintiffs settled their individual claims with the defendants and voluntarily dismissed their suit. Because the *Smyth* litigation was timely commenced, putative class members who promptly initiated *individual* suits in the wake of the class-action denial would have encountered no statute of limitations bar.

Respondent Michael Resh, who had not sought lead-plaintiff status in either the *Dean* or *Smyth* proceedings and

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was represented by counsel who had not appeared in the earlier actions, filed the present suit on June 30, 2014, styling it a class action—a year and a half after the statute of limitations expired. The other respondents moved to intervene, seeking designation as lead plaintiffs; together with Resh, they filed an amended complaint. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims. App. to Pet. for Cert. 36a.

The Court of Appeals for the Ninth Circuit reversed: “[P]ermitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling,” the court reasoned, “would advance the policy objectives that led the Supreme Court to permit tolling in the first place.” 857 F. 3d, at 1004. Applying *American Pipe* tolling to successive class actions, the Ninth Circuit added, would cause no unfair surprise to defendants and would promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion. 857 F. 3d, at 1004.

We granted certiorari, 583 U. S. 1037 (2017), in view of a division of authority among the Courts of Appeals over whether otherwise-untimely successive class claims may be salvaged by *American Pipe* tolling. Compare the instant case and *Phipps v. Wal-Mart Stores, Inc.*, 792 F. 3d 637, 652–653 (CA6 2015) (applying *American Pipe* tolling to successive class action), with, e. g., *Basch v. Ground Round, Inc.*, 139 F. 3d 6, 11 (CA1 1998) (“Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.”); *Griffin v. Singletary*, 17 F. 3d 356, 359 (CA11 1994) (similar); *Korwek v. Hunt*, 827 F. 2d 874, 879 (CA2 1987) (*American Pipe* does not apply to successive class suits); *Salazar-Calderon v. Presidio Valley Farmers Assn.*, 765 F. 2d 1334, 1351 (CA5 1985) (“Plaintiffs have no

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authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any.”). See also *Yang v. Odom*, 392 F. 3d 97, 112 (CA3 2004) (*American Pipe* tolling does not apply to successive class actions where certification was previously denied due to a class defect, but does apply when certification was denied based on the putative representative’s deficiencies).

II

A

American Pipe established that “the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.” 414 U. S., at 553. “A contrary rule,” the Court reasoned in *American Pipe*, “would deprive [Federal Rule of Civil Procedure] 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” *Ibid.* This is so, the Court explained, because without tolling, “[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.” *Ibid.* In *Crown, Cork*, the Court further elaborated: Failure to extend the *American Pipe* rule “to class members filing separate actions,” in addition to those who move to intervene, would result in “a needless multiplicity of actions” filed by class members preserving their individual claims—“precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.” 462 U. S., at 351.

American Pipe and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. See, e. g., *American Pipe*, 414 U. S., at 552 (addressing “privilege of intervening in an individual

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suit”); *Crown, Cork*, 462 U. S., at 349 (applying *American Pipe* to those who “file individual actions”); 462 U. S., at 352 (tolling benefits “class members who choose to file separate suits”).

What about a putative class representative, like Resh, who brings his claims as a new class action after the statute of limitations has expired? Neither decision so much as hints that tolling extends to otherwise time-barred class claims. We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. The “efficiency and economy of litigation” that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions; any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification.

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.²

² Encouraging early class filings will help ensure sufficient time remains under the statute of limitations, in the event that certification is denied for one of the actions or a portion of the class. Subclasses might be pleaded in one or more complaints and taken up if necessary; as class

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Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. See Fed. Rule Civ. Proc. 23(c)(1)(A). Indeed, Rule 23(c) was amended in 2003 to permit district courts to take account of multiple class-representative filings. Before the amendment, Rule 23(c) encouraged district courts to issue certification rulings “as soon as practicable.” The amendment changed the recommended timing target to “an early practicable time.” The alteration was made to allow greater leeway, more time for class discovery, and additional time to “explore designation of class counsel” and consider “additional [class counsel] applications rather than deny class certification,” thus “afford[ing] the best possible representation for the class.” Advisory Committee’s 2003 Notes on subds. (c)(1)(A) and (g)(2)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 815, 818; see Willging & Lee, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. Kan. L. Rev. 775, 785 (2010) (2003 amendments “raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision” and “expanded the opportunity for parties to engage in discovery prior to moving for class certification”).

The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation, for grouping class-representative filings at the outset of litigation. See *supra*, at 736–737. When the *Dean* and *Smyth* timely commenced actions were first filed, counsel put any share-

discovery proceeds and weaknesses in the class theory or adequacy of representation come to light, the lead complaint might be amended or a new plaintiff might intervene. See Brief for Plaintiffs in Post-*Dukes* Successor Class Actions as *Amici Curiae* 8–10 (describing regional subclasses asserted in the *Dukes* v. *Wal-Mart* litigation following this Court’s decision decertifying the nationwide class, *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011)); Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 349 (2016) (some *Dukes* plaintiffs moved to amend the original complaint to replead subclasses).

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holder who might wish to serve as lead plaintiff on notice of the action. Several heeded the call—six in *Dean* and eight in *Smyth*. See 857 F. 3d, at 997–998. The PSLRA, by requiring notice of the commencement of a class action, aims to draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint.³ See Brief for Securities Industry and Financial Markets Association as *Amicus Curiae* 12–13 (PSLRA “seeks to achieve Congress['] goal of curbing duplicative . . . litigation by encouraging all interested parties to apply to serve as lead plaintiff at the early stages of the case [and] providing for the consolidation of similar class actions”). With notice and the opportunity to participate in the first (and second) round of class litigation, there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced.

³ Although the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, includes a presumption that the most adequate plaintiff is the one who moves first and has the largest financial interest in the case, see 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), multiple potential lead plaintiffs have reason to apply for the role because there may not be an obvious candidate. Which plaintiff has the largest financial interest may not be immediately apparent; the statute does not define the term, and the size of a shareholder’s financial interest can depend on how many shares were purchased and sold, when, and at what price, as well as the order in which the losses are tallied. See, e.g., *Cortina v. Anavex Life Sciences Corp.*, 2016 WL 1337305 (SDNY, Apr. 5, 2016). District courts often permit aggregation of plaintiffs into plaintiff groups, so even a small shareholder could apply for lead-plaintiff status, hoping to join with other shareholders to create a unit with the largest financial interest. See Choi & Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 Colum. L. Rev. 1489, 1507, 1521, 1530 (2006) (80% of securities class actions in post-PSLRA data sample had two or more co-lead counsel firms). Thus, it is a reasonable expectation that, in litigation governed by the PSLRA, a district court will have several competing candidates for lead plaintiff to choose among.

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Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims. See, e. g., *McQuiggin v. Perkins*, 569 U. S. 383, 391 (2013); *Menominee Tribe of Wis. v. United States*, 577 U. S. 250, 255 (2016). Even *American Pipe*, which did not analyze “criteria of the formal doctrine of equitable tolling in any direct manner,” *ANZ*, 582 U. S., at 510, observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue individual claims had not slept on their rights, *American Pipe*, 414 U. S., at 554–555. Those plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims. See *Crown, Cork*, 462 U. S., at 350. A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief. Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff’s timely filed class suit.

Respondents’ proposed reading would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. See *Yang*, 392 F. 3d, at 113 (Alito, J., concurring in part and dissenting in part) (tolling for successive class actions could allow “lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class”); *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F. 3d 1324, 1326 (CA11 2015) (tolling for successive class actions allows plaintiffs “limitless bites at the apple”).⁴ This prospect

⁴ Respondents observe that in *Smith v. Bayer Corp.*, 564 U. S. 299 (2011), we held that federal class-certification denials do not have preclusive effect in subsequent state-court suits, despite concerns about successive class actions. See Brief for Respondents 40–41. But in *Smith*, we were guided by “the fundamental nature of the general rule that only parties can be bound by prior judgments.” 564 U. S., at 313 (internal quota-

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points up a further distinction between the individual-claim tolling established by *American Pipe* and tolling for successive class actions. The time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless. Respondents' claims happen to be governed by 28 U.S.C. § 1658(b)(2)'s five-year statute of repose, so the time to file complaints has a finite end. Statutes of repose, however, are not ubiquitous. See *Dekalb County Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (CA2 2016). Most statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*.⁵

tion marks omitted). The state-court plaintiffs were not parties to the federal-court litigation, hence they could not be bound by its holding—despite a “stron[g] argument” about the inefficiencies of serial class relitigation supporting the contrary position. *Id.*, at 316. No such countervailing presumption favors Resh’s untimely third federal class suit.

⁵JUSTICE SOTOMAYOR suggests that the Court might adopt a rule under which tolling “becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment,” but not where “class certification is denied because of the deficiencies of the lead plaintiff as class representative.” *Post*, at 753; see *Yang v. Odom*, 392 F.3d 97, 112 (CA3 2004) (embracing similar rule). But Rule 23 contains no instruction to give denials of class certification different effect based on the reason for the denial. And as the Advisory Committee Notes explain, affording district courts time to consider competing claims for class representation will advance the likelihood that lead plaintiff or class counsel deficiencies will be discovered and acted upon early in the litigation. See *supra*, at 741. Rule 23 and putative class members’ own interests in adequate representation, and the efficient adjudication thereof, weigh heavily against tolling for successive class actions. There is nothing inequitable in following these guides. See *post*, at 753, n. 2.

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B

Respondents emphasize that in *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393 (2010), we said that “[a] class action may be maintained,” *id.*, at 398 (internal quotation marks omitted), if the requirements of Rule 23(a) and (b) are satisfied, and “Rule 23 *automatically* applies in all civil actions and proceedings in the United States district courts,” *id.*, at 400 (internal quotation marks omitted). See Brief for Respondents 21–23. If Resh’s suit meets the requirements of Rule 23(a) and (b), respondents assert, there is no reason why Resh’s suit cannot proceed as a class action. *Shady Grove* does not call for that outcome. In *Shady Grove*, the Court held that a federal diversity action could proceed under Rule 23 despite a state law prohibiting class treatment of suits seeking damages of the kind asserted in the *Shady Grove* complaint. 559 U. S., at 396, 416. Our opinion in *Shady Grove* addressed a case in which a Rule 23 class action could have been maintained absent a contrary state-law command. *Id.*, at 396. Resh’s case presents the reverse situation: The class action would be untimely unless saved by *American Pipe*’s equitable-tolling exception to statutes of limitations. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled. In fact, as already explained, Rule 23 prescribes the opposite result. See *supra*, at 740–741.

Today’s clarification of *American Pipe*’s reach does not run afoul of the Rules Enabling Act by causing a plaintiff’s attempted recourse to Rule 23 to abridge or modify a substantive right. See Brief for Respondents 23–26 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U. S. 442 (2016)). Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive

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right. *American Pipe*, 414 U.S., at 558. Without *American Pipe*, respondents would have no peg to seek tolling here; as we have explained, however, *American Pipe* does not provide for the extension of the statute of limitations sought by Resh for institution of an untimely third class suit.

Respondents urge that *American Pipe*'s logic in fact supports their position because declining to toll the limitation period for successive class suits will lead to a "needless multiplicity" of protective class-action filings. Brief for Respondents 32–34. See also *post*, at 754 (expressing concern about duplicative and dueling class actions). But there is little reason to think that protective class filings will substantially increase. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period. See *supra*, at 738–739; 3 W. Rubenstein, *Newberg on Class Actions* §9:64, n. 5 (5th ed. 2013). These courts include the Second and Fifth Circuits (no strangers to class-action practice); both courts declined to entertain out-of-time class actions in the 1980's. See *Korwek*, 827 F. 2d 874 (CA2 1987); *Salazar-Calderon*, 765 F. 2d 1334 (CA5 1985). Respondents and their *amici* make no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings.

Amicus National Conference on Public Employee Retirement Systems cites examples of protective filings responding to courts' disallowance of *American Pipe* tolling for statutes of repose, but those examples in fact suggest that protective class filings are uncommon. See Brief for National Conference on Public Employee Retirement Systems as *Amicus Curiae* 7–8. Between dozens and hundreds of class plaintiffs filed protective *individual* claims while class-certification motions were pending in securities cases and the statute of repose was about to run out, placing a permanent bar against their claims. *Ibid.* But none of the plaintiffs

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appears to have filed a protective *class* action—even though, if the statute of repose expired and the pending class-certification motions were denied, there would be no further opportunity to assert class claims.⁶

Nor do the incentives of class-action practice suggest that many more plaintiffs will file protective class claims as a result of our holding. Any plaintiff whose individual claim is worth litigating on its own rests secure in the knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class. The plaintiff who seeks to preserve the ability to lead the class—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit⁷—has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.

In any event, as previously explained, see *supra*, at 740–741, a multiplicity of class-action filings is not necessarily “needless.” Indeed, multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative. And sooner rather than later filings are just what Rule 23 encourages. See *ibid.* Multiple timely filings might not line up neatly; they could be filed in different districts, at different times—perhaps when briefing on class certification has already begun—or on behalf of only par-

⁶The Second Circuit *Petrobras* litigation, referenced in *amicus*’ brief, illustrates that multiple timely class filings do not sow unmanageable chaos. Five class actions were filed there and consolidated, along with individual claims, for pretrial purposes, including class-certification determination. See *In re Petrobras Securities*, 862 F. 3d 250, 258 (CA2 2017).

⁷The class representative might receive a share of class recovery above and beyond her individual claim. See, e.g., *Cook v. Niedert*, 142 F. 3d 1004, 1016 (CA7 1998) (affirming class representative’s \$25,000 incentive award).

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tially overlapping classes. See Wasserman, *Dueling Class Actions*, 80 B. U. L. Rev. 461, 464–465 (2000) (describing variety of “dueling” class filings). But district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings. District courts are increasingly familiar with overseeing such complex cases, given the surge in multidistrict litigation. See Cabraser & Issacharoff, *The Participatory Class Action*, 92 N. Y. U. L. Rev. 846, 850–851 (2017) (multidistrict litigation frequently combines individual suits and multiple putative class actions). The Federal Rules provide a range of mechanisms to aid courts in this endeavor. What the Rules do not offer is a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims.

* * *

The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly. For all the above-stated reasons, it is the rule we adopt today: Time to file a class action falls outside the bounds of *American Pipe*.

Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the Court that in cases governed by the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U. S. C. § 78u–4, like this one, a plaintiff who seeks to bring

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a successive class action may not rely on the tolling rule established by *American Pipe & Constr. Co. v. Utah*, 414 U. S. 538 (1974). I cannot, however, join the majority in going further by holding that the same is true for class actions not subject to the PSLRA.

I

A

To understand why the PSLRA is essential to the conclusion the Court reaches here, recall that this case involves a putative class-action lawsuit brought by a plaintiff with a timely individual claim, joined by coplaintiffs with timely individual claims, on behalf of a putative class of absent class members with timely individual claims. See *ante*, at 737. One might naturally think, then, that the class claims in the lawsuit are timely. The majority, however, concludes that the named plaintiffs' and putative class members' class claims are time barred.

At first blush, this result might seem surprising, for the Court has rejected the idea that class claims are categorically different from individual claims. See *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U. S. 393, 398 (2010). Although it did not hold that class claims may never be treated differently from individual claims, *Shady Grove* indicates that there must be a special reason for doing so.

Here, the PSLRA supplies that special reason. The PSLRA imposes significant procedural requirements on securities class actions that do not apply to individual or traditionally joined securities claims. See § 78u-4(a)(1).

Foremost among these requirements is a process for the “[a]ppointment of lead plaintiff.” § 78u-4(a)(3). Under the PSLRA, the named plaintiff in a putative class action must publish within 20 days of filing the complaint a nationwide notice alerting putative class members to the filing of the

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suit and informing them that, “not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff.” § 78u-4(a)(3)(A)(i). The district court then must evaluate all prospective lead plaintiffs and choose the “most adequate” one based on a set of enumerated considerations. § 78u-4(a)(3)(B). The PSLRA thus contemplates a process by which all prospective class representatives come forward in the first-filed class action and make their arguments to the court for lead-plaintiff status. See H. R. Conf. Rep. No. 104-369, p. 32 (1995).

Respondents here bypassed that statutory process. They do not dispute that notice was published in the two earlier filed putative class actions concerning the same securities claims as here, as required by the PSLRA. Yet they did not seek to be chosen lead plaintiffs in either of those actions. See *ante*, at 736–738, 741–742. For that reason alone, I agree with the majority that respondents “can hardly qualify as diligent in asserting [class] claims and pursuing relief.” *Ante*, at 743. Respondents’ failure to utilize the PSLRA’s lead-plaintiff selection procedure distinguishes them from the *American Pipe* absent class members, who were subject only to the traditional Federal Rule of Civil Procedure 23 class procedure, which is “designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.” 414 U. S., at 550.

Unlike the PSLRA, Rule 23 contains no requirement of precertification notice to absent putative class members; it provides only for postcertification notice. See Fed. Rule Civ. Proc. 23(c)(2). There thus is no mechanism for absent putative class members to learn that a putative class action is pending, much less that they are entitled to seek to displace the named plaintiff in that lawsuit as class representative. Also unlike the PSLRA, Rule 23 contains no process for a district court to choose from among the various

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candidates for lead plaintiff, nor does it specify what would make a person the most adequate representative of the class. See 7A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1765, p. 321 (3d ed. 2005). In class actions not subject to the PSLRA, the class representative is generally the first person who files the suit, and so is self-selected (subject to an adequacy determination), rather than selected by the court.¹ See Rule 23(a)(4) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class”); Rule 23(c)(1)(A) (“At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action”); H. R. Conf. Rep. No. 104–369, at 33–35.

The majority points to Rule 23(c)’s requirement that the determination whether to certify a class be made at “an early practicable time,” *ante*, at 741, but there is no significance to that requirement with respect to the diligence of would-be class representatives. The Advisory Committee Notes accompanying the 2003 amendment to Rule 23(c), which changed the recommended timing for a certification determination from “as soon as practicable” to “at an early practicable time,” explained that the change would permit time for “controlled discovery into the ‘merits,’” efforts by defendants “to win dismissal or summary judgment as to the

¹There may, of course, be competition among putative class members to proceed on behalf of the putative class in an action not governed by the PSLRA, and the district court generally considers their relative qualities. But the point is that the court is not required by Rule 23 to identify and designate as lead plaintiff the person most capable of adequately representing the class; it is only required to determine for certification purposes whether the class representative adequately represents the class. See 7A Wright, *Federal Practice and Procedure* § 1765, at 321.

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individual plaintiffs without certification,” and the considered “designation of class counsel.” Advisory Committee’s 2003 Notes on subd. (c)(1)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815. The Notes say nothing about lead-plaintiff selection, and Rule 23(c) in no way ensures that potential lead plaintiffs know about the putative class action or about their opportunity to represent the class.

Given these important differences between Rule 23’s general class procedures and the specific procedures imposed by the PSLRA, the majority’s conclusion that absent class members were not diligent because they failed to ask to be the class representative in a prior suit makes sense only in the PSLRA context. The same conclusion simply does not follow in the generic Rule 23 context, where absent class members are most likely unaware of the existence of a putative class action. Cf. *American Pipe*, 414 U. S., at 551–552 (explaining that even absent class members who are unaware of the putative class action are entitled to tolling).

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B

In addition to its focus on plaintiff diligence, the majority offers a separate line of reasoning to support its broad holding. It explains that its limitation on *American Pipe* tolling is necessary to prevent a “limitless” series of class actions, each rendered timely by the tolling effect of the previous ones. *Ante*, at 743. As the majority acknowledges, however, there is no such risk in this case, see *ante*, at 744, because the applicable statute of repose puts a 5-year “outer limit on the right to bring a civil action.” *CTS Corp. v. Waldburger*, 573 U. S. 1, 8 (2014). The majority is right, of course, that in many other types of cases, no statute of repose will apply. See *ante*, at 744. But the Court has elsewhere pointed to the power of “comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.” *Smith v. Bayer Corp.*, 564 U. S. 299, 317

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(2011). There is no reason to assume that this existing safeguard will prove inadequate if the Court holds that *American Pipe* tolling is available for successive class actions outside the PSLRA context.

Even if principles of comity prove insufficient such that some modification to the *American Pipe* rule is necessary to prevent indefinite tolling, a narrower form of redress is available. Instead of adopting a blanket no-tolling-of-class-claims-ever rule outside the PSLRA context, the Court might hold, as a matter of equity, that tolling only becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment. Where, by contrast, class certification is denied because of the deficiencies of the lead plaintiff as class representative, or because of some other nonsubstantive defect, tolling would remain available.² See *Yang v. Odom*, 392 F.3d 97, 112 (CA3 2004). This approach would, for instance, ensure that in cases where the only problem with the first suit was the identity of the named plaintiff, a new and more adequate representative could file another suit to represent the class. Preserving the opportunity for such a fix may seem unimportant in a PSLRA case like this one, where the court in the first-filed case will usually have a choice among possible lead plaintiffs. See *ante*, at 742, n. 3. But, as just explained, in class actions not subject to the PSLRA, the certifying court often will have no choice as to the class representative.

Whether this or another rule ultimately is the right one, there is no need for the Court today to reach beyond the

²Such an approach would, of course, be “grounded in the traditional equitable powers of the judiciary,” which are “the source of the tolling rule applied in *American Pipe*,” and not Rule 23, which “does not so much as mention the extension or suspension of statutory time bars.” *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 582 U. S. 497, 509 (2017); see *ante*, at 744, n. 5.

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facts of this case, where the specter of indefinite tolling is merely hypothetical, and foreclose the possibility of a more tailored approach.

C

Finally, the majority suggests that its broader approach will encourage multiple potential class representatives to come forward early, which may “aid a district court” in making class certification decisions. *Ante*, at 747. This may well be so in the PSLRA context, given the statute’s notice requirement and built-in mechanism for selecting the most adequate lead plaintiff. But in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to “aid” the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status.

In addition to increasing the number of unnecessary filings, a result at odds with *American Pipe*’s concern with avoiding “needless duplication,” 414 U. S., at 554, the existence of multiple putative class actions covering the same harm to the same class may lead to a “race toward judgment or settlement.” Wasserman, *Dueling Class Actions*, 80 B. U. L. Rev. 461, 472 (2000). Each class lawyer knows that only the lawyers in the first-resolved case will get paid, because the other suits will then be dismissed on claim-preclusion grounds. *Ibid.* Defense lawyers know this, too, so they are “able to engage in a ‘reverse auction,’ pitting the various class counsel against one another and agreeing to settle with the lawyer willing to accept the lowest bid on behalf of the class.” *Id.*, at 473. This gamesmanship is not in class members’ interest, nor in the interest of justice. I therefore think it unwise to encourage the filing of such dueling class actions outside the PSLRA context.

II

Although there is ample support for denying *American Pipe* tolling to successive class actions subject to the

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PSLRA, the majority's reasoning does not justify denying *American Pipe* tolling to other successive class actions. The majority could have avoided this error by limiting its decision to the issues presented by the facts of this case.

Despite the Court's misstep in adopting an unnecessarily broad rule, district courts can help mitigate the potential unfairness of denying *American Pipe* tolling to class claims not subject to the PSLRA. Where appropriate, district courts should liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel.

Because I agree with the majority's conclusion just as applied to class actions governed by the PSLRA, like this one, I concur only in the judgment.

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Syllabus

HUSTED, OHIO SECRETARY OF STATE *v.* A. PHILIP
RANDOLPH INSTITUTE ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 16–980. Argued January 10, 2018—Decided June 11, 2018

The National Voter Registration Act (NVRA) addresses the removal of ineligible voters from state voting rolls, 52 U.S.C. § 20501(b), including those who are ineligible “by reason of” a change in residence, § 20507(a)(4). The Act prescribes requirements that a State must meet in order to remove a name on change-of-residence grounds, §§ 20507(b), (c), (d). The most relevant of these are found in subsection (d), which provides that a State may not remove a name on change-of-residence grounds unless the registrant either (A) confirms in writing that he or she has moved or (B) fails to return a preaddressed, postage prepaid “return card” containing statutorily prescribed content and then fails to vote in any election during the period covering the next two general federal elections.

In addition to these specific change-of-residence requirements, the NVRA also contains a general “Failure-to-Vote Clause,” § 20507(b)(2), consisting of two parts. It first provides that a state removal program “shall not result in the removal of the name of any person . . . by reason of the person’s failure to vote.” Second, as added by the Help America Vote Act of 2002 (HAVA), it specifies that “nothing in [this prohibition] may be construed to prohibit a State from using the procedures” described above—sending a return card and removing registrants who fail to return the card and fail to vote for the requisite time. Since one of the requirements for removal under subsection (d) is the failure to vote, the explanation added by HAVA makes clear that the Failure-to-Vote Clause’s prohibition on removal “by reason of the person’s failure to vote” does not categorically preclude using nonvoting as part of a test for removal. Another provision makes this point even more clearly by providing that “no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A) (emphasis added).

Respondents contend that Ohio’s process for removing voters on change-of-residence grounds violates this federal law. The Ohio process at issue relies on the failure to vote for two years as a rough way of identifying voters who may have moved. It sends these nonvoters a preaddressed, postage prepaid return card, asking them to verify that they still reside at the same address. Voters who do not return the

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card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.

Held: The process that Ohio uses to remove voters on change-of-residence grounds does not violate the Failure-to-Vote Clause or any other part of the NVRA. Pp. 767–779.

(a) Ohio’s law does not violate the Failure-to-Vote Clause. Pp. 767–775.

(1) Ohio’s removal process follows subsection (d) to the letter: It does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years. See §20507(d)(1)(B). P. 767.

(2) Nonetheless, respondents argue that Ohio’s process violates subsection (b)’s Failure-to-Vote Clause by using a person’s failure to vote twice over: once as the trigger for sending return cards and again as one of the two requirements for removal. But Congress could not have meant for the Failure-to-Vote Clause to cannibalize subsection (d) in that way. Instead, the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. The phrase “by reason of” in the Failure-to-Vote Clause denotes some form of causation, see *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176, and in context sole causation is the only type of causation that harmonizes the Failure-to-Vote Clause and subsection (d). Any other reading would mean that a State that follows subsection (d) nevertheless can violate the Failure-to-Vote Clause. When Congress enacted HAVA, it made this point explicit by adding to the Failure-to-Vote Clause an explanation of how the clause is to be read, *i. e.*, in a way that does not contradict subsection (d). Pp. 767–770.

(3) Respondents’ and the dissent’s alternative reading is inconsistent with both the text of the Failure-to-Vote Clause and the clarification of its meaning in §21083(a)(4). Among other things, their reading would make HAVA’s new language worse than redundant, since no sensible person would read the Failure-to-Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Nor does the Court’s interpretation render the Failure-to-Vote Clause superfluous; the clause retains meaning because it prohibits States from using nonvoting both as the ground for removal and as the sole evidence for another ground for removal (*e. g.*, as the sole evidence that someone has died). Pp. 770–774.

(4) Respondents’ additional argument—that so many registered voters discard return cards upon receipt that the failure to send cards back is worthless as evidence that an addressee has moved—is based on a dubious empirical conclusion that conflicts with the congressional

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judgment found in subsection (d). Congress clearly did not think that the failure to send back a return card was of no evidentiary value, having made that conduct one of the two requirements for removal under subsection (d). Pp. 774–775.

(b) Nor has Ohio violated other NVRA provisions. Pp. 775–779.

(1) Ohio removes the registrants at issue on a permissible ground: change of residence. The failure to return a notice and the failure to vote simply serve as *evidence* that a registrant has moved, not as the ground itself for removal. Pp. 775–776.

(2) The NVRA contains no “reliable indicator” prerequisite to sending notices, requiring States to have good information that someone has moved before sending them a return card. So long as the trigger for sending such notices is “uniform, nondiscriminatory, and in compliance with the Voting Rights Act,” § 20507(b)(1), States may use whatever trigger they think best, including the failure to vote. Pp. 776–777.

(3) Ohio has not violated the NVRA’s “reasonable effort” provision, § 20507(a)(4). Even assuming that this provision authorizes federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and strike down a state law that does not meet some standard of “reasonableness,” Ohio’s process cannot be unreasonable because it uses the change-of-residence evidence that Congress said it could: the failure to send back a notice coupled with the failure to vote for the requisite period. Ohio’s process is accordingly lawful. Pp. 777–779.

838 F. 3d 699, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 780. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 782. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 806.

Eric E. Murphy, State Solicitor of Ohio, argued the cause for petitioner. With him on the briefs were *Michael DeWine*, Attorney General of Ohio, *Michael J. Hendershot*, Chief Deputy Solicitor, and *Steven T. Voigt*, Principal Assistant Attorney General.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Gore*, *Deputy Solicitor General Stewart*, and *Brian H. Fletcher*.

Counsel

Paul M. Smith argued the cause for respondents. On the brief were *Brenda Wright, Stuart C. Naifeh, Naila S. Awan, Dale E. Ho, Sophia Lin Lakin, Theresa J. Lee, Cecillia D. Wang, Julie A. Ebenstein, T. Alora Thomas, Rachel Wainer Apter, Freda Levenson, Daniel P. Tokaji, and David D. Cole*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Georgia et al. by *Christopher M. Carr*, Attorney General of Georgia, *Sarah Hawkins Warren*, Solicitor General, and *Andrew A. Pinson*, Deputy Solicitor General, and by the Attorneys General of their respective States as follows: *Steve Marshall* of Alabama, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Adam Paul Laxalt* of Nevada, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean Reyes* of Utah, and *Patrick Morrissey* of West Virginia; for the American Civil Rights Union by *J. Christian Adams* and *Kaylan L. Phillips*; for the Buckeye Institute by *Michael A. Carvin*, *Robert Alt*, and *Anthony J. Dick*; for the Eagle Forum Education & Legal Defense Fund by *Laurence J. Joseph*; for Former Attorneys of the Civil Rights Division of the United States Dept. of Justice by *William S. Consovoy* and *J. Michael Connolly*; for Judicial Watch, Inc., by *Robert D. Popper*, *Chris Fedeli*, and *Lauren M. Burke*; for the Landmark Legal Foundation et al. by *Richard P. Hutchison* and *Linda Carver Whitlow Knight*; and for the National Conference of State Legislatures et al. by *Joshua P. Davis* and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, and *Seth M. Rokosky*, Assistant Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Hector Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, and *Bob Ferguson* of Washington; for American History Professors by *Richard P. Bress*; for Asian Americans Advancing Justice | AAJC by *Brigida Benitez*, *Jessica I. Rothschild*, *Niyati Shah*, and *John Yang*; for Certain Members of the Congressional Black Caucus by *Linda C. Goldstein*; for Common Cause by *Emmet J. Bondurant*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*,

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JUSTICE ALITO delivered the opinion of the Court.

It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. Pew Center on the States, Election Initiatives Issue Brief 1 (Feb. 2012). And about 2.75 million people are said to be registered to vote in more than one State. *Ibid.*

At issue in today's case is an Ohio law that aims to keep the State's voting lists up to date by removing the names of those who have moved out of the district where they are registered. Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls. We are asked to decide whether this program complies with federal law.

Brianne J. Gorod, and David H. Gans; for Current and Former Ohio Elections Officials by Rachel Bloomekatz; for the Lawyers' Committee for Civil Rights Under Law et al. by Michael C. Keats, Kristen Clarke, Jon M. Greenbaum, and Ezra D. Rosenberg; for the League of Women Voters of the United States et al. by John A. Freedman, Wendy R. Weiser, Myrna Pérez, and Elisabeth S. Theodore; for the Libertarian National Committee by Jason D. Hirsch, Thomas G. Saunders, and Ari J. Savitzky; for the Libertarian Party of Ohio et al. by Mark R. Brown and Oliver Hall; for NAACP Legal Defense and Educational Fund, Inc., et al. by Thomas M. Bondy, Sherrilyn A. Ifill, Janai S. Nelson, Samuel Spital, Leah C. Aden, and John Paul Schnapper-Casteras; for the National Association for the Advancement of Colored People et al. by Gilda R. Daniels, Martin L. Saad, James Workman, and H. Lee Thompson; for the National Disability Rights Network by Paul M. Smith, Danielle Lang, William Alvarado Rivera, Daniel B. Kohrman, Nicole G. Berner, and Claire Prestel; for Public Citizen, Inc., by Scott L. Nelson and Allison M. Zieve; for VoteVets Action Fund by Aderson B. Francois and Deborah N. Archer; for Sen. Sherrod Brown by Steven A. Hirsch and David J. Silbert; and for Eric H. Holder, Jr., et al. by Samuel R. Bagenstos.

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I

A

Like other States, Ohio requires voters to reside in the district in which they vote. Ohio Rev. Code Ann. §3503.01(A) (Lexis Supp. 2017); see National Conference of State Legislatures, Voting by Nonresidents and Noncitizens (Feb. 27, 2015). When voters move out of that district, they become ineligible to vote there. See §3503.01(A). And since more than 10% of Americans move every year,¹ deleting the names of those who have moved away is no small undertaking.

For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened. The NVRA “erect[s] a complex superstructure of federal regulation atop state voter-registration systems.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 5 (2013). The Act has two main objectives: increasing voter registration and removing ineligible persons from the States’ voter registration rolls. See §2, 107 Stat. 77, 52 U. S. C. §20501(b).

To achieve the latter goal, the NVRA requires States to “conduct a general program that makes a reasonable effort to remove the names” of voters who are ineligible “by reason of” death or change in residence. §20507(a)(4). The Act also prescribes requirements that a State must meet in

¹Dept. of Commerce, United States Census Bureau, CB16–189, Americans Moving at Historically Low Rates (Nov. 16, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-189.html> (all Internet materials as last visited June 8, 2018). States must update the addresses of even those voters who move within their county of residence, for (among other reasons) counties may contain multiple voting districts. Cf. *post*, at 793 (BREYER, J., dissenting). For example, Cuyahoga County contains 11 State House districts. See House District Map, Ohio House Districts 2012–2022, <http://www.ohiohouse.gov/members/district-map>.

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order to remove a name on change-of-residence grounds. §§ 20507(b), (c), (d).

The most important of these requirements is a prior notice obligation. Before the NVRA, some States removed registrants without giving any notice. See J. Harris, Nat. Munic. League, Model Voter Registration System 45 (rev. 4th ed. 1957). The NVRA changed that by providing in § 20507(d)(1) that a State may not remove a registrant's name on change-of-residence grounds unless either (A) the registrant confirms in writing that he or she has moved or (B) the registrant fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content. This card must explain what a registrant who has not moved needs to do in order to stay on the rolls, *i. e.*, either return the card or vote during the period covering the next two general federal elections. § 20507(d)(2)(A). And for the benefit of those who have moved, the card must contain "information concerning how the registrant can continue to be eligible to vote." § 20507(d)(2)(B). If the State does not send such a card or otherwise get written notice that the person has moved, it may not remove the registrant on change-of-residence grounds. See § 20507(d)(1).²

While the NVRA is clear about the need to send a "return card" (or obtain written confirmation of a move) before pruning a registrant's name, no provision of federal law specifies the circumstances under which a return card may be sent. Accordingly, States take a variety of approaches. See Nat. Assn. of Secretaries of State (NASS) Report: Maintenance of State Voter Registration Lists 5–6 (Dec. 2017). The NVRA

²The principal dissent attaches a misleading label to this return card, calling it a "last chance notice." *Post*, at 787–788, 790–791, 793 (opinion of BREYER, J.). It is actually no such thing. Sending back the notice does not represent a voter's "last chance" to avoid having his or her name stricken from the rolls. Instead, such a voter has many more chances over a period of four years to avoid that result. All that the voter must do is vote in any election during that time. See 52 U. S. C. § 20507(d)(1)(B).

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itself sets out one option. A State may send these cards to those who have submitted “change-of-address information” to the United States Postal Service. §20507(c)(1). Thirty-six States do at least that. See NASS Report, *supra*, at 5, and n. v (listing States). Other States send notices to every registered voter at specified intervals (say, once a year). See, *e. g.*, Iowa Code §48A.28.3 (2012); S. C. Code Ann. §§7–5–330(F), 7–5–340(2)–(3) (2017 Cum. Supp.); see also S. Rep. No. 103–6, p. 46 (1993). Still other States, including Ohio, take an intermediate approach, see NASS Report, *supra*, at 5–6, such as sending notices to those who have turned in their driver’s licenses, *e. g.*, Ind. Code §§3–7–38.2–2(b)(2), (c)(4) (2004), or sending notices to those who have not voted for some period of time, see, *e. g.*, Ga. Code Ann. §21–2–234 (Supp. 2017); Ohio Rev. Code Ann. §3503.21(B)(2); Okla. Admin. Code §230:15–11–19(a)(3) (2016); 25 Pa. Cons. Stat. §1901(b)(3) (2007); Wis. Stat. §6.50(1) (2017 West Cum. Supp.).

When a State receives a return card confirming that a registrant has left the district, the State must remove the voter’s name from the rolls. §§20507(d)(1)(A), (3). And if the State receives a card stating that the registrant has not moved, the registrant’s name must be kept on the list. See §20507(d)(2)(A).

What if no return card is mailed back? Congress obviously anticipated that some voters who received cards would fail to return them for any number of reasons, and it addressed this contingency in §20507(d), which, for convenience, we will simply call “subsection (d).” Subsection (d) treats the failure to return a card as *some evidence*—but by no means conclusive proof—that the voter has moved. Instead, the voter’s name is kept on the list for a period covering two general elections for federal office (usually about four years). Only if the registrant fails to vote during that period and does not otherwise confirm that he or she still lives in the district (*e. g.*, by updating address information online)

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may the registrant's name be removed. § 20507(d)(2)(A); see §§ 20507(d)(1)(B), (3).

In addition to these specific change-of-residence requirements, the NVRA also imposes two general limitations that are applicable to state removal programs. First, all such programs must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.” § 20507(b)(1). Second, the NVRA contains what we will call the “Failure-to-Vote Clause.” See § 20507(b)(2).

At present, this clause contains two parts. The first is a prohibition that was included in the NVRA when it was originally enacted in 1993. It provides that a state program “shall not result in the removal of the name of any person . . . by reason of the person's failure to vote.” *Ibid.* The second part, added by the Help America Vote Act of 2002 (HAVA), 116 Stat. 1666, explains the meaning of that prohibition. This explanation says that “nothing in [the prohibition] may be construed to prohibit a State from using the procedures described in [§§ 20507](c) and (d) to remove an individual from the official list of eligible voters.” § 20507(b)(2).

These referenced subsections, §§ 20507(c) and (d), are the provisions allowing the removal of registrants who either submitted change-of-address information to the Postal Service (subsection (c)) or did not mail back a return card and did not vote during a period covering two general federal elections (subsection (d)). And since one of the requirements for removal under subsection (d) is the failure to vote during this period, the explanation added by HAVA in 2002 makes it clear that the statutory phrase “by reason of the person's failure to vote” in the Failure-to-Vote Clause does not categorically preclude the use of nonvoting as part of a test for removal.

Another provision of HAVA makes this point more directly. After directing that “registrants who have not responded to a notice and . . . have not voted in 2 consecutive

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general elections for Federal office shall be removed,” it adds that “no registrant may be removed *solely* by reason of a failure to vote.” § 21083(a)(4)(A) (emphasis added).

B

Since 1994, Ohio has used two procedures to identify and remove voters who have lost their residency qualification.

First, the State utilizes the Postal Service option set out in the NVRA. The State sends notices to registrants whom the Postal Service’s “national change of address service” identifies as having moved. Ohio Rev. Code Ann. § 3503.21(B)(1). This procedure is undisputedly lawful. See 52 U. S. C. § 20507(c)(1).

But because according to the Postal Service “[a]s many as 40 percent of people who move do not inform the Postal Service,”³ Ohio does not rely on this information alone. In its so-called Supplemental Process, Ohio “identif[ies] electors whose lack of voter activity indicates they may have moved.” Record 401 (emphasis deleted). Under this process, Ohio sends notices to registrants who have “not engage[d] in any voter activity for a period of two consecutive years.” *Id.*, at 1509. “Voter activity” includes “casting a ballot” in any election—whether general, primary, or special and whether federal, state, or local. *Id.*, at 1507. (And Ohio regularly holds elections on both even and odd years.) Moreover, the term “voter activity” is broader than simply voting. It also includes such things as signing a petition, “filing a voter registration form, and updating a voting address with a variety of [state] entities.” *Id.*, at 295, 357.

After sending these notices, Ohio removes registrants from the rolls only if they “fai[l] to respond” and “continu[e]

³ U. S. Postal Service, Office of Inspector Gen., MS–MA–15–006, Strategies for Reducing Undeliverable as Addressed Mail 15 (2015); see also Brief for Buckeye Institute as *Amicus Curiae* 10. Respondents and one of their *amici* dispute this statistic. See Tr. of Oral Arg. 46; Brief for Asian Americans Advancing Justice et al. as *Amici Curiae* 27–28.

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to be inactive for an additional period of four consecutive years, including two federal general elections.” *Id.*, at 1509; see Ohio Rev. Code Ann. § 3503.21(B)(2). Federal law specifies that a registration may be canceled if the registrant does not vote “in an election during the period” covering two general federal elections after notice, § 20507(d)(1)(B)(ii), but Ohio rounds up to “four consecutive years” of nonvoting after notice, Record 1509. Thus, a person remains on the rolls if he or she votes in any election during that period—which in Ohio typically means voting in any of the at least four elections after notice. Combined with the two years of nonvoting before notice is sent, that makes a total of six years of nonvoting before removal. *Ibid.*

C

A pair of advocacy groups and an Ohio resident (respondents here) think that Ohio’s Supplemental Process violates the NVRA and HAVA. They sued petitioner, Ohio’s Secretary of State, seeking to enjoin this process. Respondents alleged, first, that Ohio removes voters who have not actually moved, thus purging the rolls of *eligible* voters. They also contended that Ohio violates the NVRA’s Failure-to-Vote Clause because the failure to vote plays a prominent part in the Ohio removal scheme: Failure to vote for two years triggers the sending of a return card, and if the card is not returned, failure to vote for four more years results in removal.

The District Court rejected both of these arguments and entered judgment for the Secretary. It held that Ohio’s Supplemental Process “mirror[s] the procedures established by the NVRA” for removing people on change-of-residence grounds and does not violate the Failure-to-Vote Clause because it does not remove anyone “**solely** for [their] failure to vote.” App. to Pet. for Cert. 43a, 57a, 69a–70a.

A divided panel of the Court of Appeals for the Sixth Circuit reversed. 838 F. 3d 699 (2016). It focused on respondents’ second argument, holding that Ohio violates the

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Failure-to-Vote Clause because it sends change-of-residence notices “based ‘solely’ on a person’s failure to vote.” *Id.*, at 711. In dissent, Judge Siler explained why he saw the case as a simple one: “The State cannot remove the registrant’s name from the rolls for a failure to vote only, and Ohio does not do [that].” *Id.*, at 716.

We granted certiorari, 581 U. S. 1006 (2017), and now reverse.

II

A

As noted, subsection (d), the provision of the NVRA that directly addresses the procedures that a State must follow before removing a registrant from the rolls on change-of-residence grounds, provides that a State may remove a registrant who “(i) has failed to respond to a notice” and “(ii) has not voted or appeared to vote . . . during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice” (about four years). 52 U. S. C. § 20507(d)(1)(B). Not only are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory. § 20507(d)(3); see also § 21083(a)(4)(A).

Ohio’s Supplemental Process follows subsection (d) to the letter. It is undisputed that Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years.

B

Respondents argue (and the Sixth Circuit held) that, even if Ohio’s process complies with subsection (d), it nevertheless violates the Failure-to-Vote Clause—the clause that generally prohibits States from removing people from the rolls “by reason of [a] person’s failure to vote.” § 20507(b)(2); see also § 21083(a)(4)(A). Respondents point out that Ohio’s Supple-

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mental Process uses a person's failure to vote twice: once as the trigger for sending return cards and again as one of the requirements for removal. Respondents conclude that this use of nonvoting is illegal.

We reject this argument because the Failure-to-Vote Clause, both as originally enacted in the NVRA and as amended by HAVA, simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way. Instead, as permitted by subsection (d), Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice.

When Congress clarified the meaning of the NVRA's Failure-to-Vote Clause in HAVA, here is what it said: "[C]onsistent with the [NVRA], . . . no registrant may be removed *solely* by reason of a failure to vote." § 21083(a)(4)(A) (emphasis added). The meaning of these words is straightforward. "Solely" means "alone." Webster's Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And "by reason of" is a "quite formal" way of saying "[b]ecause of." C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed. 2013). Thus, a State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote.

This explanation of the meaning of the Failure-to-Vote Clause merely makes explicit what was implicit in the clause as originally enacted. At that time, the clause simply said that a state program "shall not result in the removal of the name of any person from the [rolls for federal elections] by reason of the person's failure to vote." 107 Stat. 83. But that prohibition had to be read together with subsection (d), which authorized removal if a registrant did not send back a return card and also failed to vote during a period covering two successive general elections for federal office. If possible, "[w]e must interpret the statute to give effect to both

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provisions,” *Ricci v. DeStefano*, 557 U. S. 557, 580 (2009), and here, that is quite easy.

The phrase “by reason of” denotes some form of causation. See *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009). Thus, the Failure-to-Vote Clause applies when nonvoting, in some sense, causes a registrant’s name to be removed, but the law recognizes several types of causation. When a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause. See *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 265–268 (1992). Cf. *CSX Transp., Inc. v. McBride*, 564 U. S. 685, 692–693 (2011).

Which form of causation is required by the Failure-to-Vote Clause? We can readily rule out but-for causation. If “by reason of” in the Failure-to-Vote Clause meant but-for causation, a State would violate the clause if the failure to vote played a necessary part in the removal of a name from the list. *Burrage v. United States*, 571 U. S. 204, 211 (2014). But the removal process expressly authorized by subsection (d) allows a State to remove a registrant if the registrant, in addition to failing to send back a return card, fails to vote during a period covering two general federal elections. So if the Failure-to-Vote Clause were read in this way, it would cannibalize subsection (d).

Interpreting the Failure-to-Vote Clause as incorporating a proximate cause requirement would lead to a similar problem. Proximate cause is an elusive concept, see *McBride*, *supra*, at 692–693, but no matter how the term is understood, it is hard to escape the conclusion that the failure to vote is a proximate cause of removal under subsection (d). If a registrant, having failed to send back a return card, also fails to vote during the period covering the next two general federal elections, removal is the direct, foreseeable, and closely connected consequence. See *Paroline v. United States*, 572

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U. S. 434, 444–445 (2014); *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 654 (2008).

By process of elimination, we are left with sole causation. This reading harmonizes the Failure-to-Vote Clause and subsection (d) because the latter provision does not authorize removal solely by reason of a person’s failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card.

For these reasons, we conclude that the Failure-to-Vote Clause, as originally enacted, referred to sole causation. And when Congress enacted HAVA, it made this point explicit. It added to the Failure-to-Vote Clause itself an explanation of how it is to be read, *i. e.*, in a way that does not contradict subsection (d). And in language that cannot be misunderstood, it reiterated what the clause means: “[R]egistrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.” §21083(a)(4)(A) (emphasis added). In this way, HAVA dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.

That is exactly what Ohio’s Supplemental Process does. It does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

C

Respondents and the dissent advance an alternative interpretation of the Failure-to-Vote Clause, but that reading is inconsistent with both the text of the clause and the clarification of its meaning in §21083(a)(4)(A). Respondents argue that the clause allows States to consider nonvoting only to the extent that subsection (d) requires—that is, only

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after a registrant has failed to mail back a notice. Any other use of the failure to vote, including as the trigger for mailing a notice, they claim, is proscribed. In essence, respondents read the language added to the clause by HAVA—“except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)” —as an exception to the general rule forbidding the use of nonvoting. See Brief for Respondents 37. And the Sixth Circuit seemed to find this point dispositive, reasoning that “‘exceptions in statutes must be strictly construed.’” 838 F. 3d, at 708 (quoting *Detroit Edison Co. v. SEC*, 119 F. 2d 730, 739 (CA6 1941)).

We reject this argument for three reasons. First, it distorts what the new language added by HAVA actually says. The new language does not create an exception to a general rule against the use of nonvoting. It does not say that the failure to vote may not be used “except that this paragraph does not prohibit a State from using the procedures described in subsections (c) and (d).” Instead, it says that “nothing in this paragraph *may be construed*” to have that effect. § 20507(b)(2) (emphasis added). Thus, it sets out not an exception, but a rule of interpretation. It does not narrow the language that precedes it; it clarifies what that language means. That is precisely what Congress said when it enacted HAVA: It added the “may not be construed” provision to “[c]larif[y],” not to alter, the prohibition’s scope. § 903, 116 Stat. 1728.

Second, under respondents’ reading, HAVA’s new language is worse than superfluous. Even without the added language, no sensible person would read the Failure-to-Vote Clause as prohibiting what subsections (c) and (d) expressly allow. Yet according to respondents, that is all that the new language accomplishes. So at a minimum, it would be redundant.

But the implications of this reading are actually worse than that. There is no reason to create an exception to a

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prohibition unless the prohibition would otherwise forbid what the exception allows. So if the new language were an exception, it would seem to follow that prior to HAVA, the Failure-to-Vote Clause *did* outlaw what subsections (c) and (d) specifically authorize. And that, of course, would be nonsensical.

Third, respondents' reading of the language that HAVA added to the Failure-to-Vote Clause makes it hard to understand why Congress prescribed in another section of the same Act, *i. e.*, § 21083(a)(4)(A), that "no registrant may be removed solely by reason of a failure to vote." As interpreted by respondents, the amended Failure-to-Vote Clause prohibits any use of nonvoting with just two narrow exceptions—the uses allowed by subsections (c) and (d). So, according to respondents, the amended Failure-to-Vote Clause prohibits much more than § 21083(a)(4)(A). That provision, in addition to allowing the use of nonvoting in accordance with subsections (c) and (d), also permits the use of nonvoting in any other way that does not treat nonvoting as the sole basis for removal.

There is no plausible reason why Congress would enact the provision that respondents envision. As interpreted by respondents, HAVA would be like a law that contains one provision making it illegal to drive with a blood alcohol level of 0.08 or higher and another provision making it illegal to drive with a blood alcohol level of 0.10 or higher. The second provision would not only be redundant; it would be confusing and downright silly.

Our reading, on the other hand, gives the new language added to the Failure-to-Vote Clause "real and substantial effect." *Husky Int'l Electronics, Inc. v. Ritz*, 578 U. S. 356, 359 (2016) (internal quotation marks omitted). It clarifies the meaning of the prohibition against removal by reason of nonvoting, a matter that troubled some States prior to HAVA's enactment. See, *e. g.*, FEC Report on the NVRA to the 106th Congress 19 (1999).

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Respondents and the dissent separately claim that the Failure-to-Vote Clause must be read to bar the use of nonvoting as a trigger for sending return cards because otherwise it would be “superfluous.” *Post*, at 797 (opinion of BREYER, J.); see Brief for Respondents 29. After all, subsection (d) already prohibits States from removing registrants because of a failure to vote alone. See § 20507(d)(1). To have meaning independent of subsection (d), respondents reason, the Failure-to-Vote Clause must prohibit other uses of the failure to vote, including its use as a trigger for sending out notices.

This argument is flawed because the Failure-to-Vote Clause has plenty of work to do under our reading. Most important, it prohibits the once-common state practice of removing registered voters simply because they failed to vote for some period of time. Not too long ago, “[c]ancellation for failure to vote [was] the principal means used . . . to purge the [voter] lists.” Harris, *Model Voter Registration System*, at 44. States did not use a person’s failure to vote as evidence that the person had died or moved but as an independent ground for removal. See *ibid.*⁴ Ohio was one such State. Its Constitution provided that “[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.” Art. V, § 1 (1977).

In addition, our reading prohibits States from using the failure to vote as the sole cause for removal on *any* ground, not just because of a change of residence. Recall that subsection (d)’s removal process applies only to change-of-residence removals but that the Failure-to-Vote Clause applies to *all* removals. Without the Failure-to-Vote Clause, therefore, States could use the failure to vote as conclusive evidence of ineligibility for some reason other than change

⁴ See, e. g., Haw. Rev. Stat. § 11–17(a) (1993); Idaho Code Ann. § 34–435 (1981); Minn. Stat. § 201.171 (1992); Mont. Code Ann. § 13–2–401(1) (1993); N. J. Stat. Ann. § 19:31–5 (West Supp. 1989); Okla. Stat., Tit. 26, § 4–120.2 (1991); Utah Code § 20–2–24(1)(b) (1991).

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of residence, such as death, mental incapacity, or a criminal conviction resulting in prolonged imprisonment.

D

Respondents put forth one additional argument regarding the Failure-to-Vote Clause. In essence, it boils down to this. So many properly registered voters simply discard return cards upon receipt that the failure to send them back is worthless as evidence that the addressee has moved. As respondents' counsel put it at argument, "a notice that doesn't get returned" tells the State "absolutely nothing about whether the person has moved." Tr. of Oral Arg. 41, 58. According to respondents, when Ohio removes registrants for failing to respond to a notice and failing to vote, it functionally "removes people solely for non-voting" unless the State has additional "reliable evidence" that a registrant has moved. *Id.*, at 50, 72.

This argument is based on a dubious empirical conclusion that the NVRA and HAVA do not allow us to indulge. Congress clearly did not think that the failure to send back a return card was of no evidentiary value because Congress made that conduct one of the two requirements for removal under subsection (d).

Requiring additional evidence not only second-guesses the congressional judgment embodied in subsection (d)'s removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State's Supplemental Process. The Constitution gives States the authority to set the qualifications for voting in congressional elections, Art. I, § 2, cl. 1; Amdt. 17, as well as the authority to set the "Times, Places and Manner" to conduct such elections in the absence of contrary congressional direction, Art. I, § 4, cl. 1. We have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a return card. See *Inter Tribal*, 570 U.S., at 16–19; see also *id.*, at 36–37

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(THOMAS, J., dissenting); *id.*, at 42–43, 46 (ALITO, J., dissenting).

For all these reasons, we hold that Ohio law does not violate the Failure-to-Vote Clause.

III

We similarly reject respondents’ argument that Ohio violates other provisions of the NVRA and HAVA.

A

Respondents contend that Ohio removes registered voters on a ground not permitted by the NVRA. They claim that the NVRA permits the removal of a name for only a few specified reasons—a person’s request, criminal conviction, mental incapacity, death, change of residence, and initial ineligibility. Brief for Respondents 25–26; see 52 U.S.C. §§ 20507(a)(3), (4).⁵ And they argue that Ohio removes registrants for other reasons, namely, for failing to respond to a notice and failing to vote.

This argument plainly fails. Ohio simply treats the failure to return a notice and the failure to vote as evidence that a registrant has moved, not as a ground for removal. And in doing this, Ohio simply follows federal law. Subsection (d), which governs removals “on the ground that the registrant has changed residence,” treats the failure to return a notice and the failure to vote as evidence that this ground is satisfied. § 20507(d)(1).

If respondents’ argument were correct, then it would also be illegal to remove a name under § 20507(c) because that would constitute removal for submitting change-of-address information to the Postal Service. Likewise, if a State removed a name after receiving a death certificate or a judg-

⁵We assume for the sake of argument that Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest.

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ment of criminal conviction, that would be illegal because receipt of such documents is not listed as a permitted ground for removal under § 20507(a)(3) or § 20507(a)(4). About this argument no more need be said.

B

Respondents maintain, finally, that Ohio's procedure is illegal because the State sends out notices without having any "reliable indicator" that the addressee has moved. Brief for Respondents 31. The "[f]ailure to vote for a mere two-year period," they argue, does not reliably "indicate that a registrant has moved out of the jurisdiction." *Id.*, at 30; see also, *e.g.*, Brief for State of New York et al. as *Amici Curiae* 13–28.

This argument also fails. The degree of correlation between the failure to vote for two years and a change of residence is debatable, but we know from subsection (d) that Congress thought that the failure to vote for a period of two consecutive general elections was a good indicator of change of residence, since it made nonvoting for that period an element of subsection (d)'s requirements for removal. In a similar vein, the Ohio Legislature apparently thought that nonvoting for two years was sufficiently correlated with a change of residence to justify sending a return card.

What matters for present purposes is not whether the Ohio Legislature overestimated the correlation between nonvoting and moving or whether it reached a wise policy judgment about when return cards should be sent. For us, all that matters is that no provision of the NVRA prohibits the legislature from implementing that judgment. Neither subsection (d) nor any other provision of the NVRA demands that a State have some particular quantum of evidence of a change of residence before sending a registrant a return card. So long as the trigger for sending such notices is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act," § 20507(b)(1), States can use whatever plan they

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think best. That may be why not even the Sixth Circuit relied on this rationale.

Respondents attempt to find support for their argument in subsection (c), which allows States to send notices based on Postal Service change-of-address information. This provision, they argue, implicitly sets a minimum reliability requirement. Thus, they claim, a State may not send out a return card unless its evidence of change of residence is at least as probative as the information obtained from the Postal Service. See Tr. of Oral Arg. 56.

Nothing in subsection (c) suggests that it is designed to play this role. Subsection (c) says that “[a] State may meet” its obligation “to remove the names” of ineligible voters on change-of-residence grounds by sending notices to voters who are shown by the Postal Service information to have moved, but subsection (c) does not even hint that it imposes any sort of minimum reliability requirement for sending such notices. §§20507(a)(4), (c). By its terms, subsection (c) simply provides one way—the minimal way—in which a State “*may* meet the [NVRA’s] requirement[s]” for change-of-residence removals. §20507(c) (emphasis added). As respondents agreed at argument, it is not the only way. Tr. of Oral Arg. 53.

C

Nothing in the two dissents changes our analysis of the statutory language.

1

Despite its length and complexity, the principal dissent sets out only two arguments. See *post*, at 789 (opinion of BREYER, J.). The first is one that we have already discussed at length, namely, that the Failure-to-Vote Clause prohibits any use of the failure to vote except as permitted by subsections (c) and (d). We have explained why this argument is insupportable, *supra*, at 770–775, and the dissent has no answer to any of the problems we identify.

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The dissent's only other argument is that Ohio's process violates § 20507(a)(4), which requires States to make a "reasonable effort" to remove the names of ineligible voters from the rolls. The dissent thinks that this provision authorizes the federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) and to strike down any state law that does not meet their own standard of "reasonableness." But see Brief for United States as *Amicus Curiae* 28–29. The dissent contends that Ohio's system violates this supposed "reasonableness" requirement primarily because it relies on the failure to mail back the postcard sent to those who have not engaged in voter activity for two years. Based on its own cobbled-together statistics, *post*, at 793–794, and a feature of human nature of which the dissent has apparently taken judicial notice (*i. e.*, "the human tendency not to send back cards received in the mail," *post*, at 794), the dissent argues that the failure to send back the card in question "has no tendency to reveal accurately whether the registered voter has changed residences"; it is an "irrelevant factor" that "shows nothing at all that is statutorily significant." *Post*, at 794–795, 798.

Whatever the meaning of § 20507(a)(4)'s reference to reasonableness, the principal dissent's argument fails since it is the federal NVRA, not Ohio law, that attaches importance to the failure to send back the card. See §§ 20507(d)(1)(B)(i), (2)(A). The dissenters may not think that the failure to send back the card means anything, but that was not Congress's view. The NVRA plainly reflects Congress's judgment that the failure to send back the card, coupled with the failure to vote during the period covering the next two general federal elections, is significant evidence that the addressee has moved.

It is not our prerogative to judge the reasonableness of that congressional judgment, but we note that, whatever the general "human tendency" may be with respect to mailing back cards received in the mail, the notice sent under subsec-

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tion (d) is nothing like the solicitations for commercial products or contributions that recipients may routinely discard. The notice in question here warns recipients that unless they take the simple and easy step of mailing back the preaddressed, postage prepaid card—or take the equally easy step of updating their information online—their names may be removed from the voting rolls if they do not vote during the next four years. See Record 295–296, 357. It was Congress’s judgment that a reasonable person with an interest in voting is not likely to ignore notice of this sort.

2

JUSTICE SOTOMAYOR’s dissent says nothing about what is relevant in this case—namely, the language of the NVRA—but instead accuses us of “ignor[ing] the history of voter suppression” in this country and of “uphold[ing] a program that appears to further the . . . disenfranchisement of minority and low-income voters.” *Post*, at 809. Those charges are misconceived.

The NVRA prohibits state programs that are discriminatory, see § 20507(b)(1), but respondents did not assert a claim under that provision. And JUSTICE SOTOMAYOR has not pointed to any evidence in the record that Ohio instituted or has carried out its program with discriminatory intent.

* * *

The dissents have a policy disagreement, not just with Ohio, but with Congress. But this case presents a question of statutory interpretation, not a question of policy. We have no authority to second-guess Congress or to decide whether Ohio’s Supplemental Process is the ideal method for keeping its voting rolls up to date. The only question before us is whether it violates federal law. It does not.

The judgment of the Sixth Circuit is reversed.

It is so ordered.

THOMAS, J., concurring

THOMAS, J., concurring.

I join the Court's opinion in full. I write separately to add that respondents' proposed interpretation of the National Voter Registration Act (NVRA) should also be rejected because it would raise significant constitutional concerns.

Respondents would interpret the NVRA to prevent States from using failure to vote as evidence when deciding whether their voting qualifications have been satisfied. Brief for Respondents 25–30. The Court's opinion explains why that reading is inconsistent with the text of the NVRA. See *ante*, at 767–777. But even if the NVRA were “susceptible” to respondents' reading, it could not prevail because it “raises serious constitutional doubts” that the Court's interpretation avoids. *Jennings v. Rodriguez*, 583 U. S. 281, 286 (2018).

As I have previously explained, constitutional text and history both “confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 29 (2013) (dissenting opinion). The Voter Qualifications Clause provides that, in elections for the House of Representatives, “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U. S. Const., Art. I, §2, cl. 1. The Seventeenth Amendment imposes an identical requirement for elections of Senators. And the Constitution recognizes the authority of States to “appoint” Presidential electors “in such Manner as the Legislature thereof may direct.” Art. II, §1, cl. 2; see *Inter Tribal Council of Ariz.*, 570 U. S., at 35, n. 2 (opinion of THOMAS, J.). States thus retain the authority to decide the qualifications to vote in federal elections, limited only by the requirement that they not “‘establish special requirements’” for congressional elections “‘that do not apply in elections for the state legislature.’” *Id.*, at 26 (quoting *U. S. Term*

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Limits, Inc. v. Thornton, 514 U. S. 779, 865 (1995) (THOMAS, J., dissenting)). And because the power to establish requirements would mean little without the ability to enforce them, the Voter Qualifications Clause also “gives States the authority . . . to verify whether [their] qualifications are satisfied.” 570 U. S., at 28.

Respondents’ reading of the NVRA would seriously interfere with the States’ constitutional authority to set and enforce voter qualifications. To vote in Ohio, electors must have been a state resident 30 days before the election, as well as a resident of the county and precinct where they vote. Ohio Rev. Code Ann. § 3503.01(A) (Lexis Supp. 2017); see also Ohio Const., Art. V, § 1. Ohio uses a record of nonvoting as one piece of evidence that voters no longer satisfy the residence requirement. Reading the NVRA to bar Ohio from considering nonvoting would therefore interfere with the State’s “authority to verify” that its qualifications are met “in the way it deems necessary.” *Inter Tribal Council of Ariz.*, *supra*, at 36. Respondents’ reading thus renders the NVRA constitutionally suspect and should be disfavored. See *Jennings*, *supra*, at 286.

Respondents counter that Congress’ power to regulate the “Times, Places and Manner” of holding congressional elections includes the power to impose limits on the evidence that a State may consider when maintaining its voter rolls. See Brief for Respondents 51–55; see also Art. I, § 4, cl. 1 (“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”). But, as originally understood, the Times, Places and Manner Clause grants Congress power “only over the ‘when, where, and how’ of holding congressional elections,” not over the question of who can vote. *Inter Tribal Council of Ariz.*, *supra*, at 29

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(opinion of THOMAS, J.) (quoting T. Parsons, Notes of Convention Debates, Jan. 16, 1788, in 6 Documentary History of the Ratification of the Constitution 1211 (J. Kaminski & G. Saladino eds. 2000) (Massachusetts ratification delegate Sedgwick)). The “‘Manner of holding Elections’” was understood to refer to “the circumstances under which elections were held and the mechanics of the actual election.” 570 U.S., at 30 (quoting Art. I, §4, cl. 1). It does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met. See 570 U.S., at 29–33. The Clause thus does not change the fact that respondents’ reading of the NVRA is constitutionally suspect.

The Court’s interpretation of the NVRA was already the correct reading of the statute: The NVRA does not prohibit a State from considering failure to vote as evidence that a registrant has moved. The fact that this reading avoids serious constitutional problems is an additional reason why, in my view, today’s decision is undoubtedly correct.

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

Section 8 of the National Voter Registration Act of 1993 requires States to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant.” §8(a)(4), 107 Stat. 82–83, 52 U.S.C. §20507(a)(4). This case concerns the State of Ohio’s change-of-residence removal program (called the Supplemental Process), under which a registered voter’s failure to vote in a single federal election begins a process that may well result in the removal of that voter’s name from the federal voter rolls. See *infra*, at 788. The question is whether the Supplemental Process violates §8, which prohibits a State from removing registrants from the

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federal voter roll “by reason of the person’s failure to vote.” § 20507(b)(2). In my view, Ohio’s program does just that. And I shall explain why and how that is so.

I

This case concerns the manner in which States maintain federal voter registration lists. In the late 19th and early 20th centuries, a number of “[r]estrictive registration laws and administrative procedures” came into use across the United States—from literacy tests to the poll tax and from strict residency requirements to “selective purges.” H. R. Rep. No. 103–9, p. 2 (1993). Each was designed “to keep certain groups of citizens from voting” and “discourage participation.” *Ibid.* By 1965, the Voting Rights Act abolished some of the “more obvious impediments to registration,” but still, in 1993, Congress concluded that it had “unfinished business” to attend to in this domain. *Id.*, at 3. That year, Congress enacted the National Voter Registration Act “to protect the integrity of the electoral process,” “increase the number of eligible citizens who register to vote in elections for Federal office,” and “ensure that accurate and current voter registration rolls are maintained.” § 20501(b). It did so mindful that “the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.” S. Rep. No. 103–6, p. 3 (1993).

In accordance with these aims, § 8 of the Registration Act sets forth a series of requirements that States must satisfy in their “administration of voter registration for elections for Federal office.” § 20507. Ohio’s Supplemental Process fails to comport with these requirements; it erects needless hurdles to voting of the kind Congress sought to eliminate by enacting the Registration Act. Four of § 8’s provisions are critical to this case: subsections (a), (b), (c), and (d). The text of each subsection is detailed and contains multiple parts. Given the complexity of the statute, readers should

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consult these provisions themselves (see Appendix A, *infra*, at 802–804) and try to keep the thrust of those provisions in mind while reading this opinion. At the outset, I shall address each of them.

A

1

We begin with subsection (a)’s “Reasonable Program” requirement. That provision says that “each State shall”:

“conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant, in accordance with subsections (b), (c), and (d).” §20507(a)(4).

This provision tells each State that it must try to remove ineligible voters from the rolls, that it must act reasonably in doing so, and that, when it does so, it must follow the rules contained in the next three subsections of §8—namely, subsections (b), (c), and (d).

2

Subsection (b)’s “Failure-to-Vote” Clause generally forbids state change-of-residence removal programs that rely upon a registrant’s failure to vote as a basis for removing the registrant’s name from the federal voter roll. Before 1993, when Congress enacted this prohibition, many States would assume a registered voter had changed his address, and consequently remove that voter from the rolls, simply because the registrant had failed to vote. Recognizing that many registered voters who do not vote “may not have moved,” S. Rep. No. 103–6, at 17, Congress consequently prohibited States from using the failure to vote as a proxy for moving and thus a basis for purging the voter’s name from the rolls. The Failure-to-Vote Clause, as originally enacted, said:

“Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elec-

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tions for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.” 107 Stat. 83; see § 20507(b)(2).

As I shall discuss, Congress later clarified that “using the procedures described in subsections (c) and (d) to remove an individual” from the federal voter roll is permissible and does not violate the Failure-to-Vote Clause. See § 8(b)(2) of the National Voter Registration Act, 107 Stat. 83, and as amended, 116 Stat. 1728, 52 U. S. C. § 20507(b)(2).

3

Subsection (c), which is entitled “Voter Removal Programs,” explains how “[a] State may meet the requirement of subsection (a)(4).” § 20507(c)(1). Because subsection (a)(4) itself incorporates all of the relevant requirements of subsections (b), (c), and (d) within it, see § 20507(a)(4), subsection (c) sets forth one way a State can comply with the basic requirements of § 8 at issue in this case (including subsection (b)). A State’s removal program qualifies under subsection (c) if the following two things are true about the program:

“(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

“(B) if it appears [that] the registrant has moved to a different residence address not in the same registrar’s jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.” § 20507(c)(1).

The upshot is that subsection (c) explains one way a State may comply with subsection (a)’s Reasonable Program requirement without violating subsection (b)’s Failure-to-Vote prohibition. It is a roadmap that points to a two-step removal process. At step 1, States first *identify* registered

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voters whose addresses may have changed; here, subsection (c) points to one (but not the only) method a State may use to do so. At step 2, subsection (c) explains, States must “*confirm* the change of address” by using a special notice procedure, which is further described in subsection (d).

4

Subsection (d) sets forth the final procedure, which Ohio refers to as the “Confirmation Procedure.” Brief for Petitioner 7. The statute makes clear that a State must use the Confirmation Procedure to “confirm” a change of address in respect to any registered voter it initially identifies as someone who has likely changed addresses. It works as follows: the State must send the registrant identified as having likely moved a special kind of notice by forwardable mail. That notice must warn the registrant that his or her name will be removed from the voter roll unless the registrant either returns an attached card and confirms his or her current address in writing or votes in an election during the period covering the next two federal elections. In a sense, the notice a State is required to send as part of the Confirmation Procedure gives registered voters whom the State has identified as likely ineligible a “last chance” to correct the record before being removed from the federal registration list. The Confirmation Procedure is mandatory for all change-of-residence removals, regardless of the method the State uses to make its initial identification of registrants whose addresses may have changed. In particular, subsection (d) says:

“A State shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the registrant [either]—

“(A) confirms in writing that the registrant has changed residence to a place outside the registrar’s jurisdiction in which the registrant is registered; or

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“(B)(i) has failed to respond to a notice described in [subsection (d)(2)]; and (ii) has not voted [in two subsequent federal elections].” § 20507(d)(1).

Subsection (d)(2) then goes on to describe (in considerable detail) the “last chance” notice the State must send to the registrant. In particular, the notice must be sent by *forwardable* mail so that the notice will reach the registrant even if the registrant has changed addresses. It must include a postage-prepaid, preaddressed “return card” that the registrant may send back to the State to confirm or correct the State’s record of his or her current address. And the notice must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

* * *

In sum, § 8 tells States the following:

- In general, establish a removal-from-registration program that “makes a reasonable effort” to remove voters who become ineligible because they change residences.
- Do not target registered voters for removal from the registration roll because they have failed to vote. However, “using the procedures described in subsections (c) and (d) to remove an individual” from the federal voter roll is permissible and does not violate the Failure-to-Vote prohibition.
- The procedures described in subsections (c) and (d) consist of a two-step removal process in which at step 1, the State uses change-of-address information (which the State may obtain, for instance, from the Postal Service) to identify registrants whose addresses may have changed; and then at step 2, the State must use the mandatory “last chance” notice procedure described in subsection (d) to confirm the change of address.

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- The “last chance” confirmation notice must be sent by forwardable mail. It must also include a postage-prepaid, preaddressed “return card” that the registrant may send back to the State verifying his or her current address. And it must warn the registrant that unless the card is returned, if the registrant does not vote in the next two federal elections, then his or her name will be removed from the list of eligible voters.

B

The Supplemental Process, Ohio’s program for removing registrants from the federal rolls on the ground that the voter has changed his address, is much simpler. Each of Ohio’s 88 boards of elections sends its version of subsection (d)’s “last chance” notice to those on a list “of individuals who, according to the board’s records, have not engaged in certain kinds of voter activity”—including “casting a ballot”—for a period of “generally two years.” Record 1507. Accordingly, each board’s list can include registered voters who failed to vote in a single federal election. And anyone on the list who “continues to be inactive” by failing to vote for the next “four consecutive years, including two federal elections,” and fails to respond to the notice is removed from the federal voter roll. *Id.*, at 1509. Under the Supplemental Process, a person’s failure to vote is the sole basis on which the State identifies a registrant as a person whose address may have changed and the sole reason Ohio initiates a registered voter’s removal using subsection (d)’s Confirmation Procedure.

II

Section 8 requires that Ohio’s program “mak[e] a reasonable effort to remove” ineligible registrants from the rolls because of “a change in the residence of the registrant,” and it must do so “in accordance with subsections (b), (c), and

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(d).” § 20507(a)(4)(B). In my view, Ohio’s program is unlawful under § 8 in two respects. It first violates subsection (b)’s Failure-to-Vote prohibition because Ohio uses nonvoting in a manner that is expressly prohibited and not otherwise authorized under § 8. In addition, even if that were not so, the Supplemental Process also fails to satisfy subsection (a)’s Reasonable Program requirement, since using a registrant’s failure to vote is not a reasonable method for identifying voters whose registrations are likely invalid (because they have changed their addresses).

First, as to subsection (b)’s Failure-to-Vote Clause, recall that Ohio targets for removal registrants who fail to vote. In identifying registered voters who have likely changed residences by looking to see if those registrants failed to vote, Ohio’s program violates subsection (b)’s express prohibition on “[a]ny State program or activity [that] result[s] in the removal” of a registered voter “by reason of the person’s failure to vote.” § 20507(b)(2) (emphasis added). In my view, these words are most naturally read to prohibit a State from considering a registrant’s failure to vote as part of any process “that is used to start, or has the effect of starting, a purge of the voter rolls.” H. R. Rep. No. 103–9, at 15. In addition, Congress enacted the Failure-to-Vote Clause to prohibit “the elimination of names of voters from the rolls solely due to [a registrant’s] failure to respond to a mailing.” *Ibid.* But that is precisely what Ohio’s Supplemental Process does. The program violates subsection (b)’s prohibition because under it, a registrant who fails to vote in a single federal election, fails to respond to a forwardable notice, and fails to vote for another four years may well be purged. Record 1508. If the registrant had voted at any point, the registrant would not have been removed. See *supra*, at 788; *infra*, at 792–795.

Ohio does use subsection (d)’s Confirmation Procedure, but that procedure alone does not satisfy § 8’s requirements.

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How do we know that Ohio's use of the Confirmation Procedure alone cannot count as statutorily significant? The statute's basic structure along with its language makes clear that this is so.

In respect to language, § 8 says that the function of subsection (d)'s Confirmation Procedure is "to *confirm* the change of address" whenever the State has already "identif[ied] registrants whose addresses may have changed." §§ 20507(c)(1), (d)(2). The function of the Confirmation Procedure is *not* to make the initial identification of registrants whose addresses may have changed. As a matter of English usage, you cannot *confirm* that an event happened without already having some reason to believe at least that it might have happened. Black's Law Dictionary 298 (6th ed. 1990) (defining "confirm" as meaning "[t]o complete or establish that which was imperfect or uncertain").

Ohio, of course, says that it has a ground for believing that those persons they remove from the rolls have, in fact, changed their address, but the ground is the fact that the person did not vote—the very thing that the Failure-to-Vote Clause forbids Ohio to use as a basis for removing a registered voter from the registration roll.

In respect to structure, two statutory illustrations make clear what the word "confirm" already suggests, namely, that the Confirmation Procedure is a *necessary* but not a *sufficient* procedure for removing a registered voter from the voter roll. The first illustration of how the Confirmation Procedure is supposed to function appears in subsection (c), which describes a removal process under which the State first *identifies* registrants who have likely changed addresses and then "*confirm[s]*" that change of residence using the Confirmation Procedure and sending the required "last chance" notice. § 20507(c)(1) (emphasis added). The identification method subsection (c) says a State may use is "change-of-address information supplied by the Postal Service." § 20507(c)(1)(A). A person does not notify the Postal Service that he is moving unless he is likely to move or has

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already moved. And, as the Registration Act says, “if it appears from change-of-address provided by the Postal Service that . . . the registrant has moved to a different residence not in the same registrar’s jurisdiction,” the State has a reasonable (hence acceptable) basis for “us[ing] the notice procedure described in subsection (d)(2) to confirm the change of address.” § 20507(c)(1)(B).

The second illustration of how the Confirmation Procedure is supposed to function appears in a portion of the statute I have not yet discussed—namely, § 6 of the National Voter Registration Act, which sets out the rules for voter registration by mail. See § 6, 107 Stat. 80, 52 U. S. C. § 20505. In particular, § 6(d), entitled “Undelivered Notices,” says that, “[i]f a notice of the disposition of a mail voter registration application . . . is sent by *nonforwardable* mail and is returned undelivered,” at that point the State “may proceed in accordance with section 8(d),” namely, the Confirmation Procedure, and send the same “last chance” notice that I have just discussed. § 20505(d) (emphasis added).

Note that § 6(d) specifies a *nonforwardable* mailing—and not a *forwardable* mailing, like one specified in § 8(d). This distinction matters. Why? If a person moves, a forwardable mailing will be sent along (*i. e.*, “forwarded”) to that person’s new address; in contrast, a *nonforwardable* mailing will not be forwarded to the person’s new address but instead will be returned to the sender and marked “undeliverable.” And so a *nonforwardable* mailing that is returned to the sender marked “undeliverable” indicates that the intended recipient may have moved. After all, the Postal Service, as the majority points out, returns mail marked “undeliverable” if the intended recipient has moved—not if the person still lives at his old address. *Ante*, at 765, and n. 3.

Under § 6(d), the Registration Act expressly endorses *nonforwardable* mailings as a reasonable method for States to use at step 1 to identify registrants whose addresses may have changed *before* the State proceeds to step 2 and sends the *forwardable* notice required under subsection (d)’s Con-

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firmation Procedure. Specifically, § 6(d) explains that, if a State sends its registrants a mailing by *nonforwardable* mail (which States often do), and if “[that mailing] is returned undelivered,” the State has a fairly good reason for believing that the person has moved and therefore “may proceed in accordance with” § 8(d) by sending the “last chance” *forwardable* notice that the Confirmation Procedure requires. § 20505(d). In contrast to a *nonforwardable* notice that is returned undeliverable, which tells the State that a registrant has likely moved, a *forwardable* notice that elicits no response whatsoever tells the State close to nothing at all. That is because, as I shall discuss, most people who receive confirmation notices from the State simply do not send back the “return card” attached to that mailing—whether they have moved or not.

In sum, § 6(d), just like §§ 8(a) and 8(c), indicates that the State, as an initial matter, must use a reasonable method to identify a person who has likely moved and then must send that person a confirmatory notice that will in effect give him a “last chance” to remain on the rolls. And these provisions thus tend to deny, not to support, the majority’s suggestion that somehow sending a “last chance” notice is itself a way (other than nonvoting) to identify someone who has likely moved.

I concede that some individuals who have, in fact, moved do, in fact, send a return card back to the State making clear that they have moved. And some registrants do send back a card saying that they have *not* moved. Thus, the Confirmation Procedure will sometimes help provide *confirmation* of what the initial identification procedure is supposed to accomplish: finding registrants who have probably moved. But more often than not, the State fails to receive anything back from the registrant, and the fact that the State hears nothing from the registrant essentially proves nothing at all.

Anyone who doubts this last statement need simply consult figures in the record along with a few generally available

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statistics. As a general matter, the problem these numbers reveal is as follows: Very few registered voters move outside of their county of registration. But many registered voters fail to vote. Most registered voters who fail to vote also fail to respond to the State's "last chance" notice. And the number of registered voters who both fail to vote and fail to respond to the "last chance" notice exceeds the number of registered voters who move outside of their county each year.

Consider the following facts. First, Ohio tells us that a small number of Americans—about 4% of *all* Americans—move outside of their county each year. Record 376. (The majority suggests the relevant number is 10%, *ante*, at 761, but that includes people who move within their county.) At the same time, a large number of American voters fail to vote, and Ohio voters are no exception. In 2014, around 59% of Ohio's registered voters failed to vote. See Brief for League of Women Voters et al. as *Amici Curiae* 16, and n. 12 (citing Ohio Secretary of State, 2014 Official Election Results).

Although many registrants fail to vote and only a small number move, under the Supplemental Process, Ohio uses a registrant's failure to vote to identify that registrant as a person whose address has likely changed. The record shows that in 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Record 475. Ohio then sent those 1.5 million registered voters subsection (d) "last chance" confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, "You are right, Ohio. I have, in fact, moved." *Ibid.* In addition, Ohio received back about 235,000 return cards which said, in effect, "You are *wrong*, Ohio, I have *not* moved." In the end, however, there were *more than 1,000,000 notices*—the vast majority

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of notices sent—to which Ohio received back *no* return card at all. *Ibid.*

What about those registered voters—more than 1 million strong—who did not send back their return cards? Is there any reason at all (other than their failure to vote) to think they moved? The answer to this question must be no. There is no reason at all. First, those 1 million or so voters accounted for about 13% of Ohio's voting population. So if those 1 million or so registered voters (or even half of them) had, in fact, moved, then vastly more people must move each year in Ohio than is generally true of the roughly 4% of *all* Americans who move to a different county nationwide (not all of whom are registered voters). See *id.*, at 376. But there is no reason to think this. Ohio offers no such reason. And the streets of Ohio's cities are not filled with moving vans; nor has Cleveland become the Nation's residential moving companies' headquarters. Thus, I think it fair to assume (because of the human tendency not to send back cards received in the mail, confirmed strongly by the actual numbers in this record) the following: In respect to change of residence, the failure of more than 1 million Ohio voters to respond to *forwardable notices* (the vast majority of those sent) shows nothing at all that is statutorily significant.

To put the matter in the present statutory context: When a State relies upon a registrant's failure to vote to initiate the Confirmation Procedure, it violates the Failure-to-Vote Clause, and a State's subsequent use of the Confirmation Procedure cannot save the State's program from that defect. Even if that were not so, a nonreturned confirmation notice adds nothing to the State's understanding of whether the voter has moved or not. And that, I repeat, is because a nonreturned confirmation notice (as the numbers show) cannot reasonably indicate a change of address.

Finally, let us return to § 8's basic mandate and purpose. Ohio's program must "mak[e] a *reasonable effort* to remove the names of ineligible voters" from its federal rolls on

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change-of-residence grounds. § 20507(a)(4) (emphasis added). Reasonableness under § 8(a) is primarily measured in terms of the program’s compliance with “subsections (b), (c), and (d).” § 20507(a)(4)(B). That includes the broad prohibition on removing registrants because of their failure to vote. More generally, the statute seeks to “protect the integrity of the electoral process” and “ensure that accurate and current voter registration rolls are maintained.” §§ 20501(b)(3), (4). Ohio’s system adds to its non-voting-based identification system a factor that has no tendency to reveal accurately whether the registered voter has changed residences. Nothing plus one is still one. And if that “one” consists of a failure to vote, then Ohio’s program also fails to make the requisite “reasonable effort” to comply with subsection (a)’s statutory mandate. It must violate the statute.

III

The majority tries to find support in two provisions of a different statute, namely, the Help America Vote Act of 2002, 116 Stat. 1666, the pertinent part of which is reprinted in Appendix B, *infra*, at 804–805. The first is entitled “Clarification of Ability of Election Officials To Remove Registrants From Official List of Voters on Grounds of Change of Residence.” § 903, 116 Stat. 1728. That provision was added to the National Voter Registration Act’s Failure-to-Vote Clause, subsection (b)(2), which says that a State’s registrant removal program “shall not result in the removal of the name of any person from the official list . . . by reason of the person’s failure to vote.” § 20507(b)(2); see *supra*, at 785. The “Clarification” adds:

“except that nothing in this paragraph may be construed to prohibit a State *from using the procedures described in subsections (c) and (d)* to remove an individual from the official list of eligible voters if the individual—(A) has not either notified the applicable registrar (in person or in writing) or responded . . . to the [confirmation] no-

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tice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.” §903, 116 Stat. 1728 (emphasis added).

This amendment simply clarified that the use of nonvoting specified in subsections (c) and (d) does not violate the Failure-to-Vote Clause. The majority asks why, if the matter is so simple, Congress added the new language at all. The answer to this question is just what the title attached to the new language says, namely, Congress added the new language for purposes of *clarification*. And the new language clarified any confusion States may have had about the relationship between, on the one hand, subsection (b)’s broad prohibition on any use of a person’s failure to vote in removal programs and, on the other hand, the requirement in subsections (c) and (d) that a State consider whether a registrant has failed to vote at the end of the Confirmation Procedure. This reading finds support in several other provisions in both the National Voter Registration Act and the Help America Vote Act, which make similar clarifications. See, *e. g.*, §20507(c)(2)(B) (clarifying that a particular prohibition “shall not be construed to preclude” States from complying with separate statutory obligations); see also §§20510(d)(2) (similar rule of construction), 21081(c)(1), 21083(a)(1)(B), (a)(2)(A)(iii), (b)(5), (d)(1)(A)–(B), 21084.

The majority also points out another provision of the Help America Vote Act, §303. See §303(a)(4), 116 Stat. 1708, 52 U. S. C. §21083(a)(4). That provision once again reaffirms that a State’s registration list-maintenance program must “mak[e] a *reasonable effort* to remove registrants who are ineligible to vote” and adds that “*consistent with the National Voter Registration Act of 1993 . . .* registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no

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registrant may be removed *solely* by reason of a failure to vote.” §21083(a)(4)(A) (emphasis added).

The majority tries to make much of the word “solely.” But the majority makes too much of too little. For one thing, the Registration Act’s Failure-to-Vote Clause under subsection (b) does not use the word “solely.” And §303 of the Help America Vote Act tells us to interpret its language (which includes the word “solely”) “consistent with the” Registration Act. §21083(a)(4)(A). For another, the Help America Vote Act says that “nothing in this [Act] may be construed to authorize or require conduct prohibited under [the National Voter Registration Act], or to supersede, restrict or limit the application of . . . [t]he National Voter Registration Act.” §21145(a)(4).

The majority’s view of the statute leaves the Registration Act’s Failure-to-Vote Clause with nothing to do in respect to change-of-address programs. Let anyone who doubts this read subsection (d) (while remaining aware of the fact that it requires the sending of a confirmation notice) and ask himself or herself: What *else* is there for the Failure-to-Vote Clause to do? The answer is nothing. Section 8(d) requires States to send a confirmation notice for all change-of-address removals, and, in the majority’s view, failing to respond to that forwardable notice is always a valid cause for removal, even if that notice was sent by reason of the registrant’s initial failure to vote. Thus the Failure-to-Vote Clause is left with no independent weight since complying with subsection (d) shields a State from violating subsection (b). To repeat the point, under the majority’s view, the Failure-to-Vote Clause is superfluous in respect to change-of-address programs: Subsection (d) already accomplishes everything the majority says is required of a State’s removal program—namely, the sending of a notice.

Finally, even if we were to accept the majority’s premise that the question here is whether Ohio’s system removes registered voters from the registration list “solely by reason

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of a failure to vote,” that would not change anything. As I have argued, Part II, *supra*, the failure to respond to a forwardable notice is an irrelevant factor in terms of what it shows about whether that registrant changed his or her residence. To add an irrelevant factor to a failure to vote, say, a factor like having gone on vacation or having eaten too large a meal, cannot change Ohio’s sole use of “failure to vote” into something it is not.

IV

JUSTICE THOMAS, concurring, suggests that my reading of the statute “‘raises serious constitutional doubts.’” *Ante*, at 780 (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018)). He believes that it “would seriously interfere with the States’ constitutional authority to set and enforce voter qualifications.” *Ante*, at 781. At the same time, the majority “assume[s]” that “Congress has the constitutional authority to limit voting eligibility requirements in the way respondents suggest.” *Ante*, at 775, n. 5. But it suggests possible agreement with JUSTICE THOMAS, for it makes this assumption only “for the sake of argument.” *Ibid*.

Our cases indicate, however, that § 8 neither exceeds Congress’ authority under the Elections Clause, Art. I, § 4, nor interferes with the State’s authority under the Voter Qualification Clause, Art. 1, § 2. Indeed, this Court’s precedents interpreting the scope of congressional authority under the Elections Clause make clear that Congress has the constitutional power to adopt the statute before us.

The Elections Clause states:

“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.” U. S. Const., Art. I, § 4, cl. 1.

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The Court has frequently said that “[t]he Clause’s substantive scope is broad” and that it “empowers Congress to preempt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U. S. 1, 8 (2013). We have long held that “[t]he power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’” *Id.*, at 9 (quoting *Ex parte Siebold*, 100 U. S. 371, 392 (1880)).

The words “‘Times, Places, and Manner,’” we have said, are “‘comprehensive words’” that “‘embrace authority to provide a complete code for congressional elections.’” *Tribal Council*, *supra*, at 8–9 (quoting *Smiley v. Holm*, 285 U. S. 355, 366 (1932)). That “‘complete code’” includes the constitutional authority to enact “regulations relating to ‘registration.’” 570 U. S., at 8–9; see also *Cook v. Gralike*, 531 U. S. 510, 524 (2001); *Roudebush v. Hartke*, 405 U. S. 15, 24–25 (1972). That is precisely what § 8 does.

Neither does § 8 tell the States “*who* may vote in” federal elections. *Tribal Council*, 570 U. S., at 16. Instead, § 8 considers the *manner* of registering those whom the State itself considers qualified. Unlike the concurrence, I do not read our precedent as holding to the contrary. But see *id.*, at 26 (THOMAS, J., dissenting). And, our precedent strongly suggests that, given the importance of voting in a democracy, a State’s effort (because of failure to vote) to remove from a federal election roll those it considers otherwise qualified is unreasonable. Cf. *Carrington v. Rash*, 380 U. S. 89, 91–93, 96 (1965) (State can impose “reasonable residence restrictions of the availability of the ballot” but cannot forbid otherwise qualified members of military to vote); see also *Kramer v. Union Free School Dist. No. 15*, 395 U. S. 621, 625 (1969) (“States have the power to impose *reasonable* citizenship,

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age, and residency requirements on the availability of the ballot” (emphasis added)); *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966) (“To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor”).

For these reasons, with respect, I dissent.

APPENDIXES

A

The National Voter Registration Act of 1993

“SEC. 2. FINDINGS AND PURPOSES.

“(a) FINDINGS.—The Congress finds that—

“(1) The right of citizens of the United States to vote is a fundamental right;

“(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

“(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation . . . , including racial minorities.

“(b) PURPOSES.—The purposes of this Act are—

“(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

“(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

“(3) to protect the integrity of the electoral process; and

“(4) to ensure that accurate and current voter registration rolls are maintained.” 107 Stat. 77.

“SEC. 5. SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER’S LICENSE.

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“**(d) CHANGE OF ADDRESS.**—Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver’s license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.” *Id.*, at 78–79.

“**SEC. 6. MAIL REGISTRATION.**

“**(d) UNDELIVERED NOTICES.**—If a notice of the disposition of a mail voter registration application under section 8(a)(2) is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 8(d).” *Id.*, at 79–80.

“**SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION.**

“**(a) IN GENERAL.**—In the administration of voter registration for elections for Federal office, each State shall—

“(1) ensure that any eligible applicant is registered to vote in an election—

“(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

“(3) provide that the name of a registrant may not be removed from the official list of eligible voters except—

“(A) at the request of the registrant;

“(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

“(C) as provided under paragraph (4);

“(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—

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“(A) the death of the registrant; or

“(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

“(b) CONFIRMATION OF VOTER REGISTRATION.—Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office—

“(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U. S. C. 1973 et seq.); and

“(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.

“(c) VOTER REMOVAL PROGRAMS.—(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

“(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

“(B) if it appears from information provided by the Postal Service that—

“(i) a registrant has moved to a different residence address in the same registrar’s jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

“(ii) the registrant has moved to a different residence address not in the same registrar’s jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

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“(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

“(B) Subparagraph (A) shall not be construed to preclude—

“(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

“(ii) correction of registration records pursuant to this Act.

“(d) REMOVAL OF NAMES FROM VOTING ROLLS.—“(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

“(A) confirms in writing that the registrant has changed residence to a place outside the registrar’s jurisdiction in which the registrant is registered; or

“(B)(i) has failed to respond to a notice described in paragraph (2); and

“(ii) has not voted or appeared to vote (and, if necessary, correct the registrar’s record of the registrant’s address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

“(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

“(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar’s jurisdiction, the registrant should return the card not later than

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the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

"(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

"(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection." *Id.*, at 82–84.

B

The Help America Vote Act of 2002

"SEC. 303. COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS AND REQUIREMENTS FOR VOTERS WHO REGISTER BY MAIL.

"(a) COMPUTERIZED STATEWIDE VOTER REGISTRATION LIST REQUIREMENTS.—

"(4) MINIMUM STANDARD FOR ACCURACY OF STATE VOTER REGISTRATION RECORDS.—The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

"(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from

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the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U. S. C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

“(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” 116 Stat. 1708–1710.

“SEC. 903. CLARIFICATION OF ABILITY OF ELECTION OFFICIALS TO REMOVE REGISTRANTS FROM OFFICIAL LIST OF VOTERS ON GROUNDS OF CHANGE OF RESIDENCE.

“Section 8(b)(2) of the National Voter Registration Act of 1993 . . . is amended by striking the period at the end and inserting the following: ‘, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

“(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

“(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.’” *Id.*, at 1728.

“SEC. 906. NO EFFECT ON OTHER LAWS.

“(a) IN GENERAL.— . . . [N]othing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws [including]:

“(4) The National Voter Registration Act of 1993.” *Id.*, at 1729.

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JUSTICE SOTOMAYOR, dissenting.

I join the principal dissent in full because I agree that the statutory text plainly supports respondents' interpretation. I write separately to emphasize how that reading is bolstered by the essential purposes stated explicitly in the National Voter Registration Act of 1993 (NVRA) to increase the registration and enhance the participation of eligible voters in federal elections. 52 U.S.C. §§ 20501(b)(1)–(2). Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. The Court errs in ignoring this history and distorting the statutory text to arrive at a conclusion that not only is contrary to the plain language of the NVRA but also contradicts the essential purposes of the statute, ultimately sanctioning the very purging that Congress expressly sought to protect against.

Concerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an unfortunate feature of our country's history. See *Schuetz v. BAMN*, 572 U.S. 291, 337–338 (2014) (SOTOMAYOR, J., dissenting). As the principal dissent explains, “[i]n the late 19th and early 20th centuries, a number of ‘[r]estrictive registration laws and administrative procedures’ came into use across the United States.” *Ante*, at 783 (opinion of BREYER, J.). States enforced “poll tax[es], literacy tests, residency requirements, selective purges, . . . and annual registration requirements,” which were developed “to keep certain groups of citizens from voting.” H. R. Rep. No. 103–9, p. 2 (1993). Particularly relevant here, some States erected procedures requiring voters to renew registrations “whenever [they] moved or failed to vote in an election,” which “sharply depressed turnout, particularly among blacks and immigrants.” A. Keyssar, *The Right To Vote* 124 (2009). Even after the passage of the Voting Rights Act in 1965, many obstacles remained. See *ante*, at 783 (opinion of BREYER, J.).

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Congress was well aware of the “long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens” when it enacted the NVRA. S. Rep. No. 103–6, p. 18 (1993). Congress thus made clear in the statutory findings that “the right of citizens of the United States to vote is a fundamental right,” that “it is the duty of the Federal, State, and local governments to promote the exercise of that right,” and that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation . . . and disproportionately harm voter participation by various groups, including racial minorities.” 52 U. S. C. § 20501(a). In light of those findings, Congress enacted the NVRA with the express purposes of “increas[ing] the number of eligible citizens who register to vote” and “enhanc[ing] the participation of eligible citizens as voters.” §§ 20501(b)(1)–(2). These stated purposes serve at least in part to counteract the history of voter suppression, as evidenced by § 20507(b)(2), which forbids “the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.” *Ibid.*

Of course, Congress also expressed other objectives, “to protect the integrity of the electoral process” and “to ensure that accurate and current voter registration rolls are maintained.” §§ 20501(b)(3)–(4).^{*} The statute contemplates, however, that States can, and indeed must, further all four stated objectives. As relevant here, Congress crafted the NVRA with the understanding that, while States are required to make a “reasonable effort” to remove ineligi-

^{*}The majority characterizes these objectives as ones to “remov[e] ineligible persons from the States’ voter registration rolls,” *ante*, at 761, but maintaining “accurate” rolls and “protecting the integrity of the electoral process” surely encompass more than just removing ineligible voters. An accurate voter roll and fair electoral process should also reflect the continued enrollment of eligible voters. In this way, the NVRA’s enhanced-participation and accuracy-maintenance goals are to be achieved simultaneously, and are mutually reinforcing.

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ble voters from the registration lists, § 20507(a)(4), such removal programs must be developed in a manner that “prevent[s] poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register” and “prevent[s] abuse which has a disparate impact on minority communities,” S. Rep. No. 103–6, at 18.

Ohio’s Supplemental Process reflects precisely the type of purge system that the NVRA was designed to prevent. Under the Supplemental Process, Ohio will purge a registrant from the rolls after six years of not voting, *e. g.*, sitting out one Presidential election and two midterm elections, and after failing to send back one piece of mail, even though there is no reasonable basis to believe the individual actually moved. See *ante*, at 794–795 (BREYER, J., dissenting). This purge program burdens the rights of eligible voters. At best, purged voters are forced to “needlessly reregister” if they decide to vote in a subsequent election; at worst, they are prevented from voting at all because they never receive information about when and where elections are taking place.

It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, *amici* point to an investigation that revealed that in Hamilton County, “African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity” since 2012, as “compared to only 4% of voters in a suburban, majority-white neighborhood.” Brief for National Association for the Advancement of Colored People et al. as *Amici Curiae* 18–19. *Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them

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particularly vulnerable to unwarranted removal under the Supplemental Process. See Brief for Asian Americans Advancing Justice | AAJC et al. as *Amici Curiae* 15–26; Brief for National Disability Rights Network et al. as *Amici Curiae* 17, 21–24, 29–31; Brief for VoteVets Action Fund as *Amicus Curiae* 23–30. See also Brief for Libertarian National Committee as *Amicus Curiae* 19–22 (burdens on principled nonvoters).

Neither the majority nor Ohio meaningfully dispute that the Supplemental Process disproportionately burdens these communities. At oral argument, Ohio suggested that such a disparate impact is not pertinent to this case because respondents did not challenge the Supplemental Process under § 20507(b)(1), which requires that any removal program “be uniform, nondiscriminatory, and in compliance with the Voting Rights Act.” Tr. of Oral Arg. 23. The fact that respondents did not raise a claim under § 20507(b)(1), however, is wholly irrelevant to our assessment of whether, as a matter of statutory interpretation, the Supplemental Process removes voters “by reason of the person’s failure to vote” in violation of § 20507(b)(2). Contrary to the majority’s view, *ante*, at 779, the NVRA’s express findings and purpose are highly relevant to that interpretive analysis because they represent “the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the meaning of the operative provisions that follow.” A. Scalia & B. Garner, *Reading Law* 218 (2012). Respondents need not demonstrate discriminatory intent to establish that Ohio’s interpretation of the NVRA is contrary to the statutory text and purpose.

In concluding that the Supplemental Process does not violate the NVRA, the majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Con-

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gress set out to eradicate. States, though, need not choose to be so unwise. Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote. The majority of States have found ways to maintain accurate voter rolls without initiating removal processes based solely on an individual's failure to vote. See App. to Brief for League of Women Voters of the United States et al. as *Amici Curiae* 1a–9a; Brief for State of New York et al. as *Amici Curiae* 22–28. Communities that are disproportionately affected by unnecessarily harsh registration laws should not tolerate efforts to marginalize their influence in the political process, nor should allies who recognize blatant unfairness stand idly by. Today's decision forces these communities and their allies to be even more proactive and vigilant in holding their States accountable and working to dismantle the obstacles they face in exercising the fundamental right to vote.

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Syllabus

SVEEN ET AL. *v.* MELINCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 16–1432. Argued March 19, 2018—Decided June 11, 2018

The legal system has long used default rules to resolve estate litigation in a way that conforms to decedents’ presumed intent. In 2002, Minnesota enacted a statute establishing one such default rule. The statute provides that “the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual’s former spouse.” Minn. Stat. §524.2–804, subd. 1. Under the statute, if one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation so that the insurance proceeds will instead go to the contingent beneficiary or the policyholder’s estate upon his death. The law does this on the theory that the policyholder would want that result. But if he does not, he may rename the ex-spouse as beneficiary.

Mark Sveen and respondent Kaye Melin were married in 1997. The next year, Sveen purchased a life insurance policy, naming Melin as the primary beneficiary and designating his two children from a prior marriage, petitioners Ashley and Antone Sveen, as contingent beneficiaries. The Sveen-Melin marriage ended in 2007, but the divorce decree made no mention of the insurance policy and Sveen took no action to revise his beneficiary designations. After Sveen passed away in 2011, Melin and the Sveen children made competing claims to the insurance proceeds. The Sveens argued that under Minnesota’s revocation-on-divorce law, their father’s divorce canceled Melin’s beneficiary designation, leaving them as the rightful recipients. Melin claimed that because the law did not exist when the policy was purchased and she was named as the primary beneficiary, applying the later-enacted law to the policy violates the Constitution’s Contracts Clause. The District Court awarded the insurance money to the Sveens, but the Eighth Circuit reversed, holding that the retroactive application of Minnesota’s law violates the Contracts Clause.

Held: The retroactive application of Minnesota’s statute does not violate the Contracts Clause. That Clause restricts the power of States to disrupt contractual arrangements, but it does not prohibit all laws affecting pre-existing contracts, see *El Paso v. Simmons*, 379 U. S. 497, 506–507. The two-step test for determining when such a law crosses the constitutional line first asks whether the state law has “operated as a substantial impairment of a contractual relationship.” *Allied Structural Steel Co.*

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v. *Spannaus*, 438 U. S. 234, 244. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.*, at 246; *El Paso*, 379 U. S., at 514–515; *Texaco, Inc. v. Short*, 454 U. S. 516, 531. If such factors show a substantial impairment, the inquiry turns to whether the state law is drawn in an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U. S. 400, 411–412.

The Court stops after the first step here, because three aspects of Minnesota's law, taken together, show that the law does not substantially impair pre-existing contractual arrangements. First, the law is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. It applies a prevalent legislative presumption that a divorcee would not want his former partner to benefit from his life insurance policy and other will substitutes. Thus the law often honors, not undermines, the intent of the only contracting party to care about the beneficiary term. Second, the law is unlikely to disturb any policyholder's expectations at the time of contracting, because an insured cannot reasonably rely on a beneficiary designation staying in place after a divorce. Divorce courts have wide discretion to divide property upon dissolution of a marriage, including by revoking spousal beneficiary designations in life insurance policies or by mandating that such designations remain. Because a life insurance purchaser cannot know what will happen to that policy in the event of a divorce, his reliance interests are next to nil. And that fact cuts against providing protection under the Contracts Clause. Last, the law supplies a mere default rule, which the policyholder can undo in a moment. If the law's presumption about what an insured wants after divorcing is wrong, the insured may overthrow it simply by sending a change-of-beneficiary form to his insurer.

This Court has long held that laws imposing such minimal paperwork burdens do not violate the Contracts Clause. It has repeatedly sustained so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices. See *Jackson v. Lamphire*, 3 Pet. 280; *Vance v. Vance*, 108 U. S. 514; *Texaco, Inc. v. Short*, 454 U. S. 516. The Court has also upheld laws mandating other kinds of notifications or filings against Contracts Clause attack. See *Curtis v. Whitney*, 13 Wall. 68; *Gilfillan v. Union Canal Co. of Pa.*, 109 U. S. 401; *Conley v. Barton*, 260 U. S. 677. The Minnesota law places no greater obligation on a contracting party than these laws—while imposing a lesser penalty for noncompliance. Filing a change-of-

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beneficiary form is as easy as satisfying the paperwork requirements that this Court’s prior cases approved. And if an insured wants his ex-spouse to stay as beneficiary but does not send in his form, the result is only that the insurance money is redirected to his contingent beneficiaries, not that his contractual rights are extinguished. Pp. 818–826.

853 F. 3d 410, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed a dissenting opinion, *post*, p. 826.

Adam G. Unikowsky argued the cause for petitioners. With him on the briefs were *Daniel Doda* and *Clifford W. Berlow*.

Shay Dvoretzky argued the cause for respondent. With him on the brief were *Jeffrey R. Johnson* and *Robert J. Lange*.*

JUSTICE KAGAN delivered the opinion of the Court.

A Minnesota law provides that “the dissolution or annulment of a marriage revokes any revocable[] beneficiary designation[] made by an individual to the individual’s former spouse.” Minn. Stat. § 524.2–804, subd. 1 (2016). That statute establishes a default rule for use when Minnesotans divorce. If one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result. But if he does not, the policyholder may rename the ex-spouse as beneficiary.

We consider here whether applying Minnesota’s automatic-revocation rule to a beneficiary designation made before the statute’s enactment violates the Contracts Clause of the Constitution. We hold it does not.

**Robert W. Goldman* filed a brief for the American College of Trust & Estate Counsel as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Women’s Law Project et al. by *David A. Barrett*; and for James W. Ely, Jr., by *Dana Berliner*, *Jeffrey H. Redfern*, and *Mr. Ely, pro se*.

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I

All good trust-and-estate lawyers know that “[d]eath is not the end; there remains the litigation over the estate.” 8 *The Collected Works of Ambrose Bierce* 365 (1911). That epigram, beyond presaging this case, helps explain the statute at its center.

The legal system has long used default rules to resolve estate litigation in a way that conforms to decedents’ presumed intent. At common law, for example, marriage automatically revoked a woman’s prior will, while marriage *and* the birth of a child revoked a man’s. See 4 J. Kent, *Commentaries on American Law* 507, 512 (1830). The testator could then revive the old will or execute a new one. But if he (or she) did neither, the laws of intestate succession (generally prioritizing children and current spouses) would control the estate’s distribution. See 95 C. J. S., *Wills* §448, pp. 409–410 (2011); R. Sitkoff & J. Dukeminier, *Wills, Trusts, and Estates* 63 (10th ed. 2017). Courts reasoned that the average person would prefer that allocation to the one in the old will, given the intervening life events. See T. Atkinson, *Handbook of the Law of Wills* 423 (2d ed. 1953). If he’d only had the time, the thought went, he would have replaced that will himself.

Changes in society brought about changes in the laws governing revocation of wills. In addition to removing gender distinctions, most States abandoned the common-law rule canceling whole wills executed before a marriage or birth. In its place, they enacted statutes giving a new spouse or child a specified share of the decedent’s estate while leaving the rest of his will intact. See Sitkoff & Dukeminier, *Wills, Trusts, and Estates*, at 240. But more important for our purposes, climbing divorce rates led almost all States by the 1980s to adopt another kind of automatic-revocation law. So-called revocation-on-divorce statutes treat an individual’s divorce as voiding a testamentary bequest to a former spouse. Like the old common-law rule, those laws rest on a

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“judgment about the typical testator’s probable intent.” *Id.*, at 239. They presume, in other words, that the average Joe does not want his ex inheriting what he leaves behind.

Over time, many States extended their revocation-on-divorce statutes from wills to “will substitutes,” such as revocable trusts, pension accounts, and life insurance policies. See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1109 (1984) (describing nonprobate assets). In doing so, States followed the lead of the Uniform Probate Code, a model statute amended in 1990 to include a provision revoking on divorce not just testamentary bequests but also beneficiary designations to a former spouse. See §§2–804(a)(1), (b)(1), 8 U. L. A. 330, 330–331 (2013). The new section, the drafters wrote, aimed to “unify the law of probate and nonprobate transfers.” §2–804, Comment, *id.*, at 333. The underlying idea was that the typical decedent would no more want his former spouse to benefit from his pension plan or life insurance than to inherit under his will. A wealth transfer was a wealth transfer—and a former spouse (as compared with, say, a current spouse or child) was not likely to be its desired recipient. So a decedent’s failure to change his beneficiary probably resulted from “inattention,” not “intention.” Statement of the Joint Editorial Bd. for Uniform Probate Code, 17 Am. College Trust & Est. Counsel 184 (1991). Agreeing with that assumption, 26 States have by now adopted revocation-on-divorce laws substantially similar to the Code’s.¹ Minnesota is one.

¹See Ala. Code §30–4–17 (2016); Alaska Stat. §13.12.804 (2016); Ariz. Rev. Stat. Ann. §14–2804 (2012); Colo. Rev. Stat. §15–11–804 (2017); Fla. Stat. §732.703 (2017); Haw. Rev. Stat. §560:2–804 (2006); Idaho Code Ann. §15–2–804 (2017 Cum. Supp.); Iowa Code §598.20A (2017); Mass. Gen. Laws, ch. 190B, §2–804 (2016); Mich. Comp. Laws Ann. §700.2807 (West 2018 Cum. Supp.); Minn. Stat. §524.2–804, subd. 1 (2016); Mont. Code Ann. §72–2–814 (2017); Nev. Rev. Stat. §111.781 (2015); N. J. Stat. Ann. §3B:3–14 (West 2007); N. M. Stat. Ann. §45–2–804, (2014); N. Y. Est., Powers & Trusts Law Ann. §5–1.4 (West 2018 Cum. Supp.); N. D. Cent.

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Under prior Minnesota law, a divorce alone did not affect a beneficiary designation—but a particular divorce decree could do so. Take first the simple case: Joe names his wife Ann as beneficiary of his insurance policy, later gets divorced, but never changes the designation. Upon his death, Ann would receive the insurance proceeds—even if Joe had just forgotten to redirect the money. In other words, the insurance contract’s beneficiary provision would govern after the divorce, exactly as it would have before. See *Larsen v. Northwestern Nat. Life Ins. Co.*, 463 N. W. 2d 777, 779 (Minn. App. 1990). But now introduce a complication, in the form of a court addressing a spousal designation in a divorce decree. In Minnesota, as across the nation, divorce courts have always had “broad discretion in dividing property upon dissolution of a marriage.” *Maurer v. Maurer*, 623 N. W. 2d 604, 606 (Minn. 2001); see 24 Am. Jur. 2d, Divorce and Separation §456 (2008). In exercising that power, a court could revoke a beneficiary designation to a soon-to-be ex-spouse; or conversely, a court could mandate that the old designation remain. See, e. g., *Paul v. Paul*, 410 N. W. 2d 329, 330 (Minn. App. 1987); *O’Brien v. O’Brien*, 343 N. W. 2d 850, 853 (Minn. 1984). Either way, the court, rather than the insured, would decide whether the ex-spouse would stay the beneficiary.

In contrast to the old law, Minnesota’s new revocation-on-divorce statute starts from another baseline: the cancellation, rather than continuation, of a beneficiary designation. Enacted in 2002 to track the Code, the law provides that “the dissolution or annulment of a marriage revokes any revocable[] disposition, beneficiary designation, or appointment of property made by an individual to the individual’s

Code Ann. § 30.1–10–04 (2010); Ohio Rev. Code Ann. § 5815.33 (Lexis 2017); 20 Pa. Cons. Stat. § 6111.2 (2010); S. C. Code Ann. § 62–2–507 (2017 Cum. Supp.); S. D. Codified Laws §29A–2–804 (2004); Tex. Fam. Code Ann. § 9.301 (West 2006); Utah Code § 75–2–804 (Supp. 2017); Va. Code Ann. § 20–111.1 (2016); Wash. Rev. Code § 11.07.010 (2016); Wis. Stat. § 854.15 (2011).

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former spouse in a governing instrument.” Minn. Stat. §524.2–804, subd. 1. The term “governing instrument” is defined to include an “insurance or annuity policy,” along with a will and other will substitutes. §524.1–201. So now when Joe and Ann divorce, the clause naming Ann as Joe’s insurance beneficiary is automatically revoked. If nothing else occurs before Joe’s death, his insurance proceeds go to any contingent beneficiary named in the policy (perhaps his daughter Emma) or, failing that, to his estate. See §524.2–804, subd. 2.

Something else, however, may well happen. As under Minnesota’s former law, a divorce decree may alter the natural state of things. So in our example, the court could direct that Ann remain as Joe’s insurance beneficiary, despite the normal revocation rule. See §524.2–804, subd. 1 (providing that a “court order” trumps the rule). And just as important, the policyholder himself may step in to override the revocation. Joe, for example, could agree to a marital settlement ensuring Ann’s continued status as his beneficiary. See *ibid.* (providing that such an agreement controls). Or else, and more simply, he could notify his insurance company at any time that he wishes to restore Ann to that position.

But enough of our hypothetical divorcees: It is time they give way to Mark Sveen and Kaye Melin, whose marriage and divorce led to this case. In 1997, Sveen and Melin wed. The next year, Sveen purchased a life insurance policy. He named Melin as the primary beneficiary, while designating his two children from a prior marriage, Ashley and Antone Sveen, as the contingent beneficiaries. The Sveen-Melin marriage ended in 2007. The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations. In 2011, he passed away.

In this action, petitioners the Sveen children and respondent Melin make competing claims to the insurance proceeds. The Sveens contend that under Minnesota’s revocation-on-

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divorce law, their father's divorce canceled Melin's beneficiary designation and left the two of them as the rightful recipients. Melin notes in reply that the Minnesota law did not yet exist when her former husband bought his insurance policy and named her as the primary beneficiary. And she argues that applying the later-enacted law to the policy would violate the Constitution's Contracts Clause, which prohibits any state "Law impairing the Obligation of Contracts." Art. I, § 10, cl. 1.

The District Court rejected Melin's argument and awarded the insurance money to the Sveens. See Civ. No. 14–5015 (D Minn., Jan. 7, 2016), App. to Pet. for Cert. 9a–16a. But the Court of Appeals for the Eighth Circuit reversed. It held that a "revocation-upon-divorce statute like [Minnesota's] violates the Contract Clause when applied retroactively." 853 F. 3d 410, 412 (2017).

We granted certiorari, 583 U.S. 1036 (2017), to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a pre-existing agreement's beneficiary designation.² We now reverse the decision below.

II

The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U. S. Const., Art. I, § 10, cl. 1. The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors. See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 502–503 (1987). But the Clause applies to any kind of con-

² Compare 853 F. 3d 410, 414 (CA8 2017) (case below) (yes, it does); *Parsonese v. Midland Nat. Ins. Co.*, 550 Pa. 423, 434, 706 A. 2d 814, 819 (1998) (same), with *Lazar v. Kroncke*, 862 F. 3d 1186, 1199–1200 (CA9 2017) (no, it does not); *Stillman v. Teachers Ins. & Annuity Assn. College Retirement Equities Fund*, 343 F. 3d 1311, 1322 (CA10 2003) (same); *In re Estate of DeWitt*, 54 P. 3d 849, 859–860 (Colo. 2002) (same).

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tract. See *Allied Structural Steel Co. v. Spannaus*, 438 U. S. 234, 244–245, n. 16 (1978). That includes, as here, an insurance policy.

At the same time, not all laws affecting pre-existing contracts violate the Clause. See *El Paso v. Simmons*, 379 U. S. 497, 506–507 (1965). To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has “operated as a substantial impairment of a contractual relationship.” *Allied Structural Steel Co.*, 438 U. S., at 244. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.*, at 246; *El Paso*, 379 U. S., at 514–515; *Texaco, Inc. v. Short*, 454 U. S. 516, 531 (1982). If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an “appropriate” and “reasonable” way to advance “a significant and legitimate public purpose.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U. S. 400, 411–412 (1983).

Here, we may stop after step one because Minnesota’s revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. True enough that in revoking a beneficiary designation, the law makes a significant change. As Melin says, the “whole point” of buying life insurance is to provide the proceeds to the named beneficiary. Brief for Respondent 16. But three aspects of Minnesota’s law, taken together, defeat Melin’s argument that the change it effected “severely impaired” her ex-husband’s contract. *Ibid.* First, the statute is designed to reflect a policyholder’s intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder’s expectations because it does no more than a divorce court could always have done. And third, the

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statute supplies a mere default rule, which the policyholder can undo in a moment. Indeed, Minnesota's revocation statute stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s.³ We now consider in detail each of the features that make this so.

To begin, the Minnesota statute furthers the policyholder's intent in many cases—indeed, the drafters reasonably thought in the typical one. As earlier described, legislatures have long made judgments about a decedent's likely testamentary intent after large life changes—a marriage, a birth, or a divorce. See *supra*, at 814–815. And on that basis, they have long enacted statutes revoking earlier-made wills by operation of law. Legislative presumptions about divorce are now especially prevalent—probably because they accurately reflect the intent of most divorcing parties. Although there are exceptions, most divorcees do not aspire to enrich their former partners. (And that is true even when an ex-spouse has custody of shared children, given the many ways to provide them with independent support.) The Minnesota statute (like the model code it tracked) applies that

³ Because that is true, we have no occasion to address Melin's contention that we should abandon our two-step Contracts Clause test to whatever extent it departs from the Clause's original meaning and earliest applications. See Brief for Respondent 6–10, 18–33. Part of Melin's argument focuses on the back half of the test, which we do not reach today. Another part claims that the front half goes wrong in exempting *insubstantial* impairments from the Clause's reach. But as we explain below, see *infra*, at 822–824, the Court has always recognized that some laws affect contracts without violating the Contracts Clause. See, e.g., *Curtis v. Whitney*, 13 Wall. 68, 70 (1872) (“No[t] every statute which affects the value of a contract impair[s] its obligation”). And in particular, the Court has always approved statutes like this one, which enable a party with only minimal effort to protect his original contract rights against the law's operation. See, e.g., *Jackson v. Lamphire*, 3 Pet. 280, 290 (1830). So this case presents no clash, of the kind Melin says we should resolve, between the Court's two-step test and any older approach to applying the Contracts Clause.

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understanding to beneficiary designations in life insurance policies and other will substitutes. See *supra*, at 815–817. Melin rightly notes that this extension raises a brand-new constitutional question because “an insurance policy is a contract under the Contracts Clause, and a will is not.” Brief for Respondent 44 (internal quotation marks omitted). But in answering that question, it matters that the old legislative presumption equally fits the new context: A person would as little want his ex-spouse to benefit from his insurance as to collect under his will. Or said otherwise, the insured’s failure to change the beneficiary after a divorce is more likely the result of neglect than choice. And that means the Minnesota statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term. The law no doubt changes how the insurance contract operates. But does it impair the contract? Quite the opposite for lots of policyholders.

And even when presumed and actual intent diverge, the Minnesota law is unlikely to upset a policyholder’s expectations at the time of contracting. That is because an insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce. As noted above, divorce courts have wide discretion to divide property between spouses when a marriage ends. See *supra*, at 816. The house, the cars, the sporting equipment are all up for grabs. See Judgment and Decree in No. 14–cv–5015 (D Minn.), p. 51 (awarding Melin, among other things, a snowmobile and all-terrain vehicle). And (what matters here) so too are the spouses’ life insurance policies, with their beneficiary provisions. Although not part of the Sveen-Melin divorce decree, they could have been; as Melin acknowledges, they sometimes are. See *supra*, at 816; Brief for Respondent 38. Melin counters that the Contracts Clause applies only to legislation, not to judicial decisions. See *id.*, at 38–39; see also *post*, at 834 (GORSUCH, J., dissenting). That is true, but of no moment. The power of divorce courts over insurance policies is rele-

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vant here because it affects whether a party can reasonably expect a beneficiary designation to survive a marital breakdown. We venture to guess that few people, when purchasing life insurance, give a thought to what will happen in the event of divorce. But even if someone out there does, he can conclude only that . . . he cannot possibly know. So his reliance interests are next to nil. And as this Court has held before, that fact cuts against providing protection under the Contracts Clause. See, *e.g.*, *El Paso*, 379 U.S., at 514–515.

Finally, a policyholder can reverse the effect of the Minnesota statute with the stroke of a pen. The law puts in place a presumption about what an insured wants after divorcing. But if the presumption is wrong, the insured may overthrow it. And he may do so by the simple act of sending a change-of-beneficiary form to his insurer. (Or if he wants to commit himself forever, like Ulysses binding himself to the mast, he may agree to a divorce settlement continuing his ex-spouse's beneficiary status. See *supra*, at 817.) That action restores his former spouse to the position she held before the divorce—and in so doing, cancels the state law's operation. The statute thus reduces to a paperwork requirement (and a fairly painless one, at that): File a form and the statutory default rule gives way to the original beneficiary designation.

In cases going back to the 1800s, this Court has held that laws imposing such minimal paperwork burdens do not violate the Contracts Clause. One set of decisions addresses so-called recording statutes, which extinguish contractual interests unless timely recorded at government offices. In *Jackson v. Lamphire*, 3 Pet. 280 (1830), for example, the Court rejected a Contracts Clause challenge to a New York law granting title in property to a later rather than earlier purchaser whenever the earlier had failed to record his deed. It made no difference, the Court held, whether the unrecorded deed was “dated before or after the passage” of the

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statute; in neither event did the law's modest recording condition "impair[] the obligation of contracts." *Id.*, at 290. Likewise, in *Vance v. Vance*, 108 U.S. 514 (1883), the Court upheld a statute rendering unrecorded mortgages unenforceable against third parties—even when the mortgages predated the law. We reasoned that the law gave "due regard to existing contracts" because it demanded only that the mortgagee make a "public registration," and gave him several months to do so. *Id.*, at 517, 518. And more recently, in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), the Court held that a statute terminating pre-existing mineral interests unless the owner filed a "statement of claim" in a county office did not "unconstitutionally impair" a contract. *Id.*, at 531. The filing requirement was "minimal," we explained, and compliance with it would effectively "safeguard any contractual obligations or rights." *Ibid.*

So too, the Court has long upheld against Contracts Clause attack laws mandating other kinds of notifications or filings. In *Curtis v. Whitney*, 13 Wall. 68 (1872), for example, the Court approved a statute retroactively affecting buyers of "certificates" for land offered at tax sales. The law required the buyer to notify the tax-delinquent property owner, who could then put up the funds necessary to prevent the land's final sale. If the buyer failed to give the notice, he could not take the land—and if he provided the notice, his chance of gaining the land declined. Still, the Court made short work of the Contracts Clause claim. Not "every statute which affects the value of a contract," the Court stated, "impair[s] its obligation." *Id.*, at 70. Because the law's notice rule was "easy [to] compl[y] with," it did not raise a constitutional problem. *Id.*, at 71. Similarly, in *Gilfillan v. Union Canal Co. of Pa.*, 109 U.S. 401 (1883), the Court sustained a state law providing that an existing bondholder's failure to reject a settlement proposal in writing would count as consent to the deal. The law operated to reduce the interest received by an investor who did not respond. Yet the Court

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rebuffed the ensuing Contracts Clause suit. “If [the bondholder did] not wish to abandon his old rights and accept the new,” the Court explained, “all he ha[d] to do [was] to say so in writing.” *Id.*, at 406. And one last: In *Conley v. Barton*, 260 U. S. 677 (1923), the Court held that the Contracts Clause did not bar a State from compelling existing mortgagees to complete affidavits before finally foreclosing on properties. The law effectively added a paperwork requirement to the mortgage contracts’ foreclosure terms. But the Court said it was “only [a] condition, easily complied with, which the law, for its purposes, requires.” *Id.*, at 681.

The Minnesota statute places no greater obligation on a contracting party—while imposing a lesser penalty for non-compliance. Even supposing an insured wants his life insurance to benefit his ex-spouse, filing a change-of-beneficiary form with an insurance company is as “easy” as, say, providing a landowner with notice or recording a deed. *Curtis*, 13 Wall., at 71. Here too, with only “minimal” effort, a person can “safeguard” his contractual preferences. *Texaco*, 454 U. S., at 531. And here too, if he does not “wish to abandon his old rights and accept the new,” he need only “say so in writing.” *Gilfillan*, 109 U. S., at 406. What’s more, if the worst happens—if he wants his ex-spouse to stay as beneficiary but does not send in his form—the consequence pales in comparison with the losses incurred in our earlier cases. When a person ignored a recording obligation, for example, he could forfeit the sum total of his contractual rights—just ask the plaintiffs in *Jackson* and *Vance*. But when a policyholder in Minnesota does not redesignate his ex-spouse as beneficiary, his right to insurance does not lapse; the upshot is just that his contingent beneficiaries (here, his children) receive the money. See *supra*, at 817. That redirection of proceeds is not nothing; but under our precedents, it gives the policyholder—who, again, could have “easily” and entirely escaped the law’s effect—no right to complain of a Contracts Clause violation. *Conley*, 260 U. S., at 681.

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In addressing those precedents, Melin mainly urges us to distinguish between two ways a law can affect a contract. The Minnesota law, Melin claims, “operate[s] on the contract itself” by “directly chang[ing] an express term” (the insured’s beneficiary designation). Brief for Respondent 51; Tr. of Oral Arg. 57. In contrast, Melin continues, the recording statutes “impose[] a consequence” for failing to abide by a “procedural” obligation extraneous to the agreement (the State’s recording or notification rule). Brief for Respondent 51; Tr. of Oral Arg. 58. The difference, in her view, parallels the line between rights and remedies: The Minnesota law explicitly alters a person’s entitlement under the contract, while the recording laws interfere with his ability to enforce that entitlement against others. See Tr. of Oral Arg. 57–59; see also *post*, at 834–835 (GORSUCH, J., dissenting).

But we see no meaningful distinction among all these laws. The old statutes also “act[ed] on the contract” in a significant way. Tr. of Oral Arg. 59. They added a paperwork obligation nowhere found in the original agreement—“record the deed,” say, or “notify the landowner.” And they informed a contracting party that unless he complied, he could not gain the benefits of his bargain. Or viewed conversely, the Minnesota statute also “impose[s] a consequence” for not satisfying a burden outside the contract. Brief for Respondent 51. For as we have shown, that law overrides a beneficiary designation only when the insured fails to send in a form to his insurer. See *supra*, at 822. Of course, the statutes (both old and new) vary in their specific mechanisms. But they all make contract benefits contingent on some simple filing—or more positively spun, enable a party to safeguard those benefits by taking an action. And that feature is what the Court, again and again, has found dispositive.

Nor does Melin’s attempt to distinguish the cases gain force when framed in terms of rights and remedies. First, not all the old statutes, as a formal matter, confined the consequence of noncompliance to the remedial sphere. In *Gil-*

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fillan, for example, the result of failing to give written consent to a settlement was to diminish the interest rate a bondholder got, not to prevent him from enforcing a claim against others. And second, even when the consequence formally related to enforcement—for example, precluding an earlier purchaser from contesting a later one’s title—the laws in fact wiped out substantive rights. Failure to record or notify, as noted earlier, would mean that the contracting party lost what (according to his agreement) was his land or mortgage or mineral interest. See *supra*, at 824. In *Texaco*, we replied to an argument like Melin’s by saying that when the results of “eliminating a remedy” and “extinguishing a right” are “identical,” the Contracts Clause “analysis is the same.” 454 U.S., at 528; see *El Paso*, 379 U.S., at 506–507. That statement rebuts Melin’s claim too. Once again: Just like Minnesota’s statute, the laws discussed above hinged core contractual benefits on compliance with noncontractual paperwork burdens. When all is said and done, that likeness controls.

For those reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, dissenting.

The Court’s argument proceeds this way. Because people are *inattentive* to their life insurance beneficiary designations when they divorce, the legislature needs to change those designations retroactively to ensure they aren’t misdirected. But because those same people are simultaneously *attentive* to beneficiary designations (not to mention the legislature’s activity), they will surely undo the change if they don’t like it. And even if that weren’t true, it would hardly matter. People know *existing* divorce laws sometimes allow *courts* to reform insurance contracts. So people should know a *legislature* might enact *new* laws upending insurance

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contracts at divorce. For these reasons, a statute rewriting the most important term of a life insurance policy—who gets paid—somehow doesn’t “substantially impair” the contract. It just “makes a significant change.” *Ante*, at 819.

Respectfully, I cannot agree. Minnesota’s statute automatically alters life insurance policies upon divorce to remove a former spouse as beneficiary. Everyone agrees that the law is valid when applied prospectively to policies purchased after the statute’s enactment. But Minnesota wants to apply its law retroactively to policies purchased before the statute’s adoption. The Court of Appeals held that this violated the Contracts Clause, which guarantees people the “right to ‘rely on the law . . . as it existed when the[ir] contracts were made.’” *Metropolitan Life Ins. Co. v. Melin*, 853 F. 3d 410, 413 (CA8 2017) (quoting *Whirlpool Corp. v. Ritter*, 929 F. 2d 1318, 1323 (CA8 1991)). That judgment seems to me exactly right.

Because legislation often disrupts existing social arrangements, it usually applies only prospectively. This longstanding and “sacred” principle ensures that people have fair warning of the law’s demands. *Reynolds v. McArthur*, 2 Pet. 417, 434 (1829); 3 H. Bracton, *De Legibus et Consuetudinibus Angliae* 530–531 (1257) (T. Twiss ed. 1880). It also prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change. See, e.g., *Landgraf v. USI Film Products*, 511 U. S. 244, 266 (1994); Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L. J. 399, 408 (2001).

When it comes to legislation affecting contracts, the Constitution hardens the presumption of prospectivity into a mandate. The Contracts Clause categorically prohibits states from passing “*any* . . . Law impairing the Obligation of Contracts.” Art. I, §10, cl. 1 (emphasis added). Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where

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the Contracts Clause is found permits states to take otherwise unconstitutional action when “absolutely necessary,” if “actually invaded,” or “wit[h] the Consent of Congress.” Cls. 2 and 3. But in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as “inviolable” would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority. *Sturges v. Crowninshield*, 4 Wheat. 122, 206 (1819).

The categorical nature of the Contracts Clause was not lost on anyone, either. When some delegates at the Constitutional Convention sought softer language, James Madison acknowledged the “‘inconvenience’” a categorical rule could sometimes entail “‘but thought on the whole it would be overbalanced by the utility of it.’” Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *Hastings Const. L. Q.* 525, 530 (1987). During the ratification debates, these competing positions were again amply aired. Antifederalists argued that the proposed Clause would prevent states from passing valuable legislation. *Id.*, at 532–533. Federalists like Madison countered that the rule of law permitted “property rights and liberty interests [to] be dissolved only by prospective laws of general applicability.” *Id.*, at 532. And, of course, the people chose to ratify the Constitution—categorical Clause and all.

For much of its history, this Court construed the Contracts Clause in this light. The Court explained that any legislative deviation from a contract’s obligations, “however minute, or apparently immaterial,” violates the Constitution. *Green v. Biddle*, 8 Wheat. 1, 84 (1823). “All the commentators, and all the adjudicated cases upon Constitutional Law agree[d] in th[is] fundamental propositio[n].” *Winter v. Jones*, 10 Ga. 190, 195 (1851). But while absolute in its field, the Clause also left significant room for legislatures to address changing social conditions. States could regulate con-

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tractual rights prospectively. *Ogden v. Saunders*, 12 Wheat. 213, 262 (1827). They could retroactively alter contractual remedies, so long as they did so reasonably. *Sturges, supra*, at 200. And perhaps they could even alter contracts without “impairing” their obligations if they made the parties whole by paying just compensation. See *West River Bridge Co. v. Dix*, 6 How. 507, 532–533 (1848); *El Paso v. Simmons*, 379 U. S. 497, 525 (1965) (Black, J., dissenting). But what they could *not* do is destroy substantive contract rights—the “Obligation of Contracts” that the Clause protects.

More recently, though, the Court has charted a different course. Our modern cases permit a state to “substantial[ly] impai[r]” a contractual obligation in pursuit of “a significant and legitimate public purpose” so long as the impairment is “‘reasonable.’” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U. S. 400, 411–412 (1983). That test seems hard to square with the Constitution’s original public meaning. After all, the Constitution does not speak of “substantial” impairments—it bars “any” impairment. Under a balancing approach, too, how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? Should we worry that a balancing test risks investing judges with discretion to choose which contracts to enforce—a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand? How are judges supposed to balance the often radically incommensurate goods found in contracts and legislation? And does this test risk reducing the “Contract Clause’s protection” to the “Court’s judgment” about the “‘reasonableness’” of the legislation at hand? *Simmons*, 379 U. S., at 529 (Black, J., dissenting). Many critics have raised serious objections along these and other lines. See, e. g., *ibid.*; Kmiec & McGinnis, *supra*, at 552; Rappaport, Note, A Procedural Approach to the Contract Clause, 93 Yale L. J. 918, 918 (1984); Epstein, Toward a Revitalization of the

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Contract Clause, 51 U. Chi. L. Rev 703, 705–717 (1984); J. Ely, *The Contract Clause: A Constitutional History* 7–29 (2016). They deserve a thoughtful reply, if not in this case then in another.

II

Even under our modern precedents, though, I still do not see how the statute before us might survive unscathed. Recall that our recent precedents indicate a state law “substantially impairing” contracts violates the Contracts Clause unless it is “reasonable” in light of a “significant and legitimate public purpose.”

Start with the substantial impairment question. No one pays life insurance premiums for the joy of it. Or even for the pleasure of knowing that the insurance company will eventually have to cough up money to *someone*. As the Court concedes, the choice of beneficiary is the “‘whole point.’” *Ante*, at 819. So when a state alters life insurance contracts by undoing their beneficiary designations it surely “substantially impairs” them. This Court has already recognized as much, holding that a law “displac[ing] the beneficiary selected by the insured . . . and plac[ing] someone else in her stead . . . frustrates” a scheme designed to deliver proceeds to the named beneficiary. *Hillman v. Maretta*, 569 U. S. 483, 494 (2013) (quoting *Wissner v. Wissner*, 338 U. S. 655, 659 (1950); internal quotation marks omitted). As Justice Washington explained long ago, legislation “changing the objects of [the donor’s] bounty . . . changes so materially the terms of a contract” that the law can only be said to “impair its obligation.” *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 662 (1819) (concurring opinion). Just so.

Cases like ours illustrate the point. Kaye Melin testified that, despite their divorce, she and the decedent, Mark Sveen, agreed (repeatedly) to keep each other as the primary beneficiaries in their respective life insurance policies. Affidavit of Kaye Melin in No. 14–cv–05015, Doc. 46, ¶¶3, 4, 10–14. Ms. Melin noted that they adopted this arrangement not

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only because they remained friends but because they paid the policy premiums from their joint checking account. Deposition of Kaye Melin in No. 14-cv-0515, Doc. 45-4, pp. 26-27, 64-65. Of course, we don't know for sure whether removing Ms. Melin as beneficiary undid Mr. Sveen's true wishes. The case comes to us after no one was able to meet Minnesota's clear and convincing evidence standard to prove Mr. Sveen's intent. But what we do know is the retroactive removal of Ms. Melin undid the central term of the contract Mr. Sveen signed and left in place for years, even after his divorce, until the day he died.

Nor are arrangements like the ones Ms. Melin described so unusual. As the federal government has recognized, revocation on divorce statutes cannot be assumed to "effectuate the insured's 'true' intent" because a policyholder "might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse's custody." Brief for United States as *Amicus Curiae* in *Hillman v. Maretta*, O. T. 2012, No. 11-1221, p. 28. After all, leaving your ex-spouse life insurance proceeds can be a cheaper, quicker, and more private way to provide for minor or disabled children than leaving the matter to a trustee or other fiduciary. See, e. g., Feder & Sitkoff, Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute, 24 Elder L. J. 1, 15-18 (2016). For these reasons, the federal government and nearly half the states today do not treat divorce as automatically revoking insurance beneficiary designations. Brief for Petitioners 8-9, and nn. 1-2; *Hillman*, *supra*, at 494-495.

Consider next the question of the impairment's reasonableness. Our cases suggest that a substantial impairment is unreasonable when "an evident and more moderate course would serve [the state's] purposes equally well." *United States Trust Co. of N. Y. v. New Jersey*, 431 U. S. 1, 31 (1977); see also *Allied Structural Steel Co. v. Spannaus*, 438 U. S.

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234, 247 (1978) (analyzing whether an impairment of private contracts “was necessary to meet an important general social problem”). Here, Minnesota’s stated purpose is to ensure proceeds aren’t misdirected to a former spouse because a policyholder forgets to update his beneficiary designation after divorce. But the state could have easily achieved that goal without impairing contracts *at all*. It could have required courts to confirm that divorcing couples have reviewed their life insurance designations. See Va. Code Ann. § 20–111.1(E) (2017); Utah Code § 30–3–5(1)(e)(i) (2018). It could have instructed insurance companies to notify policyholders of their right to change beneficiary designations. It could have disseminated information on its own. Or it could have required attorneys in divorce proceedings to address the question with affected parties. A host of women’s rights organizations have advocated for these and other alternatives in various states. See, *e.g.*, Brief for Women’s Law Project et al. as *Amici Curiae* 34–35. Yet there’s no evidence Minnesota investigated any of them, let alone found them wanting.

III

What’s the Court’s reply? It says that we don’t have to decide whether the statute *reasonably impairs* contracts because it doesn’t *substantially impair* them in the first place. It’s easy enough to see why the Court might take this tack given the many obvious and less burdensome alternatives Minnesota never considered. To save the law, the Court must place all its chips on a “no substantial impairment” argument. The gamble, though, proves a tricky one.

The Court first stresses that individuals sometimes neglect their beneficiary designations after divorce. Because of this, it says, Minnesota’s law affords “many” persons what they would want if only they had thought about it. *Ante*, at 820. But as we’ve seen the law depends on a stereotype about divorcing couples that not everyone fits. A sizeable (and maybe growing) number of people *do* want to keep their

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former spouses as beneficiaries. Brief for Women’s Law Project 25–26. Even the Court admits the law’s presumption will sometimes prove “wrong.” *Ante*, at 822. And that tells us all we need to know. That the law is *only sometimes* wrong in predicting what divorcing policyholders want may go some way to establishing its *reasonableness* at the second step of our inquiry. But at the first step, where we ask only whether the law substantially impairs contracts, the answer is unavoidable. The statute substantially impairs contracts by displacing the term that is the “‘whole point’” of the contract. *Ante*, at 819. This Court would never say a law doesn’t substantially burden a minority’s religious practice because it reflects most people’s preferences. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520 (1993). Equally, I do not see how a statute doesn’t substantially impair contracts just because it reflects “many” people’s preferences. *Ante*, at 820. The Contracts Clause does not seek to maximize the bottom line but to protect minority rights “from improvident majoritarian impairment.” L. Tribe, *American Constitutional Law* § 9–8, p. 613 (2d ed. 1988).

The Court’s answer to this problem introduces an apparent paradox. If the statute substantially impairs contracts, it says, the impairment can be easily undone. Anyone unhappy with the statute’s beneficiary re-designation can just re-re-designate the beneficiary later. *Ante*, at 822. Yet the Court just finished telling us the statute is justified because most policyholders *neglect* their beneficiary designations after divorce. Both claims cannot be true. The statute cannot simultaneously be necessary because people are inattentive to the details of their insurance policies and constitutional because they are hyperaware of those same details.

Perhaps seeking a way out of this problem, the Court offers an entirely different line of argument. Here the Court suggests the statute doesn’t substantially impair contracts because it does no more than a divorce court might. *Ante*, at 821–822. But this argument doesn’t work either.

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Courts may apply *pre-existing* law to alter a beneficiary designation to ensure an equitable distribution of marital property in specific cases. That hardly means *legislatures* may retroactively *change* the law to rearrange beneficiary designations for everyone. A court can fine you for violating an existing law against jaywalking. That doesn't mean a legislature could hold you retroactively liable for violating a new law against jaywalking that didn't exist when you crossed the street. No one would take that idea seriously when it comes to crime, and the Contracts Clause ensures we don't when it comes to contracts, either. After all, the Clause applies only to the "law[s]" legislatures "pass," not to the rulings of courts. *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451 (1924) (emphasis deleted). That's because legislatures exist to pass new laws of general applicability responsive to majoritarian will, often upsetting settled expectations along the way. The same does not hold true for courts that are supposed to apply existing laws to discrete cases and controversies independently and without consulting shifting political winds.

The Court finally claims that its course finds support in cases where we've approved retroactive legislation. *Ante*, at 822–824. Those cases, though, involved statutes altering contractual *remedies*. *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 434, and n. 13 (1934) (noting that each of the 19th-century cases relied on by the Court today affected only "remedial processes"). And Minnesota's law changes the key contractual obligation—who gets the insurance proceeds—not the method by which the contract's existing obligation is satisfied. Although the Constitution allows legislatures some flexibility to address changing social conditions through retroactive remedial legislation, it does not permit upsetting settled expectations in contractual obligations. See, e. g., *Fletcher v. Peck*, 6 Cranch 87, 137–138 (1810); *Simmons*, 379 U. S., at 526 (Black, J., dissenting). We must respect that line found in the text of the Constitu-

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tion, not elide it. Indeed, our precedent teaches that if remedial changes are just disguised efforts at impairing obligations they will violate the Constitution too. *Blaisdell*, *supra*, at 434, n. 13 (collecting cases).

Consider just how different our case is from the classic remedial change the Contracts Clause permits. In *Jackson v. Lamphire*, 3 Pet. 280 (1830), a shady landowner sold the same tract to two people. *Id.*, at 287–288. The Court held that the second buyer was entitled to keep the land because he recorded the deed as a retroactive law required. *Id.*, at 289–290. At the same time, nothing in *Jackson* or the new statute stopped the first buyer (who failed to record his deed) from obtaining damages from the seller for breach of contract. See *id.*, at 287–291. The statute altered the first buyer’s remedy, but he remained free to enforce the obligation found in his contract. By contrast, the statute here changes the “‘whole point’” of the contract’s obligation, substituting a new beneficiary in place of the one found in the contract’s terms. *Ante*, at 819.

Even the remedial case on which the Court leans most heavily does little to help its cause. In *Gilfillan v. Union Canal Co. of Pa.*, 109 U. S. 401 (1883), the Court upheld a statute requiring bondholders to enforce their contract rights within a shortened timeframe (that is, altering the remedy) or else accept a reorganization plan that threatened a poorer rate of interest. *Id.*, at 402–403, 406. The Court gave three primary reasons for upholding this change. It emphasized that the bonds at issue were “of a peculiar character” because “each bondholder under them enter[ed] by fair implication into certain contract relations with” the other bondholders who approved the reorganization. *Id.*, at 403. It observed that “‘a calamity common to all’” had occurred, as the company that issued the bonds “was bankrupt” and payment of “its debts in the ordinary way was impossible.” *Id.*, at 405. Finally, it added that the plaintiff challenging the statute had “actual notice” of the law and so

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faced no difficulty in asserting his contract rights in a timely manner. *Id.*, at 406. These considerations, the Court concluded, justified shortening the limitations period for obtaining full relief even though it might reduce a late-moving party's interest rate a few points. No comparable considerations are present here. And this statute doesn't just *reduce* Ms. Melin's remedy; it *denies* her one altogether.

*

The judicial power to declare a law unconstitutional should never be lightly invoked. But the law before us cannot survive an encounter with even the breeziest of Contracts Clause tests. It substantially impairs life insurance contracts by retroactively revising their key term. No one can offer any reasonable justification for this impairment in light of readily available alternatives. Acknowledging this much doesn't even require us to hold the statute invalid in all applications, only that it cannot be applied to contracts formed before its enactment. I respectfully dissent.

Syllabus

WASHINGTON *v.* UNITED STATES ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17–269. Argued April 18, 2018—Decided June 11, 2018

853 F. 3d 946, affirmed by an equally divided Court.

Noah G. Purcell, Solicitor General of Washington, argued the cause for petitioner. With him on the briefs were Robert W. Ferguson, Attorney General of Washington, Fronda C. Woods, Assistant Attorney General, and Jay D. Geck and Anne E. Egeler, Deputy Solicitors General.

Allon Kedem argued the cause for the United States. With him on the brief were Solicitor General Francisco, Acting Assistant Attorney General Wood, Deputy Assistant Attorney General Kneedler, William B. Lazarus, and Evelyn S. Ying.

William M. Jay argued the cause for tribal respondents. With him on the brief were Brian T. Burgess, Jaime A. Santos, Kevin P. Martin, Riyaz A. Kanji, John C. Sledd, Jane G. Steadman, Mary Neil, James R. Sigel, Deanne E. Maynard, Brian R. Matsui, Thomas Zeilman, Craig Dorsay, Lea Ann Easton, Brian Gruber, Alan C. Stay, Ann E. Tweedy, Lauren Rasmussen, Steve Suagee, Sam Hough, Earle David Lees, Kevin R. Lyon, Samuel J. Stiltner, John Howard Bell, Harry R. Sachse, Timothy J. Filer, Scott Owen Mannakee, David Hawkins, Arthur W. Harrigan, Jr., Tyler L. Farmer, Kristin Ballinger, James Rittenhouse Bellis, Emily Hutchinson Haley, and Mason D. Morisset.*

*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by Lawrence G. Wasden, Attorney General of Idaho, Steven L. Olsen, Chief of Civil Litigation, and Clay R. Smith, Deputy Attorney General, and by the Attorneys General for their respective States as follows: Curtis T. Hill, Jr., of Indiana, Derek Schmidt of Kansas, Jeff Landry of Louisiana, Janet T. Mills of Maine, Bill Schuette of Michigan, Tim Fox of Montana, Doug Peterson of Nebraska, Mike Hunter of Oklahoma, Brad D. Schimel

Per Curiam

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

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of Wisconsin, and *Peter K. Michael* of Wyoming; for the American Forest & Paper Association et al. by *Timothy S. Bishop* and *Chad M. Clamage*; for Business Organizations et al. by *Eric D. Miller* and *Jennifer A. MacLean*; for Citizens Equal Rights Foundation et al. by *James J. Devine, Jr.*, *Lana E. Marcussen*, and *Lawrence A. Kogan*; for Modoc Point Irrigation District et al. by *Ronald S. Yockim*; for Pacific Legal Foundation by *Damien M. Schiff*; and for Washington State Association of Counties et al. by *Robert M. McKenna*, *Brian T. Moran*, and *Marc R. Shapiro*.

Briefs of *amici curiae* urging affirmance were filed for the Confederated Tribes of the Warm Springs Reservation of Oregon et al. by *Howard G. Arnett*; for Law Professors by *Collette Routel*; for the National Congress of American Indians et al. by *Troy A. Eid*, *Jennifer H. Weddle*, *Paul Spruhan*, and *John T. Harrison*; for Pacific Coast Federation of Fishermen's Associations et al. by *Amanda W. Goodin*, *Janette K. Brimmer*, *Jonathan W. Dettmann*, and *Craig S. Coleman*; for Washington State Officials et al. by *Pratik A. Shah*; and for Daniel J. Evans by *Joseph P. Mentor, Jr.*

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 838 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

Page Proof Pending Publication

ORDERS FOR MARCH 22 THROUGH
MAY 9, 2018

MARCH 22, 2018

Dismissal Under Rule 46

No. 17-368. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT *v.* TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORP. C. A. 9th Cir. [Certiorari granted *sub nom.* *Salt River Project Agricultural Improvement and Power District v. SolarCity Corp.*, 583 U.S. 1009.] Writ of certiorari dismissed under this Court's Rule 46.1.

MARCH 26, 2018

Dismissal Under Rule 46

No. 17-682. OLIVER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS, ET AL. *v.* MCDANIELS. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 700 Fed. Appx. 119.

Certiorari Granted—Vacated and Remanded

No. 17-5112. WESTBROOKS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marinello v. United States*, *ante*, p. 1. Reported below: 858 F. 3d 317.

Certiorari Dismissed

No. 17-7552. BACH *v.* JPMORGAN CHASE BANK, N. A. Ct. App. Wis. 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 non-criminal 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*

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Appeals, 506 U. S. 1 (1992) (*per curiam*). Reported below: 2017 WI App 50, 377 Wis. 2d 335, 900 N. W. 2d 871.

No. 17-7778. *JIAU v. POOLE ET AL.* C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 682 Fed. Appx. 613.

No. 17-7844. *DAY v. TRUMP, PRESIDENT OF THE UNITED STATES.* C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 860 F. 3d 686.

Miscellaneous Orders

No. 17A892. *DEWITT v. CALIFORNIA CITIZENS REDISTRICTING COMMISSION ET AL.* C. A. 9th Cir. Application for injunctive relief, addressed to JUSTICE GORSUCH and referred to the Court, denied.

No. 17M92. *SUTTLES v. TEXAS*;

No. 17M93. *LAKEY v. UNIVERSITY OF MICHIGAN HOSPITAL*;

No. 17M94. *BRADLEY v. STEVENSON, WARDEN*; and

No. 17M95. *ROSEMOND v. RATTRAY ET AL.* Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 137, Orig. *MONTANA v. WYOMING ET AL.* Final motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of \$51,984.57 for the period January 1, 2017, through January 10, 2018, to be paid equally by Montana and Wyoming. Barton H. Thompson, of Stanford, Cal., the Special Master in this case, is hereby discharged with the thanks of the Court. JUSTICE KAGAN took no part in the consideration or decision of this motion. [For earlier decision herein, see, *e. g.*, 583 U. S. 142.]

No. 17-5639. *CHAVEZ-MEZA v. UNITED STATES.* C. A. 10th Cir. [Certiorari granted, 583 U. S. 1089.] Motion of petitioner for leave to file volume II of the joint appendix under seal granted. JUSTICE GORSUCH took no part in the consideration or decision of this motion.

No. 17-7880. *BELL v. INOVA HEALTH CARE, DBA INOVA FAIRFAX HOSPITAL.* Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until

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April 16, 2018, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 17-7931. IN RE JEANLOUIS; and

No. 17-8013. IN RE BENSAM. Petitions for writs of habeas corpus denied.

No. 17-1038. IN RE DOUCE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 17-429. TAVARES *v.* WHITEHOUSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 3d 863.

No. 17-540. STARR INTERNATIONAL CO., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 953.

No. 17-670. STONE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 388 Mont. 239, 400 P. 3d 692.

No. 17-712. BROTT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 425.

No. 17-721. GAUGER *v.* STINSON;

No. 17-749. JOHNSON *v.* STINSON; and

No. 17-788. RAWSON *v.* STINSON. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 3d 516.

No. 17-735. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 701 Fed. Appx. 175.

No. 17-795. SAMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 3d 296.

No. 17-869. DAVENPORT ET AL. *v.* CITY OF SANDY SPRINGS, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 1248.

No. 17-900. CRANE CO. *v.* POAGE. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 523 S. W. 3d 496.

No. 17-942. R. K. B. ET AL. *v.* E. T. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 59, 417 P. 3d 1.

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No. 17–959. *IDAHO DEPARTMENT OF CORRECTION v. FULLER*. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 3d 1154.

No. 17–999. *JACKSON v. CONNECTICUT DEPARTMENT OF PUBLIC HEALTH ET AL.* C. A. 2d Cir. Certiorari denied.

No. 17–1014. *LUTTERODT v. EMILY LANE OWNERS ASSN., INC., ET AL.* Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17–1016. *BALTIERRA v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 160791–U.

No. 17–1017. *BRUNS ET UX. v. BRYANT ET AL.* Ct. App. N. C. Certiorari denied. Reported below: 251 N. C. App. 925, 795 S. E. 2d 830.

No. 17–1031. *MARTIN ET AL. v. BAILEY ET AL.* Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 42.

No. 17–1062. *NIOTTI-SOLTESZ v. PIOTROWSKI ET AL.* Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2017-Ohio-711, 86 N. E. 3d 1.

No. 17–1067. *HOOD v. OFFICE OF PERSONNEL MANAGEMENT*. C. A. 6th Cir. Certiorari denied.

No. 17–1068. *EDIONSERI v. SESSIONS, ATTORNEY GENERAL*. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 3d 1101.

No. 17–1080. *UNITED SOURCE ONE, INC. v. DEPARTMENT OF AGRICULTURE ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 865 F. 3d 710.

No. 17–1097. *MICHIGAN v. TERRANCE*. Ct. App. Mich. Certiorari denied.

No. 17–1122. *WHITE v. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY*. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 143.

No. 17–1133. *SPRENG v. THOMPSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL.* C. A. 3d Cir. Certiorari denied.

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No. 17–1143. *KINNEY v. CLARK*. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied. Reported below: 12 Cal. App. 5th 724, 219 Cal. Rptr. 3d 247.

No. 17–1156. *BOYER v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17–1157. *BLOUGH v. SILBERMAN ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 927.

No. 17–1177. *ALEXANDER v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 142170, 82 N. E. 3d 96.

No. 17–1187. *BOBBITT v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 172 A. 3d 458.

No. 17–1188. *CARTER v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 17–1200. *INDEPENDENT PARTY ET AL. v. PADILLA, CALIFORNIA SECRETARY OF STATE*. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 631.

No. 17–1218. *BROOKS v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 2017 IL 121413, 104 N. E. 3d 417.

No. 17–6373. *WILLIAMSON v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 3d 843.

No. 17–6560. *BRADY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 184.

No. 17–6914. *JACKSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 981.

No. 17–7436. *ZAMORA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–7464. *CRISWELL v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–7465. *DODD v. MCCOLLUM, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 844.

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No. 17-7474. *GOUCH-ONASSIS v. CALIFORNIA*. C. A. 9th Cir. Certiorari denied.

No. 17-7479. *ORTIZ v. DEPARTMENT OF FAMILY ET AL.* Sup. Ct. P. R. Certiorari denied.

No. 17-7481. *RICHARD v. TEXAS*. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17-7486. *JOHNSON v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 1000.

No. 17-7492. *DANIEL v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 17-7497. *IROMUANYA v. FRAKES, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES*. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 3d 872.

No. 17-7503. *MORRIS v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17-7507. *ISMAIL v. ORANGE COUNTY, CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 507.

No. 17-7509. *WIZAR v. SHERMAN, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 17-7511. *WEAVER v. FLORIDA*. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 237 So. 3d 329.

No. 17-7515. *YANKTON v. BYRD, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17-7541. *MANCUSO v. TDGA, LLC, ET AL.* Sup. Ct. Ga. Certiorari denied. Reported below: 301 Ga. 671, 802 S. E. 2d 248.

No. 17-7544. *DIAZ v. LEWIS, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 608.

No. 17-7546. *HENDERSON v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 248 So. 3d 992.

No. 17-7547. *CROMARTIE v. LAW OFFICES OF E. PEYTON FAULK, LLC, ET AL.* Ct. Civ. App. Ala. Certiorari denied. Reported below: 241 So. 3d 679.

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No. 17-7555. *PRESLEY v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17-7561. *AVILA v. CALIFORNIA.* Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 17-7570. *DICKEY v. SAMUEL.* C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 636.

No. 17-7576. *SALERNO v. DEPARTMENT OF THE INTERIOR.* C. A. Fed. Cir. Certiorari denied. Reported below: 717 Fed. Appx. 981.

No. 17-7579. *CATANIA v. NEW JERSEY.* Super. Ct. N. J., App. Div. Certiorari denied.

No. 17-7583. *DAVIS v. SESSIONS, ATTORNEY GENERAL.* C. A. 3d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 108.

No. 17-7617. *EVERETT v. WILSON, WARDEN.* C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 270.

No. 17-7618. *COWAN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 519.

No. 17-7632. *PIRESTANI v. REAGAN ET AL.* Sup. Ct. Del. Certiorari denied. Reported below: 173 A. 3d 78.

No. 17-7633. *DEVLIN v. MONTANA.* C. A. 9th Cir. Certiorari denied.

No. 17-7639. *RHODES v. OHTA ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17-7775. *HOWERTON v. VIRGINIA.* Sup. Ct. Va. Certiorari denied.

No. 17-7777. *HAYES v. CUMBERLAND COUNTY BOARD OF EDUCATION ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 640.

No. 17-7789. *SADDIQ v. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 570.

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No. 17-7794. *SMITH-JETER v. ARTSPACE EVERETT LOFTS CONDOMINIUM ASSN.* C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 862.

No. 17-7795. *BURGIST v. DANIELS, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 17-7800. *GOODRICH v. UNITED STATES.* C. A. 8th Cir. Certiorari denied.

No. 17-7815. *MONTGOMERY v. COAKLEY.* C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 625.

No. 17-7820. *VANAMAN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 17-7821. *ZATER v. PASTRANA, WARDEN.* C. A. 11th Cir. Certiorari denied.

No. 17-7822. *MARTIN v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 61.

No. 17-7823. *JACKSON v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 264.

No. 17-7824. *PARKER v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 152.

No. 17-7827. *BARAJAS v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 517.

No. 17-7828. *GILL v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 3d 62.

No. 17-7833. *NICHOLSON v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 400.

No. 17-7834. *KNOX v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 17-7835. *KRZECZOWSKI v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 17-7836. *RILEY v. MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK.* C. A. 1st Cir. Certiorari denied.

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No. 17-7838. *RANGEL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 277.

No. 17-7841. *SANCHEZ v. MADDEN, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 411.

No. 17-7846. *MIXSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 182.

No. 17-7847. *PERSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 547.

No. 17-7852. *WALKER-COUVERTIER v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 860 F.3d 1.

No. 17-7854. *WILSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 294.

No. 17-7857. *MUHAMMAD v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7859. *BUCIO DELGADO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 626.

No. 17-7860. *JUSTICE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 345.

No. 17-7861. *RICHARDSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 197.

No. 17-7862. *COLLINS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 392.

No. 17-7863. *ELLISON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17-7868. *YEPIZ ET AL. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 456.

No. 17-7870. *LYNCH v. PFIZER, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 541.

No. 17-7875. *PERRY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17-7877. *BROWNLEE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 472.

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No. 17-7878. *BRANCH v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 464.

No. 17-7881. *HARRISON ET AL. v. HUGGINS ET AL.* App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 170026-U.

No. 17-7885. *GRIFFIN ET AL. v. HESS CORP., AKA AMERADA PETROLEUM CORP., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 338.

No. 17-7893. *ANDERSON v. UNITED STATES*; and
No. 17-7898. *PLANY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 392.

No. 17-7895. *JOHNSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17-7897. *JONES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7905. *VICKERS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 708 Fed. Appx. 732.

No. 17-7909. *JOHNSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 133.

No. 17-7910. *REDDEN v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 374.

No. 17-7915. *SALINAS-ACEVEDO v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 846 F. 3d 417.

No. 17-7920. *BERNARD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 223.

No. 17-807. *TINGLE v. PERDUE, SECRETARY OF AGRICULTURE, ET AL.*; and

No. 17-897. *MANDAN v. PERDUE, SECRETARY OF AGRICULTURE, ET AL.* C. A. D. C. Cir. Certiorari denied. *THE CHIEF JUSTICE* took no part in the consideration or decision of these petitions. Reported below: 856 F. 3d 1039.

No. 17-1005. *OATH HOLDINGS, INC. v. AJEMIAN ET AL.* Sup. Jud. Ct. Mass. Motion of Facebook, Inc., et al. for leave to file

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brief as *amici curiae* granted. Reported below: 478 Mass. 169, 84 N. E. 3d 766.

No. 17–1073. *GRIFFIN v. UNITED HEALTHCARE OF GEORGIA, INC., ET AL.* C. A. 11th Cir. Certiorari before judgment denied.

No. 17–6859. *AL FAWWAZ, AKA OMAR, AKA HAMAD v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 694 Fed. Appx. 847.

No. 17–7528. *BROWN v. AMICA INSURANCE Co. ET AL.* Sup. Jud. Ct. Me. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–612. *QIAN v. CAROL WILSON FINE ARTS, INC.*, 583 U. S. 1055;

No. 17–6413. *JARA v. STANDARD PARKING ET AL.*, 583 U. S. 1065;

No. 17–6425. *JAMES v. PENNSYLVANIA*, 583 U. S. 1065;

No. 17–6479. *MITSKOG v. MERIT SYSTEMS PROTECTION BOARD*, 583 U. S. 1067;

No. 17–6686. *EMMEL v. AMTRUST-NP SFR, VENTURE, LLC*, 583 U. S. 1073;

No. 17–6703. *BREWER v. UNITED STATES*, 583 U. S. 1073;

No. 17–6755. *BRENNAN v. UNITED STATES*, 583 U. S. 1044;

No. 17–6775. *BARNETT v. UNITED STATES*, 583 U. S. 1076;

No. 17–6818. *LoCASCIO v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*, 583 U. S. 1104;

No. 17–6821. *BARNETT v. UNITED STATES*, 583 U. S. 1077;

No. 17–6841. *WRIGHT v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.*, 583 U. S. 1077;

No. 17–6896. *BUNCH v. UNITED STATES*, 583 U. S. 1079; and

No. 17–7203. *CVJETICANIN v. UNITED STATES*, 583 U. S. 1107. Petitions for rehearing denied.

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Miscellaneous Order

No. 17–8228 (17A1030). *IN RE RODRIGUEZ.* Application for stay of execution of sentence of death, presented to JUSTICE

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ALITO, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

APRIL 2, 2018

Dismissal Under Rule 46

No. 17–883. ALEXANDER ET AL. *v.* ORLOWSKI ET AL. C. A. 7th Cir. Certiorari dismissed under this Court’s Rule 46.1. Reported below: 872 F. 3d 417.

Certiorari Granted—Reversed and Remanded. (See No. 17–467, *ante*, p. 100.)

Certiorari Dismissed

No. 17–7843. DOVE *v.* JONES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8. Reported below: 694 Fed. Appx. 180.

Miscellaneous Orders

No. D–3013. IN RE DISCIPLINE OF SIEGEL. Stacy Enid Lebow Siegel, of Towson, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–3014. IN RE DISCIPLINE OF WERTKIN. Jeffrey Adam Wertkin, 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–3015. IN RE DISCIPLINE OF BASSI. Keith Alan Bassi, of Charleroi, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3016. IN RE DISCIPLINE OF BRAZIL. Harold E. Brazil, 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.

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No. D-3017. IN RE DISCIPLINE OF CRAWFORD. Thomas Allen Crawford, Jr., of Pittsburgh, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-3018. IN RE DISCIPLINE OF GASKINS. Johnny S. Gaskins, of Raleigh, N. 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-3019. IN RE DISCIPLINE OF LANDRY. Larry James Landry, of Seattle, Wash., 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-3020. IN RE DISCIPLINE OF DENRICH. Diana Beth Denrich, of Frederick, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-3021. IN RE DISCIPLINE OF SMITH. Edward Smith, Jr., of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-3022. IN RE DISCIPLINE OF ROBINSON. Peggy M. Hairston Robinson, of Baton Rouge, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-3024. IN RE DISCIPLINE OF TERRELL. Donald B. Terrell, 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-3025. IN RE DISCIPLINE OF ANDREWS. William Lee Andrews III, of Roanoke, Va., is suspended from the practice of

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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-3026. *IN RE DISCIPLINE OF HARRELL*. Sidney Moxey Harrell, Jr., of Mobile, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-3027. *IN RE DISCIPLINE OF LOUDON*. Byron Carroll Loudon, of Overland Park, Kan., 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. 17M96. *JONES v. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.* Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M97. *IN RE GRAND JURY SUBPOENAS RETURNABLE DECEMBER 16, 2015*. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 17M98. *BROWN v. UNITED STATES*. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 141, Orig. *TEXAS v. NEW MEXICO ET AL.* A. Gregory Grimsal, Esq., of New Orleans, La., the Special Master in this case, is hereby discharged with the thanks of the Court. It is ordered that the Honorable Michael J. Melloy, of Cedar Rapids, Iowa, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit reports as he may deem appropriate. The cost of printing his reports, and all other proper expenses, including travel expenses, shall be submitted to the Court. [For earlier decision herein, see, *e. g.*, 583 U. S. 407.]

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No. 17-7581. IN RE STONER; and

No. 17-7925. IN RE WATKINS. Petitions for writs of mandamus denied.

No. 17-7606. IN RE WILLIAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 17-5554. STOKELING *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 684 Fed. Appx. 870.

Certiorari Denied

No. 16-1071. SOKOLOW ET AL. *v.* PALESTINE LIBERATION ORGANIZATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 3d 317.

No. 16-8616. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 844 F. 3d 1260.

No. 17-202. DALEIDEN, AKA SARKIS, ET AL. *v.* NATIONAL ABORTION FEDERATION ET AL.; and

No. 17-482. NEWMAN *v.* NATIONAL ABORTION FEDERATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 623.

No. 17-730. ORTIZ-CERVANTES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 868 F. 3d 695.

No. 17-760. D. L., BY AND THROUGH HIS NEXT FRIEND, J. L. ET AL. *v.* CLEAR CREEK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 733.

No. 17-775. LEE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 244 So. 3d 998.

No. 17-871. WENZEL ET AL. *v.* ESTATE OF PERRY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 439.

No. 17-904. LOUDOUN COUNTY, VIRGINIA *v.* DULLES DUTY FREE, LLC. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 9, 803 S. E. 2d 54.

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No. 17–905. *MAHONEY ET AL. v. CITY OF SEATTLE, WASHINGTON, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 3d 873.

No. 17–911. *CRAWFORD ET AL. v. DEPARTMENT OF THE TREASURY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 3d 438.

No. 17–913. *D. T. v. W. G.* Ct. Civ. App. Ala. Certiorari denied. Reported below: 255 So. 3d 764.

No. 17–980. *R+L CARRIERS, INC. v. INTERMEC TECHNOLOGIES CORP.* C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 614.

No. 17–1001. *SEVERSON v. HEARTLAND WOODCRAFT, INC.* C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 476.

No. 17–1015. *BLAKE v. MJ OPTICAL, INC.* C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 3d 820.

No. 17–1024. *DAWSON ET AL. v. CITY OF GRAND HAVEN, MICHIGAN.* Ct. App. Mich. Certiorari denied.

No. 17–1025. *FROST-TSUJI ARCHITECTS v. HIGHWAY INN, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 674.

No. 17–1036. *TORRE v. NORTHROP GRUMMAN SYSTEMS CORP.* C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 477.

No. 17–1044. *VOLK ET UX. v. FRANZ ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 874 F. 3d 356.

No. 17–1045. *LEISER ET AL. v. MCCARTHY ET AL.* Sup. Ct. Va. Certiorari denied.

No. 17–1048. *HARRIS v. WELLS FARGO BANK, N. A.* C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 232.

No. 17–1051. *GRISE ET AL. v. ALLEN ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 489.

No. 17–1055. *PETTER INVESTMENTS, DBA RIVEER v. HYDRO ENGINEERING.* C. A. Fed. Cir. Certiorari denied. Reported below: 697 Fed. Appx. 698.

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No. 17–1057. *COTUNA v. WALMART STORES, INC.* C. A. 6th Cir. Certiorari denied.

No. 17–1070. *XIU JIAN SUN v. KIN CHEUNG.* C. A. 2d Cir. Certiorari denied.

No. 17–1076. *LAKE VILLA OXFORD ASSOCIATES, LLP, ET AL. v. HOMESTEAD PROPERTIES, LP.* Ct. App. Mich. Certiorari denied.

No. 17–1081. *FAPARUSI v. CASE WESTERN RESERVE UNIVERSITY ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 269.

No. 17–1113. *GOLDEN v. INDIANAPOLIS HOUSING AGENCY.* C. A. 7th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 835.

No. 17–1129. *TRIPP ET AL. v. SCHOLZ ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 857.

No. 17–1148. *JEFFRIES v. BURTON, WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 490.

No. 17–1178. *BACALL v. JACKSON, ACTING WARDEN.* C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 502.

No. 17–1205. *WALTER v. IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE.* C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1022.

No. 17–1206. *QUIROZ v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 562.

No. 17–1207. *POULSEN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 509.

No. 17–1217. *ANDERSON v. BORDERS, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 17–1220. *TRI-FANUCCHI FARMS v. AGRICULTURAL LABOR RELATIONS BOARD.* Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 5th 1161, 405 P. 3d 1110.

No. 17–1221. *PALIN v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 874 F. 3d 418.

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No. 17–5152. *LAMB v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 847 F. 3d 928.

No. 17–5876. *MATTHEWS v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 840.

No. 17–5965. *WESTON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 235.

No. 17–6095. *SHEA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–6611. *PERRY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–6910. *HORTON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 3d 1041.

No. 17–7207. *DAVIS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 3d 1021.

No. 17–7551. *ANDERSON v. GREENVILLE HEALTH SYSTEM*. C. A. 4th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 281.

No. 17–7560. *NICHOLS v. MAYS ET AL.* Ct. App. Mich. Certiorari denied.

No. 17–7575. *ROBINSON ET AL. v. CHESAPEAKE BANK OF MARYLAND ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 212.

No. 17–7577. *RAMIREZ v. GRIFFITH, WARDEN*. C. A. 8th Cir. Certiorari denied.

No. 17–7578. *CRITTENDON v. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ET AL.* C. A. 5th Cir. Certiorari denied.

No. 17–7585. *WARREN v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–7586. *WIJE v. BURNS ET AL.* C. A. 5th Cir. Certiorari denied.

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No. 17-7587. *TRAHAN v. DAVIS*, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17-7593. *CULCULOGU v. CULCULOGU*. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 998, 387 P. 3d 215.

No. 17-7601. *BAZZO v. ASUNCION*, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17-7611. *MONTGOMERY v. OHIO*. Ct. App. Ohio, 6th App. Dist., Lucas County. Certiorari denied. Reported below: 2016-Ohio-7527.

No. 17-7625. *CONNER v. DAVIS*, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 288.

No. 17-7647. *SMITH v. ANDERSON*. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 966.

No. 17-7662. *TASKOV v. SESSIONS*, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 17-7680. *BURKE v. FURTADO*. C. A. 6th Cir. Certiorari denied.

No. 17-7690. *SUNKETT v. BITER*, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17-7696. *SUTTON v. VAN LEEUWEN ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 514.

No. 17-7710. *ANDERSON v. SYSTEMS TECHNOLOGY, INC., ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17-7731. *LEONARD v. TEXAS* (two judgments). Ct. App. Tex., 8th Dist. Certiorari denied.

No. 17-7756. *SHAYKIN v. ROMANOWSKI*, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17-7766. *UGAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF UGAY v. SHULKIN*, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 716 Fed. Appx. 940.

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No. 17–7802. *CLARK v. STODDARD, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–7839. *RUSSELL v. ALABAMA*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 261 So. 3d 454.

No. 17–7840. *CLAYBORNE v. TECUMSEH DEPARTMENT OF CORRECTIONS ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 593.

No. 17–7858. *PATTON v. LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17–7883. *BLACKLEDGE v. BLACKLEDGE*. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 169.

No. 17–7890. *KING v. NEW YORK*. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 3d 633, 58 N. Y. S. 3d 40.

No. 17–7901. *MILES v. LARIVA, WARDEN*. C. A. D. C. Cir. Certiorari denied.

No. 17–7913. *SCHUM v. FEDERAL COMMUNICATIONS COMMISSION*. C. A. D. C. Cir. Certiorari denied. Reported below: 696 Fed. Appx. 516.

No. 17–7928. *SEYMORE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17–7932. *PEREZ-MALDONADO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 548.

No. 17–7934. *KELLY v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 781.

No. 17–7935. *MABIE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 3d 624.

No. 17–7938. *MORALES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 593.

No. 17–7940. *CAUCH-GAMBOA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 395.

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No. 17–7942. *BLANTON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 390.

No. 17–7944. *OKONKWO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 866.

No. 17–7946. *HUETT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 299.

No. 17–7947. *HINKLE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 272.

No. 17–7948. *GRAHAM v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 23.

No. 17–7949. *HAAG v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 448.

No. 17–7950. *GITTENS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 786.

No. 17–7953. *WILLIAMS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–7954. *WOLF v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 699 Fed. Appx. 62.

No. 17–7955. *THOMAS v. HOLLINGSWORTH, WARDEN*. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 126.

No. 17–7957. *KNAUP v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 453.

No. 17–7959. *LEWIS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 234.

No. 17–7961. *GLOVER ET AL. v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 253.

No. 17–7962. *GARCIA-PINEDO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 382.

No. 17–7966. *HALL v. UNITED STATES*; and

No. 17–7967. *HALL v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 159 A. 3d 315.

No. 17–7969. *SILE-PEREZ v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

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No. 17–7971. *SANTIFUL v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 242.

No. 17–7977. *MARTIN v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8022. *HOPE v. FLORIDA*. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 239 So. 3d 737.

No. 17–890. *LOPEZ ET AL. v. ESTATE OF PERRY ET AL.* C. A. 7th Cir. Motion of International Municipal Lawyers Association for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 872 F. 3d 439.

No. 17–909. *N. M., MOTHER OF A. J. ET AL., CHILDREN v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES*. Dist. Ct. App. Fla., 5th Dist. Motion of respondent Guardian ad Litem Program, on behalf of S. M., for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 230 So. 3d 1235.

No. 17–1069. *GRIFFIN v. VERIZON COMMUNICATIONS INC. ET AL.* C. A. 11th Cir. Certiorari before judgment denied.

No. 17–7171. *GUARDADO v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*; and

No. 17–7545. *COZZIE v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: No. 17–7171, 226 So. 3d 213; No. 17–7545, 225 So. 3d 717.

JUSTICE SOTOMAYOR, dissenting.

Twice now this Court has declined to vacate and remand to the Florida Supreme Court in cases where that court failed to address a substantial Eighth Amendment challenge to capital defendants' sentences, and twice I have dissented from that inaction. See *Truehill v. Florida*, 583 U. S. 938, 939 (2017); *Middleton v. Florida*, 583 U. S. 1162 (2018). Four petitioners were involved in those cases. Today we add two more to the list, for a total of at least six capital defendants who now face execution by the State without having received full consideration of their claims.

It should not be necessary for me to explain again why petitioners' challenges are substantial, why the Florida Supreme Court should have addressed those challenges, or why this Court has an obligation to intervene. Nevertheless, recent developments at

the Florida Supreme Court compel me to dissent in full once again.

As a reminder, like the petitioners in *Truehill* and *Middleton*, Jesse Guardado and Steven Cozzie challenge their death sentences pursuant to *Caldwell v. Mississippi*, 472 U. S. 320 (1985). I summarized those challenges in *Middleton* as follows:

“[Petitioners] were sentenced to death under a Florida capital sentencing scheme that this Court has since declared unconstitutional. See *Hurst v. Florida*, 577 U. S. 92 (2016). Relying on the unanimity of the juries’ recommendations of death, the Florida Supreme Court post-*Hurst* declined to disturb the petitioners’ death sentences, reasoning that the unanimity ensured that jurors had made the necessary findings of fact under *Hurst*. By doing so, the Florida Supreme Court effectively transformed the pre-*Hurst* jury recommendations into binding findings of fact with respect to the petitioners’ death sentences.” 583 U. S., at 1163 (opinion dissenting from denial of certiorari).

Reliance on those pre-*Hurst* recommendations, rendered after the juries repeatedly were instructed that their role was merely advisory, implicates *Caldwell*, where this Court recognized that “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role,” in contravention of the Eighth Amendment. 472 U. S., at 333.

Following the dissent from the denial of certiorari in *Truehill*, the Florida Supreme Court has on at least two occasions taken the position that it has, in fact, considered and rejected petitioners’ *Caldwell*-based challenges.¹ In *Franklin v. State*, 236 So. 3d 989 (2018) (*per curiam*), the Florida Supreme Court stated that, “prior to *Hurst*, [it] repeatedly rejected *Caldwell* challenges to the standard jury instructions.” *Id.*, at 992. The decisions it cited in support of that pre-*Hurst* precedent rely on one fact: “Informing the jury that its recommended sentence is ‘advisory’ is a correct statement of Florida law and does not violate *Caldwell*.”

¹The cases in which the Florida Supreme Court has taken this position, *i. e.*, that it has considered and rejected the *Caldwell*-based claims discussed herein, are not the ones currently under review before our Court in these petitions.

Rigterink v. State, 66 So. 3d 866, 897 (Fla. 2011) (*per curiam*); *Globe v. State*, 877 So. 2d 663, 673–674 (Fla. 2004) (*per curiam*) (stating that it has rejected *Caldwell* challenges to the standard jury instructions, citing cases that similarly rely on the fact that the instructions accurately reflect the advisory nature of the jurors’ role). But of course, “the rationale underlying [this] previous rejection of the *Caldwell* challenge [has] now [been] undermined by this Court in *Hurst*,” *Truehill*, 583 U. S., at 939, and the Florida Supreme Court must therefore “grapple with the Eighth Amendment implications of [its subsequent post-*Hurst*] holding” that “then-advisory jury findings are now binding and sufficient to satisfy *Hurst*,” *Middleton*, 583 U. S., at 1163. Its pre-*Hurst* precedent thus does not absolve the Florida Supreme Court from addressing petitioners’ new post-*Hurst Caldwell*-based challenges.

The Florida Supreme Court in *Franklin* did not stop there, however. It went on to state that it had “also rejected *Caldwell*-related *Hurst* claims” more recently, citing *Truehill v. State*, 211 So. 3d 930 (2017) (*per curiam*), and *Oliver v. State*, 214 So. 3d 606 (2017) (*per curiam*), noting that “the defendants in *Oliver* and *Truehill* petitioned the United States Supreme Court for a writ of certiorari to review their *Caldwell* claims, which the Court denied.” *Franklin*, 236 So. 3d, at 992–993. This is a surprising statement, because Quentin Truehill and Terence Oliver were the two petitioners whose claims were at issue in my dissent in *Truehill*. *Franklin* did not discuss that dissent, joined by two other Justices, which specifically noted that “the Florida Supreme Court has failed to address” the important *Caldwell*-based challenge. *Truehill*, 583 U. S., at 939. Earlier this month, in rejecting a motion to vacate a sentence brought by petitioner Jesse Guardado, the Florida Supreme Court again held that it had “considered and rejected” post-*Hurst Caldwell*-based challenges, citing *Franklin*, 236 So. 3d 989, and *Truehill*, 211 So. 3d 930. *Guardado v. State*, 238 So. 3d 162, 163 (2018) (*per curiam*).²

² As petitioner Guardado explained in his supplemental brief, in addition to the postconviction motion that forms the basis of the petition currently before our Court, he also filed a motion to vacate his sentence. See Supp. Brief for Petitioner 1. It was with respect to that motion that the Florida Supreme Court issued the opinion stating that it had “considered and rejected” the *Caldwell*-based challenge. No mention of the *Caldwell*-based claim was made in the Florida Supreme Court opinion directly under review in this petition. 226 So. 3d 213 (2017) (*per curiam*). In fact, petitioner

It is hard to understand how the Florida Supreme Court “considered and rejected” these *Caldwell*-based challenges based on its decisions in *Truehill* and *Oliver*. Those cases did not mention or discuss *Caldwell*. Nor did they mention or discuss the fundamental Eighth Amendment principle it announced: “[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Caldwell*, 472 U.S., at 328–329. In neither *Truehill* nor *Oliver* did the Florida Supreme Court discuss the grave Eighth Amendment concerns implicated by its finding that the *Hurst* violations in those cases are harmless, a conclusion that transforms those advisory jury recommendations into binding findings of fact. Although the Florida Supreme Court noted in *Truehill* that the defendant in that case “contends that he is entitled to relief pursuant to *Hurst v. Florida* because the jury in his case was repeatedly instructed regarding the non-binding nature of its verdict,” 211 So. 3d, at 955, that was the first and last reference to that argument. There was absolutely no reference to the argument in *Oliver*. 214 So. 3d 606.³

Therefore, the Florida Supreme Court has (again)⁴ failed to address an important and substantial Eighth Amendment challenge to capital defendants’ sentences post-*Hurst*. Nothing in its pre-*Hurst* precedent, nor in its opinions in *Truehill* and *Oliver*,

Guardado filed a motion with the Florida Supreme Court for rehearing and clarification of the denial of his postconviction motion, noting, *inter alia*, that the opinion “unreasonably omitted any consideration or discussion of [his] arguments regarding the interplay between *Caldwell* and *Hurst*.” App. to Pet. for Cert. in No. 17–7171, p. 68a. The Florida Supreme Court denied the motion in an unreasoned one-line order. See *id.*, at 7a. Petitioner Steven Cozzie also moved for rehearing below, similarly arguing in part that the Florida Supreme Court “overlooked the effect of instructing [his] jury many times that its recommendation was advisory only,” citing *Caldwell*. App. to Pet. for Cert. in No. 17–7545, p. 66a. The Florida Supreme Court also denied the motion in an unreasoned one-line order. See *id.*, at 43a.

³Tellingly, in neither *Franklin* nor *Guardado* did the Florida Supreme Court supply a pincite for its “consider[ation] and reject[ion]” in *Truehill* and *Oliver* of these *Caldwell*-based claims.

⁴“Toutes choses sont dites déjà; mais comme personne n’écoute, il faut toujours recommencer.” Gide, *Le Traité du Narcisse* 8 (1892), in *Le Traité du Narcisse* 104 (R. Robidoux ed. 1978) (“Everything has been said already; but as no one listens, we must always begin again”).

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addresses or resolves these substantial *Caldwell*-based challenges. This Court can and should intervene in the face of this troubling situation.

I dissent.

No. 17–7916. *ABU GHAYTH v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 709 Fed. Appx. 718.

Rehearing Denied

No. 17–517. *UPPAL v. HEALTH LAW FIRM*, 583 U. S. 1083;
No. 17–759. *LACY v. BP P. L. C. ET AL.*, 583 U. S. 1107;
No. 17–5073. *CARTWRIGHT v. MASSACHUSETTS*, 583 U. S. 878;
No. 17–6378. *RIEDLINGER v. CITY OF EVERETT, WASHINGTON*, 583 U. S. 1064;

No. 17–6525. *RIDEOUT v. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*, 583 U. S. 1068; and

No. 17–6857. *LEWIS v. UNITED STATES*, 583 U. S. 1078. Petitions for rehearing denied.

No. 17–928. *JONES ET AL. v. PARMLEY ET AL.*, 583 U. S. 1151. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

APRIL 3, 2018

Miscellaneous Order

No. 16–317. *DEUTSCHE BANK TRUST COMPANY AMERICAS ET AL. v. ROBERT R. MCCORMICK FOUNDATION ET AL.* C. A. 2d Cir.

Statement of JUSTICE KENNEDY and JUSTICE THOMAS respecting the petition for certiorari.

The parties are advised that consideration of the petition for certiorari will be deferred for an additional period of time. This will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court’s decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 583 U. S. 366 (2018). The petition for certiorari in this case was pending when the Court decided *Merit Management*. The Court of Appeals or

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the District Court could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum in this Court. See 28 U. S. C. §2109.

APRIL 5, 2018

Dismissals Under Rule 46

No. 17–7402. BALLARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed under this Court’s Rule 46.

No. 17–7797. BRANDON *v.* SCHROYER ET AL. C. A. 2d Cir. Certiorari dismissed under this Court’s Rule 46.

APRIL 13, 2018

Miscellaneous Orders

No. 16–1011. WESTERNGECO LLC *v.* ION GEOPHYSICAL CORP. C. A. Fed. Cir. [Certiorari granted, 583 U.S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–1215. LAMAR, ARCHER & COFRIN, LLP *v.* APPLING. C. A. 11th Cir. [Certiorari granted, 583 U.S. 1088.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–1220. ANIMAL SCIENCE PRODUCTS, INC., ET AL. *v.* HEBEI WELCOME PHARMACEUTICAL CO. LTD. ET AL. C. A. 2d Cir. [Certiorari granted, 583 U.S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Joint motion of respondents and the Ministry of Commerce of the People’s Republic of China for leave to allow the Ministry of Commerce of the People’s Republic of China to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–130. LUCIA ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. [Certiorari granted, 583 U.S. 1089.] Motion of the Solicitor General for divided argument granted.

No. 17–269. WASHINGTON *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 583 U.S. 1089.] Joint motion of respondents for divided argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

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No. 17–494. *SOUTH DAKOTA v. WAYFAIR, INC., ET AL.* Sup. Ct. S. D. [Certiorari granted, 583 U.S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–586. *ABBOTT, GOVERNOR OF TEXAS, ET AL. v. PEREZ ET AL.*; and

No. 17–626. *ABBOTT, GOVERNOR OF TEXAS, ET AL. v. PEREZ ET AL.* D. C. W. D. Tex. [Probable jurisdiction postponed, 583 U.S. 1088.] Motion of the Solicitor General for divided argument and motion of appellees for enlargement of time for oral argument and for divided argument granted, and the time is divided as follows: 25 minutes for appellants, 10 minutes for the Solicitor General in support of appellants, 15 minutes for appellees in No. 17–586, and 20 minutes for appellees in No. 17–626.

No. 17–965. *TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. v. HAWAII ET AL.* C. A. 9th Cir. [Certiorari granted, 583 U.S. 1099.] Motion of Becket Fund for Religious Liberty for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

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Certiorari Granted—Vacated and Remanded

No. 16–9604. *SYKES v. UNITED STATES.* C. A. 8th Cir. Reported below: 844 F. 3d 712; and

No. 17–6344. *BROWN v. UNITED STATES.* C. A. 8th 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 *United States v. Naylor*, 887 F. 3d 397 (CA8 2018).

Certiorari Dismissed

No. 17–7829. *BACH v. CIRCUIT COURT OF WISCONSIN, MILWAUKEE COUNTY.* Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8.

No. 17–7831. *BACH v. CIRCUIT COURT OF WISCONSIN, MILWAUKEE COUNTY, ET AL.* Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dis-

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missed. See this Court's Rule 39.8. Reported below: 2017 WI 101, 378 Wis. 2d 430, 905 N. W. 2d 842.

Miscellaneous Orders

No. 17A980. QORANE, AKA GAAS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D-3007. IN RE DISBARMENT OF GUREVICH. Disbarment entered. [For earlier order herein, see 583 U. S. 994.]

No. D-3023. IN RE DISCIPLINE OF NYCE. Kinsley Frampton Nyce, of Columbus, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-3028. IN RE DISCIPLINE OF SACKS. Stephen Howard Sacks, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 17M99. VIOLA *v.* KIRSCH ET AL.; and VIOLA *v.* ESCAPULE ET AL.;

No. 17M100. ROLLE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and

No. 17M102. BONCZEK *v.* BOARD OF TRUSTEES NATIONAL ROOFING INDUSTRY PENSION PLAN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17M101. RUSSELL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 148, Orig. MISSOURI ET AL. *v.* CALIFORNIA;

No. 149, Orig. INDIANA ET AL. *v.* MASSACHUSETTS;

No. 17-834. KANSAS *v.* GARCIA; KANSAS *v.* MORALES; and KANSAS *v.* OCHOA-LARA. Sup. Ct. Kan.; and

No. 17-936. GILEAD SCIENCES, INC. *v.* UNITED STATES EX REL. CAMPIE ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

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No. 17–587. *MOUNT LEMMON FIRE DISTRICT v. GUIDO ET AL.* C. A. 9th Cir. [Certiorari granted, 583 U. S. 1155.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–7801. *BAGI v. CITY OF PARMA, OHIO.* C. A. 6th Cir.; and

No. 17–7871. *MARRO v. CITIBANK, N. A.* Sup. Ct. Va. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 4, 2018, 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. 17–8258. *IN RE SPIVEY.* Petition for writ of habeas corpus denied.

No. 17–7702. *IN RE BELL;* and

No. 17–7735. *IN RE CLEMONS.* Petitions for writs of mandamus denied.

Certiorari Denied

No. 17–658. *BLAGOJEVICH v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 3d 918.

No. 17–689. *MARCH v. MILLS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MAINE, ET AL.* C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 3d 46.

No. 17–887. *BROWN, WARDEN v. BROWN.* C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 502.

No. 17–933. *NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS v. CONNECTICUT IRONWORKERS EMPLOYERS ASSN., INC., ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 3d 92.

No. 17–977. *ETIHAD AIRWAYS P. J. S. C. v. DOE ET VIR.* C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 406.

No. 17–1063. *DUNG QUOC PHAM v. BLAYLOCK ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 360.

No. 17–1083. *HIGGINS v. ZION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ZION.* C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 3d 1072.

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No. 17–1089. *LAKE v. SKELTON*. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 3d 1334.

No. 17–1095. *MELTON v. PHILLIPS*. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 256.

No. 17–1096. *MILEY v. CENLAR FSB ET AL.* Ct. App. Ga. Certiorari denied.

No. 17–1100. *SMITH v. SMITH*. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2017 IL App (5th) 160409–U.

No. 17–1101. *HALL ET AL. v. FLORES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 739.

No. 17–1116. *FOSTER v. KLEUESSENDORF ET AL.* (Reported below: 500 Mich. 1001, 895 N. W. 2d 188); and *FOSTER v. GANGES TOWNSHIP ET AL.* (500 Mich. 1062, 898 N. W. 2d 607). Sup. Ct. Mich. Certiorari denied.

No. 17–1117. *LUSTER v. LIZARRAGA, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 17–1118. *BRIDGES ET AL. v. EMPIRE SCAFFOLD, LLC*. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 222.

No. 17–1119. *CAJIGAS v. FLORIDA*. Sup. Ct. Fla. Certiorari denied.

No. 17–1124. *METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE v. MCMAHON*. C. A. 6th Cir. Certiorari denied.

No. 17–1125. *ALEXIS, AKA ALEXIEV v. FEDERAL BUREAU OF INVESTIGATION ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 507.

No. 17–1126. *ACKERMANN v. CVS PHARMACY*. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 17–1128. *ALOTAIBI v. NEVADA*. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 650, 404 P. 3d 761.

No. 17–1139. *AAMES v. UNITED STATES ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 450.

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No. 17–1141. *BROWN v. CITY OF GRAND RAPIDS, MICHIGAN, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–1144. *COOK ET AL. v. MAYS ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 3d 437.

No. 17–1145. *QUINTEROS v. SESSIONS, ATTORNEY GENERAL.* C. A. 5th Cir. Certiorari denied.

No. 17–1158. *MILLS v. REICHLE.* Sup. Ct. R. I. Certiorari denied. Reported below: 162 A. 3d 617.

No. 17–1162. *U1IT4LESS, INC., DBA NYBIKERGEAR v. FEDEX CORP. ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 3d 199.

No. 17–1166. *ZUZA v. OFFICE OF THE HIGH REPRESENTATIVE ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 857 F. 3d 935.

No. 17–1167. *WILKINSON v. MISSOURI.* Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 531 So. 3d 626.

No. 17–1169. *KLEINSMITH v. COLORADO.* Sup. Ct. Colo. Certiorari denied. Reported below: 409 P. 3d 305.

No. 17–1170. *DRK PHOTO v. MCGRAW-HILL GLOBAL EDUCATION HOLDINGS, LLC, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 870 F. 3d 978.

No. 17–1181. *KIEFER v. ISANTI COUNTY, MINNESOTA.* Sup. Ct. Minn. Certiorari denied.

No. 17–1182. *PRESS COMMUNICATIONS, LLC v. FEDERAL COMMUNICATIONS COMMISSION.* C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 1117.

No. 17–1196. *LIBERTARIAN PARTY OF COLORADO v. WILLIAMS, COLORADO SECRETARY OF STATE* (Reported below: 401 P. 3d 558); and *FRAZIER v. WILLIAMS, COLORADO SECRETARY OF STATE* (401 P. 3d 541). Sup. Ct. Colo. Certiorari denied.

No. 17–1199. *WILSON v. HAWAII ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 501.

No. 17–1202. *ANIEL v. RESCAP LIQUIDATING TRUST.* C. A. 2d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 93.

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No. 17–1208. *SMITH ET AL. v. CITY OF SANTA CLARA, CALIFORNIA*. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 987.

No. 17–1214. *BEYOND NUCLEAR v. NUCLEAR REGULATORY COMMISSION ET AL.* C. A. D. C. Cir. Certiorari denied. Reported below: 707 Fed. Appx. 8.

No. 17–1219. *LUNDERVILLE v. FEDERAL COMMUNICATIONS COMMISSION ET AL.* C. A. 1st Cir. Certiorari denied.

No. 17–1224. *HALIM ET AL. v. CALIFORNIA*. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied. Reported below: 14 Cal. App. 5th 632, 223 Cal. Rptr. 3d 491.

No. 17–1230. *GOLDBERG ET AL. v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 3d 529.

No. 17–1231. *D COSTA ET AL. v. SESSIONS, ATTORNEY GENERAL*. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 172.

No. 17–1238. *R&R GROUND MAINTENANCE INC. v. ALABAMA POWER CO. ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 853.

No. 17–1240. *TUERK v. FLORIDA BAR*. Sup. Ct. Fla. Certiorari denied.

No. 17–1242. *HERB v. TRUMP, PRESIDENT OF THE UNITED STATES*. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 235 So. 3d 900.

No. 17–1250. *JEFF MERCER, LLC v. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT ET AL.* Ct. App. La., 2d Cir. Certiorari denied. Reported below: 51,371 (La. App. 2 Cir. 6/7/17), 222 So. 3d 1017.

No. 17–1257. *GRANT v. NIELSEN, SECRETARY OF HOMELAND SECURITY*. C. A. 3d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 697.

No. 17–1261. *MULLER v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 76.

No. 17–1262. *EVERY v. DEPARTMENT OF VETERANS AFFAIRS ET AL.* C. A. 1st Cir. Certiorari denied.

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No. 17–1265. *JONES v. TEXAS JUVENILE JUSTICE DEPARTMENT*. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 215.

No. 17–1266. *CRANMER ET AL. v. PHILADELPHIA INDEMNITY INSURANCE CO.* C. A. 3d Cir. Certiorari denied. Reported below: 719 Fed. Appx. 95.

No. 17–1275. *MINIOR v. RHODE ISLAND*. Sup. Ct. R. I. Certiorari denied. Reported below: 175 A. 3d 1202.

No. 17–1278. *BECK v. OHIO*. Ct. App. Ohio, 1st App. Dist., Hamilton County. Certiorari denied. Reported below: 2016-Ohio-8122, 75 N. E. 3d 899.

No. 17–1280. *OPENRISK, LLC v. MICROSTRATEGY SERVICES CORP.* C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 518.

No. 17–1281. *CHARNOCK v. VIRGINIA ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 158.

No. 17–1293. *TAGAMI v. CITY OF CHICAGO, ILLINOIS*. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 375.

No. 17–1296. *SMITH v. ASSOCIATED CREDIT UNION, INC.* Sup. Ct. Ga. Certiorari denied.

No. 17–1310. *MINNIS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 3d 889.

No. 17–1312. *CHON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–6674. *SEUGASALA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 572.

No. 17–6681. *PERRY v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 3d 620.

No. 17–6749. *BELL v. ARKANSAS*. Sup. Ct. Ark. Certiorari denied. Reported below: 2017 Ark. 231, 522 S. W. 3d 788.

No. 17–6780. *SMITH v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 241.

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No. 17–6937. *VISCIOTTI v. DAVIS, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 749.

No. 17–7042. *WORKMAN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 863 F. 3d 1313.

No. 17–7045. *ACKER v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 384.

No. 17–7068. *CLEMENS v. COLORADO*. Sup. Ct. Colo. Certiorari denied. Reported below: 401 P. 3d 525.

No. 17–7121. *WEST v. RIETH ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 211.

No. 17–7199. *BURTONS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 372.

No. 17–7270. *ALEXIS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 239.

No. 17–7296. *GRAY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 589.

No. 17–7306. *HUMPHREYS v. SELLERS, WARDEN*. Sup. Ct. Ga. Certiorari denied.

No. 17–7348. *DAVIS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 605.

No. 17–7414. *SMACK v. DELAWARE*. Sup. Ct. Del. Certiorari denied. Reported below: 172 A. 3d 390.

No. 17–7615. *SMITH v. MICHIGAN*. Ct. App. Mich. Certiorari denied.

No. 17–7620. *MORRIS v. KNUTSON*. C. A. 7th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 745.

No. 17–7631. *MORRIS v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–7636. *PATTISON v. MORROW, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 772.

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No. 17–7638. *TRIGG v. JONES ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 268.

No. 17–7642. *DAVIS v. ROUNDTREE ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 377.

No. 17–7644. *DUPLICHAN v. KENT, WARDEN.* C. A. 5th Cir. Certiorari denied.

No. 17–7650. *EVERSON v. ARMSTRONG ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 66.

No. 17–7654. *COYLE v. JACKSON ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 727.

No. 17–7655. *LEACHMAN v. STEPHENS ET AL.* Ct. App. Tex., 2d Dist. Certiorari denied.

No. 17–7659. *YATES v. FLORIDA.* Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 230 So. 3d 1235.

No. 17–7663. *ADKINS v. HBL, LLC.* C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 177.

No. 17–7664. *WILLIAMS v. FLORIDA DEPARTMENT OF CORRECTIONS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 877.

No. 17–7669. *MORALES v. HEDGPETH, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 761.

No. 17–7673. *DUNSMORE v. CALIFORNIA.* Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 17–7675. *SORO v. KEYES CO.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 237 So. 3d 324.

No. 17–7676. *RICKS v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 17–7683. *ANDERSON v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–7685. *LAY v. ROYAL, WARDEN.* C. A. 10th Cir. Certiorari denied. Reported below: 860 F. 3d 1307.

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No. 17–7688. *BOWLING v. WHITE, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 1008.

No. 17–7691. *SUAREZ v. ANTHEM, INC., FKA WELLPOINT*. C. A. 10th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 607.

No. 17–7693. *HOLMAN v. SACHSE, WARDEN*. Sup. Ct. Mo. Certiorari denied. Reported below: 530 S. W. 3d 500.

No. 17–7699. *BROWN v. HUNT, SUPERINTENDENT, COLUMBUS CORRECTIONAL FACILITY, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 201.

No. 17–7705. *SMITH v. SUPERIOR COURT OF GEORGIA, COBB COUNTY*. C. A. 11th Cir. Certiorari denied.

No. 17–7707. *BAKER v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–7708. *PLEASANT-BEY v. TENNESSEE*. Sup. Ct. Tenn. Certiorari denied.

No. 17–7724. *DAVIS v. TEXAS* (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 17–7733. *BONNER v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–7738. *COTTON v. COUNTY OF SAN BERNARDINO, CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 776.

No. 17–7742. *VUE v. DOWLING, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 749.

No. 17–7746. *MACKEY v. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION*. C. A. 6th Cir. Certiorari denied.

No. 17–7752. *SKYY ET AL. v. CITY OF ARLINGTON, TEXAS*. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 396.

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No. 17–7753. *REED v. ARNOLD, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17–7754. *SHALLCROSS v. FOSTER, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 17–7759. *LONG v. TENNESSEE.* Ct. Crim. App. Tenn. Certiorari denied.

No. 17–7776. *GENTILE v. NEW YORK.* Ct. App. N. Y. Certiorari denied.

No. 17–7805. *PAPPILLION v. VANNOY, WARDEN.* C. A. 5th Cir. Certiorari denied.

No. 17–7806. *BRYNER v. CITY OF CLEARFIELD, UTAH, ET AL.* Ct. App. Utah. Certiorari denied.

No. 17–7807. *ANDERSON v. DICKSON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 481.

No. 17–7812. *CISNEROS v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–7813. *CLEWIS v. HIRSCH ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 347.

No. 17–7816. *ZANA v. NEVEN, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 744.

No. 17–7837. *SCOTT v. MISSISSIPPI.* Sup. Ct. Miss. Certiorari denied.

No. 17–7842. *DUART v. MASSACHUSETTS.* Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 477 Mass. 630, 82 N. E. 3d 1002.

No. 17–7864. *IAQUINTA v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 271.

No. 17–7867. *VILLA-GOMEZ v. CALIFORNIA.* Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 9 Cal. App. 5th 527, 215 Cal. Rptr. 3d 161.

No. 17–7876. *PULLMAN v. CALIFORNIA.* Ct. App. Cal., 6th App. Dist. Certiorari denied.

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No. 17-7882. *BEAN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7889. *DAVIS, AKA STRONG v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 175 A. 3d 375.

No. 17-7892. *BARTLETT v. ALASKA BAR ASSN.* Sup. Ct. Alaska. Certiorari denied.

No. 17-7896. *MACIAS v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 782.

No. 17-7899. *LEE v. DUCART, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 17-7908. *ADAMS v. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES*. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 17-7914. *RUCANO v. NEW YORK*. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 3d 876, 49 N. Y. S. 3d 925.

No. 17-7919. *DULAURENCE v. TELEGEN ET AL.* C. A. 1st Cir. Certiorari denied.

No. 17-7921. *WEIBLE v. CALIFORNIA*. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 17-7923. *WOODRUFF v. CROCKETT ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17-7927. *RETTIG v. UTAH*. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 83, 416 P. 3d 520.

No. 17-7936. *LABRANCHE v. DEPARTMENT OF DEFENSE*. C. A. 5th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 182.

No. 17-7937. *KHOSHMOOD v. SOCIAL SECURITY ADMINISTRATION*; and *KHOSHMOOD v. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION* (Reported below: 715 Fed. Appx. 4). C. A. D. C. Cir. Certiorari denied.

No. 17-7963. *FRANCO v. UNITED STATES*; and
No. 17-8050. *BARRAGAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 3d 689.

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No. 17-7972. *BARNES v. TEXAS*. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 17-7975. *TARVER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7979. *JACKSON v. WILSON, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 214.

No. 17-7982. *TINGLE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 850.

No. 17-7983. *WALKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 192.

No. 17-7986. *WILSON v. ZUBIATE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 479.

No. 17-7987. *YOUNGER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17-7990. *EYLE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 513.

No. 17-7992. *DEAN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 925.

No. 17-7995. *MORMON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 282.

No. 17-7996. *PHILENTROPE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7998. *MCDANIEL v. HOFFNER, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17-7999. *NAVARRETE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 535.

No. 17-8004. *STRAW v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN*. C. A. 7th Cir. Certiorari denied.

No. 17-8006. *BROOKS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17-8007. *JACQUES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 934.

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No. 17–8011. *BLOUNT v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 860 F. 3d 732.

No. 17–8014. *BOLDEN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8015. *COOK v. BAYLE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 718 Fed. Appx. 51.

No. 17–8016. *BOATWRIGHT v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17–8021. *CARRILLO-TAMAYO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 225.

No. 17–8023. *HERNANDEZ-NUNEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 317.

No. 17–8024. *HARRIS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 364.

No. 17–8025. *OWENS v. RAY, WARDEN, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 815.

No. 17–8026. *PARTIDA-CALLES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 316.

No. 17–8028. *RAINS v. SMITH, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8030. *BETHANY v. NEW YORK*. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 144 App. Div. 3d 1666, 42 N. Y. S. 3d 495.

No. 17–8033. *LAMBERT v. WASHINGTON*. Ct. App. Wash. Certiorari denied. Reported below: 199 Wash. App. 51, 395 P. 3d 1080.

No. 17–8036. *ALSTON v. CITY OF MADISON, WISCONSIN, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 3d 901.

No. 17–8037. *AKOBUNDU v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 17–8038. *BURKS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 261.

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No. 17–8039. *CRITTENDEN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 142.

No. 17–8044. *GATTIS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 3d 150.

No. 17–8045. *FRENTZ v. BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY*. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 285.

No. 17–8047. *SMITH v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8048. *STITZ v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 3d 533.

No. 17–8049. *RODRIGUEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 224.

No. 17–8051. *ADORNO v. MELVIN, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 917.

No. 17–8052. *BRIDGEWATER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 304.

No. 17–8055. *OSMAN ET AL. v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 190.

No. 17–8057. *MEDINA v. CHOATE*. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 3d 1025.

No. 17–8060. *BUILES v. KUTA, WARDEN*. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 132.

No. 17–8061. *MANNINO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 355.

No. 17–8063. *JAMES v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8068. *ALBRITTON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 178.

No. 17–8070. *SANDLAIN v. ENGLISH, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 827.

No. 17–8075. *PHILLIPS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

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No. 17–8076. *MIRANDA-MARTINEZ v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17–8078. *POWELL v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 259.

No. 17–8086. *SYLVESTER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8087. *SANCHEZ v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 476.

No. 17–8090. *THOMAS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8092. *TRUJILLO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–8093. *AMMONS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–8094. *BENTON v. UNITED STATES* (Reported below: 876 F. 3d 1260); and *MCDANIEL v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 17–8095. *HAROON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 479.

No. 17–8100. *JONES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–8101. *ELLIS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 276.

No. 17–8103. *CAMPBELL v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8104. *SHORT v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 813.

No. 17–8106. *RAYA-ORTEGA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8107. *MAIN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 3d 725.

No. 17–8108. *ROBLEDO-CRUZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 179.

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No. 17–8110. *JONES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8111. *KLUG v. ENGLISH, WARDEN, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–8114. *NANDA ET AL. v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 3d 522.

No. 17–8115. *TORRES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8119. *WERLE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 3d 879.

No. 17–8120. *WORTLEY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 649.

No. 17–8121. *BARRERA-VALDIVIA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 487.

No. 17–8123. *WOOLLAM v. MASSACHUSETTS*. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 478 Mass. 493, 87 N. E. 3d 64.

No. 17–8125. *CAIN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 3d 562.

No. 17–8126. *SILVER v. RESCAP BORROWER CLAIMS TRUST*. C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 34.

No. 17–8127. *YASITH CHHUN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8131. *COUTINO-LOPEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 872.

No. 17–8132. *MURPHY v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 775.

No. 17–8136. *BLAKE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 960.

No. 17–8137. *ASFOUR v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 822.

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No. 17–8140. *WHITTLE v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 457.

No. 17–8141. *WILD v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 376.

No. 17–8142. *CORRAL-GARCIA v. UNITED STATES*. C. A. 10th Cir. Certiorari denied.

No. 17–8143. *STRAW v. HILL, ATTORNEY GENERAL OF INDIANA, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 17–8144. *SANDERS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 745.

No. 17–8155. *DEL CAMPO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 488.

No. 17–8158. *LATTA v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 341 Ga. App. 696, 802 S. E. 2d 264.

No. 17–8159. *KING v. MARION COUNTY CIRCUIT COURT*. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 3d 589.

No. 17–8172. *CARR v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 713 Fed. Appx. 17.

No. 17–8173. *CHAPMAN v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 129.

No. 17–8177. *KENDALL v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 876 F. 3d 1264.

No. 17–8178. *JOHNSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 400.

No. 17–8179. *BOWE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8182. *ROBBIO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8183. *SAMPSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8184. *RAMOS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 693.

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No. 17–8191. *MORIN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 219.

No. 17–8194. *BLACK v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 687.

No. 17–8195. *BEASLEY v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 300.

No. 17–8196. *BLAYLOCK v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 241.

No. 17–923. *REID v. DONELAN, SHERIFF, FRANKLIN COUNTY, MASSACHUSETTS, ET AL.* C. A. 1st Cir. Certiorari before judgment denied.

No. 17–1108. *MEDICAL DEVICE BUSINESS SERVICES, INC., FKA DEPUY ORTHOPAEDICS, INC., ET AL. v. UNITED STATES EX REL. NARGOL ET AL., ET AL.* C. A. 1st Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 865 F. 3d 29.

No. 17–6261. *FELL v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 17–7715. *CASANOVA v. ULIBARRI, WARDEN*. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

No. 17–8077. *POULNOTT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–607. *JARRETT v. CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES ET AL.*, 583 U. S. 1055;

No. 17–757. *MCGEHEE ET AL. v. KENTUCKY TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS*, 583 U. S. 1116;

No. 17–798. *HOLBROOK v. RONNIES LLC*, 583 U. S. 1117;

No. 17–824. *PAYN v. KELLEY ET AL.*, 583 U. S. 1117;

No. 17–833. *LUCAS v. COLORADO STATE PUBLIC DEFENDER ET AL.*, 583 U. S. 1117;

No. 17–892. *BODY BY COOK, INC., ET AL. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE ET AL.*, 583 U. S. 1120;

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No. 17-943. OSTRANDER *v.* VIRGINIA, 583 U. S. 1167;
No. 17-6738. THOMPSON *v.* NEWSOME ET AL., 583 U. S. 1094;
No. 17-6743. SMITH *v.* WASHINGTON, 583 U. S. 1095;
No. 17-6903. IN RE ROUSE, 583 U. S. 1050;
No. 17-6940. CONNER *v.* DEPARTMENT OF EDUCATION ET AL.,
583 U. S. 1125;
No. 17-7031. BAILEY *v.* WARFIELD & ROHR, 583 U. S. 1126;
No. 17-7053. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS,
583 U. S. 1127;
No. 17-7054. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS,
583 U. S. 1127;
No. 17-7060. IN RE CHARLES, 583 U. S. 1113;
No. 17-7093. ROOSA *v.* FLORIDA, 583 U. S. 1128;
No. 17-7098. DIETRICH *v.* CITY OF GROSSE POINTE PARK,
MICHIGAN, ET AL., 583 U. S. 1128;
No. 17-7101. GREEN *v.* CREIGHTON/CHI HEALTH ET AL., 583
U. S. 1128;
No. 17-7303. ROTTE *v.* UNITED STATES, 583 U. S. 1134;
No. 17-7318. SMITH *v.* CITY OF WYOMING, OHIO, ET AL., 583
U. S. 1170; and
No. 17-7361. SIMMONS *v.* UNITED STATES, 583 U. S. 1135. Pe-
titions for rehearing denied.

APRIL 19, 2018

Miscellaneous Orders

No. 17A1150. MOODY *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 17-8530 (17A1139). IN RE MOODY. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 17-8564 (17A1145). MOODY *v.* STEWART, WARDEN (Reported below: 887 F. 3d 1281); and MOODY *v.* SESSIONS, ATTORNEY GENERAL (730 Fed. Appx. 851). 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. The order heretofore entered by JUSTICE THOMAS is vacated.

APRIL 23, 2018

Certiorari Granted—Vacated and Remanded

No. 17–5562. *WILSON v. SELLERS, WARDEN*. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson v. Sellers*, ante, p. 122. Reported below: 842 F. 3d 1155.

Certiorari Dismissed

No. 17–7817. *WEI ZHOU v. MARQUETTE UNIVERSITY*. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8.

Miscellaneous Orders

No. 17M103. *NOUNA v. ROSS, SECRETARY OF COMMERCE*. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M104. *WOOTEN v. SUPERIOR COURT OF CALIFORNIA, SAN JOAQUIN COUNTY, ET AL.* Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court’s Rule 14.5 denied.

No. 17M105. *CARBAJAL-VALDEZ v. UNITED STATES*. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17–804. *EVE–USA, INC., ET AL. v. MENTOR GRAPHICS CORP.* C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

No. 17–965. *TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. v. HAWAII ET AL.* C. A. 9th Cir. [Certiorari granted, 583 U. S. 1099.] Motion of David Boyle for leave to file brief as *amicus curiae* granted.

No. 17–6849. *SELDEN v. UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA*. C. A. 11th Cir. Motion of

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petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1100] denied.

No. 17-7313. LUCZAK *v.* PFISTER ET AL. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1111] denied.

No. 17-8084. KOCH *v.* CITY OF SARGENT, NEBRASKA. Ct. App. Neb. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 14, 2018, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 17-8291. IN RE PERAZA VIERA. Petition for writ of habeas corpus denied.

No. 17-1374. IN RE BOZELKO; and

No. 17-8234. IN RE WITCHARD. Petitions for writs of mandamus denied.

Certiorari Granted

No. 17-765. UNITED STATES *v.* STITT. C. A. 6th Cir.; and
No. 17-766. UNITED STATES *v.* SIMS. C. A. 8th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 17-765, 860 F. 3d 854; No. 17-766, 854 F. 3d 1037.

Certiorari Denied

No. 17-671. MARBLE *v.* POOLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 587.

No. 17-843. JORDAN *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 17-850. HOUGHTALING *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 326 Conn. 330, 163 A. 3d 563.

No. 17-912. BOSTIC *v.* DUNBAR, ACTING WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 17-945. QUINN ET AL. *v.* BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 3d 433.

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No. 17–991. *LONG v. PFISTER, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 544.

No. 17–1086. *GREDE, NOT INDIVIDUALLY BUT AS LIQUIDATION TRUSTEE OF THE SENTINEL LIQUIDATION TRUST v. FCSTONE, LLC*. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 767.

No. 17–1155. *BOLTON v. CITY OF HATTIESBURG, MISSISSIPPI*. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 370.

No. 17–1160. *PRICE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LIEUTENANT OF HAYWOOD COUNTY SHERIFF'S DEPARTMENT, ET AL. v. HENSLEY ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 573.

No. 17–1163. *COLEMAN v. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. Sup. Ct. Va. Certiorari denied.

No. 17–1193. *CLAYTOR ET AL. v. VOLKSWAGEN GROUP OF AMERICA, INC.* Sup. Ct. Va. Certiorari denied.

No. 17–1215. *PUERTO RICO TELEPHONE CO., INC. v. SAN JUAN CABLE LLC*. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 767.

No. 17–1216. *BEHRMANN ET UX. v. GOLDSTEIN ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 134.

No. 17–1223. *WILSON, AS EXECUTOR OF THE ESTATE OF WILSON v. DALLAS COUNTY HOSPITAL DISTRICT, DBA PARKLAND HEALTH & HOSPITAL SYSTEM, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 319.

No. 17–1248. *STORER ET AL. v. CLARK ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 860 F. 3d 1340.

No. 17–1255. *FRENCH v. JONES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 1228.

No. 17–1271. *KANOFSKY v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 229.

No. 17–1276. *BURWICK v. PILKERTON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 214.

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No. 17–1308. *SEWELL v. BULL ET AL.* Sup. Ct. Ala. Certiorari denied. Reported below: 277 So. 3d 958.

No. 17–1321. *GRANTON v. WASHINGTON STATE LOTTERY.* C. A. 9th Cir. Certiorari denied. Reported below: 682 Fed. Appx. 598.

No. 17–1322. *HENRY v. FLORIDA BAR ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 878.

No. 17–1334. *MCDANIEL v. PERDUE, SECRETARY OF AGRICULTURE.* C. A. D. C. Cir. Certiorari denied. Reported below: 717 Fed. Appx. 5.

No. 17–1338. *FOX v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 3d 574.

No. 17–1344. *WEYGANDT v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 630.

No. 17–1346. *WINANS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 17–1373. *ADAMCIK v. IDAHO.* Sup. Ct. Idaho. Certiorari denied. Reported below: 163 Idaho 114, 408 P. 3d 474.

No. 17–6021. *ALFARO-GRANADOS v. UNITED STATES;* and

No. 17–6116. *ALVARADO-LINARES v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 969.

No. 17–6477. *DAVIS v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 254.

No. 17–6567. *JOHNSON v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 349.

No. 17–6779. *STEELE v. UNITED STATES.* C. A. 7th Cir. Certiorari denied.

No. 17–7002. *SIMS v. LOUISIANA.* Ct. App. La., 3d Cir. Certiorari denied.

No. 17–7019. *REEVES v. GREEN.* C. A. 4th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 154.

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No. 17–7463. *HAND v. SHOOP, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 3d 390.

No. 17–7494. *BAIN v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 1.

No. 17–7504. *THOMPSON v. PARKER, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 641.

No. 17–7634. *MINOR v. HASTINGS ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 704 Fed. Appx. 103.

No. 17–7774. *FERGUSON v. GETTEL ACURA*. C. A. 11th Cir. Certiorari denied.

No. 17–7787. *STANTON v. DOE ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 586.

No. 17–7790. *SHEVCHANKO v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17–7792. *D. S. v. WEST VIRGINIA*. Sup. Ct. App. W. Va. Certiorari denied.

No. 17–7799. *BELSER v. WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–7811. *ANORUO v. TENET HEALTHSYSTEM HAHNEMANN, DBA HAHNEMANN UNIVERSITY HOSPITAL*. C. A. 3d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 110.

No. 17–7814. *CLARKSON v. VANNOY, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17–7826. *DANIELS v. TEXAS* (seven judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 17–7832. *DELGADO v. GODINEZ ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 528.

No. 17–7866. *TOLBERT v. HILL, ASSOCIATE JUDGE, CIRCUIT COURT OF ILLINOIS, COOK COUNTY*. Sup. Ct. Ill. Certiorari denied.

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No. 17–7874. *BIRCH v. WILLIAMS, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 852.

No. 17–7958. *JOHNSON v. FILSON, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17–7968. *STRIBLING v. BROCK ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 461.

No. 17–8005. *STRAW v. SUPREME COURT OF INDIANA*. C. A. 7th Cir. Certiorari denied.

No. 17–8010. *BREITZMAN v. WISCONSIN*. Sup. Ct. Wis. Certiorari denied. Reported below: 2017 WI 100, 378 Wis. 2d 431, 904 N. W. 2d 93.

No. 17–8020. *BRYAN v. KENTUCKY*. Sup. Ct. Ky. Certiorari denied.

No. 17–8031. *REED v. NATIONAL FOOTBALL LEAGUE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 619.

No. 17–8032. *STEELE v. THOMAS, WARDEN*. C. A. 11th Cir. Certiorari denied.

No. 17–8043. *MORGAN v. KANSAS ET AL.* C. A. 10th Cir. Certiorari denied.

No. 17–8065. *COMBS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 620.

No. 17–8071. *JACKSON v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied.

No. 17–8082. *SHILLING v. WALSH*. Super. Ct. Pa. Certiorari denied.

No. 17–8097. *ANGEL PEREZ v. NEW YORK CITY DEPARTMENT OF EDUCATION*. C. A. 2d Cir. Certiorari denied.

No. 17–8129. *TIJERINA v. LASHBROOK, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 17–8135. *THOMPSON v. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 575.

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No. 17–8149. *MATTHEWS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 284.

No. 17–8150. *MALDONADO-GOMEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 571.

No. 17–8152. *MARTIN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 881.

No. 17–8156. *ADRIAN MANZANO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 472.

No. 17–8157. *KENNEDY v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 104.

No. 17–8162. *MUNOZ GONZALEZ ET AL. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 1089 and 711 Fed. Appx. 829.

No. 17–8163. *GUZMAN v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 836.

No. 17–8164. *SINGH v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 726 Fed. Appx. 845.

No. 17–8169. *LUIS GUTIERREZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 1254.

No. 17–8171. *ROWE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 3d 623.

No. 17–8175. *AXSOM v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8185. *SEWELL v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 917.

No. 17–8186. *STURGIS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8190. *OSER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 256.

No. 17–8197. *LESTER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 241.

No. 17–8199. *DELGADO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

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No. 17–8200. *WOLFF v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 617.

No. 17–8203. *GARZA v. UNITED STATES* (Reported below: 708 Fed. Appx. 218); *RIVERA v. UNITED STATES* (710 Fed. Appx. 213); *TORRES-LARRAGA v. UNITED STATES* (713 Fed. Appx. 333); and *BARAJAS v. UNITED STATES* (714 Fed. Appx. 478). C. A. 5th Cir. Certiorari denied.

No. 17–8204. *SAID v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 9th Cir. Certiorari denied.

No. 17–8209. *DUNSTON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 17–8210. *WEBB v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 874 F. 3d 418.

No. 17–8211. *TAYLOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 391.

No. 17–8212. *WILLIAMS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 208.

No. 17–8213. *BREWER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 557.

No. 17–8214. *DIEHL v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 393.

No. 17–8215. *BURTON v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8220. *RUSSELL v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 239 So. 3d 1.

No. 17–8223. *SCHLAKE v. UNITED STATES* (two judgments). C. A. 9th Cir. Certiorari denied.

No. 17–8226. *ECHOLS v. CSX TRANSPORTATION, INC.* C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 267.

No. 17–8240. *EVERETT v. GEORGIA ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–8243. *ROLAND v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied.

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No. 17–8246. *STRAW v. EXECUTIVE COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*. C. A. 7th Cir. Certiorari denied.

No. 17–8250. *PERSAUD v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17–8254. *BATISTA v. OHIO*. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 584, 2017-Ohio-8304, 91 N. E. 3d 724.

No. 17–8255. *BARCENAS-PATINO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 285.

No. 17–8299. *NEEL v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied.

No. 17–8311. *RUSSELL v. OHIO*. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2017-Ohio-2871.

No. 17–1226. *FRONT ROW TECHNOLOGIES, LLC v. MLB ADVANCED MEDIA, L. P., ET AL.* C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 697 Fed. Appx. 701.

No. 17–7784. *COTTON v. JOHNSON & JOHNSON*. C. A. 6th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 17–8167. *SPALDING v. UNITED STATES*. C. A. 5th Cir. Certiorari before judgment denied.

No. 17–8168. *INGRAM v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 721 Fed. Appx. 811.

Rehearing Denied

No. 17–567. *SCOTT ET AL. v. FEDERAL DEPOSIT INSURANCE CORPORATION*, 583 U. S. 1167;

No. 17–924. *CABACOFF v. SELECT PORTFOLIO SERVICING, INC.*, 583 U. S. 1167;

No. 17–947. *JACKSON v. COLORADO*, 583 U. S. 1121;

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No. 17–1022. *MEISNER v. ZYMOGENETICS, INC., ET AL.*, 583 U. S. 1168;

No. 17–1054. *NGUYEN v. UNITED STATES*, 583 U. S. 1169;

No. 17–6269. *RICHARDSON v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*, 583 U. S. 1063;

No. 17–6393. *LAVELLE v. U. S. BANK N. A., AS TRUSTEE*, 583 U. S. 1064;

No. 17–6426. *NUNEZ-GARCIA v. UNITED STATES*, 583 U. S. 1122; and

No. 17–6844. *WESSINGER v. VANNOY, WARDEN*, 583 U. S. 1173. Petitions for rehearing denied.

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Certiorari Denied

No. 17–8521 (17A1140). *DAVILA v. TEXAS* (two judgments). Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

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Dismissal Under Rule 46

No. 17–161. *BLUE CROSS BLUE SHIELD OF NORTH CAROLINA v. JEMSEK CLINIC, P. A., ET AL.* C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 850 F. 3d 150.

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1045; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1059; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1079; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1089.)

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Certiorari Dismissed

No. 17–8278. *BAMDAD v. UNITED STATES*. C. A. 9th 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

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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*).

No. 17–8313. *ST. LOUIS v. DELAWARE*. Sup. Ct. Del. 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: 173 A. 3d 537.

Miscellaneous Orders

No. 17M106. *DOE v. UNITED STATES*. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record denied.

No. 17M107. *LOTHIAN-CASSIDY, L. L. C., ET AL. v. LOTHIAN EXPLORATION & DEVELOPMENT II, L. P. (LEAD II), ET AL.*; and *SHOSHANA TRUST ET AL. v. RALEIGH ET AL.* Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M108. *ALEXSAM, INC. v. WILDCARD SYSTEMS, INC., ET AL.* Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17–312. *UNITED STATES v. SANCHEZ-GOMEZ ET AL.* C. A. 9th Cir. [Certiorari granted, 583 U. S. 1036.] Motion of respondent Rene Sanchez-Gomez for appointment of counsel granted, and Ellis M. Johnston III, Esq., of San Diego, Cal., is appointed to serve as counsel for respondent Rene Sanchez-Gomez in this case.

No. 17–8425. *IN RE SEVION-EL*. Petition for writ of habeas corpus denied.

No. 17–7918. *IN RE COLEN*. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 17–961. *FRANK ET AL. v. GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.* C. A. 9th Cir. Certiorari granted. Reported below: 869 F. 3d 737.

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No. 17–988. LAMPS PLUS, INC., ET AL. *v.* VARELA. C. A. 9th Cir. Certiorari granted. Reported below: 701 Fed. Appx. 670.

No. 17–8151. BUCKLEW *v.* PRECYTHE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. In addition to the questions presented in the petition, the parties are directed to brief and argue the following question: “Whether petitioner met his burden under *Glossip v. Gross*, 576 U.S. 8 (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State’s method of execution.” Reported below: 883 F. 3d 1087.

Certiorari Denied

No. 16–778. LICCI ET AL. *v.* LEBANESE CANADIAN BANK, SAL. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 3d 201.

No. 16–1526. CELGARD, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 671 Fed. Appx. 797.

No. 17–39. HILLCREST LABORATORIES, INC. *v.* MOVEA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 683 Fed. Appx. 929.

No. 17–110. PAICE LLC ET AL. *v.* FORD MOTOR Co.; and

No. 17–111. PAICE LLC ET AL. *v.* FORD MOTOR Co. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 940.

No. 17–112. PAICE LLC ET AL. *v.* FORD MOTOR Co.; and

No. 17–113. PAICE LLC ET AL. *v.* FORD MOTOR Co. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 950.

No. 17–114. DEPOMED, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 947.

No. 17–116. AFFINITY LABS OF TEXAS, LLC *v.* SAMSUNG ELECTRONICS Co., LTD., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 1016.

No. 17–117. AFFINITY LABS OF TEXAS, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A.

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Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 1017.

No. 17-159. IPR LICENSING, INC. *v.* ZTE CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 933.

No. 17-214. SECURITY PEOPLE, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL. C. A. Fed. Cir. Certiorari denied.

No. 17-220. PAICE LLC ET AL. *v.* FORD MOTOR Co.;
No. 17-221. PAICE LLC ET AL. *v.* FORD MOTOR Co.; and
No. 17-222. PAICE LLC ET AL. *v.* FORD MOTOR Co. C. A. Fed. Cir. Certiorari denied. Reported below: 681 Fed. Appx. 904.

No. 17-229. PAICE LLC ET AL. *v.* FORD MOTOR Co. C. A. Fed. Cir. Certiorari denied. Reported below: 681 Fed. Appx. 885.

No. 17-232. AFFINITY LABS OF TEXAS, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 883.

No. 17-233. AFFINITY LABS OF TEXAS, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 902.

No. 17-330. INTEGRATED CLAIMS SYSTEMS, LLC *v.* TRAVELERS LLOYDS OF TEXAS INSURANCE Co. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 684 Fed. Appx. 959.

No. 17-349. SKKY, INC. *v.* MINDGEEK, S. A. R. L., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1014.

No. 17-357. GOOGLE, LLC *v.* UNWIRED PLANET, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 841 F. 3d 1376.

No. 17-408. OUTDRY TECHNOLOGIES CORP. *v.* GEOX S. P. A. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1364.

No. 17-535. TRANSPERFECT GLOBAL, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 703 Fed. Appx. 953.

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No. 17–617. C-CATION TECHNOLOGIES, LLC *v.* ARRIS GROUP, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 695 Fed. Appx. 574.

No. 17–643. AT&T INTELLECTUAL PROPERTY II, L. P. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 991.

No. 17–656. AUDATEX NORTH AMERICA, INC. *v.* MITCHELL INTERNATIONAL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 703 Fed. Appx. 986.

No. 17–751. NIDEC MOTOR CORP. *v.* ZHONGSHAN BROAD OCEAN MOTOR Co., LTD., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 3d 1013.

No. 17–768. HITACHI METALS, LTD. *v.* ALLIANCE OF RARE-EARTH PERMANENT MAGNET INDUSTRY. C. A. Fed. Cir. Certiorari denied. Reported below: 699 Fed. Appx. 929.

No. 17–787. ENOVA TECHNOLOGY CORP. *v.* SEAGATE TECHNOLOGY (US) HOLDINGS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 987.

No. 17–819. AMEREN CORP. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1009.

No. 17–859. HERTZ CORP. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 17–862. MARICOPA COUNTY, ARIZONA, ET AL. *v.* VILLA. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 3d 1224.

No. 17–914. LIVINGSTON CHRISTIAN SCHOOLS *v.* GENOA CHARTER TOWNSHIP. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 996.

No. 17–915. NORTH COAST RAILROAD AUTHORITY *v.* FRIENDS OF THE EEL RIVER ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 5th 677, 399 P. 3d 37.

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No. 17–1009. *CONSTITUTION PIPELINE Co., LLC v. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 3d 87.

No. 17–1018. *UNILOC USA, INC., ET AL. v. SEGA OF AMERICA, INC., ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 711 Fed. Appx. 986.

No. 17–1043. *WORLDWIDE OILFIELD MACHINE, INC. v. AMERIFORGE GROUP, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1036.

No. 17–1052. *BUSSELL v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 695.

No. 17–1127. *THOMAS E. PROCTOR HEIRS TRUST v. CORNWALL MOUNTAIN INVESTMENTS, L. P., ET AL.* (Reported below: 168 A. 3d 332); and *MARGARET O. F. PROCTOR TRUST v. CORNWALL MOUNTAIN INVESTMENTS, L. P., ET AL.* (158 A. 3d 148). Super. Ct. Pa. Certiorari denied.

No. 17–1161. *NATIONWIDE BIWEEKLY ADMINISTRATION, INC., ET AL. v. HUBANKS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 716.

No. 17–1168. *LONG ET AL. v. SOUTH DAKOTA.* Sup. Ct. S. D. Certiorari denied. Reported below: 2017 S.D. 78, 904 N. W. 2d 358.

No. 17–1173. *WILLIAMS v. GRAND TRUNK WESTERN RAILROAD Co. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 821.

No. 17–1186. *LUCE ET AL. v. TOWN OF CAMPBELL, WISCONSIN.* C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 512.

No. 17–1190. *UTTERBACK v. TRUSTMARK NATIONAL BANK ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 241.

No. 17–1191. *GOMEZ v. TEXAS.* Ct. App. Tex., 14th Dist. Certiorari denied.

No. 17–1192. *TIRAT-GEFEN v. BATISTA ALMEIDA.* Sup. Ct. Va. Certiorari denied.

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No. 17–1195. *WANN v. ST. FRANCOIS COUNTY, MISSOURI, ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 857.

No. 17–1209. *BARCLAYS PLC ET AL. v. WAGGONER ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 3d 79.

No. 17–1254. *BARTH v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 705 Fed. Appx. 1003.

No. 17–1256. *FRANKLIN-MASON v. UNITED STATES.* C. A. Fed. Cir. Certiorari denied. Reported below: 692 Fed. Appx. 633.

No. 17–1260. *MOBLEY v. LEATHERWOOD ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–1263. *SUKHOVA v. SESSIONS, ATTORNEY GENERAL.* C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 638.

No. 17–1267. *SANDHU v. SESSIONS, ATTORNEY GENERAL.* C. A. 9th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 647.

No. 17–1323. *GRAHAM v. WELLS FARGO BANK, N. A., ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 831.

No. 17–1350. *NAHMANI v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 457.

No. 17–1362. *SCHNEIDER v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 474.

No. 17–1367. *INDUSTRIAL MODELS, INC. v. SNF, INC., ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 716 Fed. Appx. 949.

No. 17–1380. *CHAPMAN ET UX. v. COMMISSIONER OF INTERNAL REVENUE.* C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 885.

No. 17–1381. *IN RE GRAND JURY SUBPOENAS RETURNABLE DECEMBER 16, 2015.* C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 3d 141.

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No. 17–6338. *MARTINEZ-RIVERA v. UNITED STATES* (Reported below: 696 Fed. Appx. 169); and *TELLO-SEGUNDO v. UNITED STATES* (693 Fed. Appx. 331). C. A. 5th Cir. Certiorari denied.

No. 17–6562. *SAUCEDO-RIOS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 882.

No. 17–6596. *MILLER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 696.

No. 17–7085. *GONZALEZ v. ARIZONA EX REL. BRNOVICH, ATTORNEY GENERAL OF ARIZONA*. Ct. App. Ariz. Certiorari denied.

No. 17–7157. *SNYDER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 871 F. 3d 1122.

No. 17–7173. *MARTINEZ-CERDA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 398.

No. 17–7607. *WESTOVER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 734.

No. 17–7845. *OGLETREE v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7848. *ORTEGA v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143424–U.

No. 17–7850. *PHILLIP v. MCARDLE*. C. A. 2d Cir. Certiorari denied.

No. 17–7851. *MCPHERSON v. ILLINOIS*. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2017 IL App (2d) 150299–U.

No. 17–7853. *WILLACY v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 744.

No. 17–7856. *NELSON v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17–7865. *GARCIA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 316.

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No. 17-7891. *BLUEFELD v. COHEN ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 788.

No. 17-7900. *NORWOOD v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17-7903. *THOMAS v. OKLAHOMA.* Ct. Crim. App. Okla. Certiorari denied.

No. 17-7904. *WILSON v. VANNOY, WARDEN.* C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 804.

No. 17-7907. *OCHOA v. NEW MEXICO.* Sup. Ct. N. M. Certiorari denied. Reported below: 2017-NMSC-031, 406 P. 3d 505.

No. 17-7911. *RICES v. CALIFORNIA.* Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 5th 49, 406 P. 3d 788.

No. 17-7917. *ESPINOZA v. MCGRATH, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 17-7922. *WORTH v. NEW YORK.* App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 145 App. Div. 3d 1573, 42 N. Y. S. 3d 905.

No. 17-7926. *STANBACK v. DANIELS.* C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 183.

No. 17-7933. *BRUMFIELD v. NATCHITOCHES PARISH DETENTION CENTER ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 309.

No. 17-7943. *STANLEY v. WASHINGTON.* Ct. App. Wash. Certiorari denied. Reported below: 200 Wash. App. 1035.

No. 17-7945. *RICHARDSON v. LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17-7951. *AUSTIN v. JACKSONVILLE SHERIFF'S OFFICE.* Sup. Ct. Fla. Certiorari denied.

No. 17-7956. *TEDESCO v. PENNSYLVANIA.* Super. Ct. Pa. Certiorari denied. Reported below: 161 A. 3d 375.

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No. 17-7973. *ROOSEVELT W. ET AL. v. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES*. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 17-7985. *WRIGHT v. HORTON, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17-7997. *NOMESIRI v. PRICE*. C. A. 9th Cir. Certiorari denied.

No. 17-8001. *RATCLIFF v. TEXAS ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 410.

No. 17-8029. *SEALS, AKA SEALS-BROWN v. LLOPIS ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 533.

No. 17-8062. *KELLY v. TRIERWEILER, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17-8064. *CHANDLER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-8079. *PYLES v. SPILLER ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 279.

No. 17-8088. *ROYSTER v. SHOOP, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17-8133. *WARFIELD v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 140813-U.

No. 17-8218. *WASHINGTON v. DIAMOND*. C. A. 9th Cir. Certiorari denied.

No. 17-8227. *CRAMER v. CITY OF AUBURN, CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 688 Fed. Appx. 483.

No. 17-8229. *MATHIAS v. BRITAIN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 876 F. 3d 462.

No. 17-8233. *WILLOUGHBY v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

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No. 17–8238. *WHITE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 194.

No. 17–8251. *ORTIZ v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 17–8252. *ORELLANO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 915.

No. 17–8259. *SEVILLA-ACOSTA v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8276. *ALEXANDER v. WILLIAMS, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 171.

No. 17–8287. *ROBINSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 135.

No. 17–8293. *VEATCH v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 338.

No. 17–8300. *STAMPER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17–8303. *COURTRIGHT v. UNITED STATES*. C. A. 7th Cir. Certiorari denied.

No. 17–8307. *WILLIAMS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 890.

No. 17–8308. *WHITEWATER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 3d 289.

No. 17–8310. *DELOGE v. DESOTO COUNTY SHERIFF'S DEPARTMENT ET AL.* Ct. App. Miss. Certiorari denied. Reported below: 230 So. 3d 1026.

No. 17–8316. *ZIMNY v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 38.

No. 17–8317. *FORD-BEY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 175.

No. 17–8318. *FELIX v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 958.

No. 17–8320. *SHAH v. QUINTANA, WARDEN*. C. A. 6th Cir. Certiorari denied.

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No. 17–8322. *HARRISON v. ILLINOIS*. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 170100–U.

No. 17–8323. *WINSTEAD v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 369.

No. 17–8330. *BAEZ v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 984.

No. 17–8337. *EVANS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17–8342. *TAYLOR v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 495.

No. 17–8343. *WILSON v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 182 A. 3d 118.

No. 17–8377. *JOHNSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8379. *ARREDONDO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 243.

No. 17–558. *LINKGINE, INC. v. VIGLINK, INC., ET AL.* C. A. Fed. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 689 Fed. Appx. 965.

No. 17–707. *KIP CR P1 LP, SUCCESSOR IN TITLE TO CROSSROADS SYSTEMS, INC. v. ORACLE CORP. ET AL.* C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 690 Fed. Appx. 665.

No. 17–708. *KIP CR P1 LP, SUCCESSOR IN TITLE TO CROSSROADS SYSTEMS, INC. v. CISCO SYSTEMS, INC., ET AL.* C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 694 Fed. Appx. 780.

No. 17–756. *PUBLIC SERVICE COMPANY OF NEW MEXICO v. BARBOAN ET AL.* C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 857 F. 3d 1101.

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No. 17–1084. *COLORADO v. FUENTES-ESPINOZA*. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 408 P. 3d 445.

No. 17–1249. *CRUZ SALES v. SESSIONS, ATTORNEY GENERAL*. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 868 F. 3d 779.

No. 17–1341. *BASCIANO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 17–1355. *MANNING v. JONES ET AL.* C. A. 8th Cir. Motion of National Association of Legal Scholars et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 875 F. 3d 408.

No. 17–8056. *MEDRANO v. SESSIONS, ATTORNEY GENERAL*. C. A. 2d Cir. Certiorari before judgment denied.

No. 17–8333. *COLLINS, AKA TURNER v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 17–8341. *RIOS-MORALES v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 878 F. 3d 978.

Rehearing Denied

No. 17–1006. *LAITY v. NEW YORK ET AL.*, 583 U. S. 1181;

No. 17–1028. *IN RE WU ET UX.*, 583 U. S. 1155;

No. 17–1131. *TAYLOR v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA*, 583 U. S. 1183;

No. 17–6500. *HOWELL v. BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY*, 583 U. S. 1067;

No. 17–6933. *PEAK v. UNITED STATES*, 583 U. S. 1080;

No. 17–7017. *STEPTOE v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*, 583 U. S. 1126;

No. 17–7018. *ENRIQUEZ SANCHEZ v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*, 583 U. S. 1126;

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No. 17–7063. ODEJIMI *v.* TOWN OF WINDSOR, NEW YORK, 583 U. S. 1127;

No. 17–7160. MALUMPHY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 583 U. S. 1130;

No. 17–7249. BAEZ ROMERO *v.* DHL EXPRESS (USA), INC., ET AL., 583 U. S. 1170;

No. 17–7278. WEISSERT *v.* PALMER, WARDEN, 583 U. S. 1133;

No. 17–7314. LILLIE *v.* HERNANDEZ, WARDEN, 583 U. S. 1134;

No. 17–7327. COTTON, AKA CORNELIUS-COTTON *v.* SUPREME COURT OF THE UNITED STATES ET AL., 583 U. S. 1171;

No. 17–7450. DARBY *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS, 583 U. S. 1159;

No. 17–7466. IN RE CERVANTES, 583 U. S. 1113;

No. 17–7470. RIOS *v.* LEWIS, WARDEN, 583 U. S. 1188;

No. 17–7487. MARTINEZ *v.* UNITED STATES, 583 U. S. 1138; and

No. 17–7565. JACKSON *v.* UNITED STATES, 583 U. S. 1161. Petitions for rehearing denied.

MAY 4, 2018

Certiorari Denied

No. 17–8787 (17A1220). BUTTS *v.* GEORGIA. 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. 17–8788 (17A1221). BUTTS *v.* SELLERS, 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.

MAY 9, 2018

Dismissal Under Rule 46

No. 16–388. PATTERSON ET AL. *v.* RAYMOURS FURNITURE CO., INC. C. A. 2d Cir. Certiorari dismissed under this Court’s Rule 46.1. Reported below: 659 Fed. Appx. 40.

MAY 14, 2018

Certiorari Granted—Vacated and Remanded

No. 16–617. UNITED STATES *v.* HERNANDEZ-LARA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pau-*

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peris granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Beckles v. United States*, 580 U. S. 256 (2017). Reported below: 817 F. 3d 651.

No. 16–6288. SOLANO-CRUZ *v.* UNITED STATES. Reported below: 667 Fed. Appx. 476. C. A. 5th Cir.;

No. 16–7214. PERDOMO *v.* UNITED STATES. Reported below: 661 Fed. Appx. 823. C. A. 5th Cir.;

No. 16–8058. ALVARO-VELASCO *v.* UNITED STATES (Reported below: 670 Fed. Appx. 854); MONTES BENAVIDES *v.* UNITED STATES (671 Fed. Appx. 350); CASTRO-CASTRO, AKA CASTRO-VALDES, AKA CASTRO-VALDEZ, AKA RIVERA-CASTRO *v.* UNITED STATES (672 Fed. Appx. 413); CANALES-BONILLA *v.* UNITED STATES (664 Fed. Appx. 403); GARRIDO, AKA GARRIDO-ARRIAGA *v.* UNITED STATES (671 Fed. Appx. 362); GONZALEZ-BAUTISTA *v.* UNITED STATES (671 Fed. Appx. 237); LARA-GRACIA *v.* UNITED STATES (671 Fed. Appx. 248); MORALES-LEON, AKA MORALES *v.* UNITED STATES (671 Fed. Appx. 327); MORALES-SANCHEZ *v.* UNITED STATES (671 Fed. Appx. 283); PEREZ-DE LEON *v.* UNITED STATES (671 Fed. Appx. 249); TZACIR-GARCIA *v.* UNITED STATES (674 Fed. Appx. 387); and VALDEZ, AKA VALDEZ CARRION *v.* UNITED STATES (671 Fed. Appx. 297). C. A. 5th Cir.;

No. 16–8453. PEREZ-JIMENEZ *v.* UNITED STATES. Reported below: 671 Fed. Appx. 938. C. A. 5th Cir.;

No. 16–8675. AGUIRRE-ARELLANO *v.* UNITED STATES (Reported below: 677 Fed. Appx. 158); ESPARZA-CASILLAS *v.* UNITED STATES (678 Fed. Appx. 195); MENDOZA-ACEVES *v.* UNITED STATES (677 Fed. Appx. 169); RIVERA-HERNANDEZ *v.* UNITED STATES (679 Fed. Appx. 371); TORRES, AKA TORRES-MENJIVAR, AKA TORRES-MENJYBAR *v.* UNITED STATES (677 Fed. Appx. 145); VALLE-RAMIREZ *v.* UNITED STATES (677 Fed. Appx. 187); VANEGAS-MARTINEZ *v.* UNITED STATES (678 Fed. Appx. 260); and ANASTACIO-MORALES *v.* UNITED STATES (677 Fed. Appx. 167). C. A. 5th Cir.;

No. 16–8734. CASTANEDA-MORALES, AKA VARGAS-BUSTOS *v.* UNITED STATES (Reported below: 673 Fed. Appx. 437); MORALES-CARDENAS *v.* UNITED STATES (677 Fed. Appx. 200); VALASQUEZ-RIOS *v.* UNITED STATES (677 Fed. Appx. 186); VEGA-ZAPATA, AKA GONZALEZ, AKA MEDINA *v.* UNITED STATES (678 Fed. Appx. 237); and PEREZ-CONDE *v.* UNITED STATES (682 Fed. Appx. 332). C. A. 5th Cir.;

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- No. 16–8996. *TAYLOR v. UNITED STATES*. C. A. 8th Cir.;
- No. 16–9319. *LINARES-MAZARIEGO v. UNITED STATES*. Reported below: 677 Fed. Appx. 182. C. A. 5th Cir.;
- No. 17–5283. *GOMEZ-UREABA ET AL. v. UNITED STATES*. Reported below: 686 Fed. Appx. 271. C. A. 5th Cir.;
- No. 17–5305. *GARCIA-HERNANDEZ, AKA DANIEL-GARCIA, AKA HERNANDEZ GARCIA, AKA HERNANDEZ-GARCIA, AKA GARCIA v. UNITED STATES* (Reported below: 689 Fed. Appx. 252); and *DELGADO CRUZ, AKA DELGADO, AKA CRUZ DELGADO, AKA CRUZ-DELGADO v. UNITED STATES* (692 Fed. Appx. 187). C. A. 5th Cir.;
- No. 17–5484. *MCCOY v. UNITED STATES*. C. A. 8th Cir.;
- No. 17–5495. *WINTERS v. UNITED STATES*. Reported below: 691 Fed. Appx. 286. C. A. 8th Cir.;
- No. 17–5767. *XING LIN v. UNITED STATES*. Reported below: 683 Fed. Appx. 41. C. A. 2d Cir.;
- No. 17–6065. *HERNANDEZ-RAMIREZ, AKA HERNANDEZ v. UNITED STATES* (Reported below: 693 Fed. Appx. 371); and *RAMOS, AKA MARQUEZ-RAMOS v. UNITED STATES* (690 Fed. Appx. 880). C. A. 5th Cir.;
- No. 17–6117. *EIZEMBER v. UNITED STATES*. C. A. 8th Cir.;
- No. 17–6340. *ENIX v. UNITED STATES*. C. A. 11th Cir.;
- No. 17–6368. *ECOURSE-WESTBROOK v. UNITED STATES*. C. A. 11th Cir.;
- No. 17–6628. *OROZCO v. SESSIONS, ATTORNEY GENERAL*. C. A. 5th Cir.;
- No. 17–6926. *CARREON v. UNITED STATES*. C. A. 5th Cir.; and
- No. 17–7183. *CASABON-RAMIREZ, AKA CASABON v. UNITED STATES*. Reported below: 706 Fed. Appx. 214. 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 *Sessions v. Dimaya*, ante, p. 148.
- No. 16–7667. *GARCIA BELLO, AKA BELLO, AKA GARCIA, AKA BELO, AKA RODRIGO GARCIA v. UNITED STATES* (Reported below: 670 Fed. Appx. 354); *FLORES v. UNITED STATES* (670 Fed. Appx. 261); *SANCHEZ OLIVAREZ, AKA SANCHEZ, AKA OLIVAREZ SANCHEZ, AKA OLIVARE SANCHEZ, AKA SANCHEZ-OLIVAREZ v. UNITED STATES* (670 Fed. Appx. 254); *MAYORGA-SALAZAR v. UNITED STATES* (670 Fed. Appx. 847); *AMAYA-GUERRERO, AKA AMAYA v. UNITED STATES* (671 Fed. Appx. 314); *MARTINEZ-*

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CASTILLO, AKA GONZALES, AKA NOGES-SAUCEDO, AKA MARTINEZ-SAVAVEDRA *v.* UNITED STATES (670 Fed. Appx. 863); VAZQUEZ-HERNANDEZ *v.* UNITED STATES (671 Fed. Appx. 259); GUERRERO-ARANIVA, AKA ARANIVA-GUERRERO *v.* UNITED STATES (664 Fed. Appx. 404); OLVERA-CASTRO *v.* UNITED STATES (671 Fed. Appx. 915); SANABIA-SANCHEZ, AKA SARABIA-SANCHEZ *v.* UNITED STATES (671 Fed. Appx. 255); TREJO-DOMINGUEZ, AKA DOMINGUEZ TREJO, AKA HERNANDEZ-HERRERA *v.* UNITED STATES (671 Fed. Appx. 324); REYES-DIAZ *v.* UNITED STATES (671 Fed. Appx. 914); CARRILLO-HERNANDEZ, AKA CARILLO-HERNANDEZ, AKA CARRILLO, AKA HERNANDEZ CARRILLO, AKA CARRILLO HERNANDEZ *v.* UNITED STATES (671 Fed. Appx. 361); TREVINO-RODRIGUEZ *v.* UNITED STATES (672 Fed. Appx. 490); and CABRERA *v.* UNITED STATES (671 Fed. Appx. 352). C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari as to Daniel G. Bello, Fidel Flores, Jose S. Olivarez, Rudy Martinez-Castillo, Lugardo Vazquez-Hernandez, Angel D. Sanabia-Sanchez, Lino I. Carrillo-Hernandez, and Hector A. Cabrera granted, judgments vacated, and case remanded for further consideration in light of *Sessions v. Dimaya, ante*, p. 148. Certiorari as to Genaro Mayorga-Salazar, Marion A. Amaya-Guerrero, Rudith V. Guerrero-Araniva, Tito Olvera-Castro, Carlos Trejo-Dominguez, Evaristo Reyes-Diaz, and Francisco D. Trevino-Rodriguez denied.

No. 16–8777. GLOVER *v.* UNITED STATES; and

No. 16–8997. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 677 Fed. Appx. 933. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Sessions v. Dimaya, ante*, p. 148.

No. 16–9660. LARIOS-VILLATORO *v.* UNITED STATES (Reported below: 684 Fed. Appx. 411); and HERNANDEZ-HERNANDEZ *v.* UNITED STATES (689 Fed. Appx. 228). C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari as to Daniel Larios-Villatoro granted, judgment vacated, and case remanded for further consideration in light of *Sessions v. Dimaya, ante*, p. 148. Certiorari as to Jaime A. Hernandez-Hernandez denied.

No. 17–97. UNITED STATES *v.* JENKINS. C. A. 7th Cir. Reported below: 849 F. 3d 390;

No. 17–651. UNITED STATES *v.* JACKSON. C. A. 7th Cir. Reported below: 865 F. 3d 946; and

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No. 17–820. DIAZ-ESPARZA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Reported below: 697 Fed. Appx. 338. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Sessions v. Dimaya*, ante, p. 148.

No. 17–350. PNC BANK N. A. ET AL. *v.* SECURE AXCESS, LLC. C. A. Fed. Cir. Certiorari granted, judgment vacated as moot, and case remanded to the Court of Appeals with instructions to remand the case to the Patent Trial and Appeal Board to vacate the Board’s order. See *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950). JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 848 F. 3d 1370.

Certiorari Dismissed

No. 17–8027. POINTER *v.* ALLIED BARTON SECURITY CO. C. A. 8th 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 non-criminal 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*).

No. 17–8113. JOHNSON *v.* BEARD ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8. Reported below: 679 Fed. Appx. 583.

No. 17–8122. WOODS *v.* ADAMS ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8. Reported below: 698 Fed. Appx. 528.

No. 17–8426. STRAW *v.* SUPREME COURT OF INDIANA ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8.

Miscellaneous Orders

No. 17M109. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* CATASTROPHE MANAGEMENT SOLUTIONS. Motion of Chastity

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Jones to intervene in order to file petition for writ of certiorari denied.

No. 17M110. WEDINGTON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17M111. AL-MAQABLAH *v.* ALLEY;

No. 17M112. GILLESPIE *v.* STAUB ET AL.;

No. 17M114. SNELLING *v.* WARREN ET AL.;

No. 17M115. DEVOE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 17M116. WASHINGTON *v.* UNITED STATES ET AL.;

No. 17M117. CARR *v.* BEAM ET AL.; and

No. 17M118. RIVERA *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17M113. MELVIN *v.* WILKIE, ACTING SECRETARY OF VETERANS AFFAIRS. Motion for leave to proceed as a veteran denied.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. Motion of the former Special Master for allowance of fees and disbursements granted, and the former Special Master is awarded a total of \$10,101.86 for the period March 13, 2017, through April 2, 2018, to be paid as follows: 37.5% by Texas, 37.5% by New Mexico, 20% by the United States, and 5% by Colorado. [For earlier order herein, see, *e. g.*, *ante*, p. 914.]

No. 17-1237. OSAGE WIND, LLC, ET AL. *v.* OSAGE MINERALS COUNCIL. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17-8544. ROBINETT *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 17-1412. IN RE RODRIGUEZ; and

No. 17-8559. IN RE JONES. Petitions for writs of habeas corpus denied.

No. 17-8584. IN RE BRICE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

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No. 17-7976. IN RE LEE; and
No. 17-8417. IN RE LINDSEY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 17-1104. AIR & LIQUID SYSTEMS CORP. ET AL. *v.* DEVRIES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DEVRIES, DECEASED, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 873 F. 3d 232.

No. 17-1042. BNSF RAILWAY CO. *v.* LOOS. C. A. 8th Cir. Motion of Association of American Railroads for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 865 F. 3d 1106.

Certiorari Denied. (See also Nos. 16-7667 and 16-9660, *supra*.)

No. 15-1494. SESSIONS, ATTORNEY GENERAL *v.* MAGANA-PENA. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 547.

No. 15-1496. SESSIONS, ATTORNEY GENERAL *v.* LOPEZ-ISLAVA. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 552.

No. 16-398. SESSIONS, ATTORNEY GENERAL *v.* MIRANDA-GODINEZ. C. A. 9th Cir. Certiorari denied. Reported below: 649 Fed. Appx. 456.

No. 16-966. SESSIONS, ATTORNEY GENERAL *v.* GOLICOV. C. A. 10th Cir. Certiorari denied. Reported below: 837 F. 3d 1065.

No. 16-978. SESSIONS, ATTORNEY GENERAL *v.* BAPTISTE. C. A. 3d Cir. Certiorari denied. Reported below: 841 F. 3d 601.

No. 16-6259. GONZALEZ-LONGORIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 831 F. 3d 670.

No. 16-6392. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 3d 340.

No. 16-7373. PRICKETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 839 F. 3d 697.

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No. 16–9318. *MALDONADO-LANDAUERDE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 181.

No. 17–684. *VICO v. UNITED STATES*; and

No. 17–685. *VICO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 594.

No. 17–731. *OMNIA ITALIAN DESIGN, INC. v. STONE CREEK, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 3d 426.

No. 17–809. *STANFORD v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 693 Fed. Appx. 908.

No. 17–818. *HUERTAS v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 864 F. 3d 214.

No. 17–867. *BARROSO ET AL. v. SHERIFF OF BEXAR COUNTY, TEXAS, ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 680 Fed. Appx. 338.

No. 17–903. *HOERLE v. NEBRASKA*. Sup. Ct. Neb. Certiorari denied. Reported below: 297 Neb. 840, 901 N. W. 2d 327.

No. 17–952. *WYOMING v. SAM*. Sup. Ct. Wyo. Certiorari denied. Reported below: 2017 WY 98, 401 P. 3d 834.

No. 17–979. *BIC CORP. ET AL. v. MARKETQUEST GROUP, INC., DBA ALL-IN-ONE*. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 927.

No. 17–982. *TEIXEIRA ET AL. v. ALAMEDA COUNTY, CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 670.

No. 17–1066. *KOPRAS v. MARCO MARINE CONSTRUCTION, INC.* Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 237 So. 3d 302.

No. 17–1085. *PERSONAL AUDIO, LLC v. ELECTRONIC FRONTIER FOUNDATION*. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 3d 1246.

No. 17–1090. *PETRO-HUNT, LLC v. UNITED STATES*. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 3d 1370.

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No. 17–1099. *COSCIA v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 3d 782.

No. 17–1130. *OKECHUKU v. UNITED STATES*; and
No. 17–7295. *IWUOHA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 3d 678.

No. 17–1204. *SCHROETER v. KEDRA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KEDRA*. C. A. 3d Cir. Certiorari denied. Reported below: 876 F. 3d 424.

No. 17–1213. *GENERAL MOTORS LLC v. BAVLSIK ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 3d 800.

No. 17–1228. *CATANACH v. THOMSON, JUDGE, DISTRICT COURT OF NEW MEXICO, FIRST JUDICIAL DISTRICT*. C. A. 10th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 595.

No. 17–1232. *COSGRIFF ET AL. v. WINNEBAGO COUNTY, ILLINOIS, ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 912.

No. 17–1239. *WALLS v. SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES*. Ct. App. S. C. Certiorari denied.

No. 17–1253. *BEAVERS v. SCHNEIDER NATIONAL, INC.* C. A. 9th Cir. Certiorari denied.

No. 17–1258. *BOLTON ET AL. v. CROWLEY, HOGE & FEIN, P. C.* Ct. App. D. C. Certiorari denied. Reported below: 170 A. 3d 214.

No. 17–1264. *COMMON APPLICATION, INC. v. COLLEGENET, INC.* C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 405.

No. 17–1273. *HOAI THANH v. NGO*. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 200.

No. 17–1277. *BOYER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WARE v. HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 3d 273.

No. 17–1288. *STEWART v. TRIERWEILER, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 633.

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No. 17–1297. *HOLMES ET AL. v. FEDERAL ELECTION COMMISSION*. C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 1153.

No. 17–1313. *DEK–M NATIONWIDE, LTD. v. HILL ET AL.* Ct. App. Tex., 14th Dist. Certiorari denied.

No. 17–1317. *NIKOLAO v. LYON ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 310.

No. 17–1319. *SECURED MAIL SOLUTIONS LLC v. UNIVERSAL WILDE, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 3d 905.

No. 17–1325. *HUMBLE SURGICAL HOSPITAL, LLC v. CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 3d 478.

No. 17–1326. *HESSE v. TEXAS*. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 17–1347. *CASTILLO v. DORAL PARK COUNTRY CLUB VILLAS ET AL.* Sup. Ct. Fla. Certiorari denied.

No. 17–1377. *MAXCREST LTD. v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 536.

No. 17–1391. *CAMPBELL v. STEPHENS*. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 289.

No. 17–1394. *FUJITA v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 725.

No. 17–1405. *HANSEN v. BLACK*. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 3d 554.

No. 17–1417. *HOWELL v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–1430. *WEED v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 68.

No. 17–1440. *COLLINS v. VILLAGE OF PALATINE, ILLINOIS*. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 839.

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No. 17–5476. *RODRIGUEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 339.

No. 17–6721. *ONTIVEROS-CEDILLO v. UNITED STATES* (Reported below: 698 Fed. Appx. 218); and *BOLANOS-GALVAN, AKA ALVARAD, AKA GALVAN BOLANOS, AKA BOLANOS GALVAN v. UNITED STATES* (697 Fed. Appx. 370). C. A. 5th Cir. Certiorari denied.

No. 17–6751. *GUTIERREZ-LOPEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 965.

No. 17–6886. *RODRIGUEZ VILLALOBOS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 157.

No. 17–6927. *ROBINSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–7024. *MONROY v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1015.

No. 17–7137. *MONTEZ v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 858 F. 3d 1085.

No. 17–7155. *AGUILAR v. MCDOWELL, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 505.

No. 17–7197. *ADAMS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–7248. *RAGLAND v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–7277. *WINDOM v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 863 F. 3d 1322.

No. 17–7387. *DOE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 3d 238.

No. 17–7521. *KITCHEN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 842.

No. 17–7603. *WILLIAMS v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

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No. 17-7692. *STONE v. LOUISIANA DEPARTMENT OF REVENUE*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 216.

No. 17-7960. *CLAYTON v. TENNESSEE*. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 535 S. W. 3d 829.

No. 17-7964. *FLORES v. TEXAS DEPARTMENT OF CRIMINAL JUSTICE TRANSITORIAL PLANNING DEPARTMENT ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 300.

No. 17-7965. *GLOVER v. LANE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17-7978. *LUCY v. GROW*. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 575.

No. 17-7980. *WARD v. DEVILLE, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17-7981. *WOODELL v. LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD*. C. A. 3d Cir. Certiorari denied.

No. 17-7984. *TEDTAOTAO v. TERRITORY OF GUAM*. Sup. Ct. Guam. Certiorari denied. Reported below: 2017 Guam 12.

No. 17-7993. *POWDRILL v. TEXAS ET AL.* C. A. 5th Cir. Certiorari denied.

No. 17-7994. *MONTGOMERY v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17-8000. *BETHUNE v. METROPOLITAN TRANSPORTATION AUTHORITY/LONG ISLAND BUS ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 17-8009. *ENDENCIA v. WELLS FARGO BANK, AS TRUSTEE*. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 17-8012. *ALLEN v. HILL, WARDEN*. C. A. 9th Cir. Certiorari denied.

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No. 17–8017. *ADAMSON v. GRIFFIN*, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 17–8018. *BELL v. JONES*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8019. *BOSTON v. JOHNSON*, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8034. *KING v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143242–U.

No. 17–8042. *PEYTON v. BROWN ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17–8053. *BOOKER v. TIMMONS ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 88.

No. 17–8054. *BAILEY v. DAVIS*, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8058. *CRYSTAL v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 234 So. 3d 669.

No. 17–8066. *AMURA v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 17–8067. *BOND v. CLARK ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 132.

No. 17–8069. *BUXTON v. HILL ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17–8072. *LIGGINS v. JPMORGAN CHASE BANK, N. A.* Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2016-Ohio-3528.

No. 17–8080. *NASBY v. NEVADA*. Ct. App. Nev. Certiorari denied. Reported below: 133 Nev. 1054.

No. 17–8081. *PETTAWAY v. TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA ET AL.* C. A. D. C. Cir. Certiorari denied.

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No. 17–8089. *ROBERTS v. HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 777.

No. 17–8091. *NELSON v. AMALGAMATED TRANSIT UNION LOCAL 1181–1061, AFL–CIO, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 17–8096. *BERARDI v. PARAMO, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 517.

No. 17–8098. *KARABAJAKYAN v. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION.* C. A. 9th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 553.

No. 17–8099. *JACKSON v. HAINSWORTH, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 713 Fed. Appx. 68.

No. 17–8102. *GASCA DURAN v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–8112. *KONSDORF v. MICHIGAN.* Ct. App. Mich. Certiorari denied.

No. 17–8116. *MORRIS v. CITY OF NEW YORK, NEW YORK, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 17–8117. *WHITE v. JACKSON ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 199.

No. 17–8118. *TOWNES v. NEW MEXICO.* Dist. Ct. N. M., Bernalillo County. Certiorari denied.

No. 17–8124. *ZARYCHTA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–8145. *STEILMAN v. MICHAEL, DIRECTOR, MONTANA DEPARTMENT OF CORRECTIONS, ET AL.* Sup. Ct. Mont. Certiorari denied. Reported below: 389 Mont. 512, 407 P. 3d 313.

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No. 17–8146. *SMITH v. SEMPLE*, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 17–8154. *MILLER v. BALDWIN*. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 408.

No. 17–8161. *HAYNES v. OREGON BOARD OF PAROLE AND POST-PRISON SUPERVISION*. Sup. Ct. Ore. Certiorari denied. Reported below: 362 Ore. 15, 403 P. 3d 394.

No. 17–8165. *RAMOS-PEREZ v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 129.

No. 17–8166. *STEELE v. HOLLAND*, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8189. *CHAPMAN v. WYOMING*. Sup. Ct. Wyo. Certiorari denied.

No. 17–8192. *LAWRENCE v. FLORIDA*. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 235 So. 3d 875.

No. 17–8193. *BRYANT v. BROWN*, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 3d 988.

No. 17–8245. *SEELEY v. INDIANA*. Ct. App. Ind. Certiorari denied. Reported below: 86 N. E. 3d 241.

No. 17–8253. *CASTILLO v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 17–8257. *SIVAK v. IDAHO*. Sup. Ct. Idaho. Certiorari denied.

No. 17–8281. *TANH HUU LAM v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8294. *WELDON v. PACHECO*, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 837.

No. 17–8332. *MERIDYTH v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 722.

No. 17–8336. *DIAMOND v. MINNESOTA*. Sup. Ct. Minn. Certiorari denied. Reported below: 905 N. W. 2d 870.

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No. 17-8339. *WINFIELD v. DORETHY, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 871 F. 3d 555.

No. 17-8340. *WEST v. GROUNDS, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 476.

No. 17-8346. *TOLAND v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 560.

No. 17-8347. *PRUETT v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 678.

No. 17-8348. *MCELDERRY v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 863.

No. 17-8355. *ISMAY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17-8356. *GUZMAN-ORTIZ v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 849 F. 3d 708.

No. 17-8359. *HAMPTON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-8360. *GADSDEN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 756.

No. 17-8361. *HOLNESS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 237.

No. 17-8364. *MERAS CHAVEZ v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17-8366. *ROLLER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 309.

No. 17-8371. *HAWTHORNE v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 566.

No. 17-8372. *CERNY ET AL. v. SECURITIES AND EXCHANGE COMMISSION*. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 29.

No. 17-8374. *GOOCH v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. Reported below: 842 F. 3d 1274.

No. 17-8375. *FARAJ v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 427.

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No. 17–8380. *GARCIA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 3d 570.

No. 17–8383. *HARSHAW v. UNITED STATES*. Ct. App. D. C. Certiorari denied. Reported below: 176 A. 3d 173.

No. 17–8384. *LECOMPT v. HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY*. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 107.

No. 17–8385. *MARES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 822.

No. 17–8387. *MURRAY v. KIRBY, WARDEN*. C. A. 3d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 518.

No. 17–8389. *COX v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 891.

No. 17–8394. *NORTON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 303.

No. 17–8395. *PEREZ-MARTINEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 828.

No. 17–8398. *CHESSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 184.

No. 17–8399. *CATERBONE v. NATIONAL SECURITY AGENCY ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 678.

No. 17–8402. *BERNABE GONZALES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 367.

No. 17–8403. *GONZALEZ-ROSALES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 815.

No. 17–8404. *JEROME v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 853.

No. 17–8410. *CERDA-ANIMA v. VANNOY, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17–8412. *DYE v. BARNES, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 686.

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No. 17–8414. *YOUNG v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8415. *YOUNG v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 705 Fed. Appx. 94.

No. 17–8416. *LIZANO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 804.

No. 17–8433. *AKINS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8434. *TEDDER v. YELDELL, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 196.

No. 17–8437. *WILLIAMS v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS*. C. A. 11th Cir. Certiorari denied.

No. 17–8438. *JACKSON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 777.

No. 17–8441. *EDELMAN v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

No. 17–8446. *CARSON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 3d 584.

No. 17–8448. *MEZA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 190.

No. 17–8449. *MORRIS v. RICHARDS ET AL.* C. A. 9th Cir. Certiorari denied.

No. 17–8451. *GUEVARA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 684.

No. 17–8453. *GORIS v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 876 F. 3d 40.

No. 17–8456. *RICHARDS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 843.

No. 17–8458. *QUIROZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 423.

No. 17–8467. *FAIRCLOTH v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 887.

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No. 17–8472. *CONTRERAS v. DAVIS, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 160.

No. 17–8474. *SPEARS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8477. *SMITH v. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17–8479. *ROBBINS v. MISSISSIPPI*. Ct. App. Miss. Certiorari denied. Reported below: 235 So. 3d 205.

No. 17–8482. *PEREZ-PADRON v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 872.

No. 17–8483. *LEWIS v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 111.

No. 17–8488. *ZUKOWSKI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8497. *DINKINS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 240.

No. 17–8498. *COLEMAN v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–8499. *BELL v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 960.

No. 17–8503. *ALEXANDER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 192.

No. 17–8508. *REASON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 591.

No. 17–8509. *ANGEL SANCHEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 215.

No. 17–8510. *SMITH v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 151643, 89 N. E. 3d 960.

No. 17–8517. *OKHIO v. UNITED STATES*. C. A. 2d Cir. Certiorari denied.

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No. 17–8519. *SOCHA v. RICHARDSON, WARDEN*. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 983.

No. 17–8538. *WATSON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 499.

No. 16–991. *SESSIONS, ATTORNEY GENERAL v. SHUTI*. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 828 F. 3d 440.

No. 17–1103. *ABBOTT ET AL. v. BELL, MAYOR OF THE CITY OF BIRMINGHAM, ALABAMA, ET AL.* Sup. Ct. Ala. Motion of Committee for a Unified Independent Party, Inc., et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 272 So. 3d 613.

No. 17–1110. *SLOUGH ET AL. v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 865 F. 3d 767.

No. 17–1244. *GRIFFIN v. COCA-COLA REFRESHMENTS USA, INC., ET AL.* C. A. 11th Cir. Certiorari before judgment denied.

No. 17–1245. *THYSSEN-BORNEMISZA COLLECTION FOUNDATION v. CASSIRER ET AL.* C. A. 9th Cir. Motion of Comunidad Judía De Madrid et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 862 F. 3d 951.

No. 17–8312. *SPRINGER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 968.

No. 17–8367. *ONTIVEROS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 533.

No. 17–8405. *MIRABAL v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 876 F. 3d 1029.

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No. 17–8409. *CARR v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

- No. 16–9236. *FIELDS v. FLORIDA*, 583 U. S. 840;
No. 17–958. *WILLIAMS v. COURT SERVICES AND OFFENDER SUPERVISION AGENCY ET AL.*, 583 U. S. 1168;
No. 17–999. *JACKSON v. CONNECTICUT DEPARTMENT OF PUBLIC HEALTH ET AL.*, *ante*, p. 904;
No. 17–1017. *BRUNS ET UX. v. BRYANT ET AL.*, *ante*, p. 904;
No. 17–1068. *EDIONSERI v. SESSIONS, ATTORNEY GENERAL*, *ante*, p. 904;
No. 17–1071. *PAIGE v. LEGAULT ET AL.*, 583 U. S. 1182;
No. 17–6124. *BARTLETT v. MORTON, COMMISSIONER, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL.*, 583 U. S. 1017;
No. 17–6156. *AGUILAR v. CALIFORNIA*, 583 U. S. 1018;
No. 17–6588. *FOREMAN v. TERRIS, WARDEN*, 583 U. S. 1023;
No. 17–6872. *LOMACK v. FARRIS, WARDEN*, 583 U. S. 1124;
No. 17–6902. *STONE v. MARYLAND*, 583 U. S. 1124;
No. 17–6909. *J'WEIAL v. SEXTON, ACTING WARDEN*, 583 U. S. 1124;
No. 17–6924. *HAYNES v. ACQUINO ET AL.*, 583 U. S. 1124;
No. 17–7009. *BISHOP ET UX. v. FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL.*, 583 U. S. 1126;
No. 17–7040. *WILLIAMS v. PENNSYLVANIA*, 583 U. S. 1127;
No. 17–7065. *STONE v. MARYLAND*, 583 U. S. 1127;
No. 17–7130. *IN RE ARMSTRONG*, 583 U. S. 1114;
No. 17–7158. *IN RE COLEN*, 583 U. S. 1114;
No. 17–7236. *MAHJOR v. GREENPOINT MORTGAGE FUNDING, INC., ET AL.*, 583 U. S. 1158;
No. 17–7353. *COOLEY v. STEWART, WARDEN, ET AL.*, 583 U. S. 1186;
No. 17–7378. *CARACCIOLI v. FACEBOOK, INC.*, 583 U. S. 1136;
No. 17–7397. *IN RE OLIVER*, 583 U. S. 1113;
No. 17–7499. *STRAW v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA*, 583 U. S. 1188;
No. 17–7522. *JOHNSON v. LOYOLA UNIVERSITY OF NEW ORLEANS*, 583 U. S. 1188;
No. 17–7527. *DILLON v. DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL.*, 583 U. S. 1171;

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No. 17-7533. *MILLS v. INDIANA DEPARTMENT OF CHILD SERVICES ET AL.*, 583 U. S. 1188;

No. 17-7547. *CROMARTIE v. LAW OFFICES OF E. PEYTON FAULK, LLC, ET AL.*, *ante*, p. 906;

No. 17-7745. *R. D. v. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES*, 583 U. S. 1192;

No. 17-7810. *DORSEY v. DEPARTMENT OF EDUCATION ET AL.*, 583 U. S. 1193;

No. 17-7840. *CLAYBORNE v. TECUMSEH DEPARTMENT OF CORRECTIONS ET AL.*, *ante*, p. 920; and

No. 17-7870. *LYNCH v. PFIZER, INC.*, *ante*, p. 909. Petitions for rehearing denied.

No. 17-807. *TINGLE v. PERDUE, SECRETARY OF AGRICULTURE, ET AL.*, *ante*, p. 910. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 17-6175. *ALLEN v. UNITED STATES ET AL.*, 583 U. S. 1026. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

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Certiorari Granted—Vacated and Remanded

No. 17-5992. *LYLE v. UNITED STATES*. C. A. 2d Cir. Reported below: 856 F. 3d 191; and

No. 17-6520. *HOUSTON v. UNITED STATES*. C. A. 4th Cir. Reported below: 689 Fed. Appx. 170. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Byrd v. United States*, *ante*, p. 395.

Miscellaneous Orders

No. 17A1138. *JOVEL-JOVEL v. SESSIONS, ATTORNEY GENERAL*. C. A. 5th Cir. Application for stay of removal, addressed to JUSTICE KAGAN and referred to the Court, denied.

No. 17M119. *GLENN v. WELLS FARGO BANK, N. A.*;

No. 17M120. *SANCHEZ v. CITY OF CHICAGO, ILLINOIS, ET AL.*; and

No. 17M121. *QUILES v. CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY*. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

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No. 17–938. CITY OF CIBOLO, TEXAS *v.* GREEN VALLEY SPECIAL UTILITY DISTRICT. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–7606. IN RE WILLIAMS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 915] denied.

No. 17–8650. IN RE BENITEZ. Petition for writ of habeas corpus denied.

No. 17–8138. IN RE WATSON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 16–1275. VIRGINIA URANIUM, INC., ET AL. *v.* WARREN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 848 F. 3d 590.

No. 17–773. CULBERTSON *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. Certiorari granted. Reported below: 861 F. 3d 1197.

No. 17–1011. JAM ET AL. *v.* INTERNATIONAL FINANCE CORP. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 860 F. 3d 703.

No. 17–1107. ROYAL, WARDEN *v.* MURPHY. C. A. 10th Cir. Certiorari granted. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 875 F. 3d 896.

Certiorari Denied

No. 17–830. TRENT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 3d 699.

No. 17–925. BROSSART ET AL. *v.* JANKE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF FOR NELSON COUNTY, NORTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 3d 616.

No. 17–1059. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 3d 899.

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No. 17–1120. *TMBC, LLC v. McKEAGE ET AL.* C. A. 8th Cir. Certiorari denied. Reported below: 847 F. 3d 992.

No. 17–1135. *DEMIRCHYAN v. SESSIONS, ATTORNEY GENERAL.* C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 335.

No. 17–1282. *MILIONE v. CITY UNIVERSITY OF NEW YORK ET AL.* App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 153 App. Div. 3d 807, 59 N. Y. S. 3d 796.

No. 17–1294. *ROTHSCHILD DIGITAL MEDIA INNOVATIONS, LLC v. SONY INTERACTIVE ENTERTAINMENT AMERICA, LLC, ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 682.

No. 17–1298. *HIGHLAND CONSTRUCTION MANAGEMENT SERVICES, LP, ET AL. v. WELLS FARGO BANK, N. A.* C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 281.

No. 17–1303. *MAGUIRE FINANCIAL, LP v. POWERSECURE INTERNATIONAL, INC., ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 541.

No. 17–1305. *BORRELL v. RICHER ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 3d 154.

No. 17–1306. *YOUNG v. LIFE ESSENTIAL-RAFIKI, INC.* Ct. App. Ga. Certiorari denied.

No. 17–1311. *COULTER v. COULTER.* C. A. 3d Cir. Certiorari denied. Reported below: 715 Fed. Appx. 158.

No. 17–1315. *COOPER v. COUNTRYWIDE HOME LOANS, INC., ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 741.

No. 17–1324. *PIEPER ET AL. v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 137.

No. 17–1331. *CLEMENTS ET AL. v. SOUTHWESTERN BELL TELEPHONE CO., DBA AT&T OKLAHOMA, ET AL.* Sup. Ct. Okla. Certiorari denied. Reported below: 2017 OK 107, 413 P. 3d 539.

No. 17–1345. *WASHINGTON ET AL. v. KELLWOOD CO.* C. A. 2d Cir. Certiorari denied. Reported below: 714 Fed. Appx. 35.

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No. 17–1359. *TOSTE ET AL. v. EL DORADO COUNTY, CALIFORNIA, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 574.

No. 17–1389. *SALDANA-FOUNTAIN v. UNITED STATES ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 295.

No. 17–1395. *WILCOX v. JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 669.

No. 17–1420. *LARRY DOIRON, INC., ET AL. v. SPECIALTY RENTAL TOOLS & SUPPLY, L. L. P., ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 3d 568.

No. 17–1427. *GILLENWATER v. UNITED STATES.* C. A. 9th Cir. Certiorari denied.

No. 17–1431. *GRACE ET AL. v. SECURITIES AND EXCHANGE COMMISSION.* C. A. D. C. Cir. Certiorari denied. Reported below: 664 Fed. Appx. 7.

No. 17–1437. *RICE v. UNITED STATES.* C. A. 3d Cir. Certiorari denied. Reported below: 716 Fed. Appx. 121.

No. 17–1446. *BANKER v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 530.

No. 17–1461. *SMITH ET AL. v. BERTHIAUME.* C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 3d 1354.

No. 17–1466. *FULLWOOD v. MARYLAND.* Ct. Sp. App. Md. Certiorari denied. Reported below: 234 Md. App. 57, 168 A. 3d 1104.

No. 17–5572. *GUZMAN v. NEW YORK.* App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 3d 1450, 47 N. Y. S. 3d 557.

No. 17–5684. *ALLEN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 17–6262. *GATES v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

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No. 17-6769. *JAMES v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-6877. *ROBINSON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-7089. *CAVIN v. WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17-7210. *KEARN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 863 F.3d 1299.

No. 17-7368. *ANDERS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17-7589. *TARRIO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17-7717. *ORR v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 892.

No. 17-8139. *THOMAS v. MICHIGAN ATTORNEY GRIEVANCE COMMISSION*. Sup. Ct. Mich. Certiorari denied. Reported below: 501 Mich. 865, 901 N. W. 2d 390.

No. 17-8147. *CARRAFA v. CALIFORNIA*. Sup. Ct. Cal. Certiorari denied.

No. 17-8181. *RAYMOND v. WELLS FARGO BANK, N. A.* Sup. Ct. Fla. Certiorari denied.

No. 17-8207. *TROY-MCKOY v. UNIVERSITY OF ILLINOIS ET AL.* App. Ct. Ill., 4th Dist. Certiorari denied.

No. 17-8231. *WHEELER v. DAVIS*. C. A. 11th Cir. Certiorari denied.

No. 17-8232. *VANAMAN v. SHARTLE, WARDEN, ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 262.

No. 17-8262. *WOODSON v. UNITED STATES*;

No. 17-8263. *WOODSON v. UNITED STATES*;

No. 17-8264. *WOODSON v. UNITED STATES*;

No. 17-8265. *WOODSON v. UNITED STATES*;

No. 17-8266. *WOODSON v. UNITED STATES*;

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No. 17–8267. *WOODSON v. UNITED STATES*;
No. 17–8268. *WOODSON v. UNITED STATES*; and
No. 17–8269. *WOODSON v. UNITED STATES*. C. A. 4th Cir.
Certiorari denied. Reported below: 708 Fed. Appx. 115.

No. 17–8271. *KOKINDA v. GILMORE, SUPERINTENDENT, STATE
CORRECTIONAL INSTITUTION AT GREENE, ET AL.* C. A. 3d Cir.
Certiorari denied.

No. 17–8305. *TAYLOR v. TEXAS*. Ct. App. Tex., 5th Dist.
Certiorari denied.

No. 17–8335. *EVANS v. WALL, DIRECTOR, RHODE ISLAND DE-
PARTMENT OF CORRECTIONS*. C. A. 1st Cir. Certiorari denied.

No. 17–8376. *GLICK v. REVERSE MORTGAGE SOLUTIONS ET AL.*
Sup. Ct. Mont. Certiorari denied.

No. 17–8378. *GRECO v. GARNETT, WARDEN*. C. A. 7th Cir.
Certiorari denied.

No. 17–8407. *MINCEY v. DAVIS, WARDEN*. C. A. 9th Cir. Cer-
tiorari denied. Reported below: 712 Fed. Appx. 642.

No. 17–8408. *MILLER v. CLARKE, DIRECTOR, VIRGINIA DE-
PARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied.
Reported below: 701 Fed. Appx. 276.

No. 17–8435. *TORRES v. TURNER, WARDEN*. C. A. 6th Cir.
Certiorari denied.

No. 17–8436. *WHITNEY v. ARKANSAS*. Sup. Ct. Ark. Certio-
rari denied.

No. 17–8439. *JEFFERSON v. CLARKE, DIRECTOR, VIRGINIA DE-
PARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied.
Reported below: 707 Fed. Appx. 145.

No. 17–8455. *ROWE v. CLARKE, DIRECTOR, VIRGINIA DEPART-
MENT OF CORRECTIONS*. Sup. Ct. Va. Certiorari denied.

No. 17–8465. *BUCK v. UNITED STATES*. C. A. 10th Cir. Cer-
tiorari denied. Reported below: 717 Fed. Appx. 773.

No. 17–8481. *WIGGINS v. UNITED STATES*. C. A. 4th Cir.
Certiorari denied. Reported below: 698 Fed. Appx. 121.

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No. 17–8490. *McKINNEY v. KASICH, GOVERNOR OF OHIO, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–8492. *VARNER v. DAVEY, WARDEN.* C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 520.

No. 17–8493. *VIOLA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied.

No. 17–8496. *WHITFIELD v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 775.

No. 17–8507. *ROGERS v. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS.* C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 185.

No. 17–8512. *VAN BUREN v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 253.

No. 17–8514. *TILLMAN v. PASTRANA, WARDEN.* C. A. 11th Cir. Certiorari denied.

No. 17–8522. *ACCURSO v. UNITED STATES.* C. A. 8th Cir. Certiorari denied.

No. 17–8525. *AYALA-NUNEZ v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 345.

No. 17–8529. *BENBOW ET AL. v. UNITED STATES.* C. A. D. C. Cir. Certiorari denied. Reported below: 709 Fed. Appx. 25.

No. 17–8539. *WARD v. SHARTLE, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 17–8542. *MENDOZA-ZAZUETA v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 557.

No. 17–8545. *BENTLEY v. CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17–8546. *BECKHAM v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 145.

No. 17–8547. *ANDERSON v. ANDREWS, WARDEN.* C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 790.

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No. 17–8549. *BORDEN v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 441.

No. 17–8550. *ADAMS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8551. *ADKINS v. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 3d Cir. Certiorari denied.

No. 17–8554. *BEY v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 693.

No. 17–8560. *KELLY v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 3d 1037.

No. 17–8562. *PALMER v. UNITED STATES*. C. A. D. C. Cir. Certiorari denied.

No. 17–8565. *MILLER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17–8569. *COOPER v. GEORGIA*. Ct. App. Ga. Certiorari denied. Reported below: 342 Ga. App. 351, 801 S. E. 2d 589.

No. 17–8571. *CRANE v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 123.

No. 17–8607. *SPAIN v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 17–1337. *ALCON LABORATORIES, INC., ET AL. v. COTTRELL ET AL.* C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 874 F. 3d 154.

No. 17–1366. *LESTER v. UNITED STATES*. C. A. 11th Cir. Certiorari before judgment denied.

No. 17–1370. *UNITED STATES EX REL. KING ET AL. v. SOLVAY PHARMACEUTICALS, INC.* C. A. 5th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 871 F. 3d 318.

No. 17–8515. *BROWN v. MOONEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL.* C. A. 3d Cir.

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Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–5420. BELSER *v.* JAMES ET AL., 583 U. S. 1060;
No. 17–6144. ALLEN *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 583 U. S. 1001;
No. 17–6565. BINGHAM *v.* BLAKELY, WARDEN, 583 U. S. 1043;
No. 17–7135. SPICER *v.* TENNESSEE, 583 U. S. 1129;
No. 17–7254. KELLEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1170;
No. 17–7431. WILLIAMS *v.* BLANCHARD ET AL., 583 U. S. 1187;
No. 17–7570. DICKEY *v.* SAMUEL, *ante*, p. 907;
No. 17–7576. SALERNO *v.* DEPARTMENT OF THE INTERIOR, *ante*, p. 907;
No. 17–7594. WILLIAMS *v.* UNITED STATES, 583 U. S. 1161;
No. 17–7600. BASKIN *v.* KANSAS, 583 U. S. 1189;
No. 17–7663. ADKINS *v.* HBL, LLC, *ante*, p. 936;
No. 17–7700. BOLTON *v.* UNITED STATES, 583 U. S. 1190; and
No. 17–7768. CLARK *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 583 U. S. 1192. Petitions for rehearing denied.

No. 16–9563. MENDES DA COSTA *v.* MARCUCILLI ET AL., 583 U. S. 856. Motion of petitioner for leave to file petition for rehearing denied.

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Miscellaneous Order

No. 17–773. CULBERTSON *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 11th Cir. [Certiorari granted, *ante* p. 992.] Amy Weil, Esq., of Atlanta, Ga., is invited to brief and argue this case as *amicus curiae* in support of judgment below.

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Appeal Dismissed

No. 17–1339. AGRE ET AL. *v.* WOLF, GOVERNOR OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. dismissed as moot. Reported below: 284 F. Supp. 3d 591.

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Certiorari Granted—Vacated and Remanded

No. 16–996. UNITED HEALTHCARE SERVICES, INC. *v.* RIEDERER. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Epic Systems Corp. v. Lewis*, ante, p. 497. Reported below: 670 Fed. Appx. 419.

Certiorari Dismissed

No. 17–8715. BAKER *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 17M122. KEHANO *v.* SEQUEIRA. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M123. BROWN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 16–1363. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL. *v.* PREAP ET AL.; and WILCOX, ACTING FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* KHOURY ET AL. C. A. 9th Cir. [Certiorari granted, 583 U.S. 1179.] Motion of petitioners to dispense with printing joint appendix granted.

No. 17–7505. MADISON *v.* ALABAMA. Cir. Ct. Mobile County, Ala. [Certiorari granted, 583 U.S. 1155.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–8797. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 17–8794. IN RE SPENGLER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 17–8225. IN RE CHRISTIAN. Petition for writ of mandamus denied.

No. 17–1403. IN RE SIMMONS. Petition for writ of mandamus and/or prohibition denied.

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Certiorari Denied

No. 16–689. NATIONAL LABOR RELATIONS BOARD *v.* 24 HOUR FITNESS USA, INC.; and

No. 16–701. SANDERS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied.

No. 16–800. NATIONAL LABOR RELATIONS BOARD *v.* PJ CHEESE, INC. C. A. 5th Cir. Certiorari denied.

No. 16–801. NATIONAL LABOR RELATIONS BOARD *v.* SF MARKETS, L. L. C., DBA SPROUTS FARMERS MARKET. C. A. 5th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 815.

No. 17–935. PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA ET AL. *v.* JEGLEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 3d 953.

No. 17–1035. HOEVER *v.* BELLEIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 908.

No. 17–1146. JACOBS *v.* OATH FOR LOUISIANA, INC., ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2016–1060 (La. App. 4 Cir. 6/22/17), 221 So. 3d 241.

No. 17–1152. CONTEST PROMOTIONS, LLC *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 665 (first judgment); 874 F. 3d 597 (second judgment).

No. 17–1210. HENRY ET AL. *v.* WEISS, LIQUIDATION TRUSTEE OF THE WALLDESIGN LIQUIDATING TRUST, SUCCESSOR IN INTEREST TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF WALLDESIGN, INC. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 3d 954.

No. 17–1329. SNELLING *v.* WOODFIN ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 524 S. W. 3d 90.

No. 17–1333. OGUN SALU *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 17–1336. COULTER *v.* LINDSAY ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 947.

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No. 17–1342. *GASCHO ET AL. v. GLOBAL FITNESS HOLDINGS, LLC, ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 795.

No. 17–1352. *HARRIS v. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS.* C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 3d 682.

No. 17–1358. *FAUNTROY v. BANK OF NEW YORK.* Ct. App. D. C. Certiorari denied.

No. 17–1360. *STRATTON v. VIRGINIA.* C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 176.

No. 17–1361. *ROEMER v. ATTORNEY GRIEVANCE COMMITTEE ET AL.* C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 36.

No. 17–1363. *MILLER v. GRUENBERG, CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORPORATION.* C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 204.

No. 17–1365. *BEZET v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 336.

No. 17–1372. *BYNUM v. MAPLEBEAR INC., DBA INSTACART.* C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 23.

No. 17–1378. *STANDLEY v. MERIT SYSTEMS PROTECTION BOARD.* C. A. Fed. Cir. Certiorari denied. Reported below: 715 Fed. Appx. 998.

No. 17–1379. *ATKINSON v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 830.

No. 17–1396. *SHAFFER v. PADILLA.* C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 3d 1110.

No. 17–1399. *UNITED STATES EX REL. IBANEZ ET AL. v. BRISTOL-MYERS SQUIBB CO. ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 905.

No. 17–1401. *ROZBICKI v. CHIEF DISCIPLINARY COUNSEL.* Sup. Ct. Conn. Certiorari denied. Reported below: 326 Conn. 686, 167 A. 3d 351.

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No. 17–1436. *MEYER v. WILKIE*, ACTING SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 26.

No. 17–1441. *KIRTON ET AL. v. VALLEY HEALTH SYSTEM ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 522.

No. 17–1447. *PILVER v. HILLSBOROUGH COUNTY, FLORIDA, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 585.

No. 17–1448. *ROBINSON ET AL. v. SESSIONS*, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 721 Fed. Appx. 20.

No. 17–1451. *CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON v. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF OMNI NATIONAL BANK, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 764.

No. 17–1465. *GRAHAM-SULT ET AL. v. CLAINOS*. C. A. 9th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 562.

No. 17–6085. *HIGGS v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17–7213. *LEE v. OHIO*. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 123, 2017-Ohio-7826, 86 N. E. 3d 322.

No. 17–7233. *BELTON v. OHIO*. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 124, 2017-Ohio-7827, 86 N. E. 3d 323.

No. 17–7234. *QURASH v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143412, 72 N. E. 3d 1272.

No. 17–7484. *HESLOP v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 485.

No. 17–7609. *WRIGHT v. ILLINOIS*. Sup. Ct. Ill. Certiorari denied. Reported below: 2017 IL 119561, 91 N. E. 3d 826.

No. 17–7657. *ANDERSON v. DUCART*, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 905.

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No. 17–7884. *BADMUS v. MUTUAL OF OMAHA INSURANCE CO.* C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 260.

No. 17–7924. *WILLIAMS v. FLORIDA.* Sup. Ct. Fla. Certiorari denied. Reported below: 226 So. 3d 758.

No. 17–8128. *RIVERA v. INFERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.* C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 236.

No. 17–8174. *PARKER v. LOUISIANA.* Ct. App. La., 1st Cir. Certiorari denied.

No. 17–8176. *KEITH v. OHIO.* Ct. App. Ohio, 3d App. Dist., Crawford County. Certiorari denied. Reported below: 2017-Ohio-5488.

No. 17–8187. *SIMMONS v. GARRETT ET AL.* C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 323.

No. 17–8201. *WOGENSTAHL v. OHIO.* Sup. Ct. Ohio. Certiorari denied. Reported below: 150 Ohio St. 3d 571, 2017-Ohio-6873, 84 N. E. 3d 1008.

No. 17–8205. *SCARZO v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 17–8206. *EDWARDS v. KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION.* C. A. 9th Cir. Certiorari denied.

No. 17–8208. *BURNETT v. BAC HOME LOANS SERVICING, LP, ET AL.* C. A. 7th Cir. Certiorari denied.

No. 17–8216. *WITHAM v. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 233.

No. 17–8217. *WARD v. TEXAS.* Ct. App. Tex., 6th Dist. Certiorari denied.

No. 17–8219. *YERMAL v. FLORIDA.* Sup. Ct. Fla. Certiorari denied.

No. 17–8221. *ARMANDO v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.* C. A. 5th Cir. Certiorari denied.

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No. 17–8222. *SCOTT v. DAVIS*, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8230. *WEST v. BERGHUIS*, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 493.

No. 17–8235. *YAZDCHI v. JPMORGAN CHASE BANK*, N. A. C. A. 5th Cir. Certiorari denied.

No. 17–8236. *TWILEGAR v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 228 So. 3d 550.

No. 17–8237. *WASHINGTON v. GRIFFIN*, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 3d 395.

No. 17–8239. *BUXTON v. THOMPSON*, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8241. *CASHNER v. WIDUP ET AL.* C. A. 7th Cir. Certiorari denied.

No. 17–8242. *SIERRA v. SHAPIRO*, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8247. *DONOVAN v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 196.

No. 17–8248. *CIOTTA v. HOLLAND*, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–8249. *PEROTTI v. O’BOYLE ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–8256. *CROMARTIE v. ALABAMA STATE UNIVERSITY ET AL.* Sup. Ct. Ala. Certiorari denied.

No. 17–8273. *BROWER v. MICHIGAN*. Ct. App. Mich. Certiorari denied.

No. 17–8277. *ANAYA v. TEXAS*. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 17–8279. *BRYANT v. JONES*, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

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No. 17–8290. *WRIGHT v. BAYVIEW LOAN SERVICING, LLC, ET AL.* (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 658 Fed. Appx. 344 (first judgment); 659 Fed. Appx. 438 (second judgment).

No. 17–8319. *DOREMUS v. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION.* C. A. 6th Cir. Certiorari denied.

No. 17–8326. *WILLIS v. LACKNER, WARDEN.* C. A. 9th Cir. Certiorari denied.

No. 17–8329. *CARTER v. LAFLER, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 17–8391. *VAUGHT v. UNITED STATES.* C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 162.

No. 17–8424. *ABELA v. WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS.* C. A. 6th Cir. Certiorari denied.

No. 17–8430. *DICOSOLA v. UNITED STATES.* C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 793.

No. 17–8478. *FOREMAN v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 17–8520. *BROWN v. LEWIS, WARDEN.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 139.

No. 17–8533. *STRINGER v. PENNSYLVANIA.* Super. Ct. Pa. Certiorari denied. Reported below: 170 A. 3d 1200.

No. 17–8552. *BOOKER v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 130177–U.

No. 17–8561. *LLEWLYN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 879 F. 3d 1291.

No. 17–8563. *CRUMP v. UNITED STATES.* C. A. 6th Cir. Certiorari denied.

No. 17–8570. *DAVIS v. UNITED STATES.* C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 869.

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No. 17–8583. *COLLINS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8588. *LERMA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 3d 628.

No. 17–8590. *PHAM v. KIRKPATRICK, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY*. C. A. 2d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 67.

No. 17–8591. *COAD v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 246.

No. 17–8594. *DONNELL v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8600. *CARBAJAL-VALDEZ v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 778.

No. 17–8601. *WILSON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 880 F. 3d 80.

No. 17–8602. *ALFORD v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 567.

No. 17–8604. *MCGREGOR v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17–8605. *PEREZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 296.

No. 17–8606. *CISNEROS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8614. *VOLKMAN v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17–8615. *SOTOLONGO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 958.

No. 17–8617. *TYREKE H. v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 170406, 89 N. E. 3d 914.

No. 17–8618. *DE JESUS VARELA, AKA ISAGUIRES-VARELA v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 504.

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No. 17–8619. *TOLLIVER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 244.

No. 17–8621. *MARIN-TORRES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 634.

No. 17–8626. *PLEDGE v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 720.

No. 17–8628. *COVINGTON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 880 F. 3d 129.

No. 17–8630. *HICKSON v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. Reported below: 708 Fed. Appx. 78.

No. 17–8631. *LOBO v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 496.

No. 17–8633. *BALTIMORE v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17–8634. *YOUKER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 492.

No. 17–8636. *WITHROW v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 769.

No. 17–8638. *HOSKINS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 3d 942.

No. 17–8640. *WILLIAMS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 3d 713.

No. 17–8642. *MANUEL CERVANTES v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 266.

No. 17–8648. *BANKSTON v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 307.

No. 17–8649. *GUTHRIE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 199.

No. 17–8651. *BUENO v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 158.

No. 17–8660. *RODRIGUEZ CUYA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 720.

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No. 17-8665. *VIRAMONTES-SANCHEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 310.

No. 17-8667. *RHODES v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 780.

No. 17-8669. *JAMES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 690.

No. 17-8671. *DEMERS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 526.

No. 17-8672. *ROBINSON v. MCFADDEN, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 154.

No. 17-8673. *MCCANDLESS v. UNITED STATES*. C. A. 9th Cir. Certiorari denied.

No. 17-8675. *DUNNAM v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-8677. *JONES v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 228.

No. 17-8679. *MARTIN v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied. Reported below: 240 So. 3d 1047.

No. 17-8684. *WILLIAMSON v. PASTRANA, WARDEN*. C. A. 11th Cir. Certiorari denied.

No. 17-8694. *BENITEZ v. MISSISSIPPI*. Sup. Ct. Miss. Certiorari denied.

No. 17-8695. *KING v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 842.

No. 17-8696. *LOPEZ v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17-8697. *LOUISSAINT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17-8698. *CHUN HEI LAM v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 850.

No. 17-8700. *BELL v. UNITED STATES*. C. A. 7th Cir. Certiorari denied. Reported below: 887 F. 3d 795.

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No. 17–8704. *ODOFFIN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 365.

No. 17–8705. *AZOR v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 1.

No. 17–8706. *MCCLOUD v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8709. *EDWARDS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8711. *MARQUEZ AREVALO v. WHITE, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8714. *GORDON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 316.

No. 17–8721. *MONTINA v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8726. *TURNER v. CITY OF LOS ANGELES, CALIFORNIA, ET AL.* Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 17–8727. *STACKER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17–8728. *SCOTT v. UNITED STATES*. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 477.

No. 17–8735. *MADRID v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 392.

No. 17–8736. *KEYS v. FAULK ET AL.* C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 787.

No. 17–8738. *CABELLO v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–8334. *CHON v. UNITED STATES ET AL.* C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 718 Fed. Appx. 653.

No. 17–8611. *SOREIDE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

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No. 17–8659. *ALBANESE v. UNITED STATES*. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–1024. *DAWSON ET AL. v. CITY OF GRAND HAVEN, MICHIGAN*, *ante*, p. 916;

No. 17–6994. *MILNER v. PENNSYLVANIA*, 583 U.S. 1125;

No. 17–7144. *WINDHAM v. HARMON LAW OFFICES, P. C., ET AL.*, 583 U.S. 1157;

No. 17–7235. *JOHNSON v. DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES*, 583 U.S. 1169;

No. 17–7263. *STEELE-KLEIN v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 117, ET AL.*, 583 U.S. 1184;

No. 17–7284. *WILLIAMS v. VICTORIA’S SECRET*, 583 U.S. 1158;

No. 17–7316. *RIVERS v. SANZONE ET AL.*, 583 U.S. 1185;

No. 17–7418. *KHATANA v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY*, 583 U.S. 1187;

No. 17–7434. *THOMPSON v. TEEBAGY ET AL.*, 583 U.S. 1188;

No. 17–7481. *RICHARD v. TEXAS*, *ante*, p. 906;

No. 17–7625. *CONNER v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL.*, *ante*, p. 919;

No. 17–7760. *JENKINS v. MISSISSIPPI*, 583 U.S. 1192; and

No. 17–7913. *SCHUM v. FEDERAL COMMUNICATIONS COMMISSION*, *ante*, p. 920. Petitions for rehearing denied.

No. 17–7720. *DERROW v. UNITED STATES*, 583 U.S. 1207. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JUNE 1, 2018

Dismissal Under Rule 46

No. 17–1241. *WILLIAMS v. LOUISIANA*. Ct. App. La., 2d Cir. Certiorari dismissed under this Court’s Rule 46.1.

JUNE 4, 2018

Dismissal Under Rule 46

No. 17–1137. *UNITED THERAPEUTICS CORP. v. STEADYMED LTD.* C. A. Fed. Cir. Certiorari dismissed under this Court’s Rule 46.1. Reported below: 702 Fed. Appx. 990.

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Appeal Dismissed

No. 17–1368. SCARNATI, SENATE PRESIDENT PRO TEMPORE *v.* AGRE ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction. Reported below: 284 F. Supp. 3d 591.

Certiorari Granted—Vacated and Remanded. (See No. 17–654, *ante*, p. 726.)

Certiorari Dismissed

No. 17–8427. STRAW *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court’s Rule 39.8.

Miscellaneous Orders

No. 17M124. TUCKER *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION; and

No. 17M125. DAVIS *v.* ANDERSON ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–654. AZAR, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J. D., *ante*, p. 726. Motion of petitioners to lodge nonrecord material under seal with redacted copies for the public record granted.

No. 17–1183. AIRLINE SERVICE PROVIDERS ASSN. ET AL. *v.* LOS ANGELES WORLD AIRPORTS ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–8826. IN RE JACKSON. Petition for writ of habeas corpus denied.

No. 17–8836. IN RE CARBAJAL. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus 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*).

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No. 17–8288. IN RE RAMSEY. Petition for writ of mandamus denied.

No. 17–8302. IN RE DOE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 17–951. VITOL S. A. ET AL. *v.* AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO. C. A. 1st Cir. Certiorari denied. Reported below: 859 F. 3d 140.

No. 17–1034. FERNANDEZ-RUNDLE *v.* McDONOUGH. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 3d 1314.

No. 17–1111. J. B. HUNT TRANSPORT, INC. *v.* ORTEGA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 589.

No. 17–1176. RANKIN *v.* LONGORIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 699.

No. 17–1179. AMERICAN ECONOMY INSURANCE CO. ET AL. *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 3d 136, 87 N. E. 3d 126.

No. 17–1185. MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, MARYLAND, ET AL. *v.* HUMBERT. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 3d 546.

No. 17–1197. LAUL *v.* LOS ALAMOS NATIONAL LABORATORIES. C. A. 10th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 832.

No. 17–1203. SINGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 108.

No. 17–1246. WHIRLPOOL CORP. *v.* HOMELAND HOUSEWARES, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 3d 1372.

No. 17–1371. NON *v.* COMCAST, INC., DBA COMCAST CABLE COMMUNICATIONS MANAGEMENT LLC, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 920.

No. 17–1385. DICKERSON *v.* QUIROZ. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 646.

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No. 17–1387. *LEMASTER ET AL. v. FEDERAL NATIONAL MORTGAGE ASSOCIATION*. Ct. App. Minn. Certiorari denied.

No. 17–1400. *ESREY ET AL. v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 749.

No. 17–1402. *DURANT v. DISTRICT OF COLUMBIA*. C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 685.

No. 17–1413. *ZEBARI v. CVS CAREMARK CORP. ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–1418. *HAMMANN v. 1–800 IDEAS, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 956.

No. 17–1435. *O’LEARY v. OFFICE OF PERSONNEL MANAGEMENT ET AL.* C. A. Fed. Cir. Certiorari denied. Reported below: 708 Fed. Appx. 669.

No. 17–1458. *LUO v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 16 Cal. App. 5th 663, 224 Cal. Rptr. 3d 526.

No. 17–1460. *ROHN ET AL. v. VIACOM INTERNATIONAL, INC., ET AL.* C. A. 6th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 319.

No. 17–1469. *MYERS v. MONTANA* (three judgments). Sup. Ct. Mont. Certiorari denied.

No. 17–1491. *MUSSELWHITE ET AL. v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 958.

No. 17–1519. *HOMES FOR AMERICA, INC. v. SUNOCO PIPELINE, L. P.* Commw. Ct. Pa. Certiorari denied. Reported below: 167 A. 3d 309.

No. 17–1520. *BLUME ET AL. v. SUNOCO PIPELINE, L. P.* Commw. Ct. Pa. Certiorari denied. Reported below: 167 A. 3d 310.

No. 17–7222. *ST. AUBIN v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied. Reported below: 537 S. W. 3d 39.

No. 17–7298. *GOODWIN v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 3d 636.

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No. 17-7407. *MARTINSON v. ARIZONA*. Ct. App. Ariz. Certiorari denied. Reported below: 241 Ariz. 93, 384 P. 3d 307.

No. 17-7410. *GONZALEZ v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 582.

No. 17-7568. *PITTSINGER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 3d 446.

No. 17-7641. *CRUZ-GARCIA v. TEXAS*. Ct. Crim. App. Tex. Certiorari denied.

No. 17-7689. *ROBINSON v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17-8261. *LATORRE v. ADRIAN ET AL.* Sup. Ct. Fla. Certiorari denied.

No. 17-8275. *BLACK v. MAYS, WARDEN*. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 3d 734.

No. 17-8283. *SCOTT v. ILLINOIS*. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2017 IL App (5th) 140261-U.

No. 17-8284. *SIMMONS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 17-8285. *RIVERA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17-8286. *SAUNDERS v. STEPHAN, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 194.

No. 17-8295. *CARRILLO v. SEXTON, WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 17-8296. *CABOT v. MELVIN, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 17-8297. *O'DELL v. PLUMLEY, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 139.

No. 17-8301. *ROBERSON v. TEXAS*. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17-8304. *WILLIAMS v. VIRGINIA*. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 25, 810 S. E. 2d 885.

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No. 17–8306. *WRIGHT v. ERFE, WARDEN, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 17–8309. *EDWARDS v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–8314. *TURNER v. BOWLES.* C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 285.

No. 17–8315. *WIRTH v. NEVADA.* Ct. App. Nev. Certiorari denied. Reported below: 133 Nev. 1095.

No. 17–8321. *STESHENKO v. ALBEE ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 869.

No. 17–8324. *WELLS v. HARRY, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 17–8325. *VOLINO v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–8327. *LEE v. GRIFFITH, WARDEN.* C. A. 8th Cir. Certiorari denied.

No. 17–8328. *WILLIAMS v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied.

No. 17–8338. *MAPS v. VENZER, JUDGE, 11TH JUDICIAL CIRCUIT OF FLORIDA, MIAMI DADE COUNTY, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17–8350. *MOHAJER v. JPMORGAN CHASE BANK, N. A., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 592.

No. 17–8351. *JACKSON v. BOUCHARD.* C. A. 6th Cir. Certiorari denied.

No. 17–8353. *MATTHEWS v. ASTORINO, COUNTY EXECUTIVE, WESTCHESTER COUNTY, NEW YORK, ET AL.* C. A. 2d Cir. Certiorari denied.

No. 17–8357. *HARDEN v. MARYLAND.* Ct. Sp. App. Md. Certiorari denied. Reported below: 231 Md. App. 712.

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No. 17–8358. *HUGHES v. BANK OF AMERICA*. C. A. 4th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 92.

No. 17–8362. *HERRINGTON v. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS*. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 158.

No. 17–8363. *HIRMIZ v. NEW HARRISON HOTEL CORP.* C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 475.

No. 17–8373. *GLOVER v. ILLINOIS*. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 151263.

No. 17–8442. *MCINTYRE v. BP EXPLORATION & PRODUCTION, INC., ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 546.

No. 17–8444. *FLORES GONZALEZ v. FLORIDA ET AL.* Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 233 So. 3d 1159.

No. 17–8573. *EL, AKA LEJON-TWIN EL, FKA HILTON v. MARINO ET AL.* C. A. 3d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 262.

No. 17–8595. *WILLIAMS v. ROBERTSON, ACTING WARDEN*. C. A. 9th Cir. Certiorari denied.

No. 17–8598. *SMITH v. FLORIDA*. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 237 So. 3d 954.

No. 17–8647. *ADAMS v. ALASKA*. Ct. App. Alaska. Certiorari denied. Reported below: 390 P. 3d 1194.

No. 17–8653. *MABRY v. VIRGINIA*. Sup. Ct. Va. Certiorari denied.

No. 17–8662. *SKLYARSKY v. KOCORAS, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*. C. A. 7th Cir. Certiorari denied.

No. 17–8701. *BROCK v. HOOKS, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8720. *BOOKER v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

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No. 17–8723. *DUCKETT v. MARSH*, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT BENNER TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8729. *RODRIGUEZ v. FLORIDA*. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 230 So. 3d 1249.

No. 17–8731. *ELIAS JIMENEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied.

No. 17–8734. *JEFFERSON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8743. *NAPOLI v. UNITED STATES*. C. A. 3d Cir. Certiorari denied.

No. 17–8747. *TAC TRAN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 329.

No. 17–8759. *MORALES v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 226.

No. 17–8760. *COLON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 125.

No. 17–8762. *BEIERLE v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 782.

No. 17–8769. *SENSENIQ ET UX. v. COMMISSIONER OF INTERNAL REVENUE*. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 139.

No. 17–8771. *CLEMENT v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8772. *NORMAN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 121.

No. 17–8774. *HARDER v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 643.

No. 17–8782. *HERRERA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 241.

No. 17–8784. *DALE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

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No. 17–8802. OREGON-MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 893.

No. 17–8803. ALBERTO NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 888.

No. 17–8804. WILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8806. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 759.

No. 17–8807. KENNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 551.

No. 17–8809. GOOSSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 608.

No. 17–8818. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–1390. FILSON, WARDEN, ET AL. *v.* BROWNING. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 875 F.3d 444.

No. 17–6883. TREVINO *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 861 F.3d 545.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The first time this Court considered petitioner Carlos Trevino’s case, it held pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), that a “procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective,” and if, as in Texas, the “state procedural framework . . . makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.” *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (quoting *Martinez*, 566 U.S., at 17). Having emphasized that the right to adequate

assistance of trial counsel is “critically important,” 569 U. S., at 428, the Court remanded Trevino’s case with the expectation that, if Trevino could establish that his underlying ineffective-assistance-of-trial-counsel claim was substantial and that his initial-review counsel was ineffective, courts would afford him meaningful review of the underlying claim.

Unfortunately, that is not what happened. When the Court of Appeals for the Fifth Circuit ultimately considered whether Trevino was prejudiced by his trial counsel’s failure to investigate and present evidence of his fetal alcohol spectrum disorder (FASD), the panel majority did not properly “reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins v. Smith*, 539 U. S. 510, 534 (2003). Rather, the majority dismissed the new FASD evidence because it purportedly created a “significant double-edged problem” in that it had both mitigating and aggravating aspects, and stopped its analysis short without reweighing the totality of all the evidence. 861 F. 3d 545, 551 (2017). That truncated approach is in direct contravention of this Court’s precedent, which has long recognized that a court cannot simply conclude that new evidence in aggravation cancels out new evidence in mitigation; the true impact of new evidence, both aggravating and mitigating, can only be understood by asking how the jury would have considered that evidence in light of what it already knew.

Although this Court is not usually in the business of error correction, this case warrants our intervention and summary disposition. I respectfully dissent from the Court’s refusal to correct the Fifth Circuit’s flagrant error.

I

A

Under *Strickland v. Washington*, 466 U. S. 668 (1984), to establish that trial counsel’s “deficient performance prejudiced the defense,” a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 687, 694. For purposes of a mitigation-investigation claim like this one, a court must “consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Sears v. Upton*, 561 U. S. 945, 955–956 (2010) (*per curiam*) (inter-

nal quotation marks and alteration omitted); *Wiggins*, 539 U.S., at 534.

Where, as here, new evidence presented during postconviction proceedings includes both mitigating and aggravating factors, a court still must consider all of the mitigating evidence alongside all of the aggravating evidence. The new evidence must not be evaluated in isolation. Moreover, the court must step into the shoes of the jury, and review the evidence as the jury would have in the first instance. See *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

In Texas, a jury at the penalty phase of a capital trial first considers whether there is a probability that the defendant will be a future threat to society, Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1) (Vernon Cum. Supp. 2017), and whether the defendant caused, intended to cause, or anticipated a death, § 2(b)(2). Only if the state has proved those two issues beyond a reasonable doubt will the jury then consider the effect of mitigating evidence on the sentence. §§ 2(c), (g).¹ If even one juror decides that, “taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed,” the court must impose a life sentence. §§ 2(e)(1), (f)(2), (g).

B

With that framework in mind, consider the facts of this case.² During the penalty-phase proceedings, the State presented evidence of Trevino’s juvenile criminal record and adult convictions.

¹ If at least one juror decides either of those two issues in the negative, the court must impose a life sentence regardless of the effect of mitigating circumstances. See Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(g).

² The procedural history of this case is complex. For present purposes, it is sufficient to note that after this Court’s remand, Trevino filed a second amended federal habeas petition. The District Court denied relief. *Trevino v. Stephens*, 2015 WL 3651534 (WD Tex., June 11, 2015). The Fifth Circuit granted a certificate of appealability and affirmed the District Court’s denial of relief solely on the basis that, on the merits, Trevino could not establish that he was prejudiced by his trial counsel’s failure to introduce additional mitigating evidence. See 861 F.3d 545, 548–551 (2017). Judge Dennis dissented from that decision. *Id.*, at 551–557.

The jury also heard uncontroverted testimony that Trevino was a member of a street gang and a violent prison gang, and, needless to say, the jurors were aware that they had just convicted Trevino of capital murder.

With respect to mitigation, Trevino's counsel presented just one witness, Trevino's aunt, who testified that

“(1) she had known [Trevino] all his life, (2) [his] father was largely absent throughout [his] life, (3) [his] mother “has alcohol problems right now,” (4) [his] family was on welfare during his childhood, (5) [Trevino] was a loner in school, (6) [Trevino] dropped out of school and went to work for his mother's boyfriend doing roofing work, (7) [Trevino] is the father of one child and is good with children, often taking care of her two daughters, and (8) she knows [he] is incapable of committing capital murder.” 861 F. 3d, at 547.

With only that mitigation before them, the jury deliberated for approximately eight hours before it unanimously concluded that the State satisfied its burden of showing that Trevino was a continuing threat to society; that he had caused, intended to cause, or anticipated the death of a person; and that the mitigating circumstances were insufficient to warrant a life sentence instead of a death sentence. *Ibid.*

In addition to this evidence presented at trial, Trevino offered new mitigating evidence in support of his habeas petition, including testimony from expert and lay witnesses, relating to his fetal alcohol spectrum disorder. Dr. Rebecca H. Dyer, Ph. D., a clinical and forensic psychologist, reported that Trevino “functions ‘within the low average range of intellectual functioning,’ and has a ‘history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse.’” *Id.*, at 553 (Dennis, J., dissenting). She further stated:

“‘[Trevino's] history of [FASD] clearly had an impact on his cognitive development, academic performance, social functioning, and overall adaptive functioning. These factors, along with his significant history of physical and emotional abuse, physical and emotional neglect, and social deprivation clearly contributed to [Trevino's] ability to make appropriate decisions and choices about his lifestyle, behaviors and actions,

his ability to withstand and ignore group influences, and his ability to work through and adapt to frustration and anger.” *Ibid.* (alterations in original).

She concluded that Trevino’s FASD “‘would . . . have impacted any of [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges,’” *ibid.* (ellipsis and alterations in original), even if the condition “‘would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense,’” *id.*, at 549 (majority opinion).

Dr. Paul Conner, Ph. D., a clinical neurologist, further reported that “Trevino demonstrated deficiencies in eight cognitive domains, where only three are necessary for a diagnosis of FASD.”³ *Id.*, at 549–550. Trevino’s “‘daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability.’” *Id.*, at 550.

Trevino’s lay witnesses placed his FASD in context. *Ibid.* Linda Mockeridge, a mitigation expert, collected testimony that Trevino’s mother drank between 18 and 24 cans of beer every day during her pregnancy; Trevino weighed only four pounds at birth; he was not potty trained until he was six years old and wore diapers at night until he was eight years old; he was developmentally delayed as compared to his siblings; he repeated several grades in elementary school and eventually dropped out of school in the ninth grade, at which point he read at a third-grade level. *Id.*, at 554 (Dennis, J., dissenting).

Trevino’s former girlfriend stated that Trevino “was a good father and caring toward her, but was easily influenced by his friends.” *Id.*, at 550 (majority opinion). She also recounts instances where he “was violent toward her,” including a time when Trevino “put a gun to [her] head” and another when “he attempted to rape her at knifepoint.” *Ibid.* She says she “‘was always fearful of him,’” and Trevino’s brother says he had “wit-

³ Trevino showed deficits in “academics, especially math; verbal and visuospatial memory; visuospatial construction; processing speed; executive functioning, especially on tasks that provide lower levels of structure and as such require greater independent problem solving or abstraction skills; communication skills, especially receptive skills; daily living skills, primarily ‘community skills’; and socialization skills.” *Id.*, at 553–554 (Dennis, J., dissenting).

nessed Trevino be physically violent toward [the former girlfriend], including choking her.” *Ibid.*

Trevino’s former employer commented that Trevino “was a good worker that lacked initiative.” *Ibid.* A friend stated that Trevino is “‘peaceful’” and “‘not violent,’” but acknowledged that Trevino “‘had firearms and was part of a street gang,’” and that when Trevino was released on parole he “‘went out with friends, ‘getting high and drunk and robbing people.’” *Ibid.*

C

Reviewing Trevino’s claim *de novo*,⁴ the Fifth Circuit majority concluded that the evidence is “insufficient to create a reasonable probability that Trevino would not have been sentenced to death had it been presented to the jury.” *Ibid.* The majority first attempted to distinguish *Wiggins*, where the Court concluded that trial counsel rendered ineffective assistance in failing to discover and present mitigation information. “Unlike in *Wiggins*,” where the only mitigation presented at trial was “‘that Wiggins had no prior convictions,’” the majority reasoned that “Trevino’s trial counsel did present mitigating evidence,” in that his aunt “covered his mother’s alcohol problems, his absent father, his trouble in school, and the love he demonstrated toward [the aunt’s] daughters.” 861 F. 3d, at 550.

Then, looking at the new evidence in isolation, the majority noted that “[t]he mitigating evidence that Trevino suffers the effects of FASD would be heard along with [his former girlfriend’s] graphic testimony of Trevino’s violence toward her and [his friend’s] testimony that he was involved in gang and criminal activity.” *Ibid.* It also found that the additional mitigating evidence was “undermined by Dyer’s conclusion that Trevino’s FASD ‘would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense.’” *Id.*, at 550–551.

In light of these negative aspects of the new evidence, the majority concluded that it created “a significant double-edged problem that was not present in *Wiggins*.” *Id.*, at 551. Because “[j]urors could easily infer from this new FASD evidence that

⁴ The Court of Appeals’ review was *de novo* because the state court “never reached the issue of prejudice.” *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Trevino may have had developmental problems . . . and poor decisionmaking, but that he also engaged in a pattern of violent behavior . . . that he understood was wrong,” the majority concluded that he could not establish prejudice. *Ibid.* The analysis stopped there, and over the dissent of one judge, the majority affirmed the denial of habeas relief.

II

In focusing on what it considered to be the “double-edged” nature of the new evidence, the Fifth Circuit majority failed to view the prejudice inquiry holistically. The requisite inquiry demands that courts consider the entirety of the evidence and reweigh it as if the jury had considered it all together in the first instance. *Wiggins*, 539 U.S., at 534. The Court’s decisions in *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wong v. Belmontes*, 558 U.S. 15 (2009) (*per curiam*), control the outcome here.

In *Williams*, new mitigation evidence presented in postconviction proceedings revealed that the petitioner was “‘borderline mentally retarded,’” experienced severe child abuse and neglect, and as a child spent time in “the custody of the social services bureau.” 529 U.S., at 395–396. The Court acknowledged, however, that “not all of the additional evidence was favorable to [the petitioner].” *Id.*, at 396. For example, “juvenile records revealed that he had been thrice committed to the juvenile system” for various offenses. *Ibid.*

The Court did not isolate that new evidence, which included both mitigating and potentially aggravating aspects, and decide that it canceled itself out. Rather, it considered all the evidence and evaluated how the new evidence would have affected the jury’s evaluation of future dangerousness and moral culpability in light of what the jury already knew. Specifically, the Court recognized that, although the additional evidence “may not have overcome a finding of future dangerousness, the graphic description of Williams’ childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability.” *Id.*, at 398.

In *Rompilla*, the Court again discussed mitigating and aggravating aspects of new evidence presented in support of a failure-to-investigate claim. Postconviction mitigation investigation re-

vealed that the petitioner “‘suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions,’” that he read at a third-grade level, and that his mental health problems “‘were likely caused by fetal alcohol syndrome.’” 545 U.S., at 392. In addition to this mitigating evidence, the Court acknowledged that new evidence also showed that the petitioner “‘early came to [the] attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations . . . often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.’” *Id.*, at 390–391 (some alterations in original).

Despite what the Fifth Circuit majority here would have called the “double-edged” nature of that new evidence, the Court concluded that the petitioner was prejudiced by his counsel’s failure to investigate and introduce the evidence because “the undiscovered ‘mitigating evidence, *taken as a whole*, “might well have influenced the jury’s appraisal” of [Rompilla’s] culpability.’” *Id.*, at 393 (alteration in original; emphasis added).

In *Wong*, although the Court concluded that the petitioner had not been prejudiced by his counsel’s mitigation presentation, that conclusion resulted from an assessment of all the mitigation and aggravation evidence available in the record, both from trial and from the habeas proceeding. The Court found that much of the new “humanizing evidence” was cumulative of the mitigating evidence presented at trial, 558 U.S., at 22, whereas the new aggravating evidence was “potentially devastating” information that the jury had not heard, namely, that Wong had committed a prior, unrelated murder “execution style,” *id.*, at 17. The Court emphasized the importance of considering “all the evidence—the good and the bad—when evaluating prejudice.” *Id.*, at 26. It ultimately concluded that because “the worst kind of bad evidence would have come in with the good,” all of the mitigating evidence would not have outweighed the aggravating evidence. *Ibid.*

The Fifth Circuit majority’s misguided focus on the “double-edged problem” of the new evidence failed to comport with the clear takeaway from *Williams*, *Rompilla*, and *Wong* that a court assessing prejudice based on failure to investigate and present mitigating evidence must consider the value of the newly discovered evidence in the context of the whole record.

That legal error is particularly evident given Texas’ capital sentencing scheme. In Texas, if a jury reaches a mitigation in-

quiry, it necessarily already has concluded beyond a reasonable doubt that the defendant poses a continuing threat to society. Tex. Code Crim. Proc. Ann., Art. 37.071, §§2(b)(1), (c), (g). Just as in *Williams*, it may be that the new evidence that Trevino uncovered in his habeas proceedings would “not have overcome [the] finding” that he posed a threat to society. 529 U.S., at 398. In fact, some of the new evidence may bolster that determination. But whether the defendant poses a risk of future dangerousness is not the only inquiry a jury considering death must undertake. Having found future dangerousness, a jury still must consider whether “there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed,” in light of variables such as the “circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant.” §2(e)(1). In that inquiry, as the Court in *Williams* stated, “[m]itigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.” *Id.*, at 398.

Had the Fifth Circuit majority undertaken a full inquiry, it is unlikely that the new aggravating evidence would have factored substantially into the jury’s mitigation decision, as much of the new aggravating evidence “was merely cumulative” of the evidence presented at trial. *Wong*, 558 U.S., at 22. The jury already knew, for example, that Trevino was a member of a street gang and a violent prison gang. The allegations that Trevino assaulted his former girlfriend, although serious, reflected his violent tendencies and were hardly new character-and-background information for a jury that had just convicted Trevino of capital murder. The fact that one expert testified that Trevino’s FASD “‘would not have significantly interfered with his ability to know right from wrong, or to appreciate the nature and quality of his actions at the time of the capital offense,’” 861 F. 3d, at 549, cannot be considered new aggravating evidence given that “Trevino did not assert an insanity defense and the same jury had already found him guilty of the offense,” *id.*, at 556 (Dennis, J., dissenting).

In contrast, the new mitigating evidence relating to FASD is completely different in kind from any other evidence that the jury heard about Trevino. At sentencing, the testimony of Trevino’s

aunt did not in any sense touch on Trevino's FASD or its implications for his cognitive development.⁵ Had the jury learned of the FASD and related testimony, it would have had a much fuller perspective of his character and background. For example, the jurors learned that Trevino dropped out of school early, but they had no idea that his disorder affected his academic functioning, including his problem-solving skills, memory, and reading ability, or that his achievement of basic childhood milestones like potty training had been so severely delayed. As in *Williams*, where the jury had not learned that the petitioner was "‘borderline mentally retarded,’" 529 U.S., at 398, the jurors here did not know that Trevino's "‘daily functioning skills are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability.’" 861 F. 3d, at 550.

The jurors heard that Trevino was a good father and often cared for his aunt's children, but they did not know of the childhood abuse and neglect that he overcame to learn to care for other children. The jurors were aware that Trevino's mother had alcohol problems, but they were unaware that she drank 18 to 24 beers per day during pregnancy, resulting in Trevino's developmental delays.

Evidence of FASD also would have helped the jury better understand the circumstances leading to the capital murder charges, as the disorder "‘would . . . have impacted any of . . . Trevino's decisions to participate in or refrain from [related] activities.’" *Id.*, at 549. The jurors heard that Trevino had violent tendencies, but they did not know that his FASD impacted his ability to work through and adapt to frustration and anger, or that FASD affected his ability to withstand and ignore group influences.

All in all, the new mitigating evidence had remarkable value, especially given this Court's recognition that evidence relating to

⁵ The Fifth Circuit majority considered the aunt's testimony to have been at least more substantial than the mitigation presented in *Wiggins v. Smith*, 539 U.S. 510 (2003), but that point is irrelevant. This Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only little or no mitigation evidence presented." *Sears v. Upton*, 561 U.S. 945, 954 (2010) (*per curiam*) (internal quotation marks omitted). The fact that trial counsel made an "effort to present *some* mitigation evidence" does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.*, at 955 (emphasis in original).

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a defendant's cognitive functioning plays an important role in a jury's selection of a penalty. See *Williams*, 529 U. S., at 398; *Rompilla*, 545 U. S., at 391–393. Yet, despite the lack of any other evidence at trial that dealt with Trevino's lifelong cognitive disorder, the Fifth Circuit majority discounted the new evidence in its entirety under its double-edged theory, without considering its potential effect on a jury's "appraisal of [Trevino's] moral culpability." *Williams*, 529 U. S., at 398.

The Fifth Circuit majority's error is glaring, because considering all of the evidence, including that relating to Trevino's FASD, it is obvious that "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.

III

The Fifth Circuit majority plainly misapplied our precedents. Absent intervention from this Court to correct that error, Trevino remains subject to a death sentence having received inadequate consideration of his claim of ineffective assistance of trial counsel, and with no jury having fairly appraised the substantial new mitigating evidence that a competent counsel would have discovered. That result is indefensible, especially where our failure to intervene sanctions the taking of a life by the state.

I therefore respectfully dissent from the denial of certiorari.

No. 17–7912. *R–S–C v. SESSIONS*, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 869 F. 3d 1176.

No. 17–8674. *CAMPBELL v. HENRY*, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 721 Fed. Appx. 668.

Rehearing Denied

No. 17–1158. *MILLS v. REICHLE*, *ante*, p. 932;

No. 17–1338. *FOX v. UNITED STATES*, *ante*, p. 951;

No. 17–6328. *BELL v. HOFFNER*, WARDEN, ET AL., 583 U. S. 1020;

No. 17–6864. *PHILIPPEAUX v. UNITED STATES*, 583 U. S. 1078;

No. 17–7638. *TRIGG v. JONES ET AL.*, *ante*, p. 936;

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No. 17–7673. *DUNSMORE v. CALIFORNIA*, *ante*, p. 936;
No. 17–7691. *SUAREZ v. ANTHEM, INC.*, FKA WELLPOINT, *ante*,
p. 937;
No. 17–7704. *SCOTT v. PALMER ET AL.*, 583 U. S. 1190; and
No. 17–7902. *IN RE ALEXANDER*, 583 U. S. 1178. Petitions for
rehearing denied.

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Certiorari Granted—Vacated and Remanded

No. 17–6904. *STERN v. UNITED STATES*. C. A. 4th Cir. Re-
ported below: 691 Fed. Appx. 105;

No. 17–7035. *SEALED APPELLANT v. SEALED APPELLEE*.
C. A. 5th Cir. Reported below: 695 Fed. Appx. 72;

No. 17–7325. *DOWELL v. UNITED STATES*. C. A. 6th Cir. Re-
ported below: 711 Fed. Appx. 280; and

No. 17–7941. *ARMSTEAD v. UNITED STATES*. C. A. 5th Cir.
Reported below: 706 Fed. Appx. 219. Motions of petitioners for
leave to proceed *in forma pauperis* granted. Certiorari granted,
judgments vacated, and cases remanded for further consideration
in light of *Hughes v. United States*, *ante*, p. 675.

Certiorari Dismissed

No. 17–8392. *VERA v. GIPSON, WARDEN*. C. A. 9th Cir. Mo-
tion of petitioner for leave to proceed *in forma pauperis* denied,
and certiorari dismissed. See this Court's Rule 39.8. Reported
below: 692 Fed. Appx. 397.

No. 17–8749. *MCCLINTON v. ARKANSAS*. Sup. Ct. Ark. Mo-
tion of petitioner for leave to proceed *in forma pauperis* denied,
and certiorari dismissed. See this Court's Rule 39.8. Reported
below: 2017 Ark. 360, 533 S. W. 3d 578.

Miscellaneous Orders

No. D–3022. *IN RE DISBARMENT OF ROBINSON*. Disbarment
entered. [For earlier order herein, see *ante*, p. 913.]

No. 17M126. *LYON v. CANADIAN NATIONAL RAILWAY CO.*
ET AL. Motion for leave to file petition for writ of certiorari with
supplemental appendix under seal granted.

No. 17M127. *ANDERSON v. FLORIDA*; and

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No. 17M128. *CONSALVO v. FLORIDA*. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17-1236. *REPUBLIC OF SUDAN ET AL. v. OWENS ET AL.*;

No. 17-1268. *OPATI, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE ESTATE OF OPATI, DECEASED, ET AL. v. REPUBLIC OF SUDAN ET AL.*; and

No. 17-1406. *REPUBLIC OF SUDAN ET AL. v. OPATI, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE ESTATE OF OPATI, DECEASED, ET AL.* C. A. D. C. Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 17-7123. *EAKINS v. WILSON ET AL.* Ct. Civ. App. Ala. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1113] denied.

No. 17-8933. *IN RE HERNANDEZ*; and

No. 17-8996. *IN RE SCHWEDER*. Petitions for writs of habeas corpus denied.

No. 17-8848. *IN RE SMOTHERMAN*. Petition for writ of mandamus denied.

Certiorari Denied

No. 16-9649. *KASOWSKI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 16-9672. *C. D. ET AL. v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 3d 1286.

No. 16-9695. *RICHTER v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17-582. *PRESBYTERY OF THE TWIN CITIES AREA v. EDEN PRAIRIE PRESBYTERIAN CHURCH, DBA PRAIRIE COMMUNITY CHURCH OF THE TWIN CITIES*. Ct. App. Minn. Certiorari denied.

No. 17-986. *IQ PRODUCTS Co. v. WD-40 Co.* C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 3d 344.

No. 17-995. *AMERICAN FUTURE SYSTEMS, INC., DBA PROGRESSIVE BUSINESS PUBLICATIONS, ET AL. v. ACOSTA, SECRE-*

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TARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 3d 420.

No. 17-997. CLEVELAND CLINIC FOUNDATION ET AL. *v.* TRUE HEALTH DIAGNOSTICS LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1352.

No. 17-1074. RIGHT FIELD ROOFTOPS, LLC, ET AL. *v.* CHICAGO CUBS BASEBALL CLUB, LLC, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 3d 682.

No. 17-1123. MADDOX *v.* MILLER. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 3d 386.

No. 17-1136. PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA ET AL. *v.* EPISCOPAL CHURCH ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 421 S. C. 211, 806 S. E. 2d 82.

No. 17-1211. FLANIGAN'S ENTERPRISES, INC., OF GEORGIA, ET AL. *v.* CITY OF SANDY SPRINGS, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 929.

No. 17-1227. ALIGN CORP. LTD. *v.* BOUSTRED ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 421 P. 3d 163.

No. 17-1233. ESTRADA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 3d 885.

No. 17-1234. ZIMMERMAN *v.* CORBETT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 3d 414.

No. 17-1247. SUN LIFE ASSURANCE COMPANY OF CANADA *v.* JACKSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 3d 698.

No. 17-1259. BOARD OF SCHOOL TRUSTEES OF MADISON CONSOLIDATED SCHOOLS ET AL. *v.* ELLIOTT. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 926.

No. 17-1388. LOPEZ GARZA *v.* CITIGROUP INC. C. A. 3d Cir. Certiorari denied. Reported below: 724 Fed. Appx. 95.

No. 17-1407. ROEDER *v.* SCHMIDT, ATTORNEY GENERAL OF KANSAS. Sup. Ct. Kan. Certiorari denied.

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No. 17-1409. *CLASSEN IMMUNOTHERAPIES, INC. v. ELAN PHARMACEUTICALS, INC.* C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1035.

No. 17-1410. *ZHAO v. YOUNG.* Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 17-1414. *LAMBERT v. SESSIONS, ATTORNEY GENERAL, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17-1415. *ZORA v. WINN, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 17-1416. *VAJK v. YOUNG ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17-1422. *WEST v. MINNESOTA.* Ct. App. Minn. Certiorari denied.

No. 17-1424. *HUCUL v. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL.* C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 542.

No. 17-1426. *FRIENDS OF ANIMALS ET AL. v. FISH AND WILDLIFE SERVICE.* C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 3d 1000.

No. 17-1429. *KIM v. HOSPIRA, INC.* C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 287.

No. 17-1464. *BROADNAX ET AL. v. WILLIAMS ET AL.* Ct. App. D. C. Certiorari denied.

No. 17-1473. *FAST FELT CORP. v. OWENS CORNING.* C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 3d 896.

No. 17-1481. *GREEN v. MNUCHIN, SECRETARY OF THE TREASURY.* C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 572.

No. 17-1493. *MISCEVIC v. ESTATE OF M. M. ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 927.

No. 17-1506. *NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. v. PENNSYLVANIA DEPARTMENT OF REVENUE.* Sup. Ct. Pa. Certiorari denied. Reported below: 642 Pa. 729, 171 A. 3d 682.

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No. 17–1523. *DUNLAP v. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–1524. *SNOW v. NICHOLSON, WARDEN.* C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 857.

No. 17–1532. *KRAMER v. UNITED STATES ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–1545. *REPOSA v. TEXAS.* Ct. Crim. App. Tex. Certiorari denied.

No. 17–6292. *RODRIGUEZ-SORIANO v. UNITED STATES.* C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 3d 1040.

No. 17–6898. *CREWS v. UNITED STATES.* C. A. 9th Cir. Certiorari denied.

No. 17–6908. *JAMES v. UNITED STATES.* C. A. 2d Cir. Certiorari denied. Reported below: 702 Fed. Appx. 24.

No. 17–7046. *SPIVEY ET AL. v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 3d 1207.

No. 17–7151. *VAIL-BAILON v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 1293.

No. 17–7188. *ROBINSON v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 17–7299. *GREEN v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 3d 846.

No. 17–7425. *ROUNTREE v. CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 125.

No. 17–7490. *ESPINOZA-BAZALDUA v. UNITED STATES.* C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 737.

No. 17–7667. *JONES v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 17–7678. *McGUIRE v. UNITED STATES.* C. A. 11th Cir. Certiorari denied.

No. 17–7694. *GATHERS v. UNITED STATES.* C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 583.

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No. 17-7991. *DOVER v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 380.

No. 17-8040. *DOE v. SESSIONS, ATTORNEY GENERAL*. C. A. 2d Cir. Certiorari denied. Reported below: 709 Fed. Appx. 63.

No. 17-8046. *RIMMER v. JONES, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 3d 1039.

No. 17-8074. *COX v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 573.

No. 17-8354. *HASAN v. NAVARRETE*. Sup. Ct. Cal. Certiorari denied.

No. 17-8369. *GREENWAY v. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS*. C. A. 9th Cir. Certiorari denied. Reported below: 866 F. 3d 1094.

No. 17-8388. *DUCKETT v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 231 So. 3d 393.

No. 17-8396. *LOCASCIO v. FLORIDA DEPARTMENT OF CORRECTIONS ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 832.

No. 17-8397. *MACON v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION*. C. A. 5th Cir. Certiorari denied.

No. 17-8400. *MASHAK v. FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL.* Sup. Ct. Minn. Certiorari denied.

No. 17-8406. *NUNEZ v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied.

No. 17-8419. *JEAN v. ARIZONA*. Sup. Ct. Ariz. Certiorari denied. Reported below: 243 Ariz. 331, 407 P. 3d 524.

No. 17-8420. *MARTIN v. TANNER, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17-8422. *DONAHUE v. PENNSYLVANIA*. Super. Ct. Pa. Certiorari denied. Reported below: 174 A. 3d 42.

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No. 17–8423. *THOMPSON v. DOWLING, WARDEN*. C. A. 10th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 524.

No. 17–8429. *SHERRATT v. UTAH*. Ct. App. Utah. Certiorari denied.

No. 17–8440. *RUIZ-RIVERA v. COMMONWEALTH OF PUERTO RICO ET AL.* C. A. 1st Cir. Certiorari denied.

No. 17–8445. *JOHNSON v. FRAKES, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES*. C. A. 8th Cir. Certiorari denied.

No. 17–8447. *COATES, AKA SIMMONS, AKA THOMAS v. SESSIONS, ATTORNEY GENERAL*. C. A. 3d Cir. Certiorari denied.

No. 17–8450. *NYABWA v. UNKNOWN JAILERS AT CORRECTIONS CORPORATION OF AMERICA*. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 379.

No. 17–8452. *FIALA v. TEXAS*. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 17–8454. *HUTCHINGS v. ONE NEVADA CREDIT UNION, FKA NEVADA FEDERAL CREDIT UNION*. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 862.

No. 17–8459. *RICHARDSON v. BATTS, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8460. *SANFORD v. LINDAMOOD, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8461. *CROSBY v. VANNOY, WARDEN*. C. A. 5th Cir. Certiorari denied.

No. 17–8463. *NYABWA v. LYCHNER, WARDEN*. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 395.

No. 17–8464. *NYABWA v. CORRECTIONS CORPORATION OF AMERICA*. C. A. 5th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 355.

No. 17–8466. *GARCIA v. FOX, WARDEN*. C. A. 9th Cir. Certiorari denied.

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No. 17–8468. *CLARK v. OHIO ADULT PAROLE AUTHORITY ET AL.* C. A. 6th Cir. Certiorari denied.

No. 17–8470. *RYAN v. SMITH, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 17–8501. *BOOKER v. ILLINOIS.* App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2017 IL App (3d) 140779–U.

No. 17–8502. *AMBROSE v. TRIERWEILER, WARDEN.* C. A. 6th Cir. Certiorari denied.

No. 17–8505. *BOZIC v. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS.* C. A. 3d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 671.

No. 17–8511. *WOULARD v. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.* C. A. 11th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 631.

No. 17–8528. *AUSTIN v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.* C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 3d 757.

No. 17–8531. *WILLIAMS v. CALIFORNIA.* Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 17–8534. *STARKS v. PARBALL CORP., DBA BALLY’S LAS VEGAS.* C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 525.

No. 17–8568. *DAVIS v. NICHOLSON, WARDEN.* C. A. 7th Cir. Certiorari denied.

No. 17–8585. *DON v. MILES, WARDEN.* C. A. 8th Cir. Certiorari denied.

No. 17–8603. *CORDER v. UNITED STATES.* C. A. 6th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 394.

No. 17–8612. *RICHMOND v. ILLINOIS.* App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143571–U.

No. 17–8625. *MILLER v. BUTTS.* C. A. 7th Cir. Certiorari denied.

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No. 17–8658. *EASTWOOD v. KNIGHT, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL FACILITY*. C. A. 7th Cir. Certiorari denied.

No. 17–8692. *ACKBAR v. WILLIAMS, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 795.

No. 17–8713. *ANDREW v. COSTER ET AL.* Sup. Ct. Nev. Certiorari denied.

No. 17–8744. *SIMMONDS v. OHIO*. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2017-Ohio-2739.

No. 17–8754. *JACKSON v. ALABAMA BOARD OF PARDON AND PAROLES*. Ct. Crim. App. Ala. Certiorari denied. Reported below: 268 So. 3d 626.

No. 17–8763. *ANGEL GARCIA v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 403.

No. 17–8765. *DE LA CRUZ-GUTIERREZ v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 221.

No. 17–8767. *SCOTT v. UNITED STATES*. C. A. 1st Cir. Certiorari denied. Reported below: 877 F. 3d 30.

No. 17–8783. *STOREY v. CITY OF ALTON, ILLINOIS*. C. A. 7th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 706.

No. 17–8785. *STOCKTON v. WARDEN, FEDERAL CORRECTIONAL INSTITUTION, WILLIAMSBURG*. C. A. 4th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 724.

No. 17–8790. *BARBA v. MONTGOMERY, WARDEN*. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 431.

No. 17–8792. *ROSS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 778.

No. 17–8796. *CRAVENS v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 810.

No. 17–8798. *WHITE v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 195.

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No. 17–8800. *PROCTOR v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8805. *WALKER v. ALABAMA*. Sup. Ct. Ala. Certiorari denied.

No. 17–8813. *MORENO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8814. *PINEDA v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 810.

No. 17–8819. *SPENCER v. FLORIDA*. Sup. Ct. Fla. Certiorari denied. Reported below: 238 So. 3d 708.

No. 17–8821. *SMITH v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8823. *BROWN v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8828. *DRAPER v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 3d 210.

No. 17–8829. *PARKER v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 190.

No. 17–8831. *MIRANDA-ZARCO v. UNITED STATES*. C. A. 8th Cir. Certiorari denied.

No. 17–8832. *WRIGHT v. INDIANA*. Sup. Ct. Ind. Certiorari denied.

No. 17–8833. *WILLIAMS v. KRUEGER, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 17–8835. *VERNON v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8837. *YU HUA WANG v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 676.

No. 17–8838. *THORNTON v. UNITED STATES*. C. A. 4th Cir. Certiorari denied.

No. 17–8840. *JOHNSTON v. UNITED STATES*. C. A. 7th Cir. Certiorari denied.

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No. 17–8852. *THOMAS v. LAMANNA, WARDEN*. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 584.

No. 17–8855. *STRAIN v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 152.

No. 17–8858. *REYES-ROJAS v. UNITED STATES*. C. A. 1st Cir. Certiorari denied.

No. 17–8859. *GOINGS v. GROSBOLL*. Sup. Ct. Ill. Certiorari denied.

No. 17–8861. *CASTRO-CONTRERAS v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 619.

No. 17–8862. *MERCADO v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 1018.

No. 17–8863. *PEEPLS v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 3d 282.

No. 17–8864. *TAYLOR v. MISSISSIPPI*. Ct. App. Miss. Certiorari denied. Reported below: 230 So. 3d 722.

No. 17–8866. *ZENOR v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 595.

No. 17–8872. *MONTOYA-CLAVIJO v. CLAY*. C. A. 5th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 391.

No. 17–8873. *MINOR v. UNITED STATES*. C. A. 6th Cir. Certiorari denied.

No. 17–8874. *CHALLONER v. SEPANEK, WARDEN*. C. A. 6th Cir. Certiorari denied.

No. 17–8875. *MAYEN v. UNITED STATES*. C. A. 9th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 781.

No. 17–8877. *BRUNKEN v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 822.

No. 17–8879. *SANDERS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

No. 17–8880. *CHANCE v. UNITED STATES*. C. A. 11th Cir. Certiorari denied.

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No. 17–8882. *WINDSOR v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 322.

No. 17–8884. *FERNANDEZ v. UNITED STATES*. C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 226.

No. 17–8885. *SANGANZA v. UNITED STATES*. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 181.

No. 17–8889. *WEDINGTON v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 3d 418.

No. 17–8893. *MUIR v. UNITED STATES*. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 510.

No. 17–8898. *DEFOGGI v. UNITED STATES*. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 3d 1102.

No. 17–8899. *DAVIS v. UNITED STATES*. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 649.

No. 17–8921. *HEBERT v. COLORADO*. Ct. App. Colo. Certiorari denied.

No. 17–8936. *ISIDRO v. CALIFORNIA*. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 17–8940. *THOMAS v. OHIO*. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied.

No. 17–8942. *TOLBERT v. REDNOUR, WARDEN*. C. A. 7th Cir. Certiorari denied.

No. 17–8954. *BARGO v. RAUNER ET AL.* C. A. 7th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 548.

No. 17–1079. *WYCKOFF ET AL. v. OFFICE OF THE COMMISSIONER OF BASEBALL, DBA MAJOR LEAGUE BASEBALL, ET AL.* C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 705 Fed. Appx. 26.

No. 17–1235. *SESSIONS, ATTORNEY GENERAL v. PEGUERO MATEO*. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 870 F. 3d 228.

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No. 17-1434. *CARSON v. MERIT SYSTEMS PROTECTION BOARD*. C. A. Fed. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

No. 17-1494. *RODRIGUEZ-DEPEN A. v. PARTS AUTHORITY, INC., ET AL.* C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 877 F. 3d 122.

No. 17-7635. *MILLER v. UNITED STATES*. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN and JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 868 F. 3d 1182.

Rehearing Denied

No. 16-6392. *TAYLOR v. UNITED STATES*, *ante*, p. 976;
No. 17-1240. *TUERK v. FLORIDA BAR*, *ante*, p. 933;
No. 17-7650. *EVERSON v. ARMSTRONG ET AL.*, *ante*, p. 936;
No. 17-7688. *BOWLING v. WHITE, WARDEN*, *ante*, p. 937;
No. 17-7886. *IN RE CALTON*, 583 U. S. 1178;
No. 17-7919. *DULAURENCE v. TELEGEN ET AL.*, *ante*, p. 939;
No. 17-8016. *BOATWRIGHT v. UNITED STATES*, *ante*, p. 941; and
No. 17-8127. *YASITH CHHUN v. UNITED STATES*, *ante*, p. 944.
Petitions for rehearing denied.

No. 17-7715. *CASANOVA v. ULIBARRI, WARDEN*, *ante*, p. 946.
Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1044. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, 559 U. S. 1119, 563 U. S. 1045, 569 U. S. 1125, 572 U. S. 1161, 578 U. S. 1031, and 581 U. S. 1029.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Appellate Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7.

[See *infra*, pp. 1047–1055.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE

Rule 8. Stay or injunction pending appeal.

(a) Motion for stay.

(1) Initial motion in the district court.—A party must ordinarily move first in the district court for the following relief:

(B) approval of a bond or other security provided to obtain a stay of judgment; or

(2) Motion in the court of appeals; conditions on relief.—A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(E) The court may condition relief on a party's filing a bond or other security in the district court.

(b) Proceeding against a security provider.—If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly send a copy to each security provider whose address is known.

Rule 11. Forwarding the record.

(g) *Record for a preliminary motion in the court of appeals.*—If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

*Rule 25. Filing and service.**(a) Filing.*

(1) *Filing with the clerk.*—A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing:—method and timeliness.*

(A) Nonelectronic filing.

(i) *In general.*—For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(ii) *A brief or appendix.*—A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) *Inmate filing.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically by an

inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. §1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or
- the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic filing and signing.

(i) By a represented person—generally required; exceptions.—A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) By an unrepresented person—when allowed or required.—A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) Signing.—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(iv) Same as a written paper.—A paper filed electronically is a written paper for purposes of these rules.

(3) Filing a motion with a judge.—If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the

judge must note the filing date on the motion and give it to the clerk.

(4) *Clerk's refusal of documents.*—The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) *Privacy protection.*—An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) *Service of all papers required.*—Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) *Manner of service.*

(1) Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days.

(2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by elec-

tronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of copies.—When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 26. Computing and extending time.

(a) Computing time.—The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(4) “Last day” defined.—Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court’s time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(A)(ii), and 25(a)(2)(A)(iii)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

Rule 28.1. Cross-appeals.

(f) *Time to serve and file a brief.*—Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Rule 29. Brief of an amicus curiae.

(a) *During initial consideration of a case on the merits.*

(1) *Applicability.*—This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a

court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

(b) *During consideration of whether to grant rehearing.*

(1) *Applicability.*—This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

Rule 31. Serving and filing briefs.

(a) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

Rule 39. Costs.

(e) *Costs on appeal taxable in the district court.*—The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a bond or other security to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

Rule 41. Mandate: contents; issuance and effective date; stay.

(a) *Contents.*—Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.

(b) *When issued.*—The court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) *Effective date.*—The mandate is effective when issued.

(d) *Staying the mandate pending a petition for certiorari.*

(1) *Motion to stay.*—A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay.

(2) *Duration of stay; extensions.*—The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) the party who obtained the stay notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed, in which case the stay continues until the Supreme Court’s final disposition.

(3) *Security.*—The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(4) *Issuance of mandate.*—The court of appeals must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist.

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL
IN FORMA PAUPERIS

12. *State the city and state of your legal residence.*

Your daytime phone number: () _____
Your age: _____ Your years of schooling: _____

FORM 7. DECLARATION OF INMATE FILING

*[insert name of court; for example,
United States District Court for the District of Minnesota]*

A. B., Plaintiff	}	Case No. _____
v.		
C. D., Defendant		

I am an inmate confined in an institution. Today, *[insert date]*, I am depositing the *[insert title of document; for example, "notice of appeal"]* in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U. S. C. § 1746; 18 U. S. C. § 1621).

Sign your name here _____
Signed on _____
[insert date]

[Note to inmate filers: *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1058. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, 563 U. S. 1051, 566 U. S. 1045, 569 U. S. 1141, 572 U. S. 1169, 575 U. S. 1049, 578 U. S. 1051, and 581 U. S. 1035.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2016 and May 2017 Reports of the Advisory Committee on Bankruptcy Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix.

[See *infra*, pp. 1061–1076.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES
OF BANKRUPTCY PROCEDURE

Rule 3002.1 Notice relating to claims secured by security interest in the debtor's principal residence.

(b) Notice of payment changes; objection.

(1) Notice.—The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) Objection.—A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

(e) Determination of fees, expenses, or charges.—On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

*Rule 5005. Filing and transmittal of papers.**(a) Filing.**(2) Electronic filing and signing.*

(A) By a represented entity—generally required; exceptions.—An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By an unrepresented individual—when allowed or required.—An individual not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) Signing.—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a written paper.—A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

*Rule 7004. Process; service of summons, complaint.**(a) Summons; service; proof of service.*

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(5), (e)–(j), (l), and (m) F. R. Civ. P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F. R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

Rule 7062. Stay of proceedings to enforce a judgment.

Rule 62 F. R. Civ. P. applies in adversary proceedings, except that proceedings to enforce a judgment are stayed for 14 days after its entry.

Rule 8002. Time for filing notice of appeal.

(a) In general.

(5) Entry defined.

(A) A judgment, order, or decree is entered for purposes of this Rule 8002(a):

(i) when it is entered in the docket under Rule 5003(a), or

(ii) if Rule 7058 applies and Rule 58(a) F. R. Civ. P. requires a separate document, when the judgment, order, or decree is entered in the docket under Rule 5003(a) and when the earlier of these events occurs:

- the judgment, order, or decree is set out in a separate document; or
- 150 days have run from entry of the judgment, order, or decree in the docket under Rule 5003(a).

(B) A failure to set out a judgment, order, or decree in a separate document when required by Rule 58(a) F. R. Civ. P. does not affect the validity of an appeal from that judgment, order, or decree.

(b) Effect of a motion on the time to appeal.

(1) *In general.*—If a party files in the bankruptcy court any of the following motions and does so within the time allowed by these rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(c) Appeal by an inmate confined in an institution.

(1) *In general.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8002(c)(1). If an

inmate files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 8002(c)(1)(A)(i).

Rule 8006. Certifying a direct appeal to the court of appeals.

(c) *Joint certification by all appellants and appellees.*

(1) *How accomplished.*—A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental statement by the court.*—Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

Rule 8007. Stay pending appeal; bonds; suspension of proceedings.

(a) *Initial motion in the bankruptcy court.*

(1) *In general.*—Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) the approval of a bond or other security provided to obtain a stay of judgment;

(c) *Filing a bond or other security.*—The district court, BAP, or court of appeals may condition relief on filing a bond or other security with the bankruptcy court.

(d) *Bond or other security for a trustee or the United States.*—The court may require a trustee to file a bond or other security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

Rule 8010. Completing and transmitting the record.

(c) *Record for a preliminary motion in the district court, BAP, or court of appeals.*—This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a bond or other security provided to obtain a stay of judgment; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

Rule 8011. Filing and service; signature.

(a) *Filing.*

(2) *Method and timeliness.*

(A) *Nonelectronic filing.*

(i) *In general.*—For a document not filed electronically, filing may be accomplished by mail addressed to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(A)(ii) and (iii), filing is timely only if the clerk receives the document within the time fixed for filing.

(ii) *Brief or appendix.*—A brief or appendix not filed electronically is also timely filed if, on or before the last day for filing, it is:

- mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid; or
- dispatched to a third-party commercial carrier for delivery within 3 days to the clerk.

(iii) *Inmate filing.*—If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(A)(iii). A document not filed electronically by an inmate confined in an institution is timely if it is deposited in the institution's internal mailing system on or before the last day for filing and:

- it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or
- the appellate court exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies this Rule 8011(a)(2)(A)(iii).

(B) *Electronic filing.*

(i) *By a represented person—generally required; exceptions.*—An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) *By an unrepresented individual—when allowed or required.*—An individual not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) *Same as a written paper.*—A document filed electronically is a written paper for purposes of these rules.

(C) *Copies.*—If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

(c) *Manner of service.*

(1) *Nonelectronic service.*—Nonelectronic service may be by any of the following:

- (A) personal delivery;
- (B) mail; or
- (C) third-party commercial carrier for delivery within 3 days.

(2) *Electronic service.*—Electronic service may be made by sending a document to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person served consented to in writing.

(3) *When service is complete.*—Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) *Proof of service.*

(1) *What is required.*—A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

- (i) the date and manner of service;
- (ii) the names of the persons served; and
- (iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

(e) *Signature.*—Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Rule 8013. Motions; intervention.

(f) *Form of documents; length limits; number of copies.*

(2) *Format of an electronically filed document.*—A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the length limits under paragraph (3).

(3) *Length limits.*—Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

(A) a motion or a response to a motion produced using a computer must include a certificate under Rule 8015(h) and not exceed 5,200 words;

(B) a handwritten or typewritten motion or a response to a motion must not exceed 20 pages;

(C) a reply produced using a computer must include a certificate under Rule 8015(h) and not exceed 2,600 words; and

(D) a handwritten or typewritten reply must not exceed 10 pages.

Rule 8015. Form and length of briefs; form of appendices and other papers.

(a) *Paper copies of a brief.*—If a paper copy of a brief may or must be filed, the following provisions apply:

(7) *Length.*

(A) *Page limitation.*—A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B).

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

- contains no more than 13,000 words; or
- uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in item (i).

(f) *Local variation.*—A district court or BAP must accept documents that comply with the form requirements of this rule and the length limits set by Part VIII of these rules. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all the form requirements of this rule or the length limits set by Part VIII of these rules.

(g) *Items excluded from length.*—In computing any length limit, headings, footnotes, and quotations count toward the limit, but the following items do not:

- the cover page;
- a corporate disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

(h) *Certificate of compliance.*

(1) *Briefs and documents that require a certificate.*—A brief submitted under Rule 8015(a)(7)(B), 8016(d)(2), or 8017(b)(4)—and a document submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The individual preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) *Acceptable form.*—The certificate requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

Rule 8016. Cross-appeals.

(d) *Length.*

(1) *Page limitation.*—Unless it complies with paragraph (2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-volume limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

- (i) contains no more than 13,000 words; or
- (ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it includes a certificate under Rule 8015(h) and:

- (i) contains no more than 15,300 words; or
- (ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it includes a certificate under Rule 8015(h) and contains no more than half of the type volume specified in subparagraph (A).

Rule 8017. Brief of an amicus curiae.

(a) *During initial consideration of a case on the merits.*

(1) *Applicability.*—This Rule 8017(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a district court or BAP may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

(3) *Motion for leave to file.*—The motion must be accompanied by the proposed brief and state:

- (A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(4) *Contents and form.*—An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

(A) a table of contents, with page references;

(B) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(C) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(D) unless the amicus curiae is one listed in the first sentence of subdivision (a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(E) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

(F) a certificate of compliance, if required by Rule 8015(h).

(5) *Length.*—Except by the district court's or BAP's permission, an amicus brief must be no more than one-half

the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) *Time for filing.*—An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) *Reply brief.*—Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(8) *Oral argument.*—An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

(b) *During consideration of whether to grant rehearing.*

(1) *Applicability.*—This Rule 8017(b) governs amicus filings during a district court's or BAP's consideration of whether to grant rehearing, unless a local rule or order in a case provides otherwise.

(2) *When permitted.*—The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) *Motion for leave to file.*—Rule 8017(a)(3) applies to a motion for leave.

(4) *Contents, form, and length.*—Rule 8017(a)(4) applies to the amicus brief. The brief must include a certificate under Rule 8015(h) and not exceed 2,600 words.

(5) *Time for filing.*—An amicus curiae supporting the motion for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the motion is filed. An amicus curiae opposing the motion for rehearing must file its brief, accompanied by a motion for filing when neces-

sary, no later than the date set by the court for the response.

Rule 8018.1. District-court review of a judgment that the bankruptcy court lacked the constitutional authority to enter.

If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.

Rule 8021. Costs.

(c) *Costs on appeal taxable in the bankruptcy court.*—The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

- (1) the production of any required copies of a brief, appendix, exhibit, or the record;
- (2) the preparation and transmission of the record;
- (3) the reporter's transcript, if needed to determine the appeal;
- (4) premiums paid for a bond or other security to preserve rights pending appeal; and
- (5) the fee for filing the notice of appeal.

Rule 8022. Motion for rehearing.

(b) *Form of the motion; length.*—The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Except by the district court's or BAP's permission:

- (1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and
- (2) a handwritten or typewritten motion must not exceed 15 pages.

Rule 9025. Security: proceedings against security providers.

Whenever the Code or these rules require or permit a party to give security, and security is given with one or more security providers, each provider submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

Appendix:
Length Limits Stated in Part VIII of the
Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g)
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate requires by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:
 - You must use the word limit if you produce your on a computer; and
 - You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document type	Word limit	Page limit	Line limit
Motions	8013(f)(3)	• Motion	5,200	20	Not applicable
		• Response to a motion			
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650

	Rule	Document type	Word limit	Page limit	Line limit
Parties' briefs (where cross-appeal)	8016(d)	- Appellant's principal brief - Appellant's response and reply brief	13,000	30	1,300
	8016(d)	Appellee's principal and response brief	15,300	35	1,500
	8016(d)	Appellee's reply brief	6,500	15	650
Party's supplemental letter	8014(f)	Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	Motion for rehearing	3,900	15	Not applicable

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U.S.C. §2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1078. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U.S.C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U.S. 645, 308 U.S. 642, 329 U.S. 839, 335 U.S. 919, 341 U.S. 959, 368 U.S. 1009, 374 U.S. 861, 383 U.S. 1029, 389 U.S. 1121, 398 U.S. 977, 401 U.S. 1017, 419 U.S. 1133, 446 U.S. 995, 456 U.S. 1013, 461 U.S. 1095, 471 U.S. 1153, 480 U.S. 953, 485 U.S. 1043, 500 U.S. 963, 507 U.S. 1089, 514 U.S. 1151, 517 U.S. 1279, 520 U.S. 1305, 523 U.S. 1221, 526 U.S. 1183, 529 U.S. 1155, 532 U.S. 1085, 535 U.S. 1147, 538 U.S. 1083, 544 U.S. 1173, 547 U.S. 1233, 550 U.S. 1003, 553 U.S. 1149, 556 U.S. 1341, 559 U.S. 1139, 569 U.S. 1149, 572 U.S. 1217, 575 U.S. 1055, 578 U.S. 1061, and 581 U.S. 1049.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Civil Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 5, 23, 62, and 65.1.

[See *infra*, pp. 1081–1086.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2018, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

Page Proof Pending Publication

AMENDMENTS TO THE FEDERAL RULES
OF CIVIL PROCEDURE

Rule 5. Serving and filing pleadings and other papers.

(b) Service: how made.

(2) Service in general.—A paper is served under this rule by:

(A) handing it to the person;

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(3) Using court facilities.—[Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]

(d) Filing.

(1) Required filings; certificate of service.

(A) Papers after the complaint.—Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of service.*—No certificate of service is required when a paper is served by filing it with the

court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) *Nonelectronic filing*.—A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic filing and signing*.—

(A) *By a represented person—generally required; exceptions*.—A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an unrepresented person—when allowed or required*.—A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing*.—A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a written paper*.—A paper filed electronically is a written paper for purposes of these rules.

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Rule 23. Class actions.

(c) *Certification order; notice to class members; judgment; issues classes; subclasses.*

(2) *Notice.*

(B) *For (b)(3) classes.*—For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(e) *Settlement, voluntary dismissal, or compromise.*—The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the class.*

(A) *Information that parties must provide to the court.*—The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a decision to give notice.*—The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties’ showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
- (ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the proposal.*—If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying agreements.*—The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New opportunity to be excluded.*—If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-member objections.*

(A) *In general.*—Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court approval required for payment in connection with an objection.*—Unless approved by the court

after a hearing, no payment or other consideration may be provided in connection with:

- (i) forgoing or withdrawing an objection, or
- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for approval after an appeal.*—If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) *Appeals.*—A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay.*—Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) *Stay by bond or other security.*—At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) *Stay of an injunction, receivership, or patent accounting order.*—Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) *Injunction pending an appeal.*—While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

Rule 65.1. Proceedings against a security provider.

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with one or more security providers, each provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the security. The security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly send a copy of each to every security provider whose address is known.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 26, 2018, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1088. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, and 553 U. S. 1155, 556 U. S. 1363, 559 U. S. 1151, 563 U. S. 1063, 566 U. S. 1053, 569 U. S. 1161, 572 U. S. 1223, and 578 U. S. 1067.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2018

*To the Senate and House of Representatives of the United
States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 4, 2017; a redline version of the rules with committee notes; an excerpt from the September 2017 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2017 Report of the Advisory Committee on Criminal Rules.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2018

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.4, 45, and 49.

[See *infra*, pp. 1091–1094.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2018, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES
OF CRIMINAL PROCEDURE

Rule 12.4. Disclosure statement.

(a) Who must file.

(1) Nongovernmental corporate party.—Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) Organizational victim.—Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time to file; later filing.—A party must:

(1) file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance; and

(2) promptly file a later statement if any required information changes.

Rule 45. Computing and extending time.

(c) Additional time after certain kinds of service.—Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49. Serving and filing papers.

(a) Service on a party.

(1) *What is required.*—Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) *Serving a party's attorney.*—Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by electronic means.

(A) *Using the court's electronic-filing system.*—A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) *Using other electronic means.*—A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(4) *Service by nonelectronic means.*—A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(b) *Filing.*

(1) *When required; certificate of service.*—Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) *Means of filing.*

(A) *Electronically.*—A paper is filed electronically by filing it with the court's electronic-filing system. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. A paper filed electronically is written or in writing under these rules.

(B) *Nonelectronically.*—A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Means used by represented and unrepresented parties.*

(A) *Represented party.*—A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *Unrepresented party.*—A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) *Signature*.—Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) *Acceptance by the clerk*.—The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) *Service and filing by nonparties*.—A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) *Notice of a court order*.—When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule 49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

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