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UNITED STATES REPORTS

VOLUME 587

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2018

MARCH 26 THROUGH JUNE 17, 2019

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CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
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*Attorney General Barr was presented to the Court on May 28, 2019. See *post*, p. III.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 19, 2018, viz.:

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice.

For the First Circuit, Stephen Breyer, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

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

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

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

For the Sixth Circuit, Sonia Sotomayor, Associate Justice.

For the Seventh Circuit, Brett M. Kavanaugh, Associate Justice.

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For the Eighth Circuit, Neil M. Gorsuch, Associate Justice.

For the Ninth Circuit, Elena Kagan, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

October 19, 2018.

(For next previous allotment, see 586 U. S., p. v.)

PRESENTATION OF THE ATTORNEY GENERAL

Supreme Court of the United States

TUESDAY, MAY 28, 2019

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

The Chief Justice said:

The Court now recognizes the Solicitor General of the United States.

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Solicitor General Francisco said:

Mr. Chief Justice, and may it please the Court. I have the privilege to present to the Court the Eighty-fifth Attorney General of the United States, the Honorable William P. Barr, of Virginia.

The Chief Justice said:

General Barr, on behalf of the Court, I welcome you back as the Chief Legal Officer of the United States and as an officer of this Court. We recognize the very important responsibilities that are entrusted to you. Your commission as Attorney General of the United States will be noted in the records of the Court. We wish you well in the discharge of the duties of your new office.

Attorney General Barr said:

Thank you, Mr. Chief Justice.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2018

REPUBLIC OF SUDAN *v.* HARRISON ET AL.

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

No. 16–1094. Argued November 7, 2018—Decided March 26, 2019

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The Foreign Sovereign Immunities Act of 1976 (FSIA) generally immunizes foreign states from suit in this country unless one of several enumerated exceptions to immunity applies. 28 U. S. C. §§ 1604, 1605–1607. If an exception applies, the FSIA provides subject-matter jurisdiction in federal district court, § 1330(a), and personal jurisdiction "where service has been made under section 1608," § 1330(b). Section 1608(a) provides four methods of serving civil process, including, as relevant here, service "by any form of mail requiring a signed receipt, to be addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned," § 1608(a)(3).

Respondents, victims of the bombing of the USS *Cole* and their family members, sued the Republic of Sudan under the FSIA, alleging that Sudan provided material support to al Qaeda for the bombing. The court clerk, at respondents' request, addressed the service packet to Sudan's Minister of Foreign Affairs at the Sudanese Embassy in the United States and later certified that a signed receipt had been returned. After Sudan failed to appear in the litigation, the District Court entered a default judgment for respondents and subsequently issued three orders requiring banks to turn over Sudanese assets to pay the judgment. Sudan challenged those orders, arguing that the judgment was invalid for lack of personal jurisdiction, because § 1608(a)(3) required that the service packet be sent to its foreign minister at his

principal office in Sudan, not to the Sudanese Embassy in the United States. The Second Circuit affirmed, reasoning that the statute was silent on where the mailing must be sent and that the method chosen was consistent with the statute's language and could be reasonably expected to result in delivery to the foreign minister.

Held: Most naturally read, § 1608(a)(3) requires a mailing to be sent directly to the foreign minister's office in the foreign state. Pp. 8–19.

(a) A letter or package is "addressed" to an intended recipient when his or her name and address are placed on the outside. The noun "address" means "a residence or place of business." Webster's Third New International Dictionary 25. A foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister. Similarly, to "dispatch" a letter to an addressee connotes sending it directly. It is also significant that service under § 1608(a)(3) requires a signed returned receipt to ensure delivery to the addressee. Pp. 8–11.

(b) Several related provisions in § 1608 support this reading. Section 1608(b)(3)(B) contains similar "addressed and dispatched" language, but also says that service by its method is permissible "if reasonably calculated to give actual notice." Respondents' suggestion that § 1608(a)(3) embodies a similar standard runs up against well-settled principles of statutory interpretation. See *Department of Homeland Security* v. *MacLean*, 574 U. S. 383, 391, and *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837. Section 1608(b)(2) expressly allows service on an agent, specifies the particular individuals who are permitted to be served as agents of the recipient, and makes clear that service on the agent may occur in the United States. Congress could have included similar terms in § 1608(a)(3) had it intended the provision to operate in this manner. Section 1608(c) deems service to have occurred under all methods only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under § 1608(a)(3), that occurs when the person who receives it from the carrier signs for it. Interpreting § 1608(a)(3) to require that a service packet be sent to a foreign minister's own office rather than to a mailroom employee in a foreign embassy better harmonizes the rules for determining when service occurs. Pp. 11–15.

(c) This reading of § 1608(a)(3) avoids potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations. If mailing a service packet to a foreign state's embassy in the United States were sufficient, then it would appear to be easier to serve the foreign state than to serve a person in that foreign state under

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Syllabus

Rule 4. The natural reading of § 1608(a)(3) also avoids the potential international implications arising from the State Department's position that the Convention's principle of inviolability precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. Pp. 15–17.

(d) Respondents' remaining arguments are unavailing. First, their suggestion that § 1608(a)(3) demands that service be sent "to a location that is likely to have a direct line of communication to the foreign minister" creates difficult line-drawing problems that counsel in favor of maintaining a clear, administrable rule. Second, their claim that § 1608(a)(4)—which requires that process be sent to the Secretary of State in "Washington, District of Columbia"—shows that Congress did not intend § 1608(a)(3) to have a similar locational requirement is outweighed by the countervailing arguments already noted. Finally, they contend that it would be unfair to throw out their judgment based on petitioner's highly technical and belatedly raised argument. But in cases with sensitive diplomatic implications, the rule of law demands adherence to strict rules, even when the equities seem to point in the opposite direction. Pp. 17–19.

802 F. 3d 399, reversed and remanded.

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ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 19.

Christopher M. Curran argued the cause for petitioner. With him on the briefs were *Nicole Erb*, *Claire A. DeLelle*, *Nicolle Kownacki*, and *Celia A. McLaughlin*.

Erica L. Ross 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 Readler*, *Deputy Solicitor General Kneedler*, *Sharon Swingle*, *Lewis S. Yelin*, and *Jennifer G. Newstead.*

Kannon K. Shanmugam argued the cause for respondents. With him on the brief were *Masha G. Hansford*, *Kevin E. Martingayle*, *Andrew C. Hall*, *Roarke Maxwell*, and *Nelson M. Jones III*.*

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*Briefs of *amici curiae* urging reversal were filed for Government of National Accord, State of Libya, by *Paul Enzinna*; for International Law Professors by *Jared L. Hubbard* and *George A. Bermann*; and for the

JUSTICE ALITO delivered the opinion of the Court.

This case concerns the requirements applicable to a particular method of serving civil process on a foreign state. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state may be served by means of a mailing that is "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U. S. C. §1608(a)(3). The question now before us is whether this provision is satisfied when a service packet that names the foreign minister is mailed to the foreign state's embassy in the United States. We hold that it is not. Most naturally read, §1608(a)(3) requires that a mailing be sent directly to the foreign minister's office in the minister's home country.

I

A

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Under the FSIA, a foreign state is immune from the jurisdiction of courts in this country unless one of several enumerated exceptions to immunity applies. 28 U. S. C. §§1604, 1605–1607. If a suit falls within one of these exceptions, the FSIA provides subject-matter jurisdiction in federal district courts. §1330(a). The FSIA also provides for personal jurisdiction "where service has been made under section 1608." §1330(b).

Section 1608(a) governs service of process on "a foreign state or political subdivision of a foreign state." §1608(a); Fed. Rule Civ. Proc. 4(j)(1). In particular, it sets out in hierarchical order the following four methods by which "[s]ervice . . . shall be made." §1608(a). The first method

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Kingdom of Saudi Arabia by *Mitchell R. Berger*, *Pierre H. Bergeron*, *Benjamin J. Beaton*, and *Colter L. Paulson.*

Briefs of *amici curiae* urging affirmance were filed for Former U. S. Counterterrorism Officials et al. by *J. Carl Cecere*; and for Veterans of Foreign Wars of the United States by *Peter K. Stris*, *Brendan S. Maher*, and *Radha A. Pathak.*

is by delivery of a copy of the summons and complaint "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." § 1608(a)(1). "[I]f no special arrangement exists," service may be made by the second method, namely, delivery of a copy of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." § 1608(a)(2). If service is not possible under either of the first two methods, the third method, which is the one at issue in this case, may be used. This method calls for

> "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, *by any form of mail requiring a signed receipt, to be addressed and dispatched* by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned*." § 1608(a)(3) (emphasis added).

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Finally, if service cannot be made within 30 days under § 1608(a)(3), service may be effected by sending the service packet "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia," for transmittal "through diplomatic channels to the foreign state." § 1608(a)(4).

Once served, a foreign state or political subdivision has 60 days to file a responsive pleading. § 1608(d). If the foreign state or political subdivision does not do this, it runs the risk of incurring a default judgment. See § 1608(e). A copy of any such default judgment must be "sent to the foreign state or political subdivision in the [same] manner prescribed for service." *Ibid.*

B

On October 12, 2000, the USS *Cole*, a United States Navy guided-missile destroyer, entered the harbor of Aden,

Yemen, for what was intended to be a brief refueling stop. While refueling was underway, a small boat drew along the side of the *Cole*, and the occupants of the boat detonated explosives that tore a hole in the side of the *Cole*. Seventeen crewmembers were killed, and dozens more were injured. Al Qaeda later claimed responsibility for the attack.

Respondents in this case are victims of the USS *Cole* bombing and their family members. In 2010, respondents sued petitioner, the Republic of Sudan, alleging that Sudan had provided material support to al Qaeda for the bombing. See 28 U. S. C. §§ 1605A(a)(1), (c). Because respondents brought suit under the FSIA, they were required to serve Sudan with process under § 1608(a). It is undisputed that service could not be made under § 1608(a)(1) or § 1608(a)(2), and respondents therefore turned to § 1608(a)(3). At respondents' request, the clerk of the court sent the service packet, return receipt requested, to: "Republic of Sudan, Deng Alor Koul, Minister of Foreign Affairs, Embassy of the Republic of Sudan, 2210 Massachusetts Avenue NW, Washington, DC 20008." App. 172. The clerk certified that the service packet had been sent and, a few days later, certified that a signed receipt had been returned.[1] After Sudan failed to appear in the litigation, the District Court for the District of Columbia held an evidentiary hearing and entered a $314 million default judgment against Sudan. Again at respondents' request, the clerk of the court mailed a copy of the default judgment in the same manner that the clerk had previously used. See § 1608(e).

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With their default judgment in hand, respondents turned to the District Court for the Southern District of New York, where they sought to register the judgment and satisfy it

[1] Sudan questions whether respondents named the correct foreign minister and whether the Sudanese Embassy received the service packet. Because we find the service deficient in any event, we assume for the sake of argument that the correct name was used and that the Embassy did receive the packet.

through orders requiring several banks to turn over Sudanese assets. See 28 U. S. C. § 1963 (providing for registration of judgments for enforcement in other districts). Pursuant to § 1610(c), the District Court entered an order confirming that a sufficient period of time had elapsed following the entry and notice of the default judgment, and the court then issued three turnover orders.

At this point, Sudan made an appearance for the purpose of contesting jurisdiction. It filed a notice of appeal from each of the three turnover orders and contended on appeal that the default judgment was invalid for lack of personal jurisdiction. In particular, Sudan maintained that § 1608(a)(3) required that the service packet be sent to its foreign minister at his principal office in Khartoum, the capital of Sudan, and not to the Sudanese Embassy in the United States.

The Court of Appeals for the Second Circuit rejected this argument and affirmed the orders of the District Court. 802 F. 3d 399 (2015). The Second Circuit reasoned that, although § 1608(a)(3) requires that a service packet be mailed "to the head of the ministry of foreign affairs of the foreign state concerned," the statute "is silent as to a specific location where the mailing is to be addressed." *Id.*, at 404. In light of this, the court concluded that "the method chosen by plaintiffs—a mailing addressed to the minister of foreign affairs at the embassy—was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person." *Ibid.*

Sudan filed a petition for rehearing, and the United States filed an *amicus curiae* brief in support of Sudan's petition. The panel ordered supplemental briefing and heard additional oral argument, but it once again affirmed, reiterating its view that § 1608(a)(3) "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country." 838 F. 3d 86, 91 (CA2 2016). The court thereafter denied Sudan's petition for rehearing en banc.

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Subsequent to the Second Circuit's decision, the Court of Appeals for the Fourth Circuit held in a similar case that § 1608(a)(3) "does not authorize delivery of service to a foreign state's embassy even if it correctly identifies the intended recipient as the head of the ministry of foreign affairs." *Kumar* v. *Republic of Sudan*, 880 F. 3d 144, 158 (2018), cert. pending, No. 17–1269.

We granted certiorari to resolve this conflict. 585 U. S. 1015 (2018).

II

A

The question before us concerns the meaning of § 1608(a)(3), and in interpreting that provision, "[w]e begin 'where all such inquiries must begin: with the language of the statute itself.'" *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U. S. 399, 412 (2012) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989)). As noted, § 1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."

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The most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state. Although this is not, we grant, the only plausible reading of the statutory text, it is the most natural one. See, *e. g.*, *United States* v. *Hohri*, 482 U. S. 64, 69–71 (1987) (choosing the "more natural" reading of a statute); *ICC* v. *Texas*, 479 U. S. 450, 456–457 (1987) (same); see also *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 41 (2008) (similar).

A key term in § 1608(a)(3) is the past participle "addressed." A letter or package is "addressed" to an intended recipient when his or her name and "address" are placed on the outside of the item to be sent. And the noun "address,"

in the sense relevant here, means "the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with." Webster's Third New International Dictionary 25 (1971) (Webster's Third); see also Webster's Second New International Dictionary 30 (1957) ("the name or description of a place of residence, business, etc., where a person may be found or communicated with"); Random House Dictionary of the English Language 17 (1966) ("the place or the name of the place where a person, organization, or the like is located or may be reached"); American Heritage Dictionary 15 (1969) ("[t]he location at which a particular organization or person may be found or reached"); Oxford English Dictionary 106 (1933) (OED) ("the name of the place to which any one's letters are directed"). Since a foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister's "address" is inconsistent with the interpretation of § 1608(a)(3) adopted by the court below and advanced by respondents.

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We acknowledge that there are circumstances in which a mailing may be "addressed" to the intended recipient at a place other than the individual's residence or usual place of business. For example, if the person sending the mailing does not know the intended recipient's current home or business address, the sender might use the intended recipient's last known address in the hope that the mailing will be forwarded. Or a sender might send a mailing to a third party who is thought to be in a position to ensure that the mailing is ultimately received by the intended recipient. But in the great majority of cases, addressing a mailing to X means placing on the outside of the mailing both X's name and the address of X's residence or customary place of work.

Section 1608(a)(3)'s use of the term "dispatched" points in the same direction. To "dispatch" a communication means

"to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." Webster's Third 653; see also OED 478 ("[t]o send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination)"). A person who wishes to "dispatch" a letter to X will generally send it directly to X at a place where X is customarily found. The sender will not "dispatch" the letter in a roundabout way, such as by directing it to a third party who, it is hoped, will then send it on to the intended recipient.

A few examples illustrate this point. Suppose that a person is instructed to "address" a letter to the Attorney General of the United States and "dispatch" the letter (*i. e.*, to "send [it] off post-haste") to the Attorney General. The person giving these instructions would likely be disappointed and probably annoyed to learn that the letter had been sent to, let us say, the office of the United States Attorney for the District of Idaho. And this would be so even though a U. S. attorney's office is part of the Department headed by the Attorney General and even though such an office would very probably forward the letter to the Attorney General's office in Washington. Similarly, a person who instructs a subordinate to dispatch a letter to the CEO of a big corporation that owns retail outlets throughout the country would probably be irritated to learn that the letter had been mailed to one of those stores instead of corporate headquarters. To "dispatch" a letter to an addressee connotes sending it directly.

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A similar understanding underlies the venerable "mailbox rule." As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed." Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); *Rosenthal* v. *Walker*, 111 U. S. 185, 193 (1884). But no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address (or an address that the offeror

held out as the place for receipt of an acceptance). See Restatement § 66, Comment *b*.

It is also significant that service under § 1608(a)(3) requires a signed returned receipt, a standard method for ensuring delivery to the addressee. Cf. Black's Law Dictionary 1096 (10th ed. 2014) (defining "certified mail" as "[m]ail for which the sender requests proof of delivery in the form of a receipt signed by the addressee"). We assume that certified mail sent to a foreign minister will generally be signed for by a subordinate, but the person who signs for the minister's certified mail in the foreign ministry itself presumably has authority to receive mail on the minister's behalf and has been instructed on how that mail is to be handled. The same is much less likely to be true for an employee in the mailroom of an embassy.

For all these reasons, we think that the most natural reading of § 1608(a)(3) is that the service packet must bear the foreign minister's name and customary address and that it be sent to the minister in a direct and expeditious way. And the minister's customary office is the place where he or she generally works, not a farflung outpost that the minister may at most occasionally visit.

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B

Several related provisions in § 1608 support this reading. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

1

One such provision is § 1608(b)(3)(B). Section 1608(b) governs service on "an agency or instrumentality of a foreign state." And like § 1608(a)(3), § 1608(b)(3)(B) requires delivery of a service packet to the intended recipient "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court." But § 1608(b)(3)(B),

unlike § 1608(a)(3), contains prefatory language saying that service by this method is permissible "if reasonably calculated to give actual notice."

Respondents read § 1608(a)(3) as embodying a similar requirement. See Brief for Respondents 34. At oral argument, respondents' counsel stressed this point, arguing that respondents' interpretation of § 1608(a)(3) "gives effect" to the "familiar" due process standard articulated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), which is "the notion that [service] must be reasonably calculated to give notice." Tr. of Oral Arg. 37–38.

This argument runs up against two well-settled principles of statutory interpretation. First, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Department of Homeland Security* v. *MacLean*, 574 U. S. 383, 391 (2015). Because Congress included the "reasonably calculated to give actual notice" language only in § 1608(b), and not in § 1608(a), we resist the suggestion to read that language into § 1608(a). Second, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988). Here, respondents encounter a superfluity problem when they argue that the "addressed and dispatched" clause in § 1608(a)(3) gives effect to the *Mullane* due process standard. They fail to account for the fact that § 1608(b)(3)(B) contains *both* the "addressed and dispatched" and "reasonably calculated to give actual notice" requirements. If respondents were correct that "addressed and dispatched" means "reasonably calculated to give notice," then the phrase "reasonably calculated to give actual notice" in § 1608(b)(3) would be superfluous. Thus, as the dissent agrees, § 1608(a)(3) "does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice." *Post*, at 20 (opinion of THOMAS, J.).

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2

Section 1608(b)(2) similarly supports our interpretation of § 1608(a)(3). Section 1608(b)(2) provides for delivery of a service packet to an officer or a managing or general agent of the agency or instrumentality of a foreign state or "to any other agent authorized by appointment or by law to receive service of process in the United States."

This language is significant for three reasons. First, it expressly allows service on an agent. Second, it specifies the particular individuals who are permitted to be served as agents of the recipient. Third, it makes clear that service on the agent may occur *in the United States* if an agent here falls within the provision's terms.

If Congress had contemplated anything similar under § 1608(a)(3), there is no apparent reason why it would not have included in that provision terms similar to those in § 1608(b)(2). Respondents would have us believe that Congress was content to have the courts read such terms into § 1608(a)(3). In view of § 1608(b)(2), this seems unlikely.[2] See also *post*, at 20 ("Nor does the FSIA authorize service on a foreign state by utilizing an agent designated to receive process for the state").

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3

Section 1608(c) further buttresses our reading of § 1608(a)(3). Section 1608(c) sets out the rules for determining when service "shall be deemed to have been made." For the first three methods of service under § 1608(a), service is deemed to have occurred on the date indicated on "the certification, signed and returned postal receipt, or other proof of service applicable to the method of service em-

[2] Notably, the idea of treating someone at a foreign state's embassy as an agent for purposes of service on the foreign state was not unfamiliar to Congress. An earlier proposed version of the FSIA would have permitted service on a foreign state by sending the service packet "to the ambassador or chief of mission of the foreign state." S. 566, 93d Cong., 1st Sess., § 1608, p. 6 (1973).

ployed." § 1608(c)(2). The sole exception is service under § 1608(a)(4), which requires the Secretary of State to transmit a service packet to the foreign state through diplomatic channels. Under this method, once the Secretary has transmitted the packet, the Secretary must send to the clerk of the court "a certified copy of the diplomatic note indicating when the papers were transmitted." § 1608(a)(4). And when service is effected in this way, service is regarded as having occurred on the transmittal date shown on the certified copy of the diplomatic note. § 1608(c)(1).

Under all these methods, service is deemed to have occurred only when there is a strong basis for concluding that the service packet will very shortly thereafter come into the hands of a foreign official who will know what needs to be done. Under § 1608(a)(4), where service is transmitted by the Secretary of State through diplomatic channels, there is presumably good reason to believe that the service packet will quickly come to the attention of a high-level foreign official, and thus service is regarded as having been completed on the date of transmittal. And under §§ 1608(a)(1), (2), and (3), where service is deemed to have occurred on the date shown on a document signed by the person who received it from the carrier, Congress presumably thought that the individuals who signed for the service packet could be trusted to ensure that the service packet is handled properly and expeditiously.

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It is easy to see why Congress could take that view with respect to a person designated for the receipt of process in a "special arrangement for service between the plaintiff and the foreign state or political subdivision," § 1608(a)(1), and a person so designated under "an applicable international convention," § 1608(a)(2). But what about § 1608(a)(3), the provision now before us? Who is more comparable to those who sign for mail under §§ 1608(a)(1) and (2)? A person who works in the office of the foreign minister in the minister's home country and is authorized to receive and process the

minister's mail? Or a mailroom employee in a foreign embassy? We think the answer is obvious, and therefore interpreting § 1608(a)(3) to require that a service packet be sent to a foreign minister's own office better harmonizes the rules for determining when service is deemed to have been made.

Respondents seek to soften the blow of an untimely delivery to the minister by noting that the foreign state can try to vacate a default judgment under Federal Rule of Civil Procedure 55(c). Brief for Respondents 27. But that is a poor substitute for sure and timely receipt of service, since a foreign state would have to show "good cause" to vacate the judgment under that Rule. Here, as with the previously mentioned provisions in § 1608, giving § 1608(a)(3) its ordinary meaning better harmonizes the various provisions in § 1608 and avoids the oddities that respondents' interpretation would create.

C

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The ordinary meaning of the "addressed and dispatched" requirement in § 1608(a)(3) also has the virtue of avoiding potential tension with the Federal Rules of Civil Procedure and the Vienna Convention on Diplomatic Relations.

1

Take the Federal Rules of Civil Procedure first. At the time of the FSIA's enactment, Rule 4(i), entitled "Alternative provisions for service in a foreign-country," set out certain permissible methods of service on "part[ies] in a foreign country." Fed. Rule Civ. Proc. 4(i)(1) (1976). One such method was "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the party to be served*." Rule 4(i)(1)(D) (emphasis added). Rule 4(i)(2) further provided that "proof of service" pursuant to that method "shall include a receipt *signed by the addressee* or other evidence of *delivery to the addressee* satisfactory to the court." (Emphasis added.) The current version of Rule 4 is similar. See Rules 4(f)(2)(C)(ii), 4(*l*)(2)(B).

The virtually identical methods of service outlined in Rule 4 and § 1608(a)(3) pose a problem for respondents' position: If mailing a service packet to a foreign state's embassy in the United States were sufficient for purposes of § 1608(a)(3), then it would appear to be easier to serve the foreign state than to serve a person in that foreign state. This is so because a receipt signed by an embassy employee would not necessarily satisfy Rule 4 since such a receipt would not bear the signature of the foreign minister and might not constitute evidence that is sufficient to show that the service packet had actually been delivered to the minister. It would be an odd state of affairs for a foreign state's inhabitants to enjoy more protections in federal courts than the foreign state itself, particularly given that the foreign state's immunity from suit is at stake. The natural reading of § 1608(a)(3) avoids that oddity.

2

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Our interpretation of § 1608(a)(3) avoids concerns regarding the United States' obligations under the Vienna Convention on Diplomatic Relations. We have previously noted that the State Department "helped to draft the FSIA's language," and we therefore pay "special attention" to the Department's views on sovereign immunity. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U. S. 170, 181 (2017). It is also "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185 (1982)).

Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U. S. T. 3237, T. I. A. S. No. 7502. Since at least 1974, the State Department has taken the position that Article 22(1)'s principle of inviolabil-

ity precludes serving a foreign state by mailing process to the foreign state's embassy in the United States. See Service of Legal Process by Mail on Foreign Governments in the U. S., 71 Dept. State Bull. 458–459 (1974). In this case, the State Department has reiterated this view in *amicus curiae* briefs filed in this Court and in the Second Circuit. The Government also informs us that United States embassies do not accept service of process when the United States is sued in a foreign court, and the Government expresses concern that accepting respondents' interpretation of § 1608 might imperil this practice. Brief for United States as *Amicus Curiae* 25–26.

Contending that the State Department held a different view of Article 22(1) before 1974, respondents argue that the Department's interpretation of the Vienna Convention is wrong, but we need not decide this question. By giving § 1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation.

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III

Respondents' remaining arguments do not alter our conclusion. First, respondents contend that § 1608(a)(3) says nothing about where the service packet must be sent. See Brief for Respondents 22 ("[T]he statute is silent as to the location *where* the service packet should be sent"). But while it is true that § 1608(a)(3) does not expressly provide where service must be sent, it is common ground that this provision must implicitly impose some requirement. Respondents acknowledge this when they argue that the provision demands that service be sent "to a location that is likely to have a direct line of communication to the foreign minister." *Id.*, at 34; cf. *post*, at 25 (stating that sending a letter to a Washington-based embassy "with a direct line of communication" to the foreign minister seems as efficient as sending it to the minister's office in the foreign state). The question, then, is precisely what § 1608(a)(3) implicitly re-

quires. Respondents assure us that a packet sent to "an embassy plainly would qualify," while a packet sent to "a tourism office plainly would not." Brief for Respondents 34. But if the test is whether "a location . . . is likely to have a direct line of communication to the foreign minister," *ibid.*, it is not at all clear why service could not be sent to places in the United States other than a foreign state's embassy. Why not allow the packet to be sent, for example, to a consulate? The residence of the foreign state's ambassador? The foreign state's mission to the United Nations? Would the answer depend on the size or presumed expertise of the staff at the delivery location? The difficult line-drawing problems that flow from respondents' interpretation of § 1608(a)(3) counsel in favor of maintaining a clear, administrable rule: The service packet must be mailed directly to the foreign minister at the minister's office in the foreign state.

Second, respondents (and the dissent, see *post*, at 24) contrast the language of § 1608(a)(3) with that of § 1608(a)(4), which says that service by this method requires that process be sent to the Secretary of State in "Washington, District of Columbia." If Congress wanted to require that process under § 1608(a)(3) be sent to a foreign minister's office in the minister's home country, respondents ask, why didn't Congress use a formulation similar to that in § 1608(a)(4)? This is respondents' strongest argument, and in the end, we see no entirely satisfactory response other than that § 1608(a) does not represent an example of perfect draftsmanship. We grant that the argument based on the contrasting language in § 1608(a)(4) cuts in respondents' favor, but it is outweighed in our judgment by the countervailing arguments already noted.

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Finally, respondents contend that it would be "the height of unfairness to throw out [their] judgment" based on the highly technical argument belatedly raised by petitioner. Brief for Respondents 35. We understand respondents' exasperation and recognize that enforcing compliance with

§ 1608(a)(3) may seem like an empty formality in this particular case, which involves highly publicized litigation of which the Government of Sudan may have been aware prior to entry of default judgment. But there are circumstances in which the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction. The service rules set out in § 1608(a)(3), which apply to a category of cases with sensitive diplomatic implications, clearly fall into this category. Under those rules, all cases must be treated the same.

Moreover, as respondents' counsel acknowledged at oral argument, holding that Sudan was not properly served under § 1608(a)(3) is not the end of the road. Tr. of Oral Arg. 56. Respondents may attempt service once again under § 1608(a)(3), and if that attempt fails, they may turn to § 1608(a)(4). When asked at argument to provide examples of any problems with service under § 1608(a)(4), respondents' counsel stated that he was unaware of any cases where such service failed. *Id.*, at 59–62.

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* * *

We interpret § 1608(a)(3) as it is most naturally understood: A service packet must be addressed and dispatched to the foreign minister at the minister's office in the foreign state. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Court holds that service on a foreign state by certified mail under the Foreign Sovereign Immunities Act (FSIA) is defective unless the packet is "addressed and dispatched to the foreign minister *at the minister's office in the foreign state.*" *Ante* this page (emphasis added). This bright-line rule

may be attractive from a policy perspective, but the FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person—"the head of the ministry of foreign affairs." 28 U. S. C. § 1608(a)(3).

Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U. S. litigant can serve the state's foreign minister. Because there is no evidence in this case suggesting that Sudan's Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA when they addressed and dispatched a service packet to Sudan's Minister of Foreign Affairs at Sudan's Embassy in Washington, D. C. Accordingly, I respectfully dissent.

I

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To serve a foreign state by certified mail under the FSIA, the service packet must be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." *Ibid.* In many respects, I approach this statutory text in the same way as the Court. I have no quarrel with the majority's definitions of the relevant statutory terms, *ante*, at 8–10, and I agree that the FSIA does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice, *ante*, at 11–12, 17–18. Nor does the FSIA authorize service on a foreign state by utilizing an agent designated to receive process for the state. *Ante*, at 13. At the same time, the FSIA stops short of requiring that the foreign minister personally receive or sign for the service packet: As long as the service packet is "addressed and dispatched . . . to" the foreign minister, § 1608(a)(3), the minister's subordinates may accept the packet and act appropriately on his behalf. *Ante*, at 10.

In short, I agree with the majority that § 1608(a)(3) requires that the service packet be dispatched to an address for the foreign minister. The relevant question, in my view, is whether a foreign state's embassy in the United States can serve as a place where the minister of foreign affairs may be reached by mail. Unlike the majority, I conclude that it can.

II

A foreign state's embassy in Washington, D. C., is generally a place where a U. S. court can communicate by mail with the state's foreign minister. Unless an embassy decides to decline packages containing judicial summonses—as it is free to do, both in individual cases or as a broader policy—a service packet addressed and dispatched to a foreign minister at the address of its embassy in the United States satisfies § 1608(a)(3).

Because embassies are "responsible for state-to-state relationships," Malone, The Modern Diplomatic Mission, in The Oxford Handbook of Modern Diplomacy 124 (A. Cooper, J. Heine, & R. Thakur eds. 2013), an important function of an embassy or other "diplomatic mission" is to "act as a permanent channel of communication between the sending state and the receiving state," G. Berridge & A. James, A Dictionary of Diplomacy 73 (2d ed. 2003). Embassies fulfill this function in numerous ways, including by using secure faxes, e-mails, or the "diplomatic bag" to transmit documents to the states they represent. A. Aust, Handbook of International Law 122 (2d ed. 2010); see *ibid.* (the diplomatic bag is a mailbag or freight container containing diplomatic documents or articles intended for official use). Thus, as one *amicus* brief aptly puts it, embassies "have direct lines of communications with the home country, and a pipeline to route communications to the proper offices and officials." Brief for Former U. S. Counterterrorism Officials et al. as *Amici Curiae* 29.

Numerous provisions of the Vienna Convention on Diplomatic Relations (VCDR) confirm this reality, Apr. 18, 1961,

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23 U. S. T. 3227, T. I. A. S. No. 7502. Under the VCDR, an embassy "may employ all appropriate means" of communicating with the state whose interests it represents, Art. 27(1), including "modern means of communication such as (mobile) telecommunication, fax, and email," Wouters, Duquet, & Meuwissen, The Vienna Conventions on Diplomatic and Consular Relations, in The Oxford Handbook of Modern Diplomacy, *supra*, at 523. The VCDR provides substantial protections for the "official correspondence of the mission" and the diplomatic bag, which may include "diplomatic documents or articles intended for official use." Arts. 27(1)–(5); cf. Vienna Convention on Consular Relations, Arts. 3, 5(j), 35, Apr. 24, 1963, 21 U. S. T. 77, T. I. A. S. No. 6820 (recognizing that embassies may perform "[c]onsular functions," such as "transmitting judicial and extrajudicial documents," and affording protections to official communications).

The capability of an embassy to route service papers to the sending state is confirmed by the State Department regulation implementing § 1608(a)(4), which provides for service on the foreign state through diplomatic channels. Under this regulation, the Department may deliver the service packet "to the embassy of the foreign state in the District of Columbia" "[i]f the foreign state so requests or if otherwise appropriate." 22 CFR § 93.1(c)(2) (2018). Although the service packet under § 1608(a)(4) need not be addressed and dispatched to the foreign minister, the regulation implementing it nevertheless demonstrates that embassies do in fact provide a channel of communication between the United States and foreign countries.

It was against this backdrop that respondents requested that their service packet be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of [Sudan]," § 1608(a)(3), at the address of its embassy in Washington, D. C. Because an embassy serves as a channel through which the U. S. Government can communicate with the sending state's minister of foreign affairs, this

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method of service complied with the ordinary meaning of § 1608(a)(3) on this record. There is—and this is critical—no evidence in the record showing that Sudan's foreign minister could not be reached through the embassy. As the majority acknowledges, the clerk received a signed return receipt and a shipping confirmation stating that the package had been delivered. *Ante,* at 6. Nothing on the receipt or confirmation indicated that the package could not be delivered to its addressee, and both the clerk and the District Judge determined that service had been properly effectuated.

Of course, the FSIA does not impose a substantive obligation on the embassy to accept or transmit service of process directed to the attention of the foreign minister. A foreign state and its embassy are free to reject some or all packets addressed to the attention of the foreign minister. But, as detailed above, Sudan has pointed to nothing in the record suggesting that its embassy refused service or that its embassy address was not a place at which its foreign minister could be reached. On these facts, I would hold that the service packet was properly "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs." § 1608(a)(3).

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III

A

Instead of focusing on whether service at an embassy satisfies the FSIA, the Court articulates a bright-line rule: To comply with § 1608(a)(3), "[a] service packet must be addressed and dispatched to the foreign minister *at the minister's office in the foreign state*." *Ante,* at 19 (emphasis added). Whatever virtues this rule possesses, the Court's interpretation is not the "most natural reading" of § 1608(a)(3), *ante,* at 8.

The Court focuses on the foreign minister's "customary office" or "place of work," *ante,* at 11, 9, but these terms

appear nowhere in § 1608. The FSIA requires that the service packet be "addressed and dispatched" to a particular *person*—"the head of the ministry of foreign affairs." § 1608(a)(3). It does not further require that the package be addressed and dispatched to any particular *place*. While I agree with the Court that sending the service packet to the foreign ministry is one way to satisfy § 1608(a)(3), that is different from saying that § 1608(a)(3) requires service exclusively at that location.

The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. Under that provision, the service packet must be "addressed and dispatched by the clerk of the court to the Secretary of State *in Washington, District of Columbia*, to the attention of the Director of Special Consular Services." § 1608(a)(4) (emphasis added); see 22 CFR § 93.1(c) (State Department regulation governing service under this provision). Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court.

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The Court offers three additional arguments in support of its position, but none justifies its bright-line rule.

First, the Court offers a series of hypotheticals to suggest that the term "dispatched" not only contemplates a prompt shipment but also connotes sending the letter directly to a place where the person is likely to be physically located. *Ante*, at 10. In my opinion, these hypotheticals are inapt. The unique role of an embassy in facilitating communications between sovereign governments does not have an analog in the hypotheticals offered by the majority.[1] And to the ex-

[1] To the extent the relationship between a U. S. attorney's office and the Attorney General is analogous, the majority correctly acknowledges that the office would "very probably forward" a letter directed to the attention

tent the statute emphasizes speed and directness, as the majority suggests, dispatching a letter to a Washington-based embassy with a direct line of communication to the foreign minister—including the ability to communicate electronically—seems at least as efficient as dispatching the letter across the globe to a foreign country, particularly if that country has recently experienced armed conflict or political instability.

Second, the Court notes that, under its rule, the effective date of service under § 1608(c) will be closer in time to when the service packet reaches a foreign official who knows how to respond to the summons. *Ante*, at 13–15. That contention assumes embassy employees are less capable of responding to a summons than foreign-ministry employees. But even granting that premise, this argument falls short. An embassy is capable of quickly transmitting a summons to the foreign minister, whether electronically, by diplomatic bag, or by some other means. Any time lost in transmission is not significant enough to warrant the Court's departure from the text of the statute.

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Third, the Court argues that allowing service at the embassy would make it easier to serve a foreign state than it is to serve a person in that foreign state under Federal Rule of Civil Procedure 4. *Ante*, at 15–16. I am not persuaded. Under the FSIA, service by mail is not effective until "the date of receipt indicated in the . . . signed and returned postal receipt." § 1608(c)(2). That is no more generous than practice under Rule 4, especially since the foreign minister need not accept service. To the extent that embassies

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of the Attorney General. *Ante*, at 10. The majority nevertheless believes that it would be improper or unusual to dispatch that letter to a local U. S. attorney's office. I disagree. It seems entirely likely that a person residing in the District of Idaho would dispatch a letter to the Attorney General through the U. S. attorney's office serving his District—even if it would be odd for a resident of the District of Columbia to use that Idaho address.

accept service of process directed to the foreign minister, it is that decision that eases the burden on the plaintiff, not § 1608(a)(3).

B

Sudan also argues that allowing service by mail at an embassy would violate Article 22(1) of the VCDR. The Court does not adopt Sudan's argument, stating only that its decision has "the virtue of avoiding potential tension" with the VCDR. *Ante*, at 15. But there is no tension between my reading of the FSIA and the VCDR.[2]

Article 22(1) of the VCDR provides that the premises of the mission—that is, "the buildings or parts of buildings and the land ancillary thereto . . . used for the purposes of the mission," Art. 1(i)—"shall be inviolable." The VCDR consistently uses the word "inviolable" to protect against physical intrusions and similar types of interference, not the jurisdiction of a court. The concept of "inviolability" is used, for instance, to protect the mission's "premises," Art. 22(1); the "archives and documents of the mission," Art. 24; the "official correspondence of the mission," Art. 27(2); the "private residence of a diplomatic agent," Art. 30(1); and the diplomatic agent's "person," "papers, correspondence, and," with certain exceptions, "his property," Arts. 29, 30(2).

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The provisions of the VCDR that protect against assertions of jurisdiction, by contrast, speak in terms of "immunity." Thus, in addition to physical inviolability, the premises of the mission (and "other property thereon") are separately "immune from search, requisition, attachment or execution." Art. 22(3). And a diplomatic agent is separately "immun[e] from the criminal jurisdiction of the receiving State" and, generally, from "its civil and administrative jurisdiction." Art. 31(1). Several provisions of the VCDR

[2] Even if there were, the FSIA postdates the VCDR and thus "'renders the treaty null'" "'to the extent of conflict.'" *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) (*per curiam*) (quoting *Reid* v. *Covert*, 354 U. S. 1, 18 (1957) (plurality opinion)).

distinguish between "immunity from jurisdiction, and inviolability." Art. 38(1); see Arts. 31(1), (3).

Given the VCDR's consistent use of "inviolability" to protect against physical intrusions and interference, and "immunity" to protect against judicial authority, Article 22(1)'s protection of the mission premises is best understood as a protection against the former. Thus, under the VCDR, the inviolability of the embassy's premises is not implicated by receipt of service papers to any greater degree than it is by receipt of other mail. Cf. *Reyes* v. *Al-Malki*, [2017] UKSC 61, ¶16 (holding that service via mail at the diplomatic residence—which is afforded the same level of protection as the mission premises under Article 30(1)—does not violate the VCDR).

* * *

Because the method of service employed by respondents here complied with the FSIA, I would affirm the judgment of the Second Circuit.

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Syllabus

STURGEON *v.* FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

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

No. 17–949. Argued November 5, 2018—Decided March 26, 2019

The Alaska National Interest Lands Conservation Act (ANILCA) set aside 104 million acres of federally owned land in Alaska for preservation purposes. With that land, ANILCA created ten new national parks, monuments, and preserves (areas known as "conservation system units"). 16 U. S. C. §3102(4). And in sketching those units' boundary lines, Congress made an uncommon choice—to follow natural features rather than enclose only federally owned lands. It thus swept in a vast set of so-called inholdings—more than 18 million acres of state, Native, and private land. Had Congress done nothing more, those inholdings could have become subject to many National Park Service rules, as the Service has broad authority under its Organic Act to administer both lands and waters within parks across the country. 54 U. S. C. §100751. But Congress added Section 103(c), the provision principally in dispute in this case. Section 103(c)'s first sentence states that "[o]nly" the "public lands"—defined as most federally owned lands, waters, and associated interests—within any system unit's boundaries are "deemed" a part of that unit. 16 U. S. C. §3103(c). The second sentence provides that no state, Native, or private lands "shall be subject to the regulations applicable solely to public lands within [system] units." *Ibid.* And the third sentence permits the Service to "acquire such lands" from "the State, a Native Corporation, or other owner," after which it may "administer[ ]" the land just as it does the other "public lands within such units." *Ibid.*

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Petitioner John Sturgeon traveled for decades by hovercraft up a stretch of the Nation River that lies within the boundaries of the Yukon-Charley Preserve, a conservation system unit in Alaska. On one such trip, park rangers informed him that the Service's rules prohibit operating a hovercraft on navigable waters "located within [a park's] boundaries." 36 CFR §2.17(e). That regulation—issued under the Service's Organic Act authority—applies to parks nationwide without any "regard to the ownership of submerged lands, tidelands, or lowlands." §1.2(a)(3). Sturgeon complied with the order, but shortly thereafter sought an injunction that would allow him to resume using his hover-

craft on his accustomed route. The District Court and the Ninth Circuit denied him relief, interpreting Section 103(c) to limit only the Service's authority to impose Alaska-specific regulations on inholdings—not its authority to enforce nationwide regulations like the hovercraft rule. This Court granted review and rejected that ground for dismissal, but it remanded for consideration of two further questions: whether the Nation River "qualifies as 'public land' for purposes of ANILCA," thus indisputably subjecting it to the Service's regulatory authority; and, if not, whether the Service could nevertheless "regulate Sturgeon's activities on the Nation River." *Sturgeon* v. *Frost*, 577 U. S. 424, 441 (*Sturgeon I*). The Ninth Circuit never got past the first question, as it concluded that the Nation River was public land.

Held:

1. The Nation River is not public land for purposes of ANILCA. "[P]ublic land" under ANILCA means (almost all) "lands, waters, and interests therein" the "title to which is in the United States." 16 U. S. C. §3102(1)–(3). Because running waters cannot be owned, the United States does not have "title" to the Nation River in the ordinary sense. And under the Submerged Lands Act, it is the State of Alaska—not the United States—that holds "title to and ownership of the lands beneath [the River's] navigable waters." 43 U. S. C. §1311. The Service therefore argues that the United States has "title" to an "interest" in the Nation River under the reserved-water-rights doctrine, which provides that when the Federal Government reserves public land, it can retain rights to the specific "amount of water" needed to satisfy the purposes of that reservation. See *Cappaert* v. *United States*, 426 U. S. 128, 138–141. But even assuming that the Service held such a right, the Nation River itself would not thereby become "public land" in the way the Service contends. Under ANILCA, the "public land" would consist only of the Federal Government's specific "interest" in the River—*i. e.*, its reserved water right. And that right, the Service agrees, merely allows it to protect waters in the park from depletion or diversion. The right could not justify applying the hovercraft rule on the Nation River, as that rule targets nothing of the kind. Pp. 42–45.

2. Non-public lands within Alaska's national parks are exempt from the Park Service's ordinary regulatory authority. Section 103(c) arose out of concern from the State, Native Corporations, and private individuals that ANILCA's broadly drawn boundaries might subject their properties to Park Service rules. Section 103(c)'s first sentence therefore sets out which land within those new parks qualify as parkland—"[o]nly" the "public lands" within any system unit's boundaries are "deemed" a part of that unit. By negative implication, non-public lands are

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"deemed" outside the unit. In other words, non-federally owned lands inside system units (on a map) are declared outside them (for the law). The effect of that exclusion, as Section 103(c)'s second sentence affirms, is to exempt non-public lands, including waters, from Park Service regulations. That is, the Service's rules will apply "solely" to public lands within the units. 16 U. S. C. § 3103(c). And for that reason, the third sentence provides a kind of escape hatch—it allows the Service to acquire inholdings when it believes regulation of those lands is needed.

The Service's alternative interpretation of Section 103(c) is unpersuasive. The provision's second sentence, it says, means that if a Park Service regulation on its face applies "solely" to public lands, then the regulation cannot apply to non-public lands. But if instead the regulation covers public and non-public lands alike, then the second sentence has nothing to say: The regulation can indeed cover both. On that view, Section 103(c)'s second sentence is a mere truism, not any kind of limitation. It does nothing to exempt inholdings from any regulation that might otherwise apply. And because that is so, the Government's reading also strips the first and third sentences of their core functions. The first sentence's "deeming" has no point, since there is no reason to pretend that inholdings are not part of a park if they can still be regulated as parklands. And the third sentence's acquisition option has far less utility if the Service has its full regulatory authority over lands the Federal Government does not own. This sort of statute-gutting cannot be squared with ANILCA's text and context. Pp. 45–55.

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3. Navigable waters within Alaska's national parks—no less than other non-public lands—are exempt from the Park Service's normal regulatory authority. The Service argues that, if nothing else, ANILCA must at least allow it to regulate navigable waters. The Act, however, does not readily allow the decoupling of navigable waters from other non-federally owned areas in Alaskan national parks. ANILCA defines "land" to mean "lands, waters, and interests therein," § 3102(1)–(3); so when it refers to "lands" in Section 103(c) (and throughout the Act) it means waters as well. Nothing in the few aquatic provisions to which the Service points conflicts with reading Section 103(c)'s regulatory exemption to cover navigable waters. The Government largely relies on the Act's statements of purpose, but this Court's construction leaves the Service with multiple tools to "protect" and "preserve" rivers in Alaska's national parks, as those provisions anticipate. See, *e. g.*, §§ 3181(j), 3191(b)(7). While such authority might fall short of the Service's usual power, it accords with ANILCA's "repeated[ ] recogni[tion]" that Alaska is "the exception, not the rule." *Sturgeon I*, 577 U. S., at 438, 440. Pp. 55–58.

872 F. 3d 927, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 59.

Matthew T. Findley argued the cause for petitioner. With him on the briefs were *Eva R. Gardner*, *William S. Consovoy*, *Jeffrey M. Harris*, *J. Michael Connolly*, and *Douglas Pope*.

Ruth Botstein argued the cause for the State of Alaska as *amicus curiae* urging reversal. With her on the brief were *Jahna Lindemuth*, Attorney General of Alaska, and *Kathryn R. Vogel*.

Deputy Solicitor General Kneedler argued the cause for respondents. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Rachel P. Kovner*, *Andrew C. Mergen*, and *Elizabeth Ann Peterson*.*

JUSTICE KAGAN delivered the opinion of the Court.

This Court first encountered John Sturgeon's lawsuit three Terms ago. See *Sturgeon* v. *Frost*, 577 U. S. 424 (2016) (*Sturgeon I*). As we explained then, Sturgeon hunted

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, *Darrell G. Early*, *Steven W. Strack*, and *Shantel M. Chapple Knowlton*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Curtis T. Hill, Jr.*, of Indiana, *Adam Paul Laxalt* of Nevada, *Doug Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for the Citizens Equal Rights Foundation et al. by *James J. Devine, Jr.*; for the Pacific Legal Foundation by *Anthony L. François* and *Damien M. Schiff*; and for Safari Club International by *Anna M. Seidman* and *Douglas S. Burdin*.

Briefs of *amici curiae* urging affirmance were filed for Alaska Native Subsistence Users by *Robert T. Anderson*, *Carter G. Phillips*, *Virginia A. Seitz*, *Heather R. Kendall Miller*, and *Lloyd B. Miller*; for Law Professors by *Amanda C. Leiter*, *Michael Pappas*, and *Justin R. Pidot*; and for National Parks Conservation Association et al. by *Valerie Brown*, *Katherine Strong*, *Thomas E. Meacham*, and *Donald B. Ayer*.

Jonathan W. Katchen, *Sarah C. Bordelon*, *Bryson C. Smith*, and *Nicholas Ostrovsky* filed a brief of *amicus curiae* for Ahtna, Inc.

moose along the Nation River in Alaska for some 40 years. See *id.*, at 427. He traveled by hovercraft, an amphibious vehicle able to glide over land and water alike. To reach his favorite hunting ground, he would pilot the craft over a stretch of the Nation River that flows through the Yukon-Charley Rivers National Preserve, a unit of the federal park system managed by the National Park Service. On one such trip, park rangers informed Sturgeon that a Park Service regulation prohibits the use of hovercrafts on rivers within any federal preserve or park. Sturgeon complied with their order to remove his hovercraft from the Yukon-Charley, thus "heading home without a moose." *Id.*, at 432. But soon afterward, Sturgeon sued the Park Service, seeking an injunction that would allow him to resume using his hovercraft on his accustomed route. The lower courts denied him relief. This Court, though, thought there was more to be said. See *id.*, at 441.

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As we put the matter then, Sturgeon's case raises the issue how much "Alaska is different" from the rest of the country—how much it is "the exception, not the rule." *Id.*, at 438, 440. The rule, just as the rangers told Sturgeon, is that the Park Service may regulate boating and other activities on waters within national parks—and that it has banned the use of hovercrafts there. See 54 U. S. C. § 100751(b); 36 CFR § 2.17(e) (2018). But Sturgeon claims that Congress created an Alaska-specific exception to that broad authority when it enacted the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 16 U. S. C. § 3101 *et seq.* In Alaska, Sturgeon argues, the Park Service has no power to regulate lands or waters that the Federal Government does not own; rather, the Service may regulate only what ANILCA calls "public land" (essentially, federally owned land) in national parks. And, Sturgeon continues, the Federal Government does not own the Nation River—so the Service cannot ban hovercrafts there. When we last faced that argument, we disagreed with the reason the lower

courts gave to reject it. But we remanded the case for consideration of two remaining questions. First, does "the Nation River qualif[y] as 'public land' for purposes of ANILCA"? 577 U. S., at 441. Second, "even if the [Nation] is not 'public land,'" does the Park Service have authority to "regulate Sturgeon's activities" on the part of the river in the Yukon-Charley? *Ibid.* Today, we take up those questions, and answer both "no." That means Sturgeon can again rev up his hovercraft in search of moose.

I

A

We begin, as *Sturgeon I* did, with a slice of Alaskan history. The United States purchased Alaska from Russia in 1867. It thereby acquired "[i]n a single stroke" 365 million acres of land—an area more than twice the size of Texas. *Id.*, at 428. You might think that would be enough to go around. But in the years since, the Federal Government and Alaskans (including Alaska Natives) have alternately contested and resolved and contested and . . . so forth who should own and manage that bounty. We offer here a few highlights because they are the backdrop against which Congress enacted ANILCA. As we do so, you might catch a glimpse of some former-day John Sturgeons—who (for better or worse) sought greater independence from federal control and, in the process, helped to shape the current law.

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For 90 years after buying Alaska, the Federal Government owned all its land. At first, those living in Alaska—a few settlers and some 30,000 Natives—were hardly aware of that fact. See E. Gruening, The State of Alaska 355 (1968). American citizens mocked the Alaska purchase as Secretary of State "Seward's Folly" and President Johnson's "Polar Bear Garden." They paid no attention to the new area, leading to an "era of total neglect." *Id.*, at 31. But as *Sturgeon I* recounted, the turn of the century brought "newfound recognition of Alaska's economic potential." 577 U. S., at

428. Opportunities to mine, trap, and fish attracted tens of thousands more settlers and sparked an emerging export economy. And partly because of that surge in commercial activity, the country's foremost conservationists—President Theodore Roosevelt and Gifford Pinchot, chief of the fledgling Forest Service—took unprecedented action to protect Alaska's natural resources. In particular, Roosevelt (and then President Taft) prevented settlers from logging or coal mining on substantial acreage. See W. Borneman, Alaska: Saga of a Bold Land 240–241 (2003). Alaskans responded by burning Pinchot in effigy and, more creatively, organizing the "Cordova Coal Party"—a mass dumping of imported Canadian coal (instead of English tea) into the Pacific Ocean (instead of Boston Harbor). See *ibid.* The terms of future conflict were thus set: resource conservation vs. economic development, federal management vs. local control.

By the 1950s, Alaskans hankered for both statehood and land—and Congress decided to give them both. In pressing for statehood, Alaska's delegate to the House of Representatives lamented that Alaskans were no better than "tenants upon the estate of the national landlord"; and Alaska's Governor (then a Presidential appointee) called on the country to "[e]nd American [c]olonialism." W. Everhart, The National Park Service 126–127 (1983) (Everhart). Ever more aware of Alaska's economic and strategic importance, Congress agreed the time for statehood had come. The 1958 Alaska Statehood Act, 72 Stat. 339, made Alaska the country's 49th State. And because the new State would need property—to propel private industry and create a tax base—the Statehood Act made a land grant too. Over the next 35 years, Alaska could select for itself 103 million acres of "vacant, unappropriated, and unreserved" federal land—an area totaling the size of California. § 6(a)–(b), 72 Stat. 340, as amended; see Everhart 127. And more: By incorporating the Submerged Lands Act of 1953, the Statehood Act gave Alaska "title to and ownership of the lands beneath naviga-

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ble waters," such as the Nation River. 43 U. S. C. § 1311; see § 6(m), 72 Stat. 343. And a State's title to the lands beneath navigable waters brings with it regulatory authority over "navigation, fishing, and other public uses" of those waters. *United States* v. *Alaska*, 521 U. S. 1, 5 (1997). All told, the State thus emerged a formidable property holder.

But the State's bonanza provoked land claims from Alaska Natives. Their ancestors had lived in the area for thousands of years, and they asserted aboriginal title to much of the property the State was now taking (and more besides). See Everhart 127. When their demands threatened to impede the trans-Alaska pipeline, Congress stepped in. The Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished the Natives' aboriginal claims. See 85 Stat. 688, as amended, 43 U. S. C. § 1601 *et seq.* But it granted the Natives much in return. Under the law, corporations organized by groups of Alaska Natives could select for themselves 40 million acres of federal land—equivalent, when combined, to all of Pennsylvania. See §§ 1605, 1610–1615. So the Natives became large landowners too.

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Yet one more land dispute loomed. In addition to settling the Natives' claims, ANCSA directed the Secretary of the Interior (Secretary) to designate, subject to congressional approval, 80 million more acres of federal land for inclusion in the national park, forest, or wildlife systems. See § 1616(d)(2). The Secretary dutifully made his selections, but Congress failed to ratify them within the five-year period ANCSA had set. Rather than let the designations lapse, President Carter invoked another federal law (the 1906 Antiquities Act) to proclaim most of the lands (totaling 56 million acres) national monuments, under the National Park Service's aegis. See 577 U. S., at 430. Many Alaskans balked. "[R]egard[ing] national parks as just one more example of federal interference," protesters demonstrated throughout the State and several thousand joined in the so-called Great Denali-McKinley Trespass. Everhart 129; see

577 U. S., at 430. "The goal of the trespass," as *Sturgeon I* explained, "was to break over 25 Park Service rules in a two-day period." *Ibid.* One especially eager participant played a modern-day Paul Revere, riding on horseback through the crowd to deliver the message: "The Feds are coming! The Feds are coming!" *Ibid.* (internal quotation marks omitted).

And so they were—but not in quite the way President Carter had contemplated. Responding to the uproar his proclamation had set off, Congress enacted a third major piece of legislation allocating land in Alaska. We thus reach ANILCA, the statute principally in dispute in this case, in which Congress set aside extensive land for national parks and preserves—but on terms different from those governing such areas in the rest of the country.

B

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Starting with the statement of purpose in its first section, ANILCA sought to "balance" two goals, often thought conflicting. 16 U. S. C. §3101(d). The Act was designed to "provide[ ] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." *Ibid.* "[A]nd at the same time," the Act was framed to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Ibid.* So if, as you continue reading, you see some tension within the statute, you are not mistaken: It arises from Congress's twofold ambitions.

ANILCA set aside 104 million acres of federally owned land in Alaska for preservation purposes. See 577 U. S., at 431. In doing so, the Act rescinded President Carter's monument designations. But it brought into the national park, forest, or wildlife systems millions more acres than even ANCSA had contemplated. The park system's share of the newly withdrawn land (to be administered, as usual, by the

Park Service) was nearly 44 million acres—an amount that more than doubled the system's prior (nationwide) size. See Everhart 132. With that land, ANILCA created ten new national parks, monuments, and preserves—including the Yukon-Charley Preserve—and expanded three old ones. See §§ 410hh, 410hh–1. In line with the Park Service's usual terminology, ANILCA calls each such park or other area a "conservation system unit." § 3102(4) ("The term . . . means any unit in Alaska of the National Park System"); see 54 U. S. C. § 100102(6) (similar).

In sketching those units' boundary lines, Congress made an uncommon choice—to follow "topographic or natural features," rather than enclose only federally owned lands. § 3103(b); see Brief for Respondents 24 (agreeing that "ANILCA [is] atypical in [this] respect"). In most parks outside Alaska, boundaries surround mainly federal property holdings. "[E]arly national parks were carved out of a larger public domain, in which virtually all land" was federally owned. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239, 263 (1976); see Dept. of Interior, Nat. Park Serv., Statistical Abstract 87 (2017) (Table 9) (noting that only 2 of Yellowstone's 2.2 million acres are in non-federal hands). And even in more recently established parks, Congress has used gerrymandered borders to exclude most non-federal land. See Sax, Buying Scenery, 1980 Duke L. J. 709, 712, and n. 12. But Congress had no real way to do that in Alaska. Its prior cessions of property to the State and Alaska Natives had created a "confusing patchwork of ownership" all but impossible to draw one's way around. C. Naske & H. Slotnick, Alaska: A History 317 (3d ed. 2011). What's more, an Alaskan Senator noted, the United States might want to reacquire state or Native holdings in the same "natural areas" as reserved federal land; that could occur most handily if Congress drew boundaries, "wherever possible, to encompass" those holdings and authorized the Secretary to buy

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whatever lay inside. 126 Cong. Rec. 21882 (1980) (remarks of Sen. Stevens). The upshot was a vast set of so-called inholdings—more than 18 million acres of state, Native, and private land—that wound up inside Alaskan system units. See 577 U. S., at 431.

Had Congress done nothing more, those inholdings could have become subject to many Park Service rules—the same kind of "restrictive federal regulations" Alaskans had protested in the years leading up to ANILCA (and further back too). *Id.*, at 430. That is because the Secretary, acting through the Director of the Park Service, has broad authority under the National Park Service Organic Act (Organic Act), 39 Stat. 535, to administer both lands and waters within all system units in the country. See 54 U. S. C. §§ 100751, 100501, 100102. The Secretary "shall prescribe such regulations as [he] considers necessary or proper for the use and management of System units." § 100751(a). And he may, more specifically, issue regulations concerning "boating and other activities on or relating to water located within System units." § 100751(b). Those statutory grants of power make no distinctions based on the ownership of either lands or waters (or lands beneath waters).[1] And although the Park Service has sometimes chosen not to regulate non-federally owned lands and waters, it has also imposed major restrictions on their use. Rules about mining and solid-waste disposal, for example, apply to all lands within system units "whether federally or nonfederally owned." 36 CFR § 6.2; see § 9.2. And (of particular note here) the Park Service freely regulates activities on all navigable (and some other) waters "within [a park's] boundaries"—once more, "without regard to . . . ownership." § 1.2(a)(3). So Alaska and its

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[1] None of the parties here have questioned the constitutional validity of the above statutory grants as applied to inholdings, and we therefore do not address the issue. Cf. *Kleppe* v. *New Mexico*, 426 U. S. 529, 536–541 (1976); *Kansas* v. *Colorado*, 206 U. S. 46, 88–89 (1907).

Natives had reason to worry about how the Park Service would regulate their lands and waters within the new parks.

Congress thus acted, as even the Park Service agrees, to give the State and Natives "assurance that [their lands] wouldn't be treated just like" federally owned property. Tr. of Oral Arg. 52. (It is only—though this is quite a large "only"—the nature and extent of that assurance that is in dispute.) The key provision here is Section 103(c), which contains three sentences that may require some re-reading. We quote it first in one block; then provide some definitions; then go over it again a bit more slowly. But still, you should expect to return to this text as you proceed through this opinion.

Section 103(c) provides in full:

> "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after [the date of ANILCA's passage], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." § 3103(c).

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Now for the promised definitions. The term "land," as found in all three sentences, actually—and crucially for this case—"means lands, waters, and interests therein." § 3102(1). The term "public lands," in the first two sentences, then means "lands" (including waters and interests therein) "the title to which is in the United States"—except for lands selected for future transfer to the State or Native Corporations (under the Statehood Act or ANCSA).

§ 3102(2), (3); see *supra*, at 34–35. "Public lands" are therefore most but not quite all lands (and again, waters and interests) that the Federal Government owns.

Finally, to recap. As explained in *Sturgeon I*, "Section 103(c) draws a distinction between 'public' and 'non-public' lands within the boundaries of conservation system units in Alaska." 577 U. S., at 440. Section 103(c)'s first sentence makes clear that only public lands (again, defined as most federally owned lands, waters, and associated interests) would be considered part of a system unit (again, just meaning a national park, preserve, or similar area). By contrast, state, Native, or private lands would not be understood as part of such a unit, even though they in fact fall within its geographic boundaries. Section 103(c)'s second sentence then expressly exempts all those non-public lands (the inholdings) from certain regulations—though exactly which ones, as will soon become clear, is a matter of dispute. And last, Section 103(c)'s third sentence enables the Secretary to buy any inholdings. If he does, the lands (because now public) become part of the park, and may be administered in the usual way—*e. g.*, without the provision's regulatory exemption.

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C

We can now return to John Sturgeon, on his way to a hunting ground alternatively dubbed "Moose Meadows" or "Sturgeon Fork." As recounted above, Sturgeon used to travel by hovercraft up a stretch of the Nation River that lies within the boundaries of the Yukon-Charley Preserve. See *supra*, at 32. Until one day, three park rangers approached Sturgeon while he was repairing his steering cable and told him he was violating a Park Service rule. According to the specified regulation, "[t]he operation or use of hovercraft is prohibited" on navigable (and some other) waters "located within [a park's] boundaries," without any "regard to . . . ownership." 36 CFR §§ 2.17(e), 1.2(a)(3); see *supra*, at 32. That regulation, issued under the Secretary's Organic Act authority, applies on its face to parks across the country.

See *supra*, at 38 (describing Organic Act). And Sturgeon did not doubt that the Nation River is a navigable water. But Sturgeon protested that in Alaska (even though nowhere else) the rule could not be enforced on a waterway—like, he said, the Nation River—that is not owned by the Federal Government. And when his objection got nowhere with the rangers (or with the Secretary, to whom he later petitioned), Sturgeon stopped using his hovercraft—but also brought this lawsuit, based on ANILCA's Section 103(c).

In *Sturgeon I*, we rejected one ground for dismissing Sturgeon's case, but remanded for consideration of two further questions. The District Court and Court of Appeals for the Ninth Circuit had held that even assuming the Nation River is non-public land, the Park Service could enforce its hovercraft ban there. See 2013 WL 5888230 (Oct. 30, 2013); 768 F. 3d 1066 (2014). Those two courts interpreted Section 103(c) to limit only the Service's authority to impose Alaska-specific regulations on such lands—not its authority to apply nationwide regulations like the hovercraft rule. But we viewed that construction as "implausible." 577 U. S., at 440. ANILCA, we reasoned, "repeatedly recognizes that Alaska is different." *Id.*, at 438; see *id.*, at 440 (The Act "reflect[s] the simple truth that Alaska is often the exception, not the rule"). Yet the lower courts' reading would "prevent the Park Service from recognizing Alaska's unique conditions"—thus producing a "topsy-turvy" result. *Ibid.* Still, we thought two hurdles remained before Sturgeon could take his hovercraft out of storage. We asked the Court of Appeals to decide whether the Nation River "qualifies as 'public land' for purposes of ANILCA," thus indisputably subjecting it to the Service's regulatory authority. *Id.*, at 441. And if the answer was "no," we asked the Ninth Circuit to address whether the Service, on some different theory from the one just dispatched, could still "regulate Sturgeon's activities on the Nation River." *Ibid.*

The Ninth Circuit never got past the first question because it concluded that the Nation River is "public land[.]" See

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872 F. 3d 927, 936 (2017). The court explained that it was bound by three circuit decisions construing that term, when used in ANILCA's provisions about subsistence fishing, as including all navigable waters. *Id.*, at 933–934. Accordingly, the court again rejected Sturgeon's challenge. *Id.*, at 936.

And we again granted certiorari. 585 U. S. 1002 (2018).

II

We first address whether, as the Ninth Circuit found, the Nation River is "public land" under ANILCA. As defined, once again, that term means (almost all) "lands, waters, and interests therein" the "title to which is in the United States." 16 U. S. C. § 3102(1)–(3). If the Nation River comes within that definition, even Sturgeon agrees that the Park Service may enforce its hovercraft rule in the stretch traversing the Yukon-Charley. That is because the Organic Act authorizes the Park Service to regulate boating and similar activities in parks and other system units—and under ANILCA's Section 103(c) those units include all "public land" within their boundaries. 54 U. S. C. § 100751(a)–(b); 16 U. S. C. § 3103(c); see *supra*, at 38–40.

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But the United States does not have "title" (as the just-quoted definition demands) to the Nation River in the ordinary sense. As the Park Service acknowledges, running waters cannot be owned—whether by a government or by a private party. See *FPC* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 247, n. 10 (1954); Brief for Respondents 33. In contrast, the lands beneath those waters—typically called submerged lands—can be owned, and the water regulated on that basis. But that does not help the Park Service because, as noted earlier, the Submerged Lands Act gives each State "title to and ownership of the lands beneath [its] navigable waters." 43 U. S. C. § 1311; see *supra*, at 34–35. That means Alaska, not the United States, has title to the lands beneath the Nation River.

So the Park Service argues instead that the United States has "title" to an "interest" in the Nation River, under what is called the reserved-water-rights doctrine. See Brief for Respondents 32–37. The canonical statement of that doctrine goes as follows: "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U. S. 128, 138 (1976). For example, this Court decided that in reserving land for an Indian tribe, the Government impliedly reserved sufficient water from a nearby river to enable the tribe to farm the area. See *Winters* v. *United States*, 207 U. S. 564, 576 (1908). And similarly, we held that in creating a national monument to preserve a species of fish inhabiting an underground pool, the United States acquired an enforceable interest in preventing others from depleting the pool below the level needed for the fish to survive. See *Cappaert*, 426 U. S., at 147. According to the Park Service, the United States has an analogous interest in the Nation River and other navigable waters in Alaska's national parks. "Because th[e] purposes [of those parks] require that the waters within [them] be safeguarded against depletion and diversion," the Service contends, "Congress's reservations of park lands also reserved interests in appurtenant navigable waters." Brief for Respondents 35.

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That argument first raises the question whether it is even possible to hold "title," as ANILCA uses the term, to reserved water rights. 16 U. S. C. § 3102(2). Those rights, as all parties agree, are "usufructuary" in nature, meaning that they are rights for the Government to use—whether by withdrawing or maintaining—certain waters it does not own. See *Niagara Mohawk Power Corp.*, 347 U. S., at 246; Brief for Petitioner 36; Brief for Respondents 36. The Park Service has found a couple of old cases suggesting that a person can hold "title" to such usufructuary interests. See *ibid.*;

Crum v. *Mt. Shasta Power Corp.*, 220 Cal. 295, 307, 30 P. 2d 30, 36 (1934); *Radcliff's Ex'rs* v. *Mayor of Brooklyn*, 4 N. Y. 195, 196 (1850). But the more common understanding, recently noted in another ANILCA case, is that "reserved water rights are not the type of property interests to which title can be held"; rather, "the term 'title' applies" to "fee ownership of property" and (sometimes) to "possessory interests" in property like those granted by a lease. See *Totemoff* v. *State*, 905 P. 2d 954, 965 (Alaska 1995) (collecting cases); Brief for State of Idaho et al. as *Amici Curiae* 21–22 (same). And we see no evidence that the Congress enacting ANILCA meant to use the term in any less customary and more capacious sense.

But even assuming so, the Nation River itself would not thereby become "public land" in the way the Park Service argues. Under ANILCA's definition, the "public land" at issue would consist only of the Federal Government's specific "interest" in the river—that is, its reserved water right. §3102(1), (3). And that reserved right, by its nature, is limited. It does not give the Government plenary authority over the waterway to which it attaches. Rather, the interest merely enables the Government to take or maintain the specific "amount of water"—and "no more"—required to "fulfill the purpose of [its land] reservation." *Cappaert*, 426 U. S., at 141. So, for example, in the cases described above, the Government could control only the volume of water necessary for the tribe to farm or the fish to survive. See *Winters*, 207 U. S., at 576–577; *Cappaert*, 426 U. S., at 141. And likewise here, the Government could protect "only th[e] amount of water" in the Nation River needed to "accomplish the purpose of the [Yukon-Charley's] reservation." *Id.*, at 138, 141.

And whatever that volume, the Government's (purported) reserved right could not justify applying the hovercraft rule on the Nation River. That right, to use the Park Service's own phrase, would support a regulation preventing the

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"depletion or diversion" of waters in the river (up to the amount required to achieve the Yukon-Charley's purposes). Brief for Respondents 34–35. But the hovercraft rule does nothing of that kind. A hovercraft moves above the water, on a thin cushion of air produced by downward-directed fans; it does not "deplet[e]" or "diver[t]" any water. Nor has the Park Service explained the hovercraft rule as an effort to protect the Nation River from pollution or other similar harm. To the contrary, that rule is directed against the "sight or sound" of "motorized equipment" in remote locations—concerns not related to safeguarding the water. 48 Fed. Reg. 30258 (1983). So the Park Service's "public lands" argument runs aground: Even if the United States holds title to a reserved water right in the Nation River, that right (as opposed to title in the river itself) cannot prevent Sturgeon from wafting along the river's surface toward his preferred hunting ground.[2]

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III

We thus move on to the second question we posed in *Sturgeon I*, concerning the Park Service's power to regulate even non-public lands and waters within Alaska's system units (or, in our unofficial terminology, national parks). The Service principally relies on that sort of ownership-indifferent authority in defending its decision to expel Sturgeon's hovercraft from the Nation River. See Brief for Respondents 16–

[2] As noted earlier, the Ninth Circuit has held in three cases—the so-called *Katie John* trilogy—that the term "public lands," when used in ANILCA's subsistence-fishing provisions, encompasses navigable waters like the Nation River. See *Alaska* v. *Babbitt*, 72 F. 3d 698 (1995); *John* v. *United States*, 247 F. 3d 1032 (2001) (en banc); *John* v. *United States*, 720 F. 3d 1214 (2013); *supra*, at 42. Those provisions are not at issue in this case, and we therefore do not disturb the Ninth Circuit's holdings that the Park Service may regulate subsistence fishing on navigable waters. See generally Brief for State of Alaska as *Amicus Curiae* 29–35 (arguing that this case does not implicate those decisions); Brief for Ahtna, Inc., as *Amicus Curiae* 30–36 (same).

18, 25–32. And we can see why. If Sturgeon lived in any other State, his suit would not have a prayer of success. As noted earlier, the Park Service has used its Organic Act authority to ban hovercrafts on navigable waters "located within [a national park's] boundaries" without any "regard to . . . ownership." 36 CFR §§2.17(e), 1.2(a)(3); see *supra*, at 40. And no one disputes that Sturgeon was driving his hovercraft on a stretch of the Nation River (a navigable water) inside the borders of the Yukon-Charley (a national park). So case closed. Except that Sturgeon lives in Alaska. And as we have said before, "Alaska is often the exception, not the rule." *Sturgeon I*, 577 U. S., at 440. Here, Section 103(c) of ANILCA makes it so. As explained below, that section provides that even when non-public lands—again, including waters—are geographically within a national park's boundaries, they may not be regulated as part of the park. And that means the Park Service's hovercraft regulation cannot apply there.[3]

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To understand why, first recall how Section 103(c) grew out of ANILCA's unusual method for drawing park boundaries. See *supra*, at 37–38. Those lines followed the area's "natural features," rather than (as customary) the Federal Government's property holdings. 16 U. S. C. §3103(b). The borders thus took in immense tracts owned by the State, Native Corporations, and private individuals. And as you might imagine, none of those parties was eager to have its lands newly regulated as national parks. To the contrary, all of them wanted to preserve the regulatory status quo—to prevent ANILCA's maps from subjecting their properties to the Park Service's rules. Hence arose Section 103(c). Cf. Tr. of Oral Arg. 51–52 (Solicitor General acknowledging

[3] Because we see, for the reasons given below, no ambiguity as to Section 103(c)'s meaning, we cannot give deference to the Park Service's contrary construction. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter").

that Section 103(c) responds to the State's and Native Corporations' "concern[s]" about the effects of "includ[ing their lands] within the outer boundaries" of the new parks). Now might be a good time to review that provision, block quoted above. See *supra*, at 39. In broad brush strokes, *Sturgeon I* described it as follows: "Section 103(c) draws a distinction between 'public' and 'non-public' lands," including waters, "within the boundaries of [Alaska's] conservation system units." 577 U. S., at 440.

Section 103(c)'s first sentence sets out the essential distinction, relating to what qualifies as parkland. It provides, once again, that "[o]nly" the "public lands" (essentially, the federally owned lands) within any system unit's boundaries would be "deemed" a part of that unit. § 3103(c). The non-public lands (everything else) were, by negative implication, "deemed" not a part of the unit—even though within the unit's geographic boundaries. The key word here is "deemed." That term is used in legal materials "[t]o treat (something) as if . . . it were really something else." Black's Law Dictionary 504 (10th ed. 2014). Legislators (and other drafters) find the word "useful" when "it is necessary to establish a legal fiction," either by "'deeming' something to be what it is not" or by "'deeming' something not to be what it is." *Ibid.* (quoting G. C. Thornton, Legislative Drafting 99 (4th ed. 1996)). The fiction in Section 103(c) involves considering certain lands actually within the new national parks as instead without them. As a matter of geography, both public and non-public lands fall inside those parks' boundaries. But as a matter of law, only public lands would be viewed as doing so. All non-public lands (again, including waters) would be "deemed," abracadabra-style, outside Alaska's system units.[4]

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[4] Consistent with that approach, Congress left out non-public lands in calculating the acreage of every new or expanded system unit. Sections 201 and 202 of ANILCA, in describing those units, state the acreage of only their public lands. See, *e. g.*, § 410hh(1) (providing that Aniakchak

The effect of that exclusion, as Section 103(c)'s second sentence affirms, is to exempt non-public lands, including waters, from the Park Service's ordinary regulatory authority. Recall that the Organic Act pegs that authority to system units. See *supra*, at 38. The Service may issue rules thought "necessary or proper" for "System units." 54 U. S. C. § 100751(a). And more pertinently here, the Service may prescribe rules about activities on "water located within System units." § 100751(b). Absent Section 103(c), those grants of power enable the Service to administer even non-federally owned waters or lands inside national parks. See *supra*, at 38. But add Section 103(c), and the equation changes. Now, according to that section's first sentence, non-federally owned waters and lands inside system units (on a map) are declared outside them (for the law). So those areas are no longer subject to the Service's power over "System units" and the "water located within" them. § 100751(a), (b). Instead, only the federal property in system units is subject to the Service's authority.[5] And that is

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National Preserve would "contain[ ] approximately [367,000] acres of public lands"); § 410hh–1(3) (providing that Denali National Park would grow "by the addition of an area containing approximately [2,426,000] acres of public land").

[5] At times, the Park Service has argued here that the Organic Act gives it authority to regulate waters outside system units, so long as doing so protects waters or lands inside them. See Brief for Respondents 28–32. If so, the argument goes, that authority would similarly permit the Service to regulate the non-federally owned waters that Section 103(c) has deemed outside Alaskan system units, if and when needed to conserve those units' federal waters or lands. But at other points in this litigation, the Service has all but disclaimed such out-of-the-park regulatory authority. See No. 14–1209, Tr. of Oral Arg. 58 (Jan. 20, 2016) ("The Park Service [has] consistently understood its authority to be regulating [within] the park's boundaries. It's never sought to enact a regulation outside of the park's boundaries"). We take no position on the question because it has no bearing on the hovercraft rule at issue here. That rule, by its express terms, applies only inside system units. See *supra*, at 40. It therefore does not raise any question relating to the existence or scope of the Service's authority over water outside system units.

just what Section 103(c)'s second sentence pronounces, for waters and lands alike. Again, that sentence says that no state, Native, or private lands "shall be subject to the regulations applicable solely to public lands within [system] units." 16 U. S. C. § 3103(c). The sentence thus expressly states the consequence of the statute's prior "deeming." The Service's rules will apply exclusively to public lands (meaning federally owned lands and waters) within system units. The rules cannot apply to any non-federal properties, even if a map would show they are within such a unit's boundaries. Geographic inholdings thus become regulatory outholdings, impervious to the Service's ordinary authority.[6]

And for that reason, Section 103(c)'s third sentence provides a kind of escape hatch—for times when the Park Service believes regulation of the inholdings is needed. In that event, "the Secretary may acquire such lands" from "the State, a Native Corporation, or other owner." § 3103(c). (As noted earlier, facilitating those acquisitions was one reason Congress put non-federal lands inside park boundaries in the first instance. See *supra*, at 37–38.) When the Secretary makes such a purchase, the newly federal land "become[s] part of the [system] unit." § 3101(c). And the Park Service may then "administer[ ]" the land just as it does (in the second sentence's phrase) the other "public lands within such units." *Ibid.* In thus providing a way out of the Section's first two sentences, the third underlines what they are doing: insulating the state, Native, or private lands that ANILCA enclosed in national parks from new and unexpected regulation. In sum, those lands may be regulated only as they could have been before ANILCA's

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[6] Another provision of ANILCA reflects that result. Right after Sections 201 and 202 describe each new or expanded system unit by reference to how many acres of public land it contains, see n. 4, *supra*, Section 203 authorizes the Park Service to administer, under the Organic Act, the areas listed in "the foregoing sections." § 410hh–2. In other words, Section 203 of ANILCA ties the Service's regulatory authority to the statute's immediately preceding statements of *public-land* acreage.

enactment, unless and until bought by the Federal Government.

The Park Service interprets Section 103(c) differently, relying wholly on its second sentence and mostly on the single word "solely" there. True enough, the Service acknowledges, that anxiety about how it would regulate inholdings was "really what drove [Section] 103(c)." Tr. of Oral Arg. 48; see *supra*, at 39, 46. But still, the Service argues, the Section's second sentence exempts those non-public lands from only "one particular class of Park Service regulations"—to wit, rules "'applicable *solely to public lands*.'" Brief for Respondents 30 (quoting and adding emphasis to § 3103(c)). In other words, if a Park Service regulation on its face applies only ("solely") to public lands, then the regulation shall not apply to a park's non-public lands. But if instead the regulation covers public and non-public lands alike, then the second sentence has nothing to say: The regulation can indeed cover both. See *ibid.* The Park Service labels that sentence a "tailored limitation" on its authority over inholdings. *Ibid.* And it concludes that the sentence has no bearing on the hovercraft rule, which expressly applies "without regard to . . . ownership." 36 CFR § 1.2(a)(3).

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But on the Park Service's view, Section 103(c)'s second sentence is a mere truism, not any kind of limitation (however "tailored"). Once again: It tells Alaskans, so the Park Service says, that rules applying only to public lands . . . will apply only to public lands. And that rules applying to both public and non-public lands . . . will apply to both. (Or, to say the same thing, but with approximate statutory definitions plugged in: It tells Alaskans that rules applying only to the Federal Government's lands . . . will apply only to the Federal Government's lands. And that rules applying to federal, state, Native, and private lands alike . . . will apply to them all.) In short, under the Park Service's reading, Section 103(c)'s second sentence does nothing but state the obvious. Its supposed exemption does not in fact ex-

empt anyone from anything to which they would otherwise be subject. Remove the sentence from ANILCA and everything would be precisely the same. For it curtails none of the Service's ordinary regulatory authority over inholdings.[7]

And more: The Park Service's reading of Section 103(c)'s second sentence also strips the first and third sentences of their core functions. Under the Service's approach, the first sentence's "deeming" has no point. There is no reason to pretend that inholdings are not part of a park if they can still be regulated as parklands. Nor is there a need to create a special legal fiction if the end result is to treat Alaskan inholdings no differently from those in the rest of the country. And similarly, the third sentence's acquisition option has far less utility if the Service has its full regulatory authority over lands the Federal Government does not own. Why cough up money to "administer[ ]" property as "part of the [system] unit" unless doing so makes a real difference, by removing a regulatory exemption otherwise in effect? The Service's reading effectively turns the whole of Section 103(c) into an inkblot.

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And still more (if implicit in all the above): That construction would undermine ANILCA's grand bargain. Recall that ANILCA announced its Janus-faced nature in its state-

[7] And just to pile on: Even taken as a truism, the Park Service's view of the second sentence misfires, because of the technical difference between "public lands" and federally owned lands in ANILCA. Recall that "public lands" is defined in the statute to mean most but not all federally owned lands: The term excludes those federal lands selected for future transfer to the State or Native Corporations. See §3102(3); *supra*, at 39–40. (That is why when we reframed the Park Service's argument just above, we noted that we were using "approximate" statutory definitions.) But the Park Service's existing regulations apply, at a minimum, to *all* federally owned lands within a park's borders. See 36 CFR §1.2(a). That means there are no regulations "applicable solely to public lands" as defined in ANILCA. §3103(c). So when the Park Service argues that the second sentence exempts non-public lands from that single "class of [its] regulations," Brief for Respondents 18, 30, it is not even exempting those lands from obviously inapplicable regulations (as we assume in the text); instead, it is exempting them from a null set of rules.

ment of purpose, reflecting the century-long struggle over federal regulation of Alaska's resources. See *supra*, at 33–36. In that opening section, ANILCA spoke about safeguarding "natural, scenic, historic[,] recreational, and wildlife values." 16 U. S. C. § 3101(a). Yet it insisted as well on "provid[ing] for" Alaska's (and its citizens') "economic and social needs." § 3101(d). In keeping with the statute's conservation goal, Congress reserved huge tracts of land for national parks. But to protect Alaskans' economic well-being, it mitigated the consequences to non-federal owners whose land wound up in those new system units. See *supra*, at 46–50. Once again, even the Park Service acknowledges that Section 103(c) was supposed to provide an "assurance" that those owners would not be subject to all the regulatory constraints placed on neighboring federal properties. See Tr. of Oral Arg. 52; see *id.*, at 48; *supra*, at 39, 46, 49. But then the Service (head-spinningly) posits that it need only draft its regulations to cover both federal and non-federal lands in order to apply those rules to ANILCA's inholdings. On that view, limitations on the Service's authority are purely a matter of administrative grace, dependent on how narrowly (or broadly) the Service chooses to write its regulations. And ANILCA's carefully drawn balance is thrown off-kilter, as Alaskan, Native, and private inholdings are exposed to the full extent of the Service's regulatory authority.

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The word "solely" in Section 103(c)'s second sentence does not support that kind of statute-gutting. We do not gainsay that the Park Service has identified a grammatically possible way of viewing that word's function: as pinpointing a narrow class of the Service's regulations (those "solely applicable to public lands").[8] But that reading, for all the reasons just stated, is "ultimately inconsistent" with the "text and context of the statute." *Sturgeon I*, 577 U. S., at 438. And a

[8] It is unfortunate for the Park Service's argument that the narrow class of regulations thus identified does not in fact exist. See n. 7, *supra*. But we put that point aside for the remainder of this paragraph.

different understanding of "solely" instead aligns with that text and context. That word encapsulates Congress's view that the Park Service's regulations should apply "solely" to public lands (and not to state, Native, or private ones). See *supra*, at 48–49, and n. 5. And the word serves to distinguish between the Park Service's rules and other regulations, both federal and state. Consider if Congress had exempted non-public lands in a system unit from regulations "applicable to public lands" there (without the "solely"). That language would apparently exempt those lands not just from park regulations but from a raft of others—*e. g.*, pollution regulations of the Environmental Protection Agency, water safety regulations of the Coast Guard, even employment regulations of Alaska itself. For those rules, too, apply to public lands inside national parks. By adding "solely," Congress made clear that the exemption granted was not from such generally applicable regulations. Instead, it was from rules applying only in national parks—*i. e.*, the newly looming Park Service rules. Congress thus ensured that inholdings would emerge from ANILCA not worse off—but also not better off—than before.[9]

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[9] The Park Service points to one provision of ANILCA that (it says) contemplates application of its rules to inholdings; but as suggested in the text that provision really envisions other agencies' regulations. Section 1301(b)(7) requires the Service to create for each system unit a land management plan that includes (among other things) a description of "privately owned areas" within the unit, the activities carried out there, and the "methods (such as cooperative agreements and issuance or enforcement of regulations)" for limiting those activities if appropriate. 16 U. S. C. § 3191(b)(7). Nothing in that section "directs the Park Service" itself to issue or enforce regulations, as the Service now argues. See Brief for Respondents 30–31. Instead, the Service satisfies all its obligations under the provision by reporting on the panoply of federal and state statutes and regulations that apply to any non-public land (whether or not in a park). And indeed, the Service's management plans have taken exactly that form. See, *e. g.*, Dept. of Interior, Nat. Park Serv., Kobuk Valley National Park: Land Protection Plan 123–124 (1986) (noting that "[w]hile [Park Service] regulations do not generally apply to private lands

The legislative history (for those who consider it) confirms, with unusual clarity, all we have said so far. The Senate Report notes that state, Native, and private lands in the new Alaskan parks would be subject to "[f]ederal laws and regulations of general applicability," such as "the Clean Air Act, the Water Pollution Control Act, [and] U. S. Army Corps of Engineers wetlands regulations." S. Rep. No. 96–413, p. 303 (1980). But that would not be so of regulations applying only to parks. The Senate Report states:

> "Those private lands, and those public lands owned by the State of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." *Ibid.*

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The sponsor of Section 103(c) in the House of Representatives described that provision's effect in similar terms. The section was designed, he observed, to ensure that ANILCA's new boundary lines would "not in any way change the status" of the state, Native, and private lands placed within them. 125 Cong. Rec. 11158 (1979) (statement of Rep. Seiberling). Those lands, he continued, "are not parts of th[e system] unit and are not subject to regulations which are applied" by virtue of being "part of the unit." *Ibid.* In short, whatever the new map might suggest, they are not subject to regulation as parkland.

We thus arrive again at the conclusion that the Park Service may not prevent John Sturgeon from driving his hovercraft on the Nation River. We held in an earlier part of this

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in the park (Section 103, ANILCA)," the regulations "that do apply" include those issued under "the Alaska Anadromous Fish Act, the Endangered Species Act, the Clean Water and Clean Air acts, and the Protection of Wetlands, to name a few"); Dept. of Interior, Nat. Park Serv., Noatak National Preserve: Land Protection Plan 138–139, 142 (1986) (similar).

opinion that the Nation is not public land. See *supra*, at 42–45. And here we hold that it cannot be regulated as if it were. Park Service regulations—like the hovercraft rule—do not apply to non-public lands in Alaska even when those lands lie within national parks. Section 103(c) "deem[s]" those lands outside the parks and in so doing deprives the Service of regulatory authority.

IV

Yet the Park Service makes one last plea—for some kind of special rule relating to Alaskan navigable waters. Even suppose, the argument runs, that those waters do not count as "public lands." And even assume that Section 103(c) strips the Service of power to regulate *most* non-public lands. Still, the Service avers—invoking "the overall statutory scheme"—that ANILCA must at least allow it to regulate navigable waters. Brief for Respondents 40; see *id.*, at 40–45; Tr. of Oral Arg. 43 (ANILCA's regulatory restrictions were "not about navigable waters"); *id.*, at 65–66 (similar). Here, the Service points to ANILCA's general statement of purpose, which lists (among many other things) the "protect[ion] and preserv[ation]" of "rivers." 16 U. S. C. §3101(b). Similarly, the Service notes that the statements of purpose associated with particular system units refer to "protect[ing]" named rivers there. *E. g.*, §410hh–1(1). And the Service highlights several statutory sections that in some way speak to its ability to regulate motorboating and fishing within the new units. See §§3121, 3170, 3201, 3203(b), 3204.[10] According to the Service, all of those provisions

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[10] The Park Service also points to a separate title of ANILCA, which raises issues outside the scope of this case. Title VI designates 26 named rivers in Alaska as "wild and scenic rivers," to be "administered by the Secretary" under the (nationwide) Wild and Scenic Rivers Act, 94 Stat. 2412–2413. According to the Service, those special designations (and associated management instructions) enable it to "administer the [specified] rivers pursuant to its general statutory authorities"—notwithstanding anything in Section 103(c). Brief for Respondents 42–43. But the Na-

show that "ANILCA preserves [its] authority to regulate conduct on navigable waters" in national parks. Brief for Respondents 42.

But ANILCA does not readily allow the decoupling of navigable waters from other non-federally owned areas in Alaskan national parks for regulatory (or, indeed, any other) purposes. Section 103(c), as we have described, speaks of "lands (as such term is defined in th[e] Act)." 16 U. S. C. §3103(c); see *supra*, at 39. The Act, in turn, defines "land" to mean "lands, waters, and interests therein." §3102(1)–(3); see *supra*, at 39. So according to an express definition, when ANILCA refers to "lands," it means waters (including navigable waters) as well. And that kind of definition is "virtually conclusive." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 228 (2012); see *ibid.* ("It is very rare that a defined meaning can be replaced" or altered). Save for some exceptional reason, we must read ANILCA as treating identically solid ground and flowing water. So if the Park Service were right that it could regulate the Nation River under its ordinary authorities, then it also could regulate the private fields and farms in the surrounding park. And more to the point, once Section 103(c) is understood to preclude the regulation of those landed properties, then the same result follows—"virtually conclusive[ly]"—for the river.

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And nothing in the few aquatic provisions to which the Park Service points can flip that strong presumption, for none conflicts with reading Section 103(c)'s regulatory exemption to cover non-federal waters. The most substantive of those provisions, as just noted, contemplate some role for the Service in regulating motorboating and fishing. But contra the Park Service, those sections have effect under our interpretation because both activities can occur on federally owned (and thus fully regulable) non-navigable waters. The

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tion River, all agree, is not a "wild and scenic river." We may therefore leave for another day the interplay between Section 103(c) and Title VI.

other provisions the Service emphasizes are statements of purpose, which by their nature "cannot override [a statute's] operative language." *Id.*, at 220. And anyway, our construction leaves the Park Service with multiple tools to "protect" rivers in Alaskan national parks, as those statements anticipate. §3101(b); §410hh–1(1). The Park Service may at a minimum regulate the public lands flanking rivers. It may, additionally, enter into "cooperative agreements" with the State (which holds the rivers' submerged lands) to preserve the rivers themselves. §3181(j). It may similarly propose that state or other federal agencies with appropriate jurisdiction undertake needed regulatory action on those rivers. See §3191(b)(7); see also Kobuk Valley: Land Protection Plan, at 118, 121 (recommending that the Alaska Department of Natural Resources classify navigable parts of the Kobuk River for preservation efforts). And if all else fails, the Park Service may invoke Section 103(c)'s third sentence to buy from Alaska the submerged lands of navigable waters—and then administer them as public lands. See §§3103(c), 3192; see also Kobuk Valley: Land Protection Plan, at 133 (proposing that if Alaska does not adequately protect the Kobuk River, the Park Service should "seek to acquire title to th[o]se state lands through exchange").

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Those authorities, though falling short of the Service's usual power to administer navigable waters in system units, accord with ANILCA's "repeated[ ] recogni[tion] that Alaska is different." *Sturgeon I*, 577 U. S., at 438. ANILCA's broadly drawn parks include stretches of some of the State's most important rivers, such as the Yukon and Kuskokwim. See Brief for State of Alaska as *Amicus Curiae* 12. And rivers function as the roads of Alaska, to an extent unknown anyplace else in the country. Over three-quarters of Alaska's 300 communities live in regions unconnected to the State's road system. See *id.*, at 11. Residents of those areas include many of Alaska's poorest citizens, who rely on rivers for access to necessities like food and fuel. See *id.*, at

11–12. Who knows?—maybe John Sturgeon could have found a comparable hunting ground that did not involve traveling by hovercraft through a national park. But some Alaskans have no such options. The State's extreme climate and rugged terrain make them dependent on rivers to reach a market, a hospital, or a home. So ANILCA recognized that when it came to navigable waters—just as to nonfederal lands—in the new parks, Alaska should be "the exception, not the rule." *Sturgeon I*, 577 U. S., at 440. Which is to say, exempt from the Park Service's normal regulatory authority.

V

ANILCA, like much legislation, was a settlement. The statute set aside more than a hundred million acres of Alaska for conservation. In so doing, it enabled the Park Service to protect—if need be, through expansive regulation—"the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska." 16 U. S. C. §3101(d). But public lands (and waters) was where it drew the line—or, at any rate, the legal one. ANILCA changed nothing for all the state, Native, and private lands (and waters) swept within the new parks' boundaries. Those lands, of course, remain subject to all the regulatory powers they were before, exercised by the EPA, Coast Guard, and the like. But they did not become subject to new regulation by the happenstance of ending up within a national park. In those areas, Section 103(c) makes clear, Park Service administration does not replace local control. For that reason, park rangers cannot enforce the Service's hovercraft rule on the Nation River. And John Sturgeon can once again drive his hovercraft up that river to Moose Meadows.

We accordingly reverse the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

Professors have long asked law students to interpret a hypothetical ordinance that prohibits bringing "a vehicle into the park."[1] The debate usually centers on what counts as a "vehicle." Is a moped forbidden? How about a baby stroller? In this case, we can all agree that John Sturgeon's hovercraft is a vehicle. But now we ask whether he has brought it "into the park"—and, if not, how a river's designation as "outside the park" will affect future attempts to regulate there.

The Court decides that the Nation River is not parkland, and I join the Court's opinion because it offers a cogent reading of § 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 16 U. S. C. § 3101 *et seq.* I write separately to emphasize the important regulatory pathways that the Court's decision leaves open for future exploration.

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The Court holds only that the National Park Service may not regulate the Nation River as if it were within Alaska's federal park system, not that the Service lacks all authority over the Nation River. A reading of ANILCA § 103(c) that left the Service with no power whatsoever over navigable rivers in Alaska's parks would be untenable in light of ANILCA's other provisions, which state Congress' intent that the Service protect those very same rivers. Congress would not have set out this aim and simultaneously deprived the Service of all means to carry out the task.

Properly interpreted, ANILCA § 103(c) cannot nullify Congress' purposes in enacting ANILCA. Even though the Service may not apply its ordinary park rules to nonpublic

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[1] See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 36 (2012); Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958).

areas like the Nation River, two sources of Service authority over navigable rivers remain undisturbed by today's decision. First, as a default, the Service may well have authority to regulate *out*-of-park, nonpublic areas in the midst of parklands when doing so is necessary or proper to protect *in*-park, public areas—for instance, to ban pollution of the Nation River if necessary to preserve habitat on the riverbanks or to ban hovercraft use on that river if needed to protect adjacent public park areas. Nothing in ANILCA removes that power. Second, Congress most likely meant for the Service to retain power to regulate as parklands a particular subset of navigable rivers designated as "Wild and Scenic Rivers," although that particular authority does not, by its terms, apply to the Nation River.

Because the Court does not address these agency authorities, see *ante*, at 48, n. 5, 55–56, n. 10, I join its opinion. I also wish to emphasize, however, that the Court's opinion introduces limitations on—and thus could engender uncertainty regarding—the Service's authority over navigable rivers that run through Alaska's parks. If this is not what Congress intended, Congress should amend ANILCA to clarify the scope of the Service's authority.

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I

Since the National Park System's creation in 1872, it has grown to include over 400 historic and recreation areas encompassing over 84 million acres. 54 U. S. C. § 100101(b)(1)(A); 83 Fed. Reg. 2065 (2018). These areas provide habitat for 247 threatened or endangered species and received more than 325 million visitors in 2016 alone. *Id.*, at 2065–2066.

The task of protecting this vast park system principally falls to the Park Service. In the National Park Service Organic Act (Organic Act), 39 Stat. 535, Congress entrusted the Service with regulating to leave the parks "unimpaired

for the enjoyment of future generations." 54 U. S. C. § 100101(a). Congress empowered the agency to promulgate regulations "necessary or proper" for managing the Park System, including regulations "concerning boating and other activities on or relating to water located within [Park] System units." §§ 100751(a), (b). The Service has carried out this charge by enacting a wide range of regulations, including the ban on hovercraft use at issue. See 36 CFR § 2.17(e) (2018).

Wielding its Organic Act authority, the Service applies many park rules on federally owned lands and waters it administers, as well as navigable waters "within the boundaries of the National Park System." §§ 1.2(a)(1), (3). The title to lands beneath navigable waters, even within national parks, typically belongs to the States.[2] Because park boundaries can encompass both federally and nonfederally owned lands and waters, this means that some nonfederally owned waters are subject to Service regulations—at least outside of Alaska. See *ante*, at 37–38.

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Against this backdrop, Congress enacted ANILCA. As the Court explains, ANILCA added millions of acres of federal land to the National Park System in Alaska and simultaneously swept around 18 million acres of nonfederally owned lands within the geographic boundary lines of the new Alaska parks. *Ante*, at 36–38; see also *Sturgeon* v. *Frost*, 577 U. S. 424, 431 (2016). In ANILCA, Congress directed the Service to manage Alaska's new and expanded parks "as new areas of the National Park System" under its Organic Act authority. 94 Stat. 2383, 16 U. S. C. § 410hh–2.

ANILCA reflects Congress' expectation that the Service will manage Alaska's parks with a particular focus on rivers and river systems. For instance, the agency must "maintain

[2] Under the Submerged Lands Act of 1953, each State has "title to and ownership of the lands beneath [its] navigable waters." 43 U. S. C. § 1311(a); see *ante*, at 34–35, 42.

unimpaired the water habitat" for salmon in Katmai National Monument, preserve "the natural environmental integrity and scenic beauty of . . . rivers" in Gates of the Arctic National Park, and "maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features." §§ 410hh(4)(a), (10); § 410hh–1(2); see also §§ 410hh(1), (6), (7)(a), (8)(a); § 410hh–1(1). Some provisions of ANILCA direct the Service to regulate boating in Alaska's parklands. See, *e. g.*, § 3170(a). Others command the Service to regulate fishing. See, *e. g.*, § 3201. Together, these provisions make clear that Congress must have intended for the Park Service to have at least some authority over navigable waters within Alaska's parks.

And yet, ANILCA includes one provision that can be read to throw a wrench into that authority: § 103(c). This provision says that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U. S. C. § 3103(c). Section 103(c) then says that no state, native, or private lands "shall be subject to the regulations applicable solely to public lands within such units," although the Secretary may acquire those lands and administer them as part of the unit. *Ibid.* ANILCA, in turn, defines "public lands" as nearly all "lands, waters, and interests therein" in which the United States has title. §§ 3102(1)–(3). Crucially, Alaska has title to the lands under its navigable waters. See n. 2, *supra.* If the Service's ordinary authority over navigable waters within park boundaries is diminished in Alaska relative to everywhere else in the United States, all agree that ANILCA § 103(c) is the culprit.

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II

Thus we arrive at the crux of this case: How, if at all, does ANILCA § 103(c) circumscribe the Service's ordinary authority over navigable rivers within the geographic boundaries of national parks?

A

I agree with the Court that the Service may not treat every navigable river in Alaska as legally part of Alaska's parks merely because those (nonpublic) rivers flow within park boundaries. The majority ably explains why ANILCA's text leads to this outcome. See *ante*, at 46–50. According to ANILCA § 103(c), navigable waters (at least apart from Wild and Scenic Rivers) must be treated as waters outside of park units for legal purposes. Thus they may not be "subject to the regulations applicable solely to public lands within such units." 16 U. S. C. § 3103(c).[3]

This principle is all that is required to resolve Sturgeon's case. The hovercraft rule applies only inside park boundaries. 36 CFR § 1.2(a) ("[R]egulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within . . . [w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System"). The Nation River is, for legal purposes, outside of park boundaries. The hovercraft rule therefore does not apply on the Nation River.

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B

Critically, although the Court decides today that the Service may not regulate the Nation River "as part of the park,"

[3] Notably, the Park Service did not argue—nor does the Court's opinion address—whether navigable waters may qualify as "public lands" because the United States has title to some interest other than an interest in reserved water rights. See §§ 3102(1)–(3). In particular, the United States did not press the argument that the Federal Government functionally holds title to the requisite interest because of the navigational servitude. See, *e. g.*, *Kaiser Aetna* v. *United States*, 444 U. S. 164, 177 (1979) ("The navigational servitude . . . gives rise to an authority in the Government to assure that [navigable] streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce"); *United States* v. *Rands*, 389 U. S. 121, 123 (1967) ("This power to regulate navigation confers upon the United States a 'dominant servitude' "); 43 U. S. C. § 1314 (providing that the United States retains the navigational servitude in navigable waters).

ante, at 46, the Court does not hold that ANILCA § 103(c) strips the Service of all authority to protect navigable waters in Alaska. For good reason. It would be absurd to think that Congress intended for the Service to preserve Alaska's rivers, but left it without any tools to do so.

Imagine if all Service regulations could apply in Alaska's parklands only up to the banks of navigable rivers, and the Service lacked any authority whatsoever over the rivers themselves. If Jane Smith were to stand on the public bank of the Nation River, bag of trash in hand, Service rules could prohibit her from discarding the trash on the riverbank. See 36 CFR § 2.14(a)(1). The rules also could bar her from intentionally disturbing wildlife breeding activities, § 2.2(a)(2), making unreasonably loud noises, § 2.12(a)(1)(ii), and introducing wildlife into the park ecosystem, § 2.1(a)(2). But reading ANILCA § 103(c) to bar any Park Service regulation of navigable waters would permit Jane to evade those rules entirely if she were to wade into the river or paddle along the bank in a canoe. She could toss her trash bag in the water and amp up her speakers with impunity. Under this reading, the Park Service would be powerless to stop her. Jane's actions would likely harm flora and fauna on the banks of the river, which are public areas inside park boundaries. Jane's trash also could drift from a navigable (and thus out-of-park, nonpublic) stretch of the Nation River into a nonnavigable (and thus in-park, public) stretch of the same river.[4] So much for the Service's duty to maintain the "environmental integrity" of the Charley River basin "in its undeveloped natural condition," 16 U. S. C. § 410hh(10).

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How can the Service adequately protect Alaska's rivers if it cannot regulate? What is more, how can it maintain nearby park areas, such as riverbanks or nonnavigable park waters downstream, if it has no power to check the

[4] The navigability of a river is determined "on a segment-by-segment basis." *PPL Montana, LLC* v. *Montana*, 565 U. S. 576, 593 (2012); see also *id.*, at 594.

contamination of navigable waters? To achieve Congress' stated goals in creating Alaska's parks, the Service must have some authority to protect navigable rivers within those parks.[5]

C

Thankfully, today's decision does not leave the Service without any authority over the Nation River and other rivers like it. Even though most navigable rivers in Alaska are not public parklands, Congress has left at least two avenues for the Service to achieve ANILCA's purposes. Neither is addressed by the Court's decision.

1

First, the Court expressly does not decide whether the Service may regulate navigable waters running through Alaska's parks as an adjunct to its authority over the parks themselves. See *ante*, at 48, n. 5.[6] In my view, the Service likely retains power over navigable rivers that run through Alaska's parks when that power is necessary to protect Alaska's parklands.

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[5] Even if the Service cannot regulate the rivers itself, the majority says that the agency can enter into "cooperative agreements" with Alaska to regulate the rivers, 16 U. S. C. §3181(j), propose that state or other federal agencies take action to protect the rivers, §3191(b)(7), or buy the submerged lands from Alaska and then regulate them, §§3103(c), 3192. See *ante*, at 57. But Congress made the Service directly responsible for protecting Alaska's parks and park resources. The Service cannot carry out its duty to "manag[e]" the park areas, §410hh, if it is estopped from promulgating necessary rules and regulations.

[6] The Court's interpretation prohibits the Service only from applying its usual, in-park rules to out-of-park areas. See, *e. g.*, *ante*, at 46 (nonpublic lands "may not be regulated as part of the park"); *ante*, at 48 (Section 103(c)'s exclusion "exempt[s] non-public lands . . . from the Park Service's ordinary regulatory authority"); *ibid.* (the areas "are no longer subject to the Service's power over 'System units' and the 'water located within' them"); *ante*, at 51 (rejecting suggestion that inholdings can be "regulated as parklands"); *ante*, at 54 (the inholdings "are not subject to regulation as parkland").

The Service's default ability to regulate comes from the Organic Act. That Act gives the Service general authority to promulgate all regulations "necessary or proper" for managing park units, including power to regulate activities "on *or relating* to water located within [Park] System units." 54 U. S. C. §§ 100751(a), (b) (emphasis added). Nothing in the text of the Organic Act suggests that the Service is powerless over out-of-park areas in the midst of public parklands, like the Nation River.

This brings us back to Jane, this time canoeing down the Nation River with a gallon of toxic insecticide onboard. If Jane spills the insecticide into the river, the effects will surely reach the riverbanks—public areas within the park's legal boundaries. An antipollution rule tailored to apply to the Nation River as it runs through the park thus could well be "necessary or proper" to manage the parklands on either side of the river, even though the river itself is not legally a part of the park. § 100751(a). And if the pollution is likely to harm nonnavigable stretches of the river downstream—public waters that are "within" the park for legal purposes—the ban also could be authorized because it specifically concerns "activities . . . relating to water located within [Park] System units." § 100751(b). Similar reasoning could justify a range of Service regulations, giving the Service substantial authority over navigable rivers inside geographic park boundaries in order to protect the parklands through which they flow.

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Assuming that the Service has such authority over out-of-park areas pursuant to its Organic Act, nothing in ANILCA § 103(c) takes it away. That section's first sentence explains that nonpublic lands are not part of Alaska's park units. See 16 U. S. C. § 3103(c); *supra*, at 62. The second sentence then emphasizes that the Service cannot regulate nonpublic lands as if they were part of the park. Together, these sentences mean that the Service loses its authority to apply nor-

mal park rules to nonpublic lands, and instead can apply only those rules that it can justify by reference to the needs of other, public lands. For instance, the Service is unlikely to have power to apply rules against abandoning property, 36 CFR §2.22(a), or trespassing, §2.31(a)(1), to nonpublic lands amid parklands because doing so would have little or no impact on neighboring public areas within the legal boundaries of the park. But a Service regulation tailored to apply to nonparklands in order to protect sensitive surrounding parklands—like a rule against putting a toxic substance in the Nation River to stop harms to the riverbanks—would present a different question. Such a regulation could be consistent with the Service's limited Organic Act authority over out-of-park areas, and it would not run afoul of ANILCA because it would not be applicable to public lands.

The Service's out-of-park authority is not at issue in this case given that the hovercraft regulation applies only within park boundaries, see *ante*, at 48, n. 5. Hovercraft can be unsightly, be loud, and disturb sensitive ecosystems within the park. See 48 Fed. Reg. 30258 (1983) ("The Service has determined that hovercraft should be prohibited because they provide virtually unlimited access to park areas and introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate"). If the Service were to choose to apply its hovercraft ban to the Nation River, the agency could justify doing so in certain designated areas to protect a particular sensitivity in a surrounding (public) park area, including some habitats on the banks of the Nation River.

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2

The Court also leaves open a second way for the Service to protect navigable rivers. Because the Nation River is not a designated Wild and Scenic River, the Court expressly does not decide the extent of the Service's power over such

designated rivers. *Ante*, at 55–56, n. 10. If ANILCA § 103(c) is to be harmonized with the remainder of the statute, the Service must possess authority to regulate fully, as parklands, at least that subset of rivers.[7]

The Wild and Scenic Rivers Act, 16 U. S. C. § 1271 *et seq.*, established a system of rivers that "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." § 1271. Congress created the system to "preserv[e]" designated rivers "in free-flowing condition." *Ibid.* Rivers can become part of the system if they are designated by an Act of Congress. § 1273(a)(i).

ANILCA designated 26 Alaskan rivers as components of this system, more than doubling the mileage of the rivers in the system at the time. § 1274; S. Johnson & L. Comay, CRS Report for Congress, The National Wild and Scenic Rivers System: A Brief Overview 1 (2015); see § 1281(c). ANILCA, in turn, expressly defines the Alaskan park system as including "any unit in Alaska of the . . . National Wild and Scenic Rivers Systems." § 3102(4).

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Although ANILCA § 103(c) generally has the effect of removing navigable waters from the legal boundaries of Alaska's parks, Congress' highly specific definition of the Wild and Scenic Rivers as a portion of Alaska's park system over-

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[7] This authority would supplement, not replace, the Service's authority over out-of-park navigable rivers, because the Service's authority over the Wild and Scenic Rivers alone cannot explain all of ANILCA's express references to protecting Alaskan rivers. For instance, ANILCA states Congress' expectation that the Service will manage the Kobuk River in Kobuk Valley National Park. See 16 U. S. C. § 410hh(6). That portion of the river is not designated as a Wild and Scenic River, see § 1274, but the Bureau of Land Management has found it to be navigable, see Dept. of Interior, Nat. Park Serv., Kobuk Valley National Park: General Management Plan 65 (1987). The Service therefore must have another source of authority over the river if the statute's purpose provision is not to be deprived of meaning.

rides ANILCA § 103(c)'s general carveout. "General language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932). To make sense of ANILCA § 103(c) within the context of the rest of ANILCA, the Service should retain full authority to regulate the Wild and Scenic Rivers as parklands.

* * *

One final note warrants mention. Although I join the Court's opinion, I recognize that today's decision creates uncertainty concerning the extent of Service authority over navigable waters in Alaska's parks. Courts ultimately may affirm some of the Service's authority over out-of-park areas and Wild and Scenic Rivers. But that authority may be more circumscribed than the special needs of the parks require. This would not only make it impossible for the Service to fulfill Congress' charge to preserve rivers, made plain in ANILCA itself, but also threaten the Service's ability to fulfill its broader duty to protect all of the parklands through which the rivers flow. See, *e. g.*, 16 U. S. C. § 410hh(6) (Kobuk Valley National Park "shall be managed . . . [t]o maintain the environmental integrity of the natural features of the Kobuk River Valley, including the Kobuk, Salmon, and other rivers"). Many of Alaska's navigable rivers course directly through the heart of protected parks, monuments, and preserves. A decision that leaves the Service with no authority, or only highly constrained authority, over those rivers would undercut Congress' clear expectations in enacting ANILCA and could have exceedingly damaging consequences.

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In light of the explicit instructions throughout ANILCA that the Service must regulate and protect rivers in Alaska, I am convinced that Congress intended the Service to pos-

sess meaningful authority over those rivers. If I am correct, Congress can and should clarify the broad scope of the Service's authority over Alaska's navigable waters.

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Syllabus

LORENZO *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17–1077. Argued December 3, 2018—Decided March 27, 2019

Securities and Exchange Commission Rule 10b–5 makes it unlawful to (a) "employ any device, scheme, or artifice to defraud," (b) "make any untrue statement of a material fact," or (c) "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit" in connection with the purchase or sale of securities. In *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U. S. 135, this Court held that to be a "*maker*" of a statement under subsection (b) of that Rule, one must have "ultimate authority over the statement, including its content and whether and how to communicate it." *Id.*, at 142 (emphasis added). On the facts of *Janus*, this meant that an investment adviser who had merely "participat[ed] in the drafting of a false statement" "made" by another could not be held liable in a private action under subsection (b). *Id.*, at 145.

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Petitioner Francis Lorenzo, while the director of investment banking at an SEC-registered brokerage firm, sent two e-mails to prospective investors. The content of those e-mails, which Lorenzo's boss supplied, described a potential investment in a company with "confirmed assets" of $10 million. In fact, Lorenzo knew that the company had recently disclosed that its total assets were worth less than $400,000.

In 2015, the Commission found that Lorenzo had violated Rule 10b–5, § 10(b) of the Exchange Act, and § 17(a)(1) of the Securities Act by sending false and misleading statements to investors with intent to defraud. On appeal, the District of Columbia Circuit held that Lorenzo could not be held liable as a "maker" under subsection (b) of the Rule in light of *Janus*, but sustained the Commission's finding with respect to subsections (a) and (c) of the Rule, as well as § 10(b) and § 17(a)(1).

Held: Dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b–5(a) and (c), as well as the relevant statutory provisions, even if the disseminator did not "make" the statements and consequently falls outside Rule 10b–5(b). Pp. 77–85.

(a) It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to de-

fraud. By sending e-mails he understood to contain material untruths, Lorenzo "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule, § 10(b), and § 17(a)(1). By the same conduct, he "engage[d] in a[n] act, practice, or course of business" that "operate[d] . . . as a fraud or deceit" under subsection (c) of the Rule. As Lorenzo does not challenge the appeals court's scienter finding, it is undisputed that he sent the e-mails with "intent to deceive, manipulate, or defraud" the recipients. *Aaron* v. *SEC*, 446 U. S. 680, 686, and n. 5. Resort to the expansive dictionary definitions of "device," "scheme," and "artifice" in Rule 10b–5(a) and § 17(a)(1), and of "act" and "practice" in Rule 10b–5(c), only strengthens this conclusion. Under the circumstances, it is difficult to see how Lorenzo's actions could escape the reach of these provisions. Pp. 78–79.

(b) Lorenzo counters that the only way to be liable for false statements is through those provisions of the securities laws—like Rule 10b–5(b)—that refer *specifically* to false statements. Holding to the contrary, he and the dissent say, would render subsection (b) "superfluous." The premise of this argument is that each subsection governs different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. And the idea that each subsection governs a separate type of conduct is difficult to reconcile with the Rule's language, since at least some conduct that amounts to "employ[ing]" a "device, scheme, or artifice to defraud" under subsection (a) also amounts to "engag[ing] in a[n] act . . . which operates . . . as a fraud" under subsection (c). This Court's conviction is strengthened by the fact that the plainly fraudulent behavior confronted here might otherwise fall outside the Rule's scope. Using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. Pp. 79–82.

(c) Lorenzo and the dissent make a few other important arguments. The dissent contends that applying Rules 10b–5(a) and (c) to conduct like Lorenzo's would render *Janus* "a dead letter." *Post*, at 94. But *Janus* concerned subsection (b), and it said nothing about the Rule's application to the dissemination of false or misleading information. Thus, *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud. Lorenzo also claims that imposing primary liability upon his conduct would erase or at least weaken the distinction between primary and secondary liability under the statute's "aiding and abetting" provision. See 15 U. S. C. § 78t(e). But the line the Court adopts today is clear:

Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b–5(a) and (c), § 10(b), and § 17(a)(1), even if they are secondarily liable under Rule 10b–5(b). As for Lorenzo's suggestion that those like him ought to be held secondarily liable, this offer will, too often, prove illusory. Where a "maker" of a false statement does not violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the "aiding and abetting" statute. And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b–5, then such a fraud, whatever its intent or consequences, might escape liability altogether. That anomalous result is not what Congress intended. Pp. 82–85.

872 F. 3d 578, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which GORSUCH, J., joined, *post*, p. 87. KAVANAUGH, J., took no part in the consideration or decision of the case.

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Robert G. Heim argued the cause for petitioner. With him on the briefs was *Howard S. Meyers*.

Christopher G. Michel argued the cause *pro hac vice* for respondent. With him on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Stewart*, *Robert B. Stebbins*, *Michael A. Conley*, *Dominick V. Freda*, and *Martin V. Totaro*.*

JUSTICE BREYER delivered the opinion of the Court.

Securities and Exchange Commission Rule 10b–5 makes it unlawful:

> "(a) To employ any device, scheme, or artifice to defraud,

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*Briefs of *amici curiae* urging reversal were filed for the Securities Industry and Financial Markets Association et al. by *Daniel A. McLaughlin*, *Carter G. Phillips*, *Kwaku A. Akowuah*, and *Kevin Carroll*; and for Securities Law Professors by *Brian Calandra* and *Lyle Roberts*.

Michael B. Eisenkraft filed a brief for the North American Securities Administrators Association, Inc., as *amicus curiae* urging affirmance.

> "(b) To make any untrue statement of a material fact . . . , or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . .
>
> "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (2018).

In *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U. S. 135 (2011), we examined the second of these provisions, Rule 10b–5(b), which forbids the "mak[ing]" of "any untrue statement of a material fact." We held that the "*maker* of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.*, at 142 (emphasis added). We said that "[w]ithout control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." *Ibid.* And we illustrated our holding with an analogy: "[W]hen a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Id.*, at 143. On the facts of *Janus*, this meant that an investment adviser who had merely "participat[ed] in the drafting of a false statement" "made" by another could not be held liable in a private action under subsection (b) of Rule 10b–5. *Id.*, at 145.

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In this case, we consider whether those who do not "make" statements (as *Janus* defined "make"), but who disseminate false or misleading statements to potential investors with the intent to defraud, can be found to have violated the *other* parts of Rule 10b–5, subsections (a) and (c), as well as related provisions of the securities laws, § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. § 78j(b), and § 17(a)(1) of the Securities Act of 1933, 48 Stat. 84–85, as amended, 15 U. S. C. § 77q(a)(1). We believe that they can.

I

A

For our purposes, the relevant facts are not in dispute. Francis Lorenzo, the petitioner, was the director of investment banking at Charles Vista, LLC, a registered broker-dealer in Staten Island, New York. Lorenzo's only investment banking client at the time was Waste2Energy Holdings, Inc., a company developing technology to convert "solid waste" into "clean renewable energy."

In a June 2009 public filing, Waste2Energy stated that its total assets were worth about $14 million. This figure included intangible assets, namely, intellectual property, valued at more than $10 million. Lorenzo was skeptical of this valuation, later testifying that the intangibles were a "dead asset" because the technology "didn't really work."

During the summer and early fall of 2009, Waste2Energy hired Lorenzo's firm, Charles Vista, to sell to investors $15 million worth of debentures, a form of "debt secured only by the debtor's earning power, not by a lien on any specific asset," Black's Law Dictionary 486 (10th ed. 2014).

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In early October 2009, Waste2Energy publicly disclosed, and Lorenzo was told, that its intellectual property was worthless, that it had "'"[w]rit[ten] off . . . all [of its] intangible assets,"'" and that its total assets (as of March 31, 2009) amounted to $370,552.

Shortly thereafter, on October 14, 2009, Lorenzo sent two e-mails to prospective investors describing the debenture offering. According to later testimony by Lorenzo, he sent the e-mails at the direction of his boss, who supplied the content and "approved" the messages. The e-mails described the investment in Waste2Energy as having "3 layers of protection," including $10 million in "confirmed assets." The e-mails nowhere revealed the fact that Waste2Energy had publicly stated that its assets were in fact worth less than $400,000. Lorenzo signed the e-mails with his own

name, he identified himself as "Vice President—Investment Banking," and he invited the recipients to "call with any questions."

B

In 2013, the Securities and Exchange Commission instituted proceedings against Lorenzo (along with his boss and Charles Vista). The Commission charged that Lorenzo had violated Rule 10b–5, § 10(b) of the Exchange Act, and § 17(a)(1) of the Securities Act. Ultimately, the Commission found that Lorenzo had run afoul of these provisions by sending false and misleading statements to investors with intent to defraud. As a sanction, it fined Lorenzo $15,000, ordered him to cease and desist from violating the securities laws, and barred him from working in the securities industry for life.

Lorenzo appealed, arguing primarily that in sending the e-mails he lacked the intent required to establish a violation of Rule 10b–5, § 10(b), and § 17(a)(1), which we have characterized as "'a mental state embracing intent to deceive, manipulate, or defraud.'" *Aaron* v. *SEC*, 446 U. S. 680, 686, and n. 5 (1980). With one judge dissenting, the Court of Appeals panel rejected Lorenzo's lack-of-intent argument. 872 F. 3d 578, 583 (CADC 2017). Lorenzo does not challenge the panel's scienter finding. Reply Brief 17.

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Lorenzo also argued that, in light of *Janus*, he could not be held liable under subsection (b) of Rule 10b–5. 872 F. 3d, at 586–587. The panel agreed. Because his boss "asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution," *id.*, at 588, it was the boss that had "ultimate authority" over the content of the statement "and whether and how to communicate it," *Janus*, 563 U. S., at 142. (We took this case on the assumption that Lorenzo was not a "maker" under subsection (b) of Rule 10b–5, and do not revisit the court's decision on this point.)

The Court of Appeals nonetheless sustained (with one judge dissenting) the Commission's finding that, by knowingly disseminating false information to prospective investors, Lorenzo had violated other parts of Rule 10b–5, subsections (a) and (c), as well as § 10(b) and § 17(a)(1).

Lorenzo then filed a petition for certiorari in this Court. We granted review to resolve disagreement about whether someone who is not a "maker" of a misstatement under *Janus* can nevertheless be found to have violated the other subsections of Rule 10b–5 and related provisions of the securities laws, when the only conduct involved concerns a misstatement. Compare, *e. g.*, 872 F. 3d 578, with *WPP Luxembourg Gamma Three Sarl* v. *Spot Runner, Inc.*, 655 F. 3d 1039, 1057–1058 (CA9 2011).

II

A

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At the outset, we review the relevant provisions of Rule 10b–5 and of the statutes. See Appendix, *infra*. As we have said, subsection (a) of the Rule makes it unlawful to "employ any device, scheme, or artifice to defraud." Subsection (b) makes it unlawful to "make any untrue statement of a material fact." And subsection (c) makes it unlawful to "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit." See 17 CFR § 240.10b–5.

There are also two statutes at issue. Section 10(b) makes it unlawful to "use or employ . . . any manipulative or deceptive device or contrivance" in contravention of Commission rules and regulations. 15 U. S. C. § 78j(b). By its authority under that section, the Commission promulgated Rule 10b–5. The second statutory provision is § 17(a), which, like Rule 10b–5, is organized into three subsections. 15 U. S. C. § 77q(a). Here, however, we consider only the first subsection, § 17(a)(1), for this is the only subsection that the Commission charged Lorenzo with violating. Like Rule 10b–5(a), sub-

section (a)(1) makes it unlawful to "employ any device, scheme, or artifice to defraud."

B

After examining the relevant language, precedent, and purpose, we conclude that (assuming other here-irrelevant legal requirements are met) dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b–5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not "make" the statements and consequently falls outside subsection (b) of the Rule.

It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending e-mails he understood to contain material untruths, Lorenzo "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule, § 10(b), and § 17(a)(1). By the same conduct, he "engage[d] in a[n] act, practice, or course of business" that "operate[d] . . . as a fraud or deceit" under subsection (c) of the Rule. Recall that Lorenzo does not challenge the appeals court's scienter finding, so we take for granted that he sent the e-mails with "'intent to deceive, manipulate, or defraud'" the recipients. *Aaron*, 446 U. S., at 686, n. 5. Under the circumstances, it is difficult to see how his actions could escape the reach of those provisions.

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Resort to dictionary definitions only strengthens this conclusion. A "'device,'" we have observed, is simply "'[t]hat which is devised, or formed by design'"; a "'scheme'" is a "'project,'" "'plan[,] or program of something to be done'"; and an "'artifice'" is "'an artful stratagem or trick.'" *Id.*, at 696, n. 13 (quoting Webster's New International Dictionary 713, 2234, 157 (2d ed. 1934) (Webster's Second)). By these lights, dissemination of false or misleading material is easily an "artful stratagem" or a "plan," "devised" to defraud an investor under subsection (a). See Rule 10b–5(a) (making it un-

lawful to "employ any device, scheme, or artifice to defraud"); § 17(a)(1) (same). The words "act" and "practice" in subsection (c) are similarly expansive. Webster's Second 25 (defining "act" as "a doing" or a "thing done"); *id.*, at 1937 (defining "practice" as an "action" or "deed"); see Rule 10b–5(c) (making it unlawful to "engage in a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit").

These provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts. But we see nothing borderline about this case, where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud. And while one can readily imagine other actors tangentially involved in dissemination—say, a mailroom clerk—for whom liability would typically be inappropriate, the petitioner in this case sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.

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C

Lorenzo argues that, despite the natural meaning of these provisions, they should not reach his conduct. This is so, he says, because the only way to be liable for false statements is through those provisions that refer *specifically* to false statements. Other provisions, he says, concern "scheme liability claims" and are violated only when conduct other than misstatements is involved. Brief for Petitioner 4–6, 28–30. Thus, only those who "make" untrue statements under subsection (b) can violate Rule 10b–5 in connection with statements. (Similarly, § 17(a)(2) would be the sole route for finding liability for statements under § 17(a).) Holding to the contrary, he and the dissent insist, would render subsection (b) of Rule 10b–5 "superfluous." See *post*, at 92, 93 (opinion of THOMAS, J.).

The premise of this argument is that each of these provisions should be read as governing different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 383 (1983) ("[I]t is hardly a novel proposition that" different portions of the securities laws "prohibit some of the same conduct" (internal quotation marks omitted)). As we have explained, these laws marked the "first experiment in federal regulation of the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 198 (1963). It is "understandable, therefore," that "in declaring certain practices unlawful," it was thought prudent "to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against nondisclosure" even though "a specific proscription against nondisclosure" might in other circumstances be deemed "surplusage." *Id.*, at 198–199. "Each succeeding prohibition" was thus "meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *United States* v. *Naftalin*, 441 U. S. 768, 774 (1979). We have found "'no warrant for narrowing alternative provisions . . . adopted with the purpose of affording added safeguards.'" *Ibid.* (quoting *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941)); see *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 152–153 (1972) (While "the second subparagraph of [Rule 10b–5] specifies the making of an untrue statement . . . [t]he first and third subparagraphs are not so restricted"). And since its earliest days, the Commission has not viewed these provisions as mutually exclusive. See, *e. g.*, *In re R. D. Bayly & Co.*, 19 S. E. C. 773 (1945) (finding violations of what would become Rules 10b–5(b) and (c) based on the same misrepresentations and omissions); *In re Arthur Hays & Co.*, 5 S. E. C. 271 (1939) (finding violations of both §§ 17(a)(2) and (a)(3) based on false representations in stock sales).

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The idea that each subsection of Rule 10b–5 governs a separate type of conduct is also difficult to reconcile with the language of subsections (a) and (c). It should go without saying that at least some conduct amounts to "employ[ing]" a "device, scheme, or artifice to defraud" under subsection (a) as well as "engag[ing] in a[n] act . . . which operates . . . as a fraud" under subsection (c). In *Affiliated Ute*, for instance, we described the "defendants' activities" as falling "within the very language of one or the other of those subparagraphs, a 'course of business' or a 'device, scheme, or artifice' that operated as a fraud." 406 U. S., at 153. (The dissent, for its part, offers no account of how the superfluity problems that motivate its interpretation can be avoided where subsections (a) and (c) are concerned.)

Coupled with the Rule's expansive language, which readily embraces the conduct before us, this considerable overlap suggests we should not hesitate to hold that Lorenzo's conduct ran afoul of subsections (a) and (c), as well as the related statutory provisions. Our conviction is strengthened by the fact that we here confront behavior that, though plainly fraudulent, might otherwise fall outside the scope of the Rule. Lorenzo's view that subsection (b), the making-false-statements provision, *exclusively* regulates conduct involving false or misleading statements would mean those who disseminate false statements with the intent to cheat investors might escape liability under the Rule altogether. But using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. We do not know why Congress or the Commission would have wanted to disarm enforcement in this way. And we cannot easily reconcile Lorenzo's approach with the basic purpose behind these laws: "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375 U. S., at 186. See also, *e. g.*, *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946) (the securities laws were designed "to meet the countless and variable

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schemes devised by those who seek the use of the money of others on the promise of profits").

III

Lorenzo and the dissent make a few other important arguments. They contend that applying subsection (a) or (c) of Rule 10b–5 to conduct like his would render our decision in *Janus* (which we described at the outset, *supra*, at 74) "a dead letter," *post*, at 94. But we do not see how that is so. In *Janus*, we considered the language in subsection (b), which prohibits the "mak[ing]" of "any untrue statement of a material fact." See 564 U. S., at 141–143. We held that the "maker" of a "statement" is the "person or entity with ultimate authority over the statement." *Id.*, at 142. And we found that subsection (b) did not (under the circumstances) cover an investment adviser who helped *draft* misstatements issued by a *different* entity that controlled the statements' content. *Id.*, at 146–148. We said nothing about the Rule's application to the dissemination of false or misleading information. And we can assume that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud.

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Next, Lorenzo points to the statute's "aiding and abetting" provision. 15 U. S. C. § 78t(e). This provision, enforceable only by the Commission (and not by private parties), makes it unlawful to "knowingly or recklessly provid[e] substantial assistance to another person" who violates the Rule. *Ibid.*; see *Janus*, 564 U. S., at 143 (citing *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994)). Lorenzo claims that imposing primary liability upon his conduct would erase or at least weaken what is otherwise a clear distinction between primary and secondary (*i. e.*, aiding and abetting) liability. He emphasizes that, under today's holding, a disseminator might be a primary

offender with respect to subsection (a) of Rule 10b–5 (by employing a "scheme" to "defraud") and also secondarily liable as an aider and abettor with respect to subsection (b) (by providing substantial assistance to one who "makes" a false statement). And he refers to two cases that, in his view, argue in favor of circumscribing primary liability. See *Central Bank*, 511 U. S., at 164; *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148 (2008).

We do not believe, however, that our decision creates a serious anomaly or otherwise weakens the distinction between primary and secondary liability. For one thing, it is hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another. John, for example, might sell Bill an unregistered firearm in order to help Bill rob a bank, under circumstances that make him primarily liable for the gun sale and secondarily liable for the bank robbery.

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For another, the cases to which Lorenzo refers do not help his cause. Take *Central Bank*, where we held that Rule 10b–5's private right of action does not permit suits against secondary violators. 511 U. S., at 177. The holding of *Central Bank*, we have said, suggests the need for a "clean line" between conduct that constitutes a primary violation of Rule 10b–5 and conduct that amounts to a secondary violation. *Janus*, 564 U. S., at 143, and n. 6. Thus, in *Janus*, we sought an interpretation of "make" that could neatly divide primary violators and actors too far removed from the ultimate decision to communicate a statement. *Ibid.* (citing *Central Bank*, 511 U. S. 164). The line we adopt today is just as administrable: Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b–5(a) and (c), § 10(b), and § 17(a)(1), even if they are secondarily liable under Rule 10b–5(b). Lorenzo suggests that classifying dissemination as a primary violation would inappropriately subject peripheral players in fraud (including him, nat-

urally) to substantial liability. We suspect the investors who received Lorenzo's e-mails would not view the deception so favorably. And as *Central Bank* itself made clear, even a bit participant in the securities markets "may be liable as a primary violator under [Rule] 10b–5" so long as "*all* of the requirements for primary liability . . . are met." *Id.*, at 191.

Lorenzo's reliance on *Stoneridge* is even further afield. There, we held that private plaintiffs could not bring suit against certain securities defendants based on *undisclosed* deceptions upon which the plaintiffs could not have relied. 552 U. S., at 159. But the Commission, unlike private parties, need not show reliance in its enforcement actions. And even supposing reliance were relevant here, Lorenzo's conduct involved the direct transmission of false statements to prospective investors intended to induce reliance—far from the kind of concealed fraud at issue in *Stoneridge*.

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As for Lorenzo's suggestion that those like him ought to be held secondarily liable, this offer will, far too often, prove illusory. In instances where a "maker" of a false statement does *not* violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the "aiding and abetting" statute. That is because the statute insists that there be a primary violator to whom the secondary violator provided "substantial assistance." 15 U. S. C. § 78t(e). And the latter can be "deemed to be in violation" of the provision only "to the same extent as the person to whom such assistance is provided." *Ibid.* In other words, if Acme Corp. could not be held liable under subsection (b) for a statement it made, then a knowing disseminator of those statements could not be held liable for aiding and abetting Acme under subsection (b). And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b–5, then

such a fraud, whatever its intent or consequences, might escape liability altogether.

That is not what Congress intended. Rather, Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.

* * *

For these reasons, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

APPENDIX

17 CFR § 240.10b–5

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"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person
>
> "in connection with the purchase or sale of any security."

15 U. S. C. § 78j

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate com-

merce or of the mails, or of any facility of any national securities exchange—

. . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U. S. C. § 77q

"(a) Use of interstate commerce for purpose of fraud or deceit

"It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

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15 U. S. C. § 78t

"(e) Prosecution of persons who aid and abet violations

"For purposes of any action brought by the Commission . . . , any person that knowingly or recklessly provides sub-

stantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided."

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

In *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U. S. 135 (2011), we drew a clear line between primary and secondary liability in fraudulent-misstatement cases: A person does not "make" a fraudulent misstatement within the meaning of Securities and Exchange Commission (SEC) Rule 10b–5(b)—and thus is not primarily liable for the statement—if the person lacks "ultimate authority over the statement." *Id.*, at 142. Such a person could, however, be liable as an aider and abettor under principles of secondary liability.

Today, the Court eviscerates this distinction by holding that a person who has not "made" a fraudulent misstatement can nevertheless be primarily liable for it. Because the majority misconstrues the securities laws and flouts our precedent in a way that is likely to have far-reaching consequences, I respectfully dissent.

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I

To appreciate the sweeping nature of the Court's holding, it is helpful to begin with the facts of this case. On October 14, 2009, the owner of the firm at which petitioner Frank Lorenzo worked instructed him to send e-mails to two clients regarding a debenture offering. The owner explained that he wanted the e-mails to come from the firm's investment-banking division, which Lorenzo directed. Lorenzo promptly addressed an e-mail to each client, "cut and pasted" the contents of each e-mail—which he received from the owner—into the body, and "sent [them] out." App. 321. It is undisputed that Lorenzo did not draft the e-mails' contents, though he knew that they contained false or mislead-

ing statements regarding the debenture offering. Both e-mails stated that they were sent "[a]t the request of" the owner of the firm. *Id.*, at 403, 405. No other allegedly fraudulent conduct is at issue.

In 2013, the SEC brought enforcement proceedings against the owner of the firm, the firm itself, and Lorenzo. Even though Lorenzo sent the e-mails at the owner's request, the SEC did not charge Lorenzo with aiding and abetting fraud committed by the owner. See 15 U. S. C. §§ 77*o*(b), 78*o*(b)(4)(E), 78t(e). Instead, the SEC charged Lorenzo as a primary violator of multiple securities laws,[1] including Rule 10b–5(b), which prohibits "mak[ing] any untrue statement of a material fact . . . in connection with the purchase or sale of any security." 17 CFR § 240.10b–5(b) (2018); see *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 212–214 (1976) (construing Rule 10b–5(b) to require scienter). The SEC ultimately concluded that, by "knowingly sen[ding] materially misleading language from his own email account to prospective investors," App. to Pet. for Cert. 77, Lorenzo violated Rule 10b–5(b) and several other antifraud provisions of the securities laws. The SEC "barred [him] from serving in the securities industry" for life. *Id.*, at 91.

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The Court of Appeals unanimously rejected the SEC's determination that Lorenzo violated Rule 10b–5(b). Applying *Janus*, the court held that Lorenzo did not "make" the false statements at issue because he merely "transmitted statements devised by [his boss] at [his boss'] direction." 872 F. 3d 578, 587 (CADC 2017). The SEC has not challenged that aspect of the decision below.

The panel majority nevertheless upheld the SEC's decision holding Lorenzo primarily liable for the same false statements under other provisions of the securities laws—specifically, § 10(b) of the Securities Exchange Act of 1934

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[1] For ease of reference, I use "securities laws" to refer to both statutes and SEC regulations.

(1934 Act), Rules 10b–5(a) and (c), and § 17(a)(1) of the Securities Act of 1933 (1933 Act). Unlike Rule 10b–5(b), none of these provisions pertains specifically to fraudulent misstatements.

II

Even though Lorenzo undisputedly did not "make" the false statements at issue in this case under Rule 10b–5(b), the Court follows the SEC in holding him primarily liable for those statements under other provisions of the securities laws. As construed by the Court, each of these more general laws completely subsumes Rule 10b–5(b) and § 17(a)(2) of the 1933 Act in cases involving fraudulent misstatements, even though these provisions specifically govern false statements. The majority's interpretation of these provisions cannot be reconciled with their text or our precedents. Thus, I am once again compelled to "disagre[e] with the SEC's broad view" of the securities laws. *Janus*, *supra*, at 145, n. 8.

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A

I begin with the text. The Court of Appeals held that Lorenzo violated § 10(b) of the 1934 Act and Rules 10b–5(a) and (c). In relevant part, § 10(b) makes it unlawful for a person, in connection with the purchase or sale of a security, "[t]o use or employ . . . any manipulative or deceptive device or contrivance" in contravention of an SEC rule. 15 U. S. C. § 78j(b). Rule 10b–5 was promulgated under this statutory authority. That Rule makes it unlawful, in connection with the purchase or sale of any security,

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact . . . , or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . . ." 17 CFR § 240.10b–5.

The Court of Appeals also held that Lorenzo violated § 17(a)(1) of the 1933 Act. Similar to Rule 10b–5, § 17(a) of the Act provides that it is unlawful, in connection with the offer or sale of a security,

> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact . . . ; or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U. S. C. § 77q(a).

We can quickly dispose of Rule 10b–5(a) and § 17(a)(1). The act of knowingly disseminating a false statement at the behest of its maker, without more, does not amount to "employ[ing] any device, scheme, or artifice to defraud" within the meaning of those provisions. As the contemporaneous dictionary definitions cited by the majority make clear, each of these words requires some form of planning, designing, devising, or strategizing. See *ante,* at 78–79. We have previously observed that "the terms 'device,' 'scheme,' and 'artifice' all connote knowing or intentional *practices.*" *Aaron* v. *SEC*, 446 U. S. 680, 696 (1980) (emphasis added). In other words, they encompass "fraudulent scheme[s]," such as a "'short selling' scheme," a wash sale, a matched order, price rigging, or similar conduct. *United States* v. *Naftalin*, 441 U. S. 768, 770, 778 (1979) (applying § 17(a)(1)); see *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 473 (1977) (interpreting the term "manipulative" in § 10(b)).

Here, it is undisputed that Lorenzo did not engage in any conduct involving planning, scheming, designing, or strategizing, as Rule 10b–5(a) and § 17(a)(1) require for a primary violation. He sent two e-mails drafted by a superior, to recipients specified by the superior, pursuant to instructions

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given by the superior, without collaborating on the substance of the e-mails or otherwise playing an independent role in perpetrating a fraud. That Lorenzo knew the messages contained falsities does not change the essentially administrative nature of his conduct here; he might have *assisted* in a scheme, but he did not himself plan, scheme, design, or strategize. In my view, the plain text of Rule 10b–5(a) and § 17(a)(1) thus does not encompass Lorenzo's conduct as a matter of primary liability.

The remaining provision, Rule 10b–5(c), seems broader at first blush. But the scope of this conduct-based provision—and, for that matter, Rule 10b–5(a) and § 17(a)(1)—must be understood in light of its codification alongside a prohibition specifically addressing primary liability for false statements. Rule 10b–5(b) imposes primary liability on the "make[r]" of a fraudulent misstatement. 17 CFR § 240.10b–5(b); see *Janus*, 564 U. S., at 141–142. And § 17(a)(2) imposes primary liability on a person who "obtain[s] money or property by means of" a false statement. 15 U. S. C. § 77q(a)(2). The conduct-based provisions of Rules 10b–5(a) and (c) and § 17(a)(1) must be interpreted in view of the specificity of these false-statement provisions, and therefore cannot be construed to encompass primary liability solely for false statements. This view is consistent with our previous recognition that "each subparagraph of § 17(a) 'proscribes a distinct category of misconduct' " and " 'is meant to cover *additional* kinds of illegalities.' " *Aaron*, *supra*, at 697 (quoting *Naftalin*, *supra*, at 774; emphasis added).

The majority disregards these express limitations. Under the Court's rule, a person who has not "made" a fraudulent misstatement within the meaning of Rule 10b–5(b) nevertheless could be held primarily liable for facilitating that same statement; the SEC or plaintiff need only relabel the person's involvement as an "act," "device," "scheme," or "artifice" that violates Rule 10b–5(a) or (c). And a person

could be held liable for a fraudulent misstatement under § 17(a)(1) even if the person did not obtain money or property by means of the statement. In short, Rule 10b–5(b) and § 17(a)(2) are rendered entirely superfluous in fraud cases under the majority's reading.[2]

This approach is in tension with "'the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932)). I would therefore apply the "old and familiar rule" that "the specific governs the general." *RadLAX*, *supra*, at 645–646 (internal quotation marks omitted); see A. Scalia & B. Garner, Reading Law 51 (2012) (canon equally applicable to statutes and regulations). This canon of construction applies not only to resolve "contradiction[s]" between general and specific provisions but also to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX*, 566 U. S., at 645. Here, liability for false statements is "'specifically dealt with'" in Rule 10b–5(b) and § 17(a)(2). *Id.*, at 646 (quoting *D. Ginsberg & Sons*, *supra*, at 208). But Rule 10b–5 and § 17(a) also contain general prohibitions that, "'in [their] most comprehensive sense, would include what is embraced in'" the more specific provisions. 566 U. S., at 646. I would hold that the provisions specifically addressing false statements "'must be operative'" as to false-statement cases, and that the more general provisions should be read to apply "'only [to] such cases within [their] general language as are not within the'" purview of the specific provisions on false statements. *Ibid.*

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[2] I recognize that § 17(a)(1) could be deemed narrower than § 17(a)(2) in the sense that it requires scienter, whereas § 17(a)(2) does not. *Aaron* v. *SEC*, 446 U. S. 680, 697 (1980). But scienter is not disputed in this case, and the specific terms of § 17(a)(2) are otherwise completely subsumed within the more general terms of § 17(a)(1), as interpreted by the majority.

Adopting this approach to the statutory text would align with our previous admonitions that the securities laws should not be "[v]iewed in isolation" and stretched to their limits. *Hochfelder*, 425 U. S., at 212. In *Hochfelder*, for example, we concluded that the key words of § 10(b) employed the "terminology of intentional wrongdoing" and thus "strongly suggest[ed]" that it "proscribe[s] knowing or intentional misconduct," even though the statute did not expressly state as much. *Id.*, at 197, 214. We took a similar approach to § 17(a)(1) of the 1933 Act. *Aaron*, 446 U. S., at 695–697. We have also limited the terms of Rule 10b–5 by recognizing that it was adopted pursuant to § 10(b) and thus "encompasses only conduct already prohibited by § 10(b)." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008); see *Hochfelder*, *supra*, at 212–214.

Contrary to the suggestion of the majority, this approach does not necessarily require treating each provision of Rule 10b–5 or § 17(a) as "governing different, mutually exclusive, spheres of conduct." *Ante*, at 80. Nor does it prevent the securities laws from mutually reinforcing one another or overlapping to some extent. *Ante*, at 80–81. It simply contemplates giving full effect to the specific prohibitions on false statements in Rule 10b–5(b) and § 17(a)(2) instead of rendering them superfluous.

The majority worries that this approach would allow people who disseminate false statements with the intent to defraud to escape liability under Rule 10b–5. *Ante*, at 81. That is not so. If a person's only role is transmitting fraudulent misstatements at the behest of the statements' maker, the person's conduct would be appropriately assessed as a matter of secondary liability pursuant to provisions like 15 U. S. C. §§ 77*o*(b), 78t(e), and 78*o*(b)(4)(E). And if a person engages in *other* acts prohibited by the Rule, such as developing and employing a fraudulent scheme, the person would be primarily liable for that conduct.

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The majority suggests that secondary liability may often prove illusory. It hypothesizes, for example, a situation in which the "maker" of a false statement does not know that it was false and thus does not violate Rule 10b–5(b), but the disseminator knows that the statement is false. Under that scenario, the majority fears that the person disseminating the statements could be "engaged in an egregious fraud," yet would not be liable as an aider and abettor for lack of a primary violator. *Ante*, at 84. This concern is misplaced. As an initial matter, I note that § 17(a)(2) does not require scienter, so the maker of the statement may still be liable under that provision. *Aaron*, *supra*, at 695–697. Moreover, an ongoing, "egregious" fraud is likely to independently constitute a primary violation of the conduct-based securities laws, wholly apart from the laws prohibiting fraudulent misstatements. Here, by contrast, we are concerned with the dissemination of two misstatements at the request of their maker. This type of conduct is appropriately assessed under principles of secondary liability.

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B

The majority's approach contradicts our precedent in two distinct ways.

First, the majority's opinion renders *Janus* a dead letter. In *Janus*, we held that liability under Rule 10b–5(b) was limited to the "make[r]" of the statement and that "[o]ne who *prepares or publishes* a statement on behalf of another is not its maker" within the meaning of Rule 10b–5(b). 564 U. S., at 142 (emphasis added). It is undisputed here that Lorenzo was not the maker of the fraudulent misstatements. The majority nevertheless finds primary liability under different provisions of Rule 10b–5, without any real effort to reconcile its decision with *Janus*. Although it "assume[s] that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information," in

the next breath the majority states that this would be true only if "the individual is not involved in some other form of fraud." *Ante*, at 82. Given that, under the majority's rule, administrative acts undertaken in connection with a fraudulent misstatement qualify as "other form[s] of fraud," the majority's supposed preservation of *Janus* is illusory.

Second, the majority fails to maintain a clear line between primary and secondary liability in fraudulent-misstatement cases. Maintaining this distinction is important because, as the majority notes, there is no private right of action against mere aiders and abettors. *Ante*, at 82; see *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 191 (1994). Here, however, the majority does precisely what we declined to do in *Janus*: impose broad liability for fraudulent misstatements in a way that makes the category of aiders and abettors in these cases "almost nonexistent." 564 U. S., at 143. If Lorenzo's conduct here qualifies for primary liability under § 10(b) and Rule 10b–5(a) or (c), then virtually any person who assists with the making of a fraudulent misstatement will be primarily liable and thereby subject not only to SEC enforcement but also to private lawsuits.

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The Court correctly notes that it is not uncommon for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another—as, for example, when someone illegally sells a gun to help another person rob a bank. *Ante*, at 83. But this case does not involve two distinct crimes. The majority has interpreted certain provisions of an offense so broadly as to render superfluous the more stringent, on-point requirements of a narrower provision of the same offense. Criminal laws regularly and permissibly overlap with each other in a way that allows the same conduct to constitute different crimes with different punishments. That differs significantly from interpreting provisions in a law to completely eliminate spe-

cific limitations in a neighboring provision of that very same law. The majority's overreading of Rules 10b–5(a) and (c) and § 17(a)(1) is especially problematic because the heartland of these provisions is conduct-based fraud—"employ[ing] [a] device, scheme, or artifice to defraud" or "engag[ing] in any act, practice, or course of business"—not mere misstatements. 15 U. S. C. § 77q(a)(1); 17 CFR §§ 240.10b–5(a), (c).

The Court attempts to cabin the implications of its holding by highlighting several facts that supposedly would distinguish this case from a case involving a secretary or other person "tangentially involved in disseminat[ing]" fraudulent misstatements. *Ante*, at 79. None of these distinctions withstands scrutiny. The fact that Lorenzo "sent false statements directly to investors" in e-mails that "invited [investors] to follow up with questions," *ibid.*, puts him in precisely the same position as a secretary asked to send an identical message from her e-mail account. And under the unduly capacious interpretation that the majority gives to the securities laws, I do not see why it would matter whether the sender is the "vice president of an investment banking company" or a secretary, *ibid.*—if the sender knowingly sent false statements, the sender apparently would be primarily liable. To be sure, I agree with the majority that liability would be "inappropriate" for a secretary put in a situation similar to Lorenzo's. *Ibid.* But I can discern no legal principle in the majority opinion that would preclude the secretary from being pursued for primary violations of the securities laws.

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* * *

Instead of blurring the distinction between primary and secondary liability, I would hold that Lorenzo's conduct did not amount to a primary violation of the securities laws and reverse the judgment of the Court of Appeals. Accordingly, I respectfully dissent.

Syllabus

BIESTEK *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

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

No. 17–1184. Argued December 4, 2018—Decided April 1, 2019

Petitioner Michael Biestek, a former construction worker, applied for social security disability benefits, claiming he could no longer work due to physical and mental disabilities. The Social Security Administration assigned an Administrative Law Judge (ALJ) to conduct a hearing, at which the ALJ had to determine whether Biestek could successfully transition to less physically demanding work. For guidance on that issue, the ALJ heard testimony from a vocational expert regarding the types of jobs Biestek could still perform and the number of such jobs that existed in the national economy. See 20 CFR §§404.1560(c)(1), 416.960(c)(1). On cross-examination, Biestek's attorney asked the expert "where [she was] getting [her numbers] from," and the expert explained they were from her own individual labor market surveys. Biestek's attorney then requested that the expert turn over the surveys. The expert declined. The ALJ ultimately denied Biestek benefits, basing his conclusion on the expert's testimony about the number of jobs available to him. Biestek sought review in federal court, where an ALJ's factual findings are "conclusive" if supported by "substantial evidence," 42 U. S. C. §405(g). The District Court rejected Biestek's argument that the expert's testimony could not possibly constitute substantial evidence because she had declined to produce her supporting data. The Sixth Circuit affirmed.

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Held: A vocational expert's refusal to provide private market-survey data upon the applicant's request does not categorically preclude the testimony from counting as "substantial evidence."

Substantial evidence is "more than a mere scintilla," and means only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229. Biestek proposes a categorical rule that the testimony of a vocational expert who refuses a request for supporting data about job availability can never clear that bar. To assess that proposal, the Court begins with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data.

If that is true, it is not obvious why one additional fact—a refusal to a request for that data—should make an expert's testimony categorically inadequate. In some cases, the refusal to disclose data, considered along with other shortcomings, will undercut an expert's credibility and prevent a court from finding that "a reasonable mind" could accept the expert's testimony. But in other cases, the refusal will have no such consequence. Similarly, the refusal will sometimes interfere with effective cross-examination, which a reviewing court may consider in deciding how much to credit an expert's opinion. But other times, even without supporting data, an applicant will be able to probe the strength of the expert's testimony on cross-examination. Ultimately, Biestek's error lies in his pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record, and defers to the presiding ALJ, who has seen the hearing up close. Pp. 102–108.

880 F. 3d 778, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, ALITO, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post,* p. 108. GORSUCH, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 111.

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Ishan K. Bhabha argued the cause for petitioner. With him on the briefs were *Natacha Y. Lam*, *Lauren J. Hartz*, *Frederick J. Daley, Jr.*, and *Meredith Marcus*.

Anthony A. Yang argued the cause for respondent. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, and *Alisa B. Klein*.*

JUSTICE KAGAN delivered the opinion of the Court.

The Social Security Administration (SSA) provides benefits to individuals who cannot obtain work because of a physical or mental disability. To determine whether an applicant

*Briefs of *amici curiae* urging reversal were filed for the National Association of Disability Representatives by *Rakesh N. Kilaru* and *Chanakya A. Sethi*; and for the National Organization of Social Security Claimants' Representatives et al. by *Lawrence D. Rohlfing*, *Barbara A. Jones*, and *William Alvarado Rivera*.

is entitled to benefits, the agency may hold an informal hearing examining (among other things) the kind and number of jobs available for someone with the applicant's disability and other characteristics. The agency's factual findings on that score are "conclusive" in judicial review of the benefits decision so long as they are supported by "substantial evidence." 42 U. S. C. § 405(g).

This case arises from the SSA's reliance on an expert's testimony about the availability of certain jobs in the economy. The expert largely based her opinion on private market-survey data. The question presented is whether her refusal to provide that data upon the applicant's request categorically precludes her testimony from counting as "substantial evidence." We hold it does not.

I

Petitioner Michael Biestek once worked as a carpenter and general laborer on construction sites. But he stopped working after he developed degenerative disc disease, Hepatitis C, and depression. He then applied for social security disability benefits, claiming eligibility as of October 2009.

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After some preliminary proceedings, the SSA assigned an Administrative Law Judge (ALJ) to hold a hearing on Biestek's application. Those hearings, as described in the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.*, are recognizably adjudicative in nature. The ALJ may "receive evidence" and "examine witnesses" about the contested issues in a case. §§ 405(b)(1), 1383(c)(1)(A). But many of the rules governing such hearings are less rigid than those a court would follow. See *Richardson* v. *Perales*, 402 U. S. 389, 400–401 (1971). An ALJ is to conduct a disability hearing in "an informal, non-adversarial manner." 20 CFR § 404.900(b) (2018); § 416.1400(b). Most notably, an ALJ may receive evidence in a disability hearing that "would not be admissible in court." §§ 404.950(c), 416.1450(c); see 42 U. S. C. §§ 405(b)(1), 1383(c)(1)(A).

To rule on Biestek's application, the ALJ had to determine whether the former construction laborer could successfully transition to less physically demanding work. That required exploring two issues. The ALJ needed to identify the types of jobs Biestek could perform notwithstanding his disabilities. See 20 CFR §§ 404.1560(c)(1), 416.960(c)(1). And the ALJ needed to ascertain whether those kinds of jobs "exist[ed] in significant numbers in the national economy." §§ 404.1560(c)(1), 416.960(c)(1); see §§ 404.1566, 416.966.

For guidance on such questions, ALJs often seek the views of "vocational experts." See §§ 404.1566(e), 416.966(e); SSA, Hearings, Appeals, and Litigation Law Manual I–2–5–50 (Aug. 29, 2014). Those experts are professionals under contract with SSA to provide impartial testimony in agency proceedings. See *id.*, at I–2–1–31.B.1 (June 16, 2016); *id.*, at I–2–5–48. They must have "expertise" and "current knowledge" of "[w]orking conditions and physical demands of various" jobs; "[k]nowledge of the existence and numbers of [those jobs] in the national economy"; and "[i]nvolvement in or knowledge of placing adult workers[ ] with disabilities[ ] into jobs." *Id.*, at I–2–1–31.B.1. Many vocational experts simultaneously work in the private sector locating employment for persons with disabilities. See C. Kubitschek & J. Dubin, Social Security Disability Law & Procedure in Federal Court § 3:89 (2019). When offering testimony, the experts may invoke not only publicly available sources but also "information obtained directly from employers" and data otherwise developed from their own "experience in job placement or career counseling." Social Security Ruling, SSR 00–4p, 65 Fed. Reg. 75760 (2000).

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At Biestek's hearing, the ALJ asked a vocational expert named Erin O'Callaghan to identify a sampling of "sedentary" jobs that a person with Biestek's disabilities, education, and job history could perform. Tr. 59 (July 21, 2015); see 20 CFR §§ 404.1567(a), 416.967(a) (defining a "sedentary" job as

one that "involves sitting" and requires "lifting no more than 10 pounds"). O'Callaghan had served as a vocational expert in SSA proceedings for five years; she also had more than ten years' experience counseling people with disabilities about employment opportunities. See *Stachowiak* v. *Commissioner of Social Security*, 2013 WL 593825, *1 (ED Mich., Jan. 11, 2013); Record in No. 16–10422 (ED Mich.), Doc. 17–13, p. 1274 (resume). In response to the ALJ's query, O'Callaghan listed sedentary jobs "such as a bench assembler [or] sorter" that did not require many skills. Tr. 58–59. And she further testified that 240,000 bench assembler jobs and 120,000 sorter jobs existed in the national economy. See *ibid.*

On cross-examination, Biestek's attorney asked O'Callaghan "where [she was] getting those [numbers] from." *Id.*, at 71. O'Callaghan replied that they came from the Bureau of Labor Statistics and her "own individual labor market surveys." *Ibid.* The lawyer then requested that O'Callaghan turn over the private surveys so he could review them. *Ibid.* O'Callaghan responded that she wished to keep the surveys confidential because they were "part of [her] client files." *Id.*, at 72. The lawyer suggested that O'Callaghan could "take the clients' names out." *Ibid.* But at that point the ALJ interjected that he "would not require" O'Callaghan to produce the files in any form. *Ibid.* Biestek's counsel asked no further questions about the basis for O'Callaghan's assembler and sorter numbers.

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After the hearing concluded, the ALJ issued a decision granting Biestek's application in part and denying it in part. According to the ALJ, Biestek was entitled to benefits beginning in May 2013, when his advancing age (he turned fifty that month) adversely affected his ability to find employment. See App. to Pet. for Cert. 19a, 112a–113a. But before that time, the ALJ held, Biestek's disabilities should not have prevented a "successful adjustment to other work." *Id.*, at 110a–112a. The ALJ based that conclusion on O'Cal-

laghan's testimony about the availability in the economy of "sedentary unskilled occupations such as bench assembler [or] sorter." *Id.*, at 111a (emphasis deleted).

Biestek sought review in federal court of the ALJ's denial of benefits for the period between October 2009 and May 2013. On judicial review, an ALJ's factual findings—such as the determination that Biestek could have found sedentary work—"shall be conclusive" if supported by "substantial evidence." 42 U. S. C. § 405(g); see *supra*, at 99. Biestek contended that O'Callaghan's testimony could not possibly constitute such evidence because she had declined, upon request, to produce her supporting data. See Plaintiff's Motion for Summary Judgment in No. 16–10422 (ED Mich.), Doc. 22, p. 23. But the District Court rejected that argument. See 2017 WL 1173775, *2 (Mar. 30, 2017). And the Court of Appeals for the Sixth Circuit affirmed. See *Biestek* v. *Commissioner of Social Security*, 880 F. 3d 778 (2018). That court recognized that the Seventh Circuit had adopted the categorical rule Biestek proposed, precluding a vocational expert's testimony from qualifying as substantial if the expert had declined an applicant's request to provide supporting data. See *id.*, at 790 (citing *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (2004)). But that rule, the Sixth Circuit observed in joining the ranks of unconvinced courts, "ha[d] not been a popular export." 880 F. 3d, at 790 (internal quotation marks omitted).

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And no more is it so today.

II

The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. *T-Mobile South, LLC* v. *Roswell*, 574 U. S. 293, 301 (2015). Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938)

(emphasis deleted). And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla." *Ibid.*; see, *e. g.*, *Perales*, 402 U. S., at 401 (internal quotation marks omitted). It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U. S., at 229. See *Dickinson* v. *Zurko*, 527 U. S. 150, 153 (1999) (comparing the substantial-evidence standard to the deferential clearly-erroneous standard).

Today, Biestek argues that the testimony of a vocational expert who (like O'Callaghan) refuses a request for supporting data about job availability can never clear the substantial-evidence bar. See Brief for Petitioner 21–34. As that formulation makes clear, Biestek's proposed rule is categorical, rendering expert testimony insufficient to sustain an ALJ's factfinding whenever such a refusal has occurred.[1] But Biestek hastens to add two caveats. The first is to clarify what the rule is not, the second to stress where its limits lie.

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Biestek initially takes pains—and understandably so—to distinguish his argument from a procedural claim. Reply Brief 12–14. At no stage in this litigation, Biestek says, has

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[1] In contrast, the principal dissent cannot decide whether it favors such a categorical rule. At first, JUSTICE GORSUCH endorses the rule Biestek and the Seventh Circuit have proposed. See *post*, at 111–112. But in then addressing our opinion, he takes little or no issue with the reasoning we offer to show why that rule is too broad. See *post*, at 114–116. So the dissent tries to narrow the scope of Biestek's categorical rule—to only cases that look just like his. See *post*, at 116–118. And still more, it shelves all the "categorical" talk and concentrates on Biestek's case alone. See *post*, at 111, 114–118. There, JUSTICE GORSUCH's dissent joins JUSTICE SOTOMAYOR's in concluding that the expert evidence in this case was insubstantial. But as we later explain, see *infra*, at 108, Biestek did not petition us to resolve that factbound question; nor did his briefing and argument focus on anything other than the Seventh Circuit's categorical rule. We confine our opinion accordingly.

he ever espoused "a free-standing procedural rule under which a vocational expert would always have to produce [her underlying data] upon request." *Id.*, at 2. That kind of rule exists in federal court: There, an expert witness must produce all data she has considered in reaching her conclusions. See Fed. Rule Civ. Proc. 26(a)(2)(B). But as Biestek appreciates, no similar requirement applies in SSA hearings. As explained above, Congress intended those proceedings to be "informal" and provided that the "strict rules of evidence, applicable in the courtroom, are not to" apply. *Perales*, 402 U. S., at 400; see 42 U. S. C. § 405(b)(1); *supra*, at 99. So Biestek does not press for a "procedural rule" governing "the means through which an evidentiary record [must be] created." Tr. of Oral Arg. 6; Reply Brief 13. Instead, he urges a "substantive rule" for "assess[ing] the quality and quantity of [record] evidence"—which would find testimony like O'Callaghan's inadequate, when taken alone, to support an ALJ's factfinding. *Id.*, at 12.

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And Biestek also emphasizes a limitation within that proposed rule. For the rule to kick in, the applicant must make a demand for the expert's supporting data. See Brief for Petitioner i, 5, 18, 40, 55; Tr. of Oral Arg. 25–26. Consider two cases in which vocational experts rely on, but do not produce, nonpublic information. In the first, the applicant asks for the data; in the second, not. According to Biestek, the expert's testimony in the first case cannot possibly clear the substantial-evidence bar; but in the second case, it may well do so, even though the administrative record is otherwise the same. And Biestek underscores that this difference in outcome has nothing to do with waiver or forfeiture: As he acknowledges, an applicant "cannot waive the substantial evidence standard." *Id.*, at 27. It is just that the evidentiary problem arises from the expert's refusal of a demand, not from the data's absence alone. In his words, the testimony "can constitute substantial evidence if unchallenged, but not if challenged." Reply Brief 18.

To assess Biestek's proposal, we begin with the parties' common ground: Assuming no demand, a vocational expert's testimony may count as substantial evidence even when unaccompanied by supporting data. Take an example. Suppose an expert has top-of-the-line credentials, including professional qualifications and many years' experience; suppose, too, she has a history of giving sound testimony about job availability in similar cases (perhaps before the same ALJ). Now say that she testifies about the approximate number of various sedentary jobs an applicant for benefits could perform. She explains that she arrived at her figures by surveying a range of representative employers; amassing specific information about their labor needs and employment of people with disabilities; and extrapolating those findings to the national economy by means of a well-accepted methodology. She answers cogently and thoroughly all questions put to her by the ALJ and the applicant's lawyer. And nothing in the rest of the record conflicts with anything she says. But she never produces her survey data. Still, her testimony would be the kind of evidence—far "more than a mere scintilla"—that "a reasonable mind might accept as adequate to support" a finding about job availability. *Consolidated Edison*, 305 U. S., at 229. Of course, the testimony would be even better—more reliable and probative—if she had produced supporting data; that would be a best practice for the SSA and its experts.[2] And of course, a different (maybe less qualified) expert failing to produce such data might offer testimony that is so feeble, or contradicted, that it would fail to clear the substantial-evidence bar. The point is only—as,

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[2] The SSA itself appears to agree. In the handbook given to vocational experts, the agency states: "You should have available, at the hearing, any vocational resource materials that you are likely to rely upon" because "the ALJ may ask you to provide relevant portions of [those] materials." SSA, Vocational Expert Handbook 37 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (as last visited Mar. 28, 2019).

again, Biestek accepts—that expert testimony can sometimes surmount that bar absent underlying data.

But if that is true, why should one additional fact—a refusal to a request for that data—make a vocational expert's testimony categorically inadequate? Assume that an applicant challenges our hypothetical expert to turn over her supporting data; and assume the expert declines because the data reveals private information about her clients and making careful redactions will take a fair bit of time. Nothing in the expert's refusal changes her testimony (as described above) about job availability. Nor does it alter any other material in the record. So if our expert's opinion was sufficient—*i. e.*, qualified as substantial evidence—before the refusal, it is hard to see why the opinion has to be insufficient afterward.

Biestek suggests two reasons for that non-obvious result. First, he contends that the expert's rejection of a request for backup data necessarily "cast[s her testimony] into doubt." Reply Brief 16. And second, he avers that the refusal inevitably "deprives an applicant of the material necessary for an effective cross-examination." *Id.*, at 2. But Biestek states his arguments too broadly—and the nuggets of truth they contain cannot justify his proposed flat rule.

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Consider Biestek's claim about how an expert's refusal undercuts her credibility. Biestek here invokes the established idea of an "adverse inference": If an expert declines to back up her testimony with information in her control, then the factfinder has a reason to think she is hiding something. See *id.*, at 16 (citing cases). We do not dispute that possibility—but the inference is far from always required. If an ALJ has no other reason to trust the expert, or finds her testimony iffy on its face, her refusal of the applicant's demand for supporting data may properly tip the scales against her opinion. (Indeed, more can be said: Even if the applicant makes no demand, such an expert's withholding of data may count against her.) But if (as in our prior hypo-

thetical example, see *supra*, at 105) the ALJ views the expert and her testimony as otherwise trustworthy, and thinks she has good reason to keep her data private, her rejection of an applicant's demand need not make a difference. So too when a court reviews the ALJ's decision under the deferential substantial-evidence standard. In some cases, the refusal to disclose data, considered along with other shortcomings, will prevent a court from finding that "a reasonable mind" could accept the expert's testimony. *Consolidated Edison*, 305 U. S., at 229. But in other cases, that refusal will have no such consequence. Even taking it into account, the expert's opinion will qualify as "more than a mere scintilla" of evidence supporting the ALJ's conclusion. Which is to say it will count, contra Biestek, as substantial.

And much the same is true of Biestek's claim that an expert's refusal precludes meaningful cross-examination. We agree with Biestek that an ALJ and reviewing court may properly consider obstacles to such questioning when deciding how much to credit an expert's opinion. See *Perales*, 402 U. S., at 402–406. But Biestek goes too far in suggesting that the refusal to provide supporting data always interferes with effective cross-examination, or that the absence of such testing always requires treating an opinion as unreliable. Even without specific data, an applicant may probe the strength of testimony by asking an expert about (for example) her sources and methods—where she got the information at issue and how she analyzed it and derived her conclusions. See, *e. g.*, *Chavez* v. *Berryhill*, 895 F. 3d 962, 969–970 (CA7 2018). And even without significant testing, a factfinder may conclude that testimony has sufficient indicia of reliability to support a conclusion about whether an applicant could find work. Indeed, Biestek effectively concedes both those points in cases where supporting data is missing, so long as an expert has not refused an applicant's demand. See *supra*, at 104. But once that much is acknowledged, Biestek's argument cannot hold. For with or without an express

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refusal, the absence of data places the selfsame limits on cross-examination.

Where Biestek goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, *e. g.*, *Perales*, 402 U. S., at 399, 410 (rejecting a categorical rule pertaining to the substantiality of medical reports in a disability hearing). It takes into account all features of the vocational expert's testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

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That much is sufficient to decide this case. Biestek petitioned us only to adopt the categorical rule we have now rejected. He did not ask us to decide whether, in the absence of that rule, substantial evidence supported the ALJ in denying him benefits. Accordingly, we affirm the Court of Appeals' judgment.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

The Court focuses on the propriety of a categorical rule that precludes private data that a vocational expert refuses to provide upon request from qualifying as " 'substantial evidence.' " See *ante*, at 99. I agree with JUSTICE GORSUCH that the question presented by this case encompasses an in-

quiry not just into the propriety of a categorical rule in such circumstances but also into whether the substantial-evidence standard was met in the narrower circumstances of Michael Biestek's case. See *post*, at 116–117 (dissenting opinion). For the reasons that JUSTICE GORSUCH sets out, the vocational expert's conclusory testimony in this case, offered without even a hint of support, did not constitute substantial evidence.

Once Biestek established that he had impairments, the agency bore the burden of proving that work opportunities were available to someone with his disabilities and individual characteristics. 20 CFR §416.912(b)(3) (2018). To meet that burden, the agency relied on a vocational expert's testimony that Biestek could qualify for one of 240,000 "bench assembler" jobs or 120,000 "sorter" jobs nationwide. Tr. 59 (July 21, 2015). The expert said that those numbers were based in part on her "professional experience." *Id.*, at 61. When Biestek's counsel understandably asked for more details, the expert said only that she got the numbers from a publicly available source as well as from her "own individual labor market surveys" that were part of confidential client files. *Id.*, at 71; see *id.*, at 67, 71–72. Biestek's counsel asked if the names in the files could be redacted, but the Administrative Law Judge (ALJ) interrupted and ruled that she would not require the surveys to be produced in redacted form. *Id.*, at 72; see also *id.*, at 67.

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Perhaps the ALJ would have allowed Biestek's counsel to ask followup questions about the basis for the testimony at that point, and perhaps Biestek's counsel should have tried to do so. But a Social Security proceeding is "inquisitorial rather than adversarial." *Sims* v. *Apfel*, 530 U. S. 103, 110–111 (2000); see 20 CFR §§404.900(b), 416.1400(b). The ALJ acts as "an examiner charged with developing the facts," *Richardson* v. *Perales*, 402 U. S. 389, 410 (1971), and has a duty to "develop the arguments both for and against granting benefits," *Sims*, 530 U. S., at 111; see also Social Security

Ruling, SSR 00–4p, 65 Fed. Reg. 75760 (2000) (noting "the adjudicator's duty to fully develop the record"). Here, instead of taking steps to ensure that the claimant had a basis from which effective cross-examination could be made and thus the record could be developed, the ALJ cut off that process by intervening when Biestek's counsel asked about the possibility of redaction.

The result was that the expert offered no detail whatsoever on the basis for her testimony. She did not say whom she had surveyed, how many surveys she had conducted, or what information she had gathered, nor did she offer any other explanation of the data on which she relied. In conjunction with the failure to proffer the surveys themselves, the expert's conclusory testimony alone could not constitute substantial evidence to support the ALJ's factfinding.*

I agree with much of JUSTICE GORSUCH's reasoning. I emphasize that I do not foreclose the possibility that a more developed record could justify an ALJ's reliance on vocational-expert testimony in some circumstances even if the expert does not produce records underlying that testimony on request. An expert may have legitimate reasons for not turning over data, such as the burden of gathering records or confidentiality concerns that redaction cannot address. In those circumstances, as the majority suggests, the agency may be able to support an expert's testimony in ways other than by providing underlying data, such as by offering a fulsome description of the data and methodology on which the expert relies. See *ante*, at 105–106. The agency simply did not do so here.

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*I note that the agency's own handbook says that experts "should have available, at the hearing, any vocational resource materials that [they] are likely to rely upon and should be able to thoroughly explain what resource materials [they] used and how [they] arrived at [their] opinions." SSA, Vocational Expert Handbook 37 (Aug. 2017), https://www.ssa.gov/appeals/public_experts/Vocational_Experts_(VE)_Handbook-508.pdf (as last visited Mar. 29, 2019).

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, dissenting.

Walk for a moment in Michael Biestek's shoes. As part of your application for disability benefits, you've proven that you suffer from serious health problems and can't return to your old construction job. Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. When it comes to that question, the Social Security Administration bears the burden of proof. To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 "sorter" and 240,000 "bench assembler" jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can't be the source; its numbers aren't that specific. The source—if there is a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants "great weight" and is more than enough evidence to deny your application. Case closed. App. to Pet. for Cert. 111a–112a, 118a–119a.

Would you say this decision was based on "substantial evidence"? Count me with Judge Easterbrook and the Seventh Circuit in thinking that an agency expert's bottom-line conclusion, supported only by a claim of readily available evidence that she refuses to produce on request, fails to satisfy

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the government's statutory burden of producing substantial evidence of available other work. See *Donahue* v. *Barnhart*, 279 F. 3d 441, 446 (CA7 2002); *McKinnie* v. *Barnhart*, 368 F. 3d 907, 910–911 (CA7 2004) (*per curiam*).

Start with the legal standard. The Social Security Act of 1935 requires the agency to support its conclusions about the number of available jobs with "substantial evidence." 42 U. S. C. § 405(g). Congress borrowed that standard from civil litigation practice, where reviewing courts may overturn a jury verdict when the record lacks "substantial evidence"—that is, evidence sufficient to permit a reasonable jury to reach the verdict it did. Much the same standard governs summary judgment and directed verdict practice today. See 2 K. Hickman & R. Pierce, Administrative Law § 10.2.1, pp. 1082–1085 (6th ed. 2019); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986); *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300 (1939).

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Next, consider what we know about this standard. Witness testimony that's clearly wrong as a matter of fact cannot be substantial evidence. See *Scott* v. *Harris*, 550 U. S. 372, 380 (2007). Falsified evidence isn't substantial evidence. See, *e. g.*, *Firemen's and Policemen's Civil Serv. Comm'n* v. *Brinkmeyer*, 662 S. W. 2d 953, 956 (Tex. 1984). Speculation isn't substantial evidence. See, *e. g.*, *Cao He Lin* v. *Department of Justice*, 428 F. 3d 391, 400 (CA2 2005); *Alpo Petfoods, Inc.* v. *NLRB*, 126 F. 3d 246, 250 (CA4 1997). And, maybe most pointedly for our purposes, courts have held that a party or expert who supplies only conclusory assertions fails this standard too. See, *e. g.*, *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 888 (1990) ("The object of [summary-judgment practice] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"); *Regents of Univ. of Minn.* v. *AGA Medical Corp.*, 717 F. 3d 929, 941 (CA Fed. 2013) (" '[C]onclusory expert assertions cannot raise triable issues of material fact' ") (collecting cases); *Mid-State Fertilizer Co.* v. *Exchange*

Nat. Bank of Chicago, 877 F. 2d 1333, 1339 (CA7 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"); *Sea Robin Pipeline Co.* v. *FERC*, 795 F. 2d 182, 188 (CADC 1986) ("[I]nordinate faith in the conclusory assertions of an expert . . . cannot satisfy the requirement [of] substantial evidence").

If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either. The case hinges on an expert who (a) claims to possess evidence on the dispositive legal question that can be found nowhere else in the record, but (b) offers only a conclusion about its contents, and (c) refuses to supply the evidence when requested without showing that it can't readily be made available. What reasonable factfinder would rely on evidence like that? It seems just the sort of conclusory evidence courts have long held insufficient to meet the substantial evidence standard. And thanks to its conclusory nature, for all anyone can tell it may have come out of a hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too. Unsurprisingly given all this, the government fails to cite even a single authority blessing the sort of evidence here as substantial evidence, despite the standard's long history and widespread use.

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Veteran Social Security practitioners must be feeling a sense of *déjà vu*. Half a century ago, Judge Henry Friendly encountered *Kerner* v. *Flemming*, 283 F. 2d 916 (CA2 1960). There, the agency's hearing examiner offered "nothing save [his own] speculation" to support his holding that the claimant "could in fact obtain substantial gainful employment." *Id.*, at 921. The Second Circuit firmly explained that this kind of conclusory claim is insufficient to meet the substantial evidence standard. In response, the Social Security Administration began hiring vocational experts, like the one in this case, to document the number of jobs available to a given claimant. But if the government can do what it did in this

case, it's hard to see what all the trouble was for. The agency might still rest decisions on a hunch—just so long as the hunch comes from an agency contractor rather than an agency examiner.

Instead of addressing the realities of this case, the government asks us to imagine a hypothetical one. Assume, it says, that no one had requested the underlying data. In those circumstances, the government points out, even Mr. Biestek appears to accept that the agency's decision could have stood. And if that's true, the government asks, why should it make a difference if we add only one additional fact—the expert's refusal to produce the data? See *ante*, at 104–106 (presenting the same argument).

The answer is an old and familiar one. The refusal to supply readily available evidentiary support for a conclusion strongly suggests that the conclusion is, well, unsupported. See, *e. g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse"); *Clifton* v. *United States*, 4 How. 242, 248 (1846) (the withholding of "more direct" proof suggests that "if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal"); 31A C. J. S., Evidence § 156(2), p. 402 (1964) ("The unfavorable inference . . . is especially applicable where the party withholding the evidence has had notice or has been ordered to produce it"). Meanwhile, a similar inference may not arise if no one's bothered to ask for the evidence, or if the evidence is shown to be unavailable for a good reason. In cases like those, there may be just too many other plausible and innocent excuses for the evidence's absence. Maybe, for example, nobody bothered to seek the underlying data because everyone knew what it would show.

Fine, the Court responds, all that's true enough. But even if we accept that an expert's failure to produce the evi-

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dence underlying her conclusion *may* support an inference that her conclusion is unsupported, that doesn't mean such an inference *must* follow. Whether an inference is appropriate depends on the facts of the particular case. See *ante*, at 106–107.

But what more do we need to know about the facts of *this* case? All of the relevant facts are undisputed, and it remains only to decide the legal question whether they meet the substantial evidence standard. We know that the expert offered a firm and exact conclusion about the number of available jobs. We know that the expert claimed to have private information to support her conclusion. We know Mr. Biestek requested that information and we have no reason to think any confidentiality concerns could not have been addressed. We know, too, that the hearing examiner had "no other reason to trust the expert['s]" numbers beyond her say-so. *Ante*, at 106. Finally and looking to the law, we know that a witness's bare conclusion is regularly held insufficient to meet the substantial evidence threshold—and we know that the government hasn't cited a single case finding substantial evidence on so little. This is *exactly* the sort of case where an adverse inference should "tip the scales." *Ibid.*

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With so much now weighing against the government, everything seems to turn on a final hypothetical. Now we are asked to imagine that the expert had offered detailed oral testimony about the withheld data. Her testimony was so detailed, we are asked to suppose, that Mr. Biestek could have thoroughly tested the data's reliability through cross-examination. (You might wonder just how effective this cross-examination could be if Mr. Biestek didn't have access to the data. But overlook that.) Surely in *those* circumstances it wouldn't matter whether the expert failed to produce the data even in bad faith. Any failure to produce would be harmless as a matter of law because the expert's testimony, all by itself, would amount to substantial evidence on which a rational factfinder might rely. *Ante*, at 107.

The problem is that this imaginary case has nothing to teach us about our real one. In Mr. Biestek's case, it is undisputed that the expert offered only a bare conclusion about the number of available jobs. No other relevant testimony was offered or received: no testimony about the underlying data, no testimony about its specific sources, no testimony about its reliability. In our real case, there is simply no way to shrug off the failure to produce the data as harmless error. To the contrary, and as we have seen, cases like *this* routinely fail to satisfy the substantial evidence standard. And if the government has a "'duty to fully develop the record,'" *ante*, at 110 (SOTOMAYOR, J., dissenting), that conclusion should follow all the more strongly.

What leads the Court to a different conclusion? It says that it views Mr. Biestek's petition as raising only the "categorical" question whether an expert's failure to produce underlying data always and in "every case" precludes her testimony from qualifying as substantial evidence. *Ante*, at 99, 108. And once the question is ratcheted up to that level of abstraction, of course it is easy enough to shoot it down: just point to a series of hypothetical cases where the record contains *additional* justification for the expert's failure to produce or *additional* evidence to support her opinion. In such counterfactual cases, the failure to produce either would not be enough to give rise to an adverse inference under traditional legal principles or could be held harmless as a matter of law. See *ante*, at 105–107.

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But as I understand Mr. Biestek's submission, it does not require an all-or-nothing approach that would cover "every case." As the Court acknowledges, Mr. Biestek has focused us on "the Seventh Circuit's categorical rule." *Ante*, at 103, n. 1. And that "rule" targets the narrower "category" of circumstances we have here—where an expert "'give[s] a bottom line,'" fails to provide evidence "underlying that bottom line" when challenged, and fails to show the evidence is unavailable. *McKinnie*, 368 F. 3d, at 911 (quoting *Donahue*,

279 F. 3d, at 446). What to do about *that* category falls well within the question presented: "[w]hether a vocational expert's testimony can constitute substantial evidence of 'other work' . . . when the expert fails upon the applicant's request to provide the underlying data on which that testimony is premised." Pet. for Cert. i. The answer to that question may be "always," "never," or—as the Court itself seems to acknowledge—"[s]ometimes." *Ante*, at 108. And if the answer is "sometimes," the critical question becomes "in what circumstances"?

I suppose we could stop short and leave everyone guessing. But another option is to follow the Seventh Circuit's lead, resolve the smaller yet still significant "category" of cases like the one before us, and in that way begin to offer lower courts meaningful guidance in this important area. While I would not hesitate to take this course and make plain that cases like Mr. Biestek's fail the substantial evidence standard, I understand the Court today to choose the first option and leave these matters for another day.

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There is good news and bad news in this. If my understanding of the Court's opinion is correct, the good news is that the Court remains open to the possibility that in real-world cases like Mr. Biestek's, lower courts may—and even should—find the substantial evidence test unmet. The bad news is that we must wait to find out, leaving many people and courts in limbo in the meantime. Cases with facts like Mr. Biestek's appear to be all too common. See, *e. g.*, Dubin, Overcoming Gridlock: *Campbell* After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs, 62 Admin. L. Rev. 937, 966 (2010). And many courts have erred in them by finding the substantial evidence test met, as the Sixth Circuit did in the case now before us. Some courts have even conflated the substantial evidence standard—a substantive standard governing what's needed to sustain a judgment as a matter of law—with procedural

rules governing the admission of evidence. These courts have mistakenly suggested that, because the Federal Rules of Evidence don't apply in Social Security proceedings, anything an expert says will suffice to meet the agency's burden of proof. See, *e. g.*, *Welsh* v. *Commissioner of Social Security*, 662 Fed. Appx. 105, 109–110 (CA3 2016); *Bayliss* v. *Barnhart*, 427 F. 3d 1211, 1218, and n. 4 (CA9 2005). Definitively resolving this case would have provided more useful guidance for practitioners and lower courts that have struggled with a significant category of cases like Mr. Biestek's, all while affording him the relief the law promises in disputes like his.

The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1313–1314 (1975). Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice. Over 100 years ago, in *ICC* v. *Louisville & Nashville R. Co.*, 227 U. S. 88 (1913), the government sought to justify an agency order binding private parties without producing the information on which the agency had relied. The government argued that its findings should be "presumed to have been supported." *Id.*, at 93. In essence, the government sought the right to "act upon any sort of secret evidence." Gellhorn, Official Notice in Administrative Adjudication, 20 Texas L. Rev. 131, 145 (1941). This Court did not approve of that practice then, and I would not have hesitated to make clear that we do not approve of it today.

I respectfully dissent.

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Syllabus

BUCKLEW *v.* PRECYTHE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 17–8151. Argued November 6, 2018—Decided April 1, 2019

In *Baze* v. *Rees*, 553 U. S. 35, a plurality of this Court concluded that a State's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Id.*, at 52. A majority of the Court subsequently held *Baze*'s plurality opinion to be controlling. See *Glossip* v. *Gross*, 576 U. S. 863.

Petitioner Russell Bucklew was convicted of murder and sentenced to death. The State of Missouri plans to execute him by lethal injection using a single drug, pentobarbital. Mr. Bucklew presented an as-applied Eighth Amendment challenge to the State's lethal injection protocol, alleging that, regardless of whether it would cause excruciating pain for *all* prisoners, it would cause *him* severe pain because of his particular medical condition.

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The District Court dismissed his challenge. The Eighth Circuit, applying the *Baze-Glossip* test, remanded the case to allow Mr. Bucklew to identify a feasible, readily implemented alternative procedure that would significantly reduce his alleged risk of pain. Eventually, Mr. Bucklew identified nitrogen hypoxia, but the District Court found the proposal lacking and granted the State's motion for summary judgment. The Eighth Circuit affirmed.

Held:

1. *Baze* and *Glossip* govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain. Pp. 129–140.

(a) The Eighth Amendment forbids "cruel and unusual" methods of capital punishment but does not guarantee a prisoner a painless death. See *Glossip*, 576 U. S., at 869. As originally understood, the Eighth Amendment tolerated methods of execution, like hanging, that involved a significant risk of pain, while forbidding as cruel only those methods that intensified the death sentence by "superadding" terror, pain, or disgrace. To establish that a State's chosen method cruelly "superadds" pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method that would significantly reduce

a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. *Baze*, 553 U. S., at 52; *Glossip*, 576 U. S., at 877. And *Glossip* left no doubt that this standard governs "all Eighth Amendment method-of-execution claims." *Id.*, at 867. *Baze* and *Glossip* recognized that the Constitution affords a "measure of deference to a State's choice of execution procedures" and does not authorize courts to serve as "boards of inquiry charged with determining 'best practices' for executions." *Baze*, 553 U. S., at 51–52. Nor do they suggest that traditionally accepted methods of execution are necessarily rendered unconstitutional as soon as an arguably more humane method becomes available. Pp. 129–135.

(b) Precedent forecloses Mr. Bucklew's argument that methods posing a "substantial and particular risk of grave suffering" when applied to a particular inmate due to his "unique medical condition" should be considered "categorically" cruel. Because distinguishing between constitutionally permissible and impermissible degrees of pain is a *necessarily* comparative exercise, the Court held in *Glossip*, identifying an available alternative is "a requirement of all Eighth Amendment method-of-execution claims" alleging cruel pain. 576 U. S., at 867. Mr. Bucklew's argument is also inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest: When it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved, the law has always asked whether the punishment superadds pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives, not an abstract exercise in "categorical" classification. The substantive meaning of the Eighth Amendment does not change depending on how broad a remedy the plaintiff chooses to seek. Mr. Bucklew's solution also invites pleading games, and there is little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative. Pp. 135–140.

2. Mr. Bucklew has failed to satisfy the *Baze-Glossip* test. Pp. 140–151.

(a) He fails for two independent reasons to present a triable question on the viability of nitrogen hypoxia as an alternative to the State's lethal injection protocol. First, an inmate must show that his proposed alternative method is not just theoretically "feasible" but also "'readily implemented,'" *Glossip*, 576 U. S., at 877. This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly. Mr. Bucklew's proposal falls well short of that standard. He presented no evidence on numerous questions essential to implementing his preferred method; instead, he merely pointed to reports from correctional

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authorities in other States indicating the need for additional study to develop a nitrogen hypoxia protocol. Second, the State had a "legitimate" reason for declining to switch from its current method of execution as a matter of law, *Baze*, 553 U. S., at 52, namely, choosing not to be the first to experiment with a new, "untried and untested" method of execution. *Id.*, at 41. Pp. 141–142.

(b) Even if nitrogen hypoxia were a viable alternative, neither of Mr. Bucklew's theories shows that nitrogen hypoxia would significantly reduce a substantial risk of severe pain. First, his contention that the State may use painful procedures to administer the lethal injection, including forcing him to lie flat on his back (which he claims could impair his breathing even before the pentobarbital is administered), rests on speculation unsupported, if not affirmatively contradicted, by the record. And to the extent the record is unclear, he had ample opportunity to conduct discovery and develop a factual record concerning the State's planned procedures. Second, Mr. Bucklew contends that while either method will cause him to experience feelings of suffocation for some period of time before he is rendered fully unconscious, the duration of that period will be shorter with nitrogen than with pentobarbital. But nothing in the record suggests that he will be capable of experiencing pain for significantly more time after receiving pentobarbital than he would after receiving nitrogen. His claim to the contrary rested on his expert's testimony regarding a study of euthanasia in horses that everyone now agrees the expert misunderstood or misremembered. Pp. 143–149.

883 F. 3d 1087, affirmed.

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GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and KAVANAUGH, JJ., joined. THOMAS, J., *post*, p. 151, and KAVANAUGH, J., *post*, p. 152, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined as to all but Part III, *post*, p. 154. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 170.

Robert N. Hochman argued the cause for petitioner. With him on the briefs were *Lawrence P. Fogel*, *Steven J. Horowitz*, *Kelly J. Huggins*, *Suzanne B. Notton*, *Matthew J. Saldaña*, *Heather B. Sultanian*, and *Cheryl A. Pilate*.

D. John Sauer, State Solicitor of Missouri, argued the cause for respondents. With him on the brief were *Joshua D. Hawley*, Attorney General, *Joshua M. Divine*, *Julie*

Marie Blake, and *Peter T. Reed*, Deputy Solicitors, and *Michael Joseph Spillane*, Assistant Attorney General.*

JUSTICE GORSUCH delivered the opinion of the Court.

Russell Bucklew concedes that the State of Missouri lawfully convicted him of murder and a variety of other crimes. He acknowledges that the U. S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State's lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Cassandra Stubbs*, *Anna Arceneaux*, *David D. Cole*, *Amanda W. Shanor*, *Anthony E. Rothert*, and *Sandra L. Babcock*; for Former Corrections Officials by *Tejinder Singh* and *Erica Oleszczuk Evans*; for Former Judges et al. by *John Mills* and *Jennifer Merrigan*; for Pharmacy, Medicine, and Health Policy Experts by *Jessica L. Ellsworth*, *Philip Katz*, and *Lowell M. Zeta*; for Scholars and Academics of Constitutional Law by *Bruce H. Schneider* and *David J. Kahne*; and for Megan McCracken et al. by *Ginger D. Anders* and *Christopher M. Lynch.*

Briefs of *amici curiae* urging affirmance 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, and *Heather Gebelin Hacker*, Assistant Solicitor General, and by the Attorneys General of their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Jim Hood* of Mississippi, *Doug Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; and for Arizona Voice for Crime Victims, Inc., et al. by *Allyson N. Ho* and *Paul G. Cassell*.

Briefs of *amici curiae* were filed for the American Medical Association by *Leonard A. Nelson*; and for the Association for Accessible Medicines by *Brian T. Burgess*, *Jeffrey K. Francer*, *Jaime A. Santos*, and *Andrew Kim*.

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the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so.

I

A

In 1996, when Stephanie Ray announced that she wanted to end their relationship, Mr. Bucklew grew violent. He cut her jaw, punched her in the face, and threatened her with a knife. Frightened to remain in the home they had shared, Ms. Ray sought refuge with her children in Michael Sanders' nearby residence. But then one night Mr. Bucklew invaded that home. Bearing a pistol in each hand, he shot Mr. Sanders in the chest; fired at Mr. Sanders' 6-year-old son (thankfully, he missed); and pistol-whipped Ms. Ray, this time breaking her jaw. Then Mr. Bucklew handcuffed Ms. Ray, drove her to a secluded spot, and raped her at gunpoint. After a trooper spotted Mr. Bucklew, a shootout followed and he was finally arrested. While all this played out, Mr. Sanders bled to death. As a coda, Mr. Bucklew escaped from jail while awaiting trial and attacked Ms. Ray's mother with a hammer before he could be recaptured.

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After a decade of litigation, Mr. Bucklew was seemingly out of legal options. A jury had convicted him of murder and other crimes and recommended a death sentence, which the court had imposed. His direct appeal had proved unsuccessful. *State* v. *Bucklew*, 973 S. W. 2d 83 (Mo. 1998), cert. denied, 525 U. S. 1082 (1999). Separate rounds of state and federal post-conviction proceedings also had failed to yield relief. *Bucklew* v. *State*, 38 S. W. 3d 395 (Mo.), cert. denied, 534 U. S. 964 (2001); *Bucklew* v. *Luebbers*, 436 F. 3d 1010 (CA8), cert. denied, 549 U. S. 1079 (2006).

B

As it turned out, though, Mr. Bucklew's case soon became caught up in a wave of litigation over lethal injection proce-

dures. Like many States, Missouri has periodically sought to improve its administration of the death penalty. Early in the 20th century, the State replaced hanging with the gas chamber. Later in the century, it authorized the use of lethal injection as an alternative to lethal gas. By the time Mr. Bucklew's post-conviction proceedings ended, Missouri's protocol called for lethal injections to be carried out using three drugs: sodium thiopental, pancuronium bromide, and potassium chloride. And by that time, too, various inmates were in the process of challenging the constitutionality of the State's protocol and others like it around the country. See *Taylor* v. *Crawford*, 457 F. 3d 902 (CA8 2006); Note, A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections, 120 Harv. L. Rev. 1301, 1304 (2007) (describing flood of lethal injection lawsuits around 2006 that "severely constrained states' ability to carry out executions"); Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 102–116 (2007).

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Ultimately, this Court answered these legal challenges in *Baze* v. *Rees*, 553 U. S. 35 (2008). Addressing Kentucky's similar three-drug protocol, THE CHIEF JUSTICE, joined by JUSTICE ALITO and Justice Kennedy, concluded that a State's refusal to alter its lethal injection protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." *Id.*, at 52. JUSTICE THOMAS, joined by Justice Scalia, thought the protocol passed muster because it was not intended "to add elements of terror, pain, or disgrace to the death penalty." *Id.*, at 107. JUSTICE BREYER reached the same result because he saw no evidence that the protocol created "a significant risk of unnecessary suffering." *Id.*, at 113. And though Justice Stevens objected to the continued use of the death penalty, he agreed that petitioners' evidence was insufficient. *Id.*, at 87. After this Court decided *Baze*, it denied

review in a case seeking to challenge Missouri's similar lethal injection protocol. *Taylor* v. *Crawford*, 487 F. 3d 1072 (CA8 2007), cert. denied, 553 U. S. 1004 (2008).

But that still was not the end of it. Next, Mr. Bucklew and other inmates unsuccessfully challenged Missouri's protocol in state court, alleging that it had been adopted in contravention of Missouri's Administrative Procedure Act. *Middleton* v. *Missouri Dept. of Corrections*, 278 S. W. 3d 193 (Mo.), cert. denied, 556 U. S. 1255 (2009). They also unsuccessfully challenged the protocol in federal court, this time alleging it was pre-empted by various federal statutes. *Ringo* v. *Lombardi*, 677 F. 3d 793 (CA8 2012). And Mr. Bucklew sought to intervene in yet another lawsuit alleging that Missouri's protocol violated the Eighth Amendment because unqualified personnel might botch its administration. That lawsuit failed too. *Clemons* v. *Crawford*, 585 F. 3d 1119 (CA8 2009), cert. denied, 561 U. S. 1026 (2010).

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While all this played out, pressure from anti-death-penalty advocates induced the company that manufactured sodium thiopental to stop supplying it for use in executions. As a result, the State was unable to proceed with executions until it could change its lethal injection protocol again. This it did in 2012, prescribing the use of a single drug, the sedative propofol. Soon after that, Mr. Bucklew and other inmates sued to invalidate this new protocol as well, alleging that it would produce excruciating pain and violate the Eighth Amendment on its face. After the State revised the protocol in 2013 to use the sedative pentobarbital instead of propofol, the inmates amended their complaint to allege that pentobarbital would likewise violate the Constitution.

C

Things came to a head in 2014. With its new protocol in place and the necessary drugs now available, the State scheduled Mr. Bucklew's execution for May 21. But 12 days before the execution Mr. Bucklew filed yet another lawsuit,

the one now before us. In this case, he presented an as-applied Eighth Amendment challenge to the State's new protocol. Whether or not it would cause excruciating pain for *all* prisoners, as his previous lawsuit alleged, Mr. Bucklew now contended that the State's protocol would cause *him* severe pain because of his particular medical condition. Mr. Bucklew suffers from a disease called cavernous hemangioma, which causes vascular tumors—clumps of blood vessels—to grow in his head, neck, and throat. His complaint alleged that this condition could prevent the pentobarbital from circulating properly in his body; that the use of a chemical dye to flush the intravenous line could cause his blood pressure to spike and his tumors to rupture; and that pentobarbital could interact adversely with his other medications.

These latest protocol challenges yielded mixed results. The district court dismissed both the inmates' facial challenge and Mr. Bucklew's as-applied challenge. But, at Mr. Bucklew's request, this Court agreed to stay his execution until the Eighth Circuit could hear his appeal. *Bucklew* v. *Lombardi*, 572 U. S. 1131 (2014). Ultimately, the Eighth Circuit affirmed the dismissal of the facial challenge. *Zink* v. *Lombardi*, 783 F. 3d 1089 (en banc) (*per curiam*), cert. denied, 576 U. S. 1083 (2015). Then, turning to the as-applied challenge and seeking to apply the test set forth by the *Baze* plurality, the court held that Mr. Bucklew's complaint failed as a matter of law to identify an alternative procedure that would significantly reduce the risks he alleged would flow from the State's lethal injection protocol. Yet, despite this dispositive shortcoming, the court of appeals decided to give Mr. Bucklew another chance to plead his case. The court stressed that, on remand before the district court, Mr. Bucklew had to identify "at the earliest possible time" a feasible, readily implemented alternative procedure that would address those risks. *Bucklew* v. *Lombardi*, 783 F. 3d 1120, 1127–1128 (2015) (en banc).

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Shortly after the Eighth Circuit issued its judgment, this Court decided *Glossip* v. *Gross*, 576 U. S. 863 (2015), rejecting a challenge to Oklahoma's lethal injection protocol. There, the Court clarified that THE CHIEF JUSTICE's plurality opinion in *Baze* was controlling under *Marks* v. *United States*, 430 U. S. 188 (1977). In doing so, it reaffirmed that an inmate cannot successfully challenge a method of execution under the Eighth Amendment unless he identifies "an alternative that is 'feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.' " 576 U. S., at 877 (alteration omitted). JUSTICE THOMAS, joined by Justice Scalia, reiterated his view that the Eighth Amendment "prohibits only those methods of execution that are deliberately designed to inflict pain," but he joined the Court's opinion because it correctly explained why petitioners' claim failed even under the controlling opinion in *Baze*. *Glossip*, 576 U. S., at 899 (concurring opinion) (internal quotation marks and alteration omitted).

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D

Despite the Eighth Circuit's express instructions, when Mr. Bucklew returned to the district court in 2015 he still refused to identify an alternative procedure that would significantly reduce his alleged risk of pain. Instead, he insisted that inmates should have to carry this burden only in facial, not as-applied, challenges. Finally, after the district court gave him "one last opportunity," App. 30, Mr. Bucklew filed a fourth amended complaint in which he claimed that execution by "lethal gas" was a feasible and available alternative method that would significantly reduce his risk of pain. *Id.*, at 42. Mr. Bucklew later clarified that the lethal gas he had in mind was nitrogen, which neither Missouri nor any other State had ever used to carry out an execution.

The district court allowed Mr. Bucklew "extensive discovery" on his new proposal. 883 F. 3d 1087, 1094 (CA8 2018). But even at the close of discovery in 2017, the district court still found the proposal lacking and granted the State's mo-

tion for summary judgment. By this point in the proceedings, Mr. Bucklew's contentions about the pain he might suffer had evolved considerably. He no longer complained about circulation of the drug, the use of dye, or adverse drug interactions. Instead, his main claim now was that he would experience pain during the period after the pentobarbital started to take effect but before it rendered him fully unconscious. According to his expert, Dr. Joel Zivot, while in this semiconscious "twilight stage" Mr. Bucklew would be unable to prevent his tumors from obstructing his breathing, which would make him feel like he was suffocating. Dr. Zivot declined to say how long this twilight stage would last. When pressed, however, he referenced a study on euthanasia in horses. He claimed that the horses in the study had displayed some amount of brain activity, as measured with an electroencephalogram (or EEG), for up to four minutes after they were given a large dose of pentobarbital. Based on Dr. Zivot's testimony, the district court found a triable issue as to whether there was a "substantial risk" that Mr. Bucklew would "experience choking and an inability to breathe for up to four minutes" if he were executed by lethal injection. App. 827. Even so, the court held, Mr. Bucklew's claim failed because he had produced no evidence that his proposed alternative, execution by nitrogen hypoxia, would significantly reduce that risk.

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This time, a panel of the Eighth Circuit affirmed. The panel held that Mr. Bucklew had produced no evidence that the risk of pain he alleged "would be substantially reduced by use of nitrogen hypoxia instead of lethal injection as the method of execution." 883 F. 3d, at 1096. Judge Colloton dissented, arguing that the evidence raised a triable issue as to whether nitrogen gas would "render Bucklew insensate more quickly than pentobarbital." *Id.*, at 1099. The full court denied rehearing en banc over a dissent by Judge Kelly, who maintained that, while prisoners pursuing facial challenges to a state execution protocol must plead and prove

an alternative method of execution under *Baze* and *Glossip*, prisoners like Mr. Bucklew who pursue as-applied challenges should not have to bear that burden. 885 F. 3d 527, 528 (2018).

On the same day Mr. Bucklew was scheduled to be executed, this Court granted him a second stay of execution. 583 U. S. 1208 (2018). We then agreed to hear his case to clarify the legal standards that govern an as-applied Eighth Amendment challenge to a State's method of carrying out a death sentence. 584 U. S. 959 (2018).

II

We begin with Mr. Bucklew's suggestion that the test for lethal injection protocol challenges announced in *Baze* and *Glossip* should govern only facial challenges, not as-applied challenges like his. In evaluating this argument, we first examine the original and historical understanding of the Eighth Amendment and our precedent in *Baze* and *Glossip*. We then address whether, in light of those authorities, it would be appropriate to adopt a different constitutional test for as-applied claims.

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A

The Constitution allows capital punishment. See *Glossip*, 576 U. S., at 867–869; *Baze*, 553 U. S., at 47. In fact, death was "the standard penalty for all serious crimes" at the time of the founding. S. Banner, The Death Penalty: An American History 23 (2002) (Banner). Nor did the later addition of the Eighth Amendment outlaw the practice. On the contrary—the Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a "capital" crime and "deprived of life" as a penalty, so long as proper procedures are followed. And the First Congress, which proposed both Amendments, made a number of crimes punishable by death. See Act of Apr. 30, 1790, 1 Stat. 112. Of course, that doesn't mean the American people must continue to use the death

penalty. The same Constitution that permits States to authorize capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives.

While the Eighth Amendment doesn't forbid capital punishment, it does speak to how States may carry out that punishment, prohibiting methods that are "cruel and unusual." What does this term mean? At the time of the framing, English law still formally tolerated certain punishments even though they had largely fallen into disuse—punishments in which "terror, pain, or disgrace [were] superadded" to the penalty of death. 4 W. Blackstone, Commentaries on the Laws of England 370 (1769). These included such "[d]isgusting" practices as dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive, all of which Blackstone observed "savo[red] of torture or cruelty." *Ibid.*

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Methods of execution like these readily qualified as "cruel and unusual," as a reader at the time of the Eighth Amendment's adoption would have understood those words. They were undoubtedly "cruel," a term often defined to mean "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting," 1 S. Johnson, A Dictionary of the English Language 459 (4th ed. 1773), or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness," 1 N. Webster, An American Dictionary of the English Language (1828). And by the time of the founding, these methods had long fallen out of use and so had become "unusual." 4 Blackstone, Commentaries on the Laws of England, at 370; Banner 76; *Baze*, 553 U. S., at 97 (THOMAS, J., concurring in judgment); see also Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739, 1770–1771, 1814 (2008) (observing that Americans in the late 18th and early 19th centuries described as "unusual" governmen-

tal actions that had "fall[en] completely out of usage for a long period of time").

Contemporary evidence confirms that the people who ratified the Eighth Amendment would have understood it in just this way. Patrick Henry, for one, warned that unless the Constitution was amended to prohibit "cruel and unusual punishments," Congress would be free to inflict "tortures" and "barbarous" punishments. 3 Debates on the Federal Constitution 447–448 (J. Elliot 2d ed. 1891). Many early commentators likewise described the Eighth Amendment as ruling out "the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 140 (1833); see B. Oliver, The Rights of an American Citizen 186 (1832) (the Eighth Amendment prohibits such "barbarous and cruel punishments" as "[b]reaking on the wheel, flaying alive, rending asunder with horses, . . . maiming, mutilating and scourging to death"). Justice Story even remarked that he thought the prohibition of cruel and unusual punishments likely "unnecessary" because no "free government" would ever authorize "atrocious" methods of execution like these. 3 J. Story, Commentaries on the Constitution of the United States § 1896, p. 750 (1833).

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Consistent with the Constitution's original understanding, this Court in *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), permitted an execution by firing squad while observing that the Eighth Amendment forbade the gruesome methods of execution described by Blackstone "and all others in the same line of unnecessary cruelty." *Id.*, at 135–136. A few years later, the Court upheld a sentence of death by electrocution while observing that, though electrocution was a new mode of punishment and therefore perhaps could be considered "unusual," it was not "cruel" in the constitutional sense: "[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution. [Cruelty] implies . . .

something inhuman and barbarous, something more than the mere extinguishment of life." *In re Kemmler*, 136 U. S. 436, 447 (1890).

It's instructive, too, to contrast the modes of execution the Eighth Amendment was understood to forbid with those it was understood to permit. At the time of the Amendment's adoption, the predominant method of execution in this country was hanging. *Glossip*, 576 U. S., at 867. While hanging was considered more humane than some of the punishments of the Old World, it was no guarantee of a quick and painless death. "Many and perhaps most hangings were evidently painful for the condemned person because they caused death slowly," and "[w]hether a hanging was painless or painful seems to have been largely a matter of chance." Banner 48, 170. The force of the drop could break the neck and sever the spinal cord, making death almost instantaneous. But that was hardly assured given the techniques that prevailed at the time. More often it seems the prisoner would die from loss of blood flow to the brain, which could produce unconsciousness usually within seconds, or suffocation, which could take several minutes. *Id.*, at 46–47; J. Laurence, The History of Capital Punishment 44–46 (1960); Gardner, Executions and Indignities: An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 120 (1978). But while hanging could and often did result in significant pain, its use "was virtually never questioned." Banner 170. Presumably that was because, in contrast to punishments like burning and disemboweling, hanging wasn't "*intended* to be painful" and the risk of pain involved was considered "unfortunate but inevitable." *Ibid.*; see also *id.*, at 48.

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What does all this tell us about how the Eighth Amendment applies to methods of execution? For one thing, it tells us that the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital

crimes. *Glossip*, 576 U. S., at 869. Instead, what unites the punishments the Eighth Amendment was understood to forbid, and distinguishes them from those it was understood to allow, is that the former were long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) "'superadd[ition]'" of "'terror, pain, or disgrace.'" *Baze*, 553 U. S., at 48; accord, *id.*, at 96 (THOMAS, J., concurring in judgment).

This Court has yet to hold that a State's method of execution qualifies as cruel and unusual, and perhaps understandably so. Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite, exactly as Justice Story predicted. Through much of the 19th century, States experimented with technological innovations aimed at making hanging less painful. See Banner 170–177. In the 1880s, following the recommendation of a commission tasked with finding "'the most humane and practical method known to modern science of carrying into effect the sentence of death,'" the State of New York replaced hanging with electrocution. *Glossip*, 576 U. S., at 867–868. Several States followed suit in the "'"belief that electrocution is less painful and more humane than hanging."'" *Id.*, at 868 Other States adopted lethal gas after concluding it was "'the most humane [method of execution] known to modern science.'" *Ibid.* And beginning in the 1970s, the search for less painful modes of execution led many States to switch to lethal injection. *Ibid.*; *Baze*, 553 U. S., at 42, 62; see also Banner 178–181, 196–197, 297. Notably, all of these innovations occurred not through this Court's intervention, but through the initiative of the people and their representatives.

Still, accepting the possibility that a State might try to carry out an execution in an impermissibly cruel and unusual manner, how can a court determine when a State has crossed the line? THE CHIEF JUSTICE's opinion in *Baze*, which a majority of the Court held to be controlling in *Glossip*, sup-

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plies critical guidance. It teaches that where (as here) the question in dispute is whether the State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason. See *Glossip*, 576 U. S., at 877; *Baze*, 553 U. S., at 52. *Glossip* left no doubt that this standard governs "all Eighth Amendment method-of-execution claims." 576 U. S., at 867.

In reaching this conclusion, *Baze* and *Glossip* recognized that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U. S., at 47. To the contrary, the Constitution affords a "measure of deference to a State's choice of execution procedures" and does not authorize courts to serve as "boards of inquiry charged with determining 'best practices' for executions." *Id.*, at 51–52, and nn. 2–3. The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is "substantial when compared to a known and available alternative." *Glossip*, 576 U. S., at 878; see *Baze*, 553 U. S., at 61. Nor do *Baze* and *Glossip* suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available. There are, the Court recognized, many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution. See, *e. g.*, *Glossip*, 576 U. S., at 878–879 (a State can't be faulted for failing to use lethal injection drugs that it's unable to procure through good-faith efforts); *Baze*, 553 U. S., at 57 (a State has a legitimate interest in selecting a method it regards as "preserving the dignity of the procedure"); *id.*, at 66 (ALITO, J., concurring) (a State isn't required to modify its protocol in ways that would re-

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quire the involvement of "persons whose professional ethics rules or traditions impede their participation").

As we've seen, two Members of the Court whose votes were essential to the judgment in *Glossip* argued that establishing cruelty consistent with the Eighth Amendment's original meaning demands slightly more than the majority opinion there (or the *Baze* plurality opinion it followed) suggested. Instead of requiring an inmate to establish that a State has unreasonably refused to alter its method of execution to avoid a risk of unnecessary pain, JUSTICE THOMAS and Justice Scalia contended that an inmate must show that the State *intended* its method to inflict such pain. See *Glossip*, 576 U. S., at 899 (THOMAS, J., concurring); *Baze*, 553 U. S., at 94–107 (THOMAS, J., concurring in judgment). But revisiting that debate isn't necessary here because, as we'll see, the State was entitled to summary judgment in this case even under the more forgiving *Baze-Glossip* test. See Part III, *infra*.

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B

Before turning to the application of *Baze* and *Glossip*, however, we must confront Mr. Bucklew's argument that a different standard entirely should govern as-applied challenges like his. He admits that *Baze* and *Glossip* supply the controlling test in facial challenges to a State's chosen method of execution. But he suggests that he should not have to prove an alternative method of execution in his as-applied challenge because "certain categories" of punishment are "manifestly cruel . . . without reference to any alternative methods." Brief for Petitioner 41–42 (internal quotation marks omitted). He points to " 'burning at the stake, crucifixion, [and] breaking on the wheel' " as examples of "categorically" cruel methods. *Ibid.* (emphasis deleted). And, he says, we should use this case to add to the list of "categorically" cruel methods any method that, as applied to a particular inmate, will pose a "substantial and particular risk of grave suffering" due to the inmate's "unique medical condition." *Id.*, at 44.

The first problem with this argument is that it's foreclosed by precedent. *Glossip* expressly held that identifying an available alternative is "a requirement of *all* Eighth Amendment method-of-execution claims" alleging cruel pain. 576 U. S., at 867 (emphasis added). And just as binding as this holding is the reasoning underlying it. Distinguishing between constitutionally permissible and impermissible degrees of pain, *Baze* and *Glossip* explained, is a *necessarily* comparative exercise. To decide whether the State has cruelly "superadded" pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by "compar[ing]" that method with a viable alternative. *Glossip*, 576 U. S., at 878; see *Baze*, 553 U. S., at 61. As Mr. Bucklew acknowledges when speaking of facial challenges, this comparison "provides the needed metric" to measure whether the State is lawfully carrying out an execution or inflicting "gratuitous" pain. Brief for Petitioner 42–43. Yet it is that very comparison and needed metric Mr. Bucklew would now have us discard. Nor does he offer some persuasive reason for overturning our precedent. To the contrary, Mr. Bucklew simply repeats the same argument the principal dissent offered and the Court expressly and thoughtfully rejected in *Glossip*. Just as Mr. Bucklew argues here, the dissent there argued that "certain methods of execution" like "burning at the stake" should be declared "categorically off limits." And just as Mr. Bucklew submits here, the dissent there argued that any other "intolerably painful" method of execution should be added to this list. 576 U. S., at 969–970 (SOTOMAYOR, J., dissenting). Mr. Bucklew's submission, thus, amounts to no more than a headlong attack on precedent.

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Mr. Bucklew's argument fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth Amendment on which *Baze* and *Glossip* rest. As we've seen, when it comes to determining whether a punishment is unconstitutionally cruel because of

the pain involved, the law has always asked whether the punishment "superadds" pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives, not some abstract exercise in "categorical" classification. At common law, the ancient and barbaric methods of execution Mr. Bucklew cites were understood to be cruel precisely because—by comparison to other available methods—they went so far beyond what was needed to carry out a death sentence that they could only be explained as reflecting the infliction of pain for pain's sake. Meanwhile, hanging carried with it an acknowledged and substantial risk of pain but was not considered cruel because that risk was thought—by comparison to other known methods—to involve no more pain than was reasonably necessary to impose a lawful death sentence. See *supra*, at 130–133.

What does the principal dissent have to say about all this? It acknowledges that *Glossip*'s comparative requirement helps prevent facial method-of-execution claims from becoming a "backdoor means to abolish" the death penalty. *Post*, at 161 (opinion of BREYER, J.). But, the dissent assures us, there's no reason to worry that as-applied method-of-execution challenges might be used that way. This assurance misses the point. As we've explained, the alternative-method requirement is compelled by our understanding of the Constitution, not by mere policy concerns.

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With that, the dissent is left only to rehash the same argument that Mr. Bucklew offers. The dissent insists that some forms of execution are just categorically cruel. *Post*, at 162–163. At first and like others who have made this argument, the dissent offers little more than intuition to support its conclusion. Ultimately, though, even it bows to the necessity of something firmer. If a "comparator is needed" to assess whether an execution is cruel, the dissent tells us, we should compare the pain likely to follow from the use of a lethal injection in this case with the pain-free use of lethal

injections in mine-run cases. *Post*, at 162. But that's just another way of saying executions must always be carried out painlessly because they can be carried out painlessly most of the time, a standard the Constitution has never required and this Court has rejected time and time again. *Supra*, at 132–133. To determine whether the State is cruelly superadding pain, our precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.

That Mr. Bucklew and the dissent fail to respect the force of our precedents—or to grapple with the understanding of the Constitution on which our precedents rest—is more than enough reason to reject their view that as-applied and facial challenges should be treated differently. But it turns out their position on this score suffers from further problems too—problems that neither Mr. Bucklew nor the dissent even attempts to address.

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Take this one. A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications. So classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding "breadth of the remedy," but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation. *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 331 (2010). Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek. See *Gross* v. *United States*, 771 F. 3d 10, 14–15 (CADC 2014) ("'[T]he substantive rule of law is the same for both [facial and as-applied] challenges'"); *Brooklyn Legal Servs. Corp. B* v. *Legal Servs. Corp.*, 462 F. 3d 219, 228 (CA2 2006) (the facial/as-applied distinction affects "*the extent to which* the invalidity of a statute need be demonstrated," not

"the *substantive rule of law* to be used"). And surely, too, it must count for something that we have found not a single court decision in over 200 years suggesting that the Eighth Amendment's meaning shifts in this way. To the contrary, our precedent suggests just the opposite. In the related context of an Eighth Amendment challenge to conditions of confinement, we have seen "no basis whatever" for applying a different legal standard to "deprivations inflicted upon all prisoners" and those "inflicted upon particular prisoners." *Wilson* v. *Seiter*, 501 U. S. 294, 299, n. 1 (1991).

Here's yet another problem with Mr. Bucklew's argument: It invites pleading games. The line between facial and as-applied challenges can sometimes prove "amorphous," *Elgin* v. *Department of Treasury*, 567 U. S. 1, 15 (2012), and "not so well defined," *Citizens United*, 558 U. S., at 331. Consider an example. Suppose an inmate claims that the State's lethal injection protocol violates the Eighth Amendment when used to execute anyone with a very common but not quite universal health condition. Should such a claim be regarded as facial or as-applied? In another context, we sidestepped a debate over how to categorize a comparable claim—one that neither sought "to strike [the challenged law] in all its applications" nor was "limited to plaintiffs' particular case"—by concluding that "[t]he label is not what matters." *Doe* v. *Reed*, 561 U. S. 186, 194 (2010). To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their tactical advantage. Unless increasing the delay and cost involved in carrying out executions is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse exercise.

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Finally, the burden Mr. Bucklew must shoulder under the *Baze-Glossip* test can be overstated. An inmate seeking to

identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law. Missouri itself seemed to acknowledge as much at oral argument. Tr. of Oral Arg. 65. So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option. Of course, in a case like that a court would have to inquire into the possibility that one State possessed a legitimate reason for declining to adopt the protocol of another. See *supra*, at 134–135. And existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim. See *Hill* v. *McDonough*, 547 U. S. 573, 582–583 (2006) (if the relief sought in a 42 U. S. C. § 1983 action would "foreclose the State from implementing the [inmate's] sentence under present law," then "recharacterizing a complaint as an action for habeas corpus might be proper"). But the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes. In light of this, we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative—assuming, of course, that the inmate is more interested in avoiding unnecessary pain than in delaying his execution.

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III

Having (re)confirmed that anyone bringing a method-of-execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test, we can now turn to the question whether Mr. Bucklew is able to satisfy that test. Has he identified a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain? Because the case comes to us after the entry of summary judgment, this appeal turns on whether Mr. Bucklew has shown a genuine issue of material fact warranting a trial.

A

We begin with the question of a proposed alternative method. Through much of this case and despite many opportunities, Mr. Bucklew refused to identify *any* alternative method of execution, choosing instead to stand on his argument that *Baze* and *Glossip*'s legal standard doesn't govern as-applied challenges like his (even after the Eighth Circuit rejected that argument). Only when the district court warned that his continued refusal to abide this Court's precedents would result in immediate dismissal did Mr. Bucklew finally point to nitrogen hypoxia. The district court then afforded Mr. Bucklew "extensive discovery" to explore the viability of that alternative. 883 F. 3d, at 1094. But even after all that, we conclude Mr. Bucklew has failed for two independent reasons to present a triable question on the viability of nitrogen hypoxia as an alternative to the State's lethal injection protocol.

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First, an inmate must show that his proposed alternative method is not just theoretically "'feasible'" but also "'readily implemented.'" *Glossip*, 576 U. S., at 877. This means the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out "relatively easily and reasonably quickly." *McGehee* v. *Hutchinson*, 854 F. 3d 488, 493 (CA8 2017); *Arthur* v. *Commissioner, Ala. Dept. of Corrections*, 840 F. 3d 1268, 1300 (CA11 2016). Mr. Bucklew's bare-bones proposal falls well short of that standard. He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks. Instead of presenting the State with a readily implemented alternative method, Mr. Bucklew (and the principal dissent) point to reports from correctional authorities

in other States indicating that additional study is needed to develop a protocol for execution by nitrogen hypoxia. See App. 697 (Oklahoma grand jury report recommending that the State "retain experts" and conduct "further research" to "determine how to carry out the sentence of death by this method"); *id.*, at 736 (report of Louisiana Dept. of Public Safety & Corrections stating that "[r]esearch . . . is ongoing" to develop a nitrogen hypoxia protocol). That is a proposal for more research, not the readily implemented alternative that *Baze* and *Glossip* require.

Second, and relatedly, the State had a "legitimate" reason for declining to switch from its current method of execution as a matter of law. *Baze*, 553 U. S., at 52. Rather than point to a proven alternative method, Mr. Bucklew sought the adoption of an entirely new method—one that had "never been used to carry out an execution" and had "no track record of successful use." *McGehee*, 854 F. 3d, at 493. But choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it. In *Baze* we observed that "no other State ha[d] adopted" the one-drug protocol the inmates sought and they had "proffered no study showing" their one-drug protocol would be as effective and humane as the State's existing three-drug protocol. 553 U. S., at 57. Under those circumstances, we held as a matter of law that Kentucky's refusal to adopt the inmates' proffered protocol could not "constitut[e] a violation of the Eighth Amendment." *Ibid.* The Eighth Amendment prohibits States from dredging up archaic cruel punishments or perhaps inventing new ones, but it does not compel a State to adopt "untried and untested" (and thus unusual in the constitutional sense) methods of execution. *Id.*, at 41.[1]

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[1] While this case has been pending, a few States have authorized nitrogen hypoxia as a method of execution. See 2018 Ala. Acts no. 2018–353 (allowing condemned inmates to elect execution by nitrogen hypoxia); 2017 Miss. Laws ch. 406, p. 905 (authorizing execution by nitrogen hypoxia only

B

Even if a prisoner can carry his burden of showing a readily available alternative, he must still show that it would significantly reduce a substantial risk of severe pain. *Glossip*, 576 U. S., at 877; *Baze*, 553 U. S., at 52. A minor reduction in risk is insufficient; the difference must be clear and considerable. Over the course of this litigation, Mr. Bucklew's explanation why nitrogen hypoxia meets this standard has evolved significantly. But neither of the two theories he has advanced in this Court turns out to be supported by record evidence.

First, Mr. Bucklew points to several risks that he alleges could result from use of the State's lethal injection protocol that would not be present if the State used nitrogen gas. For example, he says the execution team might try to insert an IV into one of his peripheral veins, which could cause the vein to rupture; or the team might instead use an allegedly painful "cut-down" procedure to access his femoral vein. He also says that he might be forced to lie flat on his back during the execution, which could impair his breathing even before the pentobarbital is administered. And he says the stress from all this could cause his tumors to bleed, further impairing his breathing. These risks, we may assume, would not exist if Mr. Bucklew were executed by his preferred method of nitrogen hypoxia.

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if lethal injection is held unconstitutional or is otherwise unavailable); 2015 Okla. Sess. Laws ch. 75, p. 244 (same). In March 2018, officials in Oklahoma announced that, due to the unavailability of lethal injection drugs, the State would use nitrogen gas for its executions going forward. See Williams, Oklahoma Proposes To Use Nitrogen Gas for Executions by Asphyxiation, N. Y. Times, Mar. 15, 2018, p. A22. But Oklahoma has so far been unable to find a manufacturer willing to sell it a gas delivery device for use in executions. See Clay, State Not Ready for Executions, The Oklahoman, Jan. 27, 2019, p. A1. To date, no one in this case has pointed us to an execution in this country using nitrogen gas.

The problem with all of these contentions is that they rest on speculation unsupported, if not affirmatively contradicted, by the evidence in this case. Nor does the principal dissent contend otherwise. So, for example, uncontroverted record evidence indicates that the execution team will have discretion to adjust the gurney to whatever position is in Mr. Bucklew's best medical interests. 883 F. 3d, at 1092, n. 3; App. 531. Moreover, the State agreed in the district court that it would not try to place an IV in Mr. Bucklew's compromised peripheral veins. *Id.*, at 820; see Brief for Appellant in No. 17–3052 (CA8), p. 7. And, assuming without granting that using a cut-down would raise issues under the Eighth Amendment—but see *Nooner* v. *Norris*, 594 F. 3d 592, 604 (CA8 2010) (holding otherwise)—the State's expert, Dr. Michael Antognini, testified without contradiction that it should be possible to place an IV in Mr. Bucklew's femoral vein without using a cut-down procedure, App. 350. Mr. Bucklew responds by pointing to the warden's testimony that he once saw medical staff perform a cut-down as part of an execution; but there's no evidence that what the warden saw was an attempt to access a femoral vein, as opposed to some other vein.

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Moreover, to the extent the record is unclear on any of these issues, Mr. Bucklew had ample opportunity to conduct discovery and develop a factual record concerning exactly what procedures the State planned to use. He failed to do so—presumably because the thrust of his constitutional claim was that *any* attempt to execute him via lethal injection would be unconstitutional, regardless of the specific procedures the State might use. As the court of appeals explained: "Having taken the position that *any* lethal injection procedure would violate the Eighth Amendment," Mr. Bucklew "made no effort to determine what changes, if any, the [State] would make in applying its lethal injection protocol" to him, and he "never urged the district court to establish a suitable fact-finding procedure . . . to define the

as-applied lethal injection protocol [the State] intends to use." 883 F. 3d, at 1095–1096.[2]

Second, Mr. Bucklew contends that the lethal injection itself will expose him to a substantial risk of severe pain that could be eliminated by adopting his preferred method. He claims that once the sedative pentobarbital is injected he will "lose the ability to manage" the tumors in his airway and, as a result, will experience a "sense of suffocation" for some period of time before the State's sedative renders him fully unconscious. Brief for Petitioner 12–13. "It is during this in-between twilight stage," according to his expert, Dr. Zivot, "that Mr. Bucklew is likely to experience prolonged feelings of suffocation and excruciating pain." App. 234. Mr. Bucklew admits that similar feelings of suffocation could occur with nitrogen, the only difference being the potential duration of the so-called "twilight stage." He contends that with nitrogen the stage would last at most 20 to 30 seconds, while with pentobarbital it could last up to several minutes.

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But here again the record contains insufficient evidence to permit Mr. Bucklew to avoid summary judgment. For starters, in the courts below Mr. Bucklew maintained he would have trouble managing his airway only if he were forced to lie supine, which (as we've explained) the evidence shows he won't be. (The dissenters don't address this point.) But even indulging his new claim that he will have this difficulty regardless of position, he still has failed to

[2] While the district court allowed discovery on many other matters, Mr. Bucklew protests that it did not permit him to learn the identities of the lethal injection execution team members, to depose them, or to inquire into their qualifications, training, and experience. Like the Eighth Circuit, we see no abuse of discretion in the district court's discovery rulings. As the district court explained, Mr. Bucklew argues that there is no way he may be constitutionally executed by lethal injection, even with modifications to the State's lethal injection protocol. And in a case like that, discovery into such granular matters as who administers the protocol simply is not relevant.

present colorable evidence that nitrogen would significantly reduce his risk of pain. We can assume for argument's sake that Mr. Bucklew is correct that with nitrogen the twilight stage would last 20 to 30 seconds. The critical question, then, is how long that period might last with pentobarbital. The State's expert, Dr. Antognini, testified that pentobarbital, too, would render Mr. Bucklew fully unconscious and incapable of experiencing pain within 20 to 30 seconds. *Id.*, at 299–301, 432–433. Dr. Zivot disagreed; but when he was asked how long he thought the twilight stage would last with pentobarbital, his testimony was evasive. Eventually, he said his "number would be longer than" 20 to 30 seconds, but he declined to say how much longer. *Id.*, at 195. Instead, he referenced a 2015 study on euthanasia in horses. He said the study found that when horses were given a large dose of pentobarbital (along with other drugs), they exhibited "isoelectric EEG"—a complete absence of detectable brain activity—after 52 to 240 seconds. *Id.*, at 194–196. The district court assumed Dr. Zivot meant that "pain might be felt until measurable brain activity ceases" and that, extrapolating from the horse study, it might take up to four minutes for pentobarbital to "induc[e] a state in which [Mr. Bucklew] could no longer sense that he is choking or unable to breathe." The district court acknowledged, however, that this might be "a generous interpretation of Dr. Zivot's testimony." *Id.*, at 822, and n. 5.

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In fact, there's nothing in the record to suggest that Mr. Bucklew will be capable of experiencing pain for significantly more than 20 to 30 seconds after being injected with pentobarbital. For one thing, Mr. Bucklew's lawyer now admits that Dr. Zivot "crossed up the numbers" from the horse study. Tr. of Oral Arg. 7–8, 11–12. The study actually reported that the horses displayed isoelectric EEG between 2 and 52 seconds after infusion of pentobarbital was completed, with an average time of less than 24 seconds. App. 267. So

if anything, the horse study appears to bolster Dr. Antognini's time estimate. For another thing, everyone now also seems to acknowledge that isoelectric EEG is the wrong measure. Dr. Zivot never claimed the horses were capable of experiencing pain until they reached isoelectric EEG. And Mr. Bucklew's lawyer now concedes that doctors perform major surgery on human patients with measurable EEG readings, which strongly suggests that Mr. Bucklew will be insensible to pain *before* reaching isoelectric EEG. Tr. of Oral Arg. 9. Finally, the record evidence even allows the possibility that nitrogen could *increase* the risk of pain. Because Dr. Zivot declined to testify about the likely effects of nitrogen gas, Mr. Bucklew must rely on Dr. Antognini's testimony. And while Dr. Antognini did say he thought nitrogen's "onset of action" could be "relatively fast," App. 458, he added that the effects of nitrogen could vary depending on exactly how it would be administered—information Mr. Bucklew hadn't provided. Indeed, he stated that "depending on . . . how it's used, you might get more suffering from nitrogen gas than you would have" from the State's current protocol. *Id.*, at 460–461.

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Of course, the principal dissent maintains that Dr. Zivot's testimony supports an inference that pentobarbital might cause Mr. Bucklew to suffer for a prolonged period. But its argument rests on a number of mistakes about the record. For example, the dissent points to Dr. Zivot's remark that, with pentobarbital, "'the period of time between receiving the injection and death could range over a few minutes to many minutes.'" *Post*, at 157, 158 (quoting App. 222; emphasis deleted). From this, the dissent concludes that Mr. Bucklew may suffer for "up to several minutes." *Post*, at 154, 159, 162. But everyone agrees that the relevant question isn't how long it will take for Mr. Bucklew to die, but how long he will be capable of feeling pain. Seeking to address the problem, the dissent next points to *another* part of Dr. Zivot's testimony and

says it means Mr. Bucklew could experience pain during the entire time between injection and death. *Post*, at 159, 165 (quoting App. 222). But the dissent clips the relevant quotation. As the full quotation makes clear, Dr. Zivot claimed that Mr. Bucklew might be unable to "maintain the integrity of his airway" until he died—but he carefully avoided claiming that Mr. Bucklew would be capable of feeling pain until he died.[3] To avoid *this* problem, the dissent quotes Dr. Zivot's assertions that pentobarbital might not produce "'rapid unconsciousness'" and that Mr. Bucklew's suffering with pentobarbital could be "'prolonged.'" *Post*, at 157, 158, 165 (quoting App. 233–234). But Dr. Zivot's statements here, too, fail to specify how long Mr. Bucklew is likely to be able to feel pain. The hard fact is that, when Dr. Zivot was *finally* compelled to offer a view on this question, his only response was to refer to the horse study. *Id.*, at 195–196. The dissent's effort to suggest that Dr. Zivot "did not rely exclusively or even heavily upon that study," *post*, at 159, is belied by (among other things) Mr. Bucklew's own brief in this Court, which asserted that the twilight stage during which he might feel pain could last "between 52 and 240 seconds," based entirely on a citation of Dr. Zivot's incorrect testimony about the horse study. Brief for Petitioner 13.

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In sum, even if execution by nitrogen hypoxia were a feasible and readily implemented alternative to the State's chosen method, Mr. Bucklew has still failed to present any evidence suggesting that it would significantly reduce his risk of pain.

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[3] Here's the full quotation, with the portion quoted by the dissent underlined:

"As a result of his inability to maintain the integrity of his airway for the period of time beginning with the injection of the Pentobarbital solution and ending with Mr. Bucklew's death several minutes to as long as many minutes later, Mr. Bucklew would be highly likely to experience feelings of 'air hunger' and the excruciating pain of prolonged suffocation resulting from the complete obstruction of his airway by the large vascular tumor." App. 222.

For that reason as well, the State was entitled to summary judgment on Mr. Bucklew's Eighth Amendment claim.[4]

IV

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U. S., at 584. Those interests have been frustrated in this case. Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning.

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The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better. Even the principal dissent acknowledges that "the long delays that now typically occur between the time an offender is sentenced to death and his execution" are "excessive." *Post*, at 168. The answer is not, as the dissent incongruously suggests, to reward those who interpose delay with a decree

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[4] The State contends that Mr. Bucklew's claim should fail for yet another reason: because, in the State's view, the evidence does not show that he is very likely to suffer "'*severe* pain'" cognizable under the Eighth Amendment. *Glossip* v. *Gross*, 576 U. S. 863, 877 (2015) (quoting *Baze* v. *Rees*, 553 U. S. 35, 52 (2008); emphasis added). We have no need, however, to address that argument because (as explained above) Mr. Bucklew fails even to show that a feasible and readily available alternative could significantly reduce the pain he alleges.

ending capital punishment by judicial fiat. *Post*, at 170. Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." *Hill*, 547 U. S., at 584 (internal quotation marks omitted). So, for example, we have vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier. See *Dunn* v. *Ray*, 586 U. S. 1138 (2019).[5] If litigation is allowed to pro-

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[5] Seeking to relitigate *Dunn* v. *Ray*, the principal dissent asserts that that case involved no undue delay because the inmate "brought his claim only five days after he was notified" that the State would not allow his spiritual adviser to be present with him in the execution chamber itself, although it *would* allow the adviser to be present on the other side of a glass partition. *Post*, at 169. But a state statute listed "[t]he spiritual adviser of the condemned" as one of numerous individuals who would be allowed to "be present at an execution," many of whom—such as "newspaper reporters," "relatives or friends of the condemned person," and "the victim's immediate family members"—obviously would not be allowed into the chamber itself. Ala. Code § 15–18–83 (2018). The inmate thus had long been on notice that there was a question whether his adviser would be allowed into the chamber or required to remain on the other side of the glass. Yet although he had been on death row since 1999, and the State had set a date for his execution on November 6, 2018, he waited until January 23, 2019—just 15 days before the execution—to ask for clarification. He then brought a claim 10 days before the execution and sought an indefinite stay. This delay implicated the "strong equitable presumption" that no stay should be granted "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006).

ceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories. *Hill*, 547 U. S., at 584–585.

*

The judgment of the court of appeals is

Affirmed.

JUSTICE THOMAS, concurring.

I adhere to my view that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." *Baze* v. *Rees*, 553 U. S. 35, 94 (2008) (opinion concurring in judgment); *ante*, at 135. Because there is no evidence that Missouri designed its protocol to inflict pain on anyone, let alone Russell Bucklew, I would end the inquiry there. Nonetheless, I join the Court's opinion in full because it correctly explains why Bucklew's claim fails even under the Court's precedents.

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I write separately to explain why JUSTICE BREYER's dissenting opinion does not cast doubt on this standard. *Post*, at 167–168. As I explained in *Baze*, "[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain." 553 U. S., at 102 (opinion concurring in judgment). The historical evidence shows that the Framers sought to disable Congress from imposing various kinds of torturous punishments, such as "'gibbeting,'" "burning at the stake," and "'embowelling alive, beheading, and quartering.'" *Id.*, at 95–98 (quoting 4 W. Blackstone, Commentaries *376 (W. Lewis ed. 1897) (Blackstone), and S. Banner, The Death Penalty: An American History 71–72 (2002)). In England, these aggravated forms of capital punishment were "'superadded'" to increase terror and disgrace for "'very atrocious crimes,'" such as treason and murder. See *Baze*, *supra*, at 96–97 (quoting 4 Blackstone *376). The founding generation ratified the Eighth Amendment to reject that practice, contemplating that capital punishment would continue, but without those

punishments deliberately designed to superadd pain. See *Baze*, 553 U. S., at 97–98. Under this view, the constitutionality of a particular execution thus turns on whether the Government "deliberately designed" the method of execution "to inflict pain," *id.*, at 94, without regard to the subjective intent of the executioner.

Contrary to JUSTICE BREYER's suggestion, my view does not render the Eighth Amendment "a static prohibition" proscribing only "the same things that it proscribed in the 18th century." *Post*, at 167. A method of execution not specifically contemplated at the founding could today be imposed to "superad[d]" "terror, pain, or disgrace." 4 Blackstone *376. Thankfully—and consistent with Justice Story's view that the Eighth Amendment is "wholly unnecessary in a free government," 3 J. Story, Commentaries on the Constitution of the United States 750 (1833)—States do not attempt to devise such diabolical punishments. *E. g.*, *Baze*, *supra*, at 107 (opinion of THOMAS, J.) ("Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane"). It is therefore unsurprising that, despite JUSTICE BREYER's qualms about the death penalty, *e. g.*, *post*, at 170, this Court has never held a method of execution unconstitutional. Because the Court correctly declines to do so again today, I join in full.

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JUSTICE KAVANAUGH, concurring.

When an inmate raises an *as-applied* constitutional challenge to a particular method of execution—that is, a challenge to a method of execution that is constitutional in general but that the inmate says is very likely to cause him severe pain—one question is whether the inmate must identify an available alternative method of execution that would significantly reduce the risk of severe pain. Applying our recent decisions in *Glossip* v. *Gross*, 576 U. S. 863 (2015), and *Baze* v. *Rees*, 553 U. S. 35 (2008) (plurality opinion), the Court's answer to that question is yes. Under those prece-

dents, I agree with the Court's holding and join the Court's opinion.

I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before today's decision. See *Arthur* v. *Dunn*, 580 U. S. 1141, 1149–1151 (2017) (SOTOMAYOR, J., dissenting from denial of certiorari). Importantly, all nine Justices today agree on that point. *Ante*, at 139–140; *post*, at 166 (BREYER, J., dissenting).

As the Court notes, it follows from that additional holding that the burden of the alternative-method requirement "can be overstated." *Ante*, at 139. Indeed, the Court states: "[W]e see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Ante*, at 140.

In other words, an inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain. At oral argument in this Court, the State suggested that the firing squad would be such an available alternative, if adequately pleaded. Tr. of Oral Arg. 64 ("He can plead firing squad. . . . Of course, if he had . . . pleaded firing squad, it's possible that Missouri could have executed him by firing squad"). JUSTICE SOTOMAYOR has likewise explained that the firing squad is an alternative method of execution that generally causes an immediate and certain death, with close to zero risk of a botched execution. See *Arthur*, 580 U. S., at 1154–1155. I do not here prejudge the question whether the firing squad, or any other alternative method of execution, would be a feasible and readily implemented alternative for every State. See *McGehee* v. *Hutchinson*, 854 F. 3d 488, 493–494 (CA8 2017). Rather, I simply emphasize the Court's statement that "we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Ante*, at 140.

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JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join as to all but Part III, dissenting.

The Court's decision in this case raises three questions. The first is primarily a factual question, namely, whether Bucklew has established genuine issues of material fact concerning whether executing him by lethal injection would cause him excessive suffering. The second is primarily a legal question, namely, whether a prisoner like Bucklew with a rare medical condition must identify an alternative method by which the State may execute him. And the third is a more general question, namely, how to minimize delays in executing offenders who have been condemned to death.

I disagree with the majority's answers to all three questions. Bucklew cites evidence that executing him by lethal injection will cause the tumors that grow in his throat to rupture during his execution, causing him to sputter, choke, and suffocate on his own blood for up to several minutes before he dies. That evidence establishes at this stage of the proceedings that executing Bucklew by lethal injection risks subjecting him to constitutionally impermissible suffering. The majority holds that the State may execute him anyway. In my view, that holding violates the clear command of the Eighth Amendment.

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I

I begin with a factual question: whether Bucklew has established that, because of his rare medical condition, the State's current method of execution risks subjecting him to excessive suffering. See *Glossip* v. *Gross*, 576 U. S. 863, 878 (2015) (requiring "a demonstrated risk of severe pain"); see also *Baze* v. *Rees*, 553 U. S. 35, 50 (2008) (plurality opinion) (requiring "a substantial risk of serious harm" (internal quotation marks omitted)).

There is no dispute as to the applicable summary judgment standard. Because the State moved for summary judgment,

it can prevail if, but only if, it "shows that there is no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986). On review, we examine the record as a whole, which includes "depositions, documents, [and] affidavits or declarations." Rule 56(c). And we must construe the evidence in the light most favorable to Bucklew and draw every justifiable inference in his favor. See *Tolan* v. *Cotton*, 572 U. S. 650, 651 (2014) (*per curiam*).

A

Bucklew has easily established a genuine issue of material fact regarding whether an execution by lethal injection would subject him to impermissible suffering.

The record indicates that Bucklew suffers from a congenital condition known as cavernous hemangioma that causes tumors filled with blood vessels to grow throughout his body, including in his head, face, neck, and oral cavity. The condition is rare. One study estimates that hemangiomas in the oral cavity occur in less than one percent of the population, and that hemangiomas like Bucklew's have been identified in five cases. See Wang, Chen, Mojica, & Chen, Cavernous Hemangioma of the Uvula, 8 N. Am. J. Med. & Sci. 56, 56–59 (2015).

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Tumors grow out of Bucklew's lip and over his mouth, as well as on his hard and soft palates. One tumor also grows directly on Bucklew's uvula, which has become "grossly enlarged" as a result. App. 225. (The uvula is the "pendent fleshy lobe" that hangs from the back of the throat. Merriam-Webster's Collegiate Dictionary 1379 (11th ed. 2003).) Bucklew's tumors obstruct his airway and make it difficult for him to breathe. His difficulty breathing is chronic, but is particularly acute when he lies flat and gravity pulls his engorged uvula into his airway. He often has to adjust the positioning of his head to prevent his uvula from obstructing his breathing. He sleeps at a 45-degree angle

to facilitate breathing, and he often wakes up in the middle of the night gasping for air.

Due to the sensitivity of his tumors, even minimal contact may cause them to hemorrhage. He has described past hemorrhages as "'squirting'" or "leaking" blood, and he states that the first thing he does each morning is to wipe the blood off his face that leaked from his nose and mouth as he slept. App. 226–227. Bucklew's condition is progressive and, due to the risk of significant blood loss caused by the sensitivity of his tumors, cannot be treated by surgery.

Bucklew maintains that, as a result of this medical condition, executing him by lethal injection would prove excruciatingly painful. In support of this claim, Bucklew submitted sworn declarations and deposition testimony from an expert witness, Dr. Joel Zivot, an anesthesiologist. Dr. Zivot provided extensive testimony regarding the pain that Bucklew would likely endure in an execution by lethal injection:

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- Dr. Zivot testified that in light of "the degree to which Mr. Bucklew's airway is compromised by the hemangiomas" and "the particular psychological and physical effects of lethal injection, it is highly likely that Mr. Bucklew would be unable to maintain the integrity of his airway during the time after receiving the lethal injection and before death." App. 221.
- Dr. Zivot explained that, as a result of "the highly friable and fragile state of the tissue of Mr. Bucklew's mouth and airway," Bucklew "will likely experience hemorrhaging and/or the possible rupture of the tumor" on his uvula during his execution. *Id.*, at 222.
- Dr. Zivot added that the "hemorrhaging will further impede Mr. Bucklew's airway by filling his mouth and airway with blood, causing him to choke and cough on his own blood." *Ibid.*

- Dr. Zivot concluded that "it is highly likely that Mr. Bucklew, given his specific congenital medical condition, cannot undergo lethal injection without experiencing the excruciating pain and suffering" of "suffocation, convulsions, and visible hemorrhaging." *Id.*, at 223.

Dr. Zivot also testified about the duration of pain to which an execution by lethal injection would subject Bucklew, describing it as "prolonged." *Id.*, at 234.

- Dr. Zivot stated that the effects of a pentobarbital injection "are highly unlikely to be instantaneous and the period of time between receiving the injection and death could range *over a few minutes to many minutes*." *Id.*, at 222 (emphasis added).
- Dr. Zivot "strongly disagree[d] with [the State's expert's] repeated claim that the pentobarbital injection would result in 'rapid unconsciousness.'" *Id.*, at 233.
- Dr. Zivot explained that Bucklew "would likely experience unconsciousness that sets in progressively as the chemical circulates through his system" and that it was during this period that Bucklew was "likely to experience prolonged feelings of suffocation and excruciating pain." *Id.*, at 233–234.

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The State asked the District Court to grant summary judgment in its favor on the theory that Bucklew failed to identify a genuine factual issue regarding whether an execution by lethal injection would be impermissibly painful. The District Court refused. The court believed that Bucklew had adequately shown that for up to several minutes he "could be aware that he is choking or unable to breathe but be unable to 'adjust' his breathing to remedy the situation." *Id.*, at 827. Recognizing that the State's evidence suggested that Bucklew would experience this choking sensation for a shorter period, the District Court concluded that the dispute

between the experts was "a factual dispute that the Court cannot resolve on summary judgment, and would have to be resolved at trial." *Ibid.*

The District Court was right. The evidence, taken in the light most favorable to Bucklew, creates a genuine factual issue as to whether Missouri's lethal injection protocol would subject him to several minutes of "severe pain and suffering," *Glossip*, 576 U. S., at 878, during which he would choke and suffocate on his own blood. In my view, executing Bucklew by forcing him to choke on his grossly enlarged uvula and suffocate on his blood would exceed "the limits of civilized standards." *Kennedy* v. *Louisiana*, 554 U. S. 407, 435 (2008) (internal quotation marks omitted); see also *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion). The experts dispute whether Bucklew's execution will prove as unusually painful as he claims, but resolution of that dispute is a matter for trial.

B

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The majority, while characterizing the matter as "critical," says that there is "nothing in the record to suggest that Mr. Bucklew will be capable of experiencing pain for significantly more than 20 to 30 seconds after being injected with pentobarbital." *Ante*, at 146. But what about Dr. Zivot's testimony that the time between injection and death "could range over a few minutes to many minutes"? App. 222. What about Dr. Zivot's characterization of the pain involved as "prolonged"? *Id.*, at 234. What about Dr. Zivot's "stron[g] disagree[ment] with [the State's expert's] repeated claim that the pentobarbital injection would result in 'rapid unconsciousness' "? *Id.*, at 233.

The majority construes Dr. Zivot's testimony to show only that Bucklew might remain alive for several minutes after the injection, not that he will be capable of feeling pain for several minutes after the injection. *Ante*, at 147–148. But immediately following his prediction that the time between injection and death could range up to many minutes, Dr. Zivot

stated that "beginning with the injection of the Pentobarbital solution and ending with Mr. Bucklew's death *several-minutes to as long as many minutes* later, Mr. Bucklew would be highly likely to experience feelings of 'air hunger' *and the excruciating pain of prolonged suffocation*." App. 222 (emphasis added). Dr. Zivot thus testified both that lethal injection would take up to several minutes to kill Bucklew and that Bucklew would experience excruciating pain during this period. And it is not the case, as the majority believes, that Dr. Zivot "carefully avoided claiming that Mr. Bucklew would be capable of feeling pain until he died," *ante*, at 148, particularly given that the record must be construed in the light most favorable to Bucklew.

The majority also justifies its refusal to credit Dr. Zivot's testimony on the ground that Dr. Zivot gave a response during his deposition suggesting that he misinterpreted a study of euthanasia in horses. *Ante*, at 146–147. Bucklew's expert, however, did not rely exclusively or even heavily upon that study; he mentioned it only in response to a question posed in his deposition. To the contrary, Dr. Zivot explained that his testimony regarding the pain to which Bucklew would be subjected was "supported both by [his] own professional knowledge of how chemicals of this type are likely to exert their effects in the body as well as by the terms of Missouri's Execution Procedure." App. 222.

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Whether any mistake about the importance of a single study makes all the difference to Bucklew's case is a matter not for this Court to decide at summary judgment, but for the factfinder to resolve at trial. As Judge Colloton pointed out in dissent below, attacks on the "reliability and credibility of Dr. Zivot's opinion," including "his possible misreading of the horse study on which he partially relied," give rise to factual disputes. See 883 F. 3d 1087, 1099 (CA8 2018). Judge Colloton therefore concluded that "[t]he district court did not err in concluding that it could not resolve the

dispute between the experts on summary judgment." *Ibid.* I agree.

II

This case next presents a legal question. The Court in *Glossip* held in the context of a facial challenge to a State's execution protocol that the plaintiffs were required not only to establish that the execution method gave rise to a "demonstrated risk of severe pain," but also to identify a "known and available" alternative method. 576 U. S., at 878. The Court added that the alternative must be "feasible, readily implemented, and in fact significantly reduc[e] a substantial risk of severe pain." *Id.*, at 877 (internal quotation marks omitted).

I joined the dissent in *Glossip,* but for present purposes I accept the *Glossip* majority opinion as governing. I nonetheless do not believe its "alternative method" requirement applies in this case. We "often read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U. S. 419, 424 (2004). And while I acknowledge that the Court in *Glossip* spoke in unqualified terms, the circumstances in *Glossip* were indeed "different" in relevant respects from the circumstances presented here.

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A

The plaintiffs in *Glossip* undertook an across-the-board attack against the use of a particular execution method, which they maintained violated the Eighth Amendment categorically. In this case, by contrast, Bucklew does not attack Missouri's lethal injection protocol categorically, or even in respect to any execution other than his own. Instead, he maintains that he is special; that he suffers from a nearly unique illness; and that, by virtue of that illness, Missouri's

execution method will be excruciatingly painful for him even though it would not affect others in the same way. These differences make a difference.

First, these differences show that the reasons that underlie *Glossip*'s "alternative method" requirement do not apply here.

The *Glossip* Court stressed the importance of preventing method-of-execution challenges from becoming a backdoor means to abolish capital punishment in general. The Court wrote that "because it is settled that capital punishment is constitutional, 'it necessarily follows that there must be a constitutional means of carrying it out.' " *Glossip*, 576 U. S., at 869 (alterations omitted). The Court added that "we have time and again reaffirmed that capital punishment is not *per se* unconstitutional." *Id.*, at 881. And the Court feared that allowing prisoners to invalidate a State's method of execution without identifying an alternative would "effectively overrule these decisions." *Ibid.* But there is no such risk here. Holding Missouri's lethal injection protocol unconstitutional as applied to Bucklew—who has a condition that has been identified in only five people, see *supra*, at 155—would not risk invalidating the death penalty in Missouri. And, because the State would remain free to execute prisoners by other permissible means, declining to extend *Glossip*'s "alternative method" requirement in this context would be unlikely to exempt Bucklew or any other prisoner from the death penalty. Even in the unlikely event that the State could not identify a permissible alternative in a particular case, it would be perverse to treat that as a reason to execute a prisoner by the method he has shown to involve excessive suffering.

The *Glossip* Court, in adopting the "alternative method" requirement, relied on THE CHIEF JUSTICE's plurality opinion in *Baze*, which discussed the need to avoid "intrud[ing] on the role of state legislatures in implementing their execu-

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tion procedures." 553 U. S., at 51; see also *ante*, at 134 (we owe "a measure of deference to a State's choice of execution procedures" (internal quotation marks omitted)). But no such intrusion problem exists in a case like this one. When adopting a method of execution, a state legislature will rarely consider the method's application to an individual who, like Bucklew, suffers from a rare disease. It is impossible to believe that Missouri's legislature, when adopting lethal injection, considered the possibility that it would cause prisoners to choke on their own blood for up to several minutes before they die. Exempting a prisoner from the State's chosen method of execution in these circumstances does not interfere with any legislative judgment.

The Court in *Glossip* may have also believed that the identification of a permissible alternative method of execution would provide a reference point to assist in determining how much pain in an execution is too much pain. See 576 U. S., at 876–878; *Baze*, 553 U. S., at 47, 51 (plurality opinion); see also *ante*, at 136 (arguing that determining the constitutionality of a method of execution "is a *necessarily* comparative exercise"). But there is no need for any such reference point in a case like this. Bucklew accepts the constitutionality of Missouri's chosen execution method as to prisoners who do not share his medical condition. See Brief for Petitioner 36. We are informed that this method has been used in 20 executions, apparently without subjecting prisoners to undue pain. See Brief for Respondents 5. To the extent that any comparator is needed, those executions provide a readymade, built-in comparator against which a court can measure the degree of excessive pain Bucklew will suffer.

Second, precedent counsels against extending *Glossip*. Neither this Court's oldest method-of-execution case, *Wilkerson* v. *Utah*, 99 U. S. 130 (1879), nor any subsequent decision of this Court until *Glossip*, held that prisoners who challenge a State's method of execution must identify an alternative means by which the State may execute them. To

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the contrary, in *Hill* v. *McDonough*, 547 U. S. 573 (2006), the Court squarely and unanimously rejected the argument that a prisoner must "identif[y] an alternative, authorized method of execution." *Id.*, at 582. The Court noted that any such requirement would "change the traditional pleading requirements for [42 U. S. C.] § 1983 actions," which we were not at liberty to do. *Ibid.* It is thus difficult to see how the "alternative-method" requirement could be "compelled by our understanding of the Constitution," *ante*, at 137, even though the Constitution itself never hints at such a requirement, even though we did not apply such a requirement in more than a century of method-of-execution cases, and even though we unanimously rejected such a requirement in *Hill*. And while the Court in *Glossip* did not understand itself to be bound by *Hill*, see *Glossip*, 576 U. S., at 879–880 (distinguishing *Hill* on the theory that *Hill* merely rejected a heightened pleading requirement for § 1983 suits), the two decisions remain in considerable tension. Confining *Glossip*'s "alternative method" requirement to facial challenges would help to reconcile them.

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Third, the troubling implications of today's ruling provide the best reason for declining to extend *Glossip*'s "alternative method" requirement. The majority acknowledges that the Eighth Amendment prohibits States from executing prisoners by "'horrid modes of torture'" such as burning at the stake. *Ante*, at 131. But the majority's decision permits a State to execute a prisoner who suffers from a medical condition that would render his execution no less painful. Bucklew has provided evidence of a serious risk that his execution will be excruciating and grotesque. The majority holds that the State may execute him anyway. That decision confirms the warning leveled by the *Glossip* dissent—that the Court has converted the Eighth Amendment's "categorical prohibition into a conditional one." 576 U. S., at 970 (opinion of SOTOMAYOR, J.).

B

Even assuming for argument's sake that Bucklew must bear the burden of showing the existence of a "known and available" alternative method of execution that "significantly reduces a substantial risk of severe pain," *id.*, at 877–878 (majority opinion) (alteration and internal quotation marks omitted), Bucklew has satisfied that burden. The record contains more than enough evidence on the point to raise genuine and material factual issues that preclude summary judgment.

Bucklew identified as an alternative method of execution the use of nitrogen hypoxia, which is a form of execution by lethal gas. Missouri law permits the use of this method of execution. See Mo. Rev. Stat. § 546.720 (2002). Three other States—Alabama, Mississippi, and Oklahoma—have specifically authorized nitrogen hypoxia as a method of execution. See *ante*, at 142–143, n. 1. And Bucklew introduced into the record reports from Oklahoma and Louisiana indicating that nitrogen hypoxia would be simple and painless. These reports summarized the scientific literature as indicating that there is "no reported physical discom[fort] associated with inhaling pure nitrogen," App. 742, that the "onset of hypoxia is typically so subtle that it is unnoticeable to the subject," *id.*, at 745, and that nitrogen hypoxia would take an estimated "seventeen-to-twenty seconds" to render a subject unconscious, *id.*, at 746–747. The Oklahoma study concluded that nitrogen hypoxia is "the most humane method" of execution available. *Id.*, at 736. And the Louisiana study stated that the "[u]se of nitrogen as a method of execution can assure a quick and painless death of the offender." *Id.*, at 746.

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How then can the majority conclude that Bucklew has failed to identify an alternative method of execution? The majority finds Bucklew's evidence inadequate in part because, in the majority's view, it does not show that nitrogen hypoxia will "significantly reduce" Bucklew's risk of pain as compared with lethal injection. *Ante*, at 143. But the ma-

jority does not dispute the evidence suggesting that nitrogen hypoxia would be "quick and painless" and would take effect in 20 to 30 seconds. The majority instead believes that "nothing in the record" suggests that lethal injection would take longer than nitrogen gas to take effect. *Ante*, at 146. As I have already explained, the majority reaches this conclusion by overlooking considerable evidence to the contrary—such as Dr. Zivot's testimony that Bucklew's pain would likely prove "prolonged," App. 234, that lethal injection would not "result in 'rapid unconsciousness,' " *id.*, at 233, and that from the time of injection to "Mr. Bucklew's death several minutes to as long as many minutes later, Mr. Bucklew would be highly likely to experience . . . the excruciating pain of prolonged suffocation," *id.*, at 222. In discounting this evidence, the majority simply fails "to adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan*, 572 U. S., at 651 (internal quotation marks and alteration omitted).

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The majority additionally believes that Bucklew's evidence fails to show that nitrogen hypoxia would be easy to implement. *Ante*, at 141–142. But the reports from Oklahoma and Louisiana tell a different story. The Louisiana report states that nitrogen hypoxia would be "simple to administer." App. 737. The Oklahoma report similarly concludes that "[d]eath sentences carried out by nitrogen inhalation would be simple to administer." *Id.*, at 746; see also *id.*, at 696. The reports explain that nitrogen hypoxia would "not require the use of a complex medical procedure or pharmaceutical products," *id.*, at 747, would "not require the assistance of licensed medical professionals," *id.*, at 736, and would require only materials that are "readily available for purchase," *id.*, at 739. Further, "[b]ecause the protocol involved in nitrogen induced hypoxia is so simple, mistakes are unlikely to occur." *Id.*, at 748. And both studies recommend the de-

velopment of protocols for actual implementation. See *id.*, at 697 (Oklahoma report recommending development of "a nitrogen hypoxia protocol"); *id.*, at 736 (Louisiana report noting that although "the exact protocol" has not been finalized, the report recommends "that hypoxia induced by the inhalation of nitrogen be considered for adoption"); see also Murphy, Oklahoma Says It Plans To Use Nitrogen for Executions, USA Today, Mar. 15, 2018 (quoting the Oklahoma attorney general's statement that nitrogen "will be effective, simple to administer, easy to obtain and requires no complex medical procedures"); but cf. *ante*, at 141.

Presented with evidence such as Bucklew's, I believe a State should take at least minimal steps to determine the feasibility of the proposed alternative. The responsible state official in this case, however, acknowledged that he "did not conduct research concerning the feasibility of lethal gas as a method of execution in Missouri." App. 713; see also Record in No. 14–800 (WD Mo.), Doc. 182–6, p. 16 (different official acknowledging that, "to be candid, no, I didn't go out and try to find answers to those questions").

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The majority sensibly recognizes that an inmate seeking to identify an alternative method of execution "is not limited to choosing among those presently authorized by a particular State's law." *Ante*, at 140. But the majority faults Bucklew for failing to provide guidance about the administration of nitrogen hypoxia down to the last detail. The majority believes that Bucklew failed to present evidence "on essential questions" such as whether the nitrogen should be administered "using a gas chamber, a tent, a hood, [or] a mask"; or "in what concentration (pure nitrogen or some mixture of gases)" it should be administered; or even how the State might "protec[t the execution team] against the risk of gas leaks." *Ante*, at 141.

Perhaps Bucklew did not provide these details. But *Glossip* did not refer to any of these requirements; today's majority invents them. And to insist upon them is to create

what, in a case like this one, would amount to an insurmountable hurdle for prisoners like Bucklew. That hurdle, I fear, could permit States to execute even those who will endure the most serious pain and suffering, irrespective of how exceptional their case and irrespective of how thoroughly they prove it. I cannot reconcile the majority's decision with a constitutional Amendment that forbids all "cruel and unusual punishments." Amdt. 8.

C

JUSTICE THOMAS concurs in the majority's imposition of an "alternative method" requirement, but would also permit Bucklew's execution on the theory that a method of execution violates the Eighth Amendment "'only if it is deliberately designed to inflict pain.'" *Ante*, at 151 (concurring opinion) (quoting *Baze*, 553 U. S., at 94 (THOMAS, J., concurring in judgment)). But that is not the proper standard.

For one thing, JUSTICE THOMAS' view would make the constitutionality of a particular execution turn on the intent of the person inflicting it. But it is not correct that concededly torturous methods of execution such as burning alive are impermissible when imposed to inflict pain but not when imposed for a subjectively different purpose. To the prisoner who faces the prospect of a torturous execution, the intent of the person inflicting the punishment makes no difference.

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For another thing, we have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today. The Amendment prohibits "unnecessary suffering" in the infliction of punishment, which this Court has understood to prohibit punishments that are "grossly disproportionate to the severity of the crime" as well as punishments that do not serve any "penological purpose." *Estelle* v. *Gamble*, 429 U. S. 97, 103, and n. 7 (1976). The Constitution prohibits gruesome punishments even though they may have been common at the time of the found-

ing. Few would dispute, for example, the unconstitutionality of "a new law providing public lashing, or branding of the right hand, as punishment . . . [e]ven if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791." Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 861 (1989). The question is not, as JUSTICE THOMAS maintains, whether a punishment is deliberately inflicted to cause unnecessary pain, but rather whether we would today consider the punishment to cause excessive suffering.

III

Implicitly at the beginning of its opinion and explicitly at the end, the majority invokes the long delays that now typically occur between the time an offender is sentenced to death and his execution. Bucklew was arrested for the crime that led to his death sentence more than 20 years ago. And Bucklew's case is not an anomaly. The average time between sentencing and execution approaches 18 years and in some instances rises to more than 40 years. See *Glossip*, 576 U. S., at 924 (BREYER, J., dissenting); *Reynolds* v. *Florida*, 586 U. S. 1004, 1007 (2018) (BREYER, J., statement respecting denial of certiorari).

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I agree with the majority that these delays are excessive. Undue delays in death penalty cases frustrate the interests of the State and of surviving victims, who have "an important interest" in seeing justice done quickly. *Hill*, 547 U. S., at 584. Delays also exacerbate the suffering that accompanies an execution itself. *Glossip*, 576 U. S., at 926–929 (BREYER, J., dissenting). Delays can "aggravate the cruelty of capital punishment" by subjecting the offender to years in solitary confinement, and delays also "undermine [capital punishment's] jurisprudential rationale" by reducing its deterrent effect and retributive value. *Id.*, at 938, 933.

The majority responds to these delays by curtailing the constitutional guarantees afforded to prisoners like Bucklew who have been sentenced to death. By adopting elaborate

new rules regarding the need to show an alternative method of execution, the majority places unwarranted obstacles in the path of prisoners who assert that an execution would subject them to cruel and unusual punishment. These obstacles in turn give rise to an unacceptable risk that Bucklew, or others in yet more difficult circumstances, may be executed in violation of the Eighth Amendment. Given the rarity with which cases like this one will arise, an unfortunate irony of today's decision is that the majority's new rules are not even likely to improve the problems of delay at which they are directed.

In support of the need to end delays in capital cases, the majority refers to *Dunn* v. *Ray*, 586 U. S. 1138 (2019). In that case, the Court vacated a stay of execution on the ground that the prisoner brought his claim too late. The prisoner in that case, however, brought his claim only five days after he was notified of the policy he sought to challenge. See *id.*, at 1139 (KAGAN, J., dissenting). And in the view of some of us, the prisoner's claim—that prisoners of some faiths were entitled to have a minister present at their executions while prisoners of other faiths were not—raised a serious constitutional question. See *id.*, at 1138 (characterizing the Court's decision as "profoundly wrong"). And therein lies the problem. It might be possible to end delays by limiting constitutional protections for prisoners on death row. But to do so would require us to pay too high a constitutional price.

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Today's majority appears to believe that because "[t]he Constitution allows capital punishment," *ante*, at 129, the Constitution must allow capital punishment to occur quickly. In reaching that conclusion the majority echoes an argument expressed by the Court in *Glossip*, namely, that "because it is settled that capital punishment is constitutional, it *necessarily follows* that there must be a constitutional means of carrying it out." 576 U. S., at 869 (emphasis added; alterations and internal quotation marks omitted).

These conclusions do not follow. It may be that there is no way to execute a prisoner quickly while affording him the protections that our Constitution guarantees to those who have been singled out for our law's most severe sanction. And it may be that, as our Nation comes to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty.

I have elsewhere written about these problems. See *id.*, at 935–938 (dissenting opinion). And I simply conclude here that the law entitles Bucklew to an opportunity to prove his claim at trial. I note, however, that this case adds to the mounting evidence that we can either have a death penalty that avoids excessive delays and "arguably serves legitimate penological purposes," or we can have a death penalty that "seeks reliability and fairness in the death penalty's application" and avoids the infliction of cruel and unusual punishments. *Id.*, at 938. It may well be that we "cannot have both." *Ibid.*

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* * *

I respectfully dissent.

JUSTICE SOTOMAYOR, dissenting.

As I have maintained ever since the Court started down this wayward path in *Glossip* v. *Gross*, 576 U. S. 863 (2015), there is no sound basis in the Constitution for requiring condemned inmates to identify an available means for their own executions. JUSTICE BREYER ably explains why today's extension of *Glossip*'s alternative-method requirement is misguided (even on that precedent's own terms), and why (with or without that requirement) a trial is needed to determine whether Missouri's planned means of executing Russell Bucklew creates an intolerable risk of suffering in light of his rare medical condition. I join JUSTICE BREYER's dissent, except for Part III. I write separately to address the troubling dicta with which the Court concludes its opinion.

I

Given the majority's ominous words about late-arising death penalty litigation, *ante,* at 149–151, one might assume there is some legal question before us concerning delay. Make no mistake: There is not. The majority's commentary on once and future stay applications is not only inessential but also wholly irrelevant to its resolution of any issue before us.

The majority seems to imply that this litigation has been no more than manipulation of the judicial process for the purpose of delaying Bucklew's execution. *Ante,* at 149–150. When Bucklew commenced this case, however, there was nothing "settled," *ibid.*, about whether the interaction of Missouri's lethal-injection protocol and his rare medical condition would be tolerable under the Eighth Amendment. At that time, *Glossip* had not yet been decided, much less extended to any as-applied challenge like Bucklew's. In granting prior stay requests in this case, we acted as necessary to ensure sufficient time for sober review of Bucklew's claims. The majority laments those decisions, but there is nothing unusual—and certainly nothing untoward—about parties pressing, and courts giving full consideration to, potentially meritorious constitutional claims, even when those claims do not ultimately succeed.

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II

I am especially troubled by the majority's statement that "[l]ast-minute stays should be the extreme exception," which could be read to intimate that late-occurring stay requests from capital prisoners should be reviewed with an especially jaundiced eye. See *ante,* at 150. Were those comments to be mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role.

Courts' equitable discretion in handling stay requests is governed by well-established principles. See *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). Courts examine the stay applicant's likelihood of success on the merits, whether the

applicant will suffer irreparable injury without a stay, whether other parties will suffer substantial injury from a stay, and public interest considerations. *Ibid.*

It is equally well established that "death is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976). For that reason, the equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits. See *Nken*, 556 U. S., at 434 (noting that success on the merits and irreparable injury "are the most critical" factors); cf. *Glossip*, 576 U. S., at 876 (observing, in a preliminary-injunction posture, that "[t]he parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits" and analyzing the case accordingly); accord, *id.*, at 968–969 (SOTOMAYOR, J., dissenting). This accords with each court's "'duty to search for constitutional error with painstaking care'" in capital cases. *Kyles* v. *Whitley*, 514 U. S. 419, 422 (1995).

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It is of course true that a court may deny relief when a party has "unnecessarily" delayed seeking it, *Nelson* v. *Campbell*, 541 U. S. 637, 649–650 (2004), and that courts should not grant equitable relief on clearly "'dilatory,'" "'speculative,'" or meritless grounds, *ante*, at 151 (quoting *Hill* v. *McDonough*, 547 U. S. 573, 584–585 (2006)); see also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) (vacating a stay where an inmate's unjustified 10-year delay in bringing a claim was an "obvious attempt at manipulation"). That is hardly the same thing as treating late-arising claims as presumptively suspect.[1]

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[1] A skewed view of the facts caused the majority to misapply these principles and misuse its "'equitable powers,'" see *ante*, at 151, 150, n. 5, in vacating the Court of Appeals' unanimous stay in *Dunn* v. *Ray*, 586 U. S. 1138 (2019). Even today's belated explanation from the majority rests on the mistaken premise that Domineque Ray could have figured out sooner that

The principles of federalism and finality that the majority invokes are already amply served by other constraints on our review of state judgments—most notably the Antiterrorism and Effective Death Penalty Act of 1996, but also statutes of limitations and other standard filters for dilatory claims. We should not impose further constraints on judicial discretion in this area based on little more than our own policy impulses. Finality and federalism need no extra thumb on the scale from this Court, least of all with a human life at stake.

The only sound approach is for courts to continue to afford each request for equitable relief a careful hearing on its own merits. That responsibility is never graver than when the litigation concerns an impending execution. See, *e. g.*, *Kyles*, 514 U. S., at 422; *Woodson*, 428 U. S., at 303–304. Meritorious claims can and do come to light even at the eleventh hour, and the cost of cursory review in such cases would be unacceptably high. See *Glossip*, 576 U. S., at 927–928 (BREYER, J., dissenting) (collecting examples of inmates who came "within hours or days of execution before later being exonerated"). A delay, moreover, may be entirely beyond a prisoner's control. Execution methods, for example, have been moving targets subject to considerable secrecy in recent years, which means that constitutional concerns may surface only once a State settles on a procedure and communicates its choice to the prisoner.[2] In other contexts, too,

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Alabama planned to deny his imam access to the execution chamber. But see *id.*, at 1140 (KAGAN, J., dissenting) (noting that the governing statute authorized both the inmate's imam and the prison's Christian chaplain to attend the execution, and that "the prison refused to give Ray a copy of its own practices and procedures" that would have clarified the two clergymen's degrees of access); *Ray* v. *Commissioner, Ala. Dept. of Corrections*, 915 F. 3d 689, 701–703 (CA11 2019).

[2] See *Zagorski* v. *Parker*, 586 U. S. 938, 940 (2018) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari) (describing Tennessee's recent equivocation about the availability of its preferred lethal-injection protocol); *Glossip*, 576 U. S., at 976 (SOTOMAYOR,

fortuity or the imminence of an execution may shake loose constitutionally significant information when time is short.[3]

There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness.

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J., dissenting) (noting States' "scramble" to formulate "new and untested" execution methods); *Sepulvado* v. *Jindal*, 739 F. 3d 716, 717–718 (CA5 2013) (Dennis, J., dissenting from denial of rehearing en banc) (describing Louisiana's refusal to inform a prisoner of the drugs that would be used to execute him); Denno, Lethal Injection Chaos Post-*Baze*, 102 Geo. L. J. 1331, 1376–1380 (2014) (describing increased secrecy around execution procedures).

[3] See *Connick* v. *Thompson*, 563 U. S. 51, 55–56, and n. 1 (2011) (intentionally suppressed exculpatory crime lab report discovered a month before a scheduled execution); *Ex parte Braziel*, No. WR–72,186–01 (Tex. Crim. App., Dec. 11, 2018), pp. 1–2 (Alcala, J., dissenting) (disclosure by the State of "new information about possible prosecutorial misconduct" the same day as an execution).

Syllabus

EMULEX CORP. ET AL. *v.* VARJABEDIAN ET AL.

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

No. 18–459. Argued April 15, 2019—Decided April 23, 2019
Certiorari dismissed. Reported below: 888 F. 3d 399.

Gregory G. Garre argued the cause for petitioners. With him on the briefs were *Benjamin W. Snyder*, *Shay Dvoretzky*, and *Jeffrey R. Johnson*.

Morgan L. Ratner argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Stewart*, *Robert B. Stebbins*, *Michael A. Conley*, *David D. Lisitza*, and *Lisa K. Helvin*.

Daniel L. Geyser argued the cause for respondents. With him on the brief were *Miles D. Schreiner* and *Benjamin Heikali*.*

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PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *George T. Conway III* and *Daryl Joseffer*; for Former Commissioners of the Securities and Exchange Commission by *Jonathan L. Marcus* and *Michael A. McIntosh*; for the Securities Industry and Financial Markets Association by *William M. Regan*, *Marc J. Gottridge*, *Allison M. Wuertz*, and *Kevin Carroll*; and for the Washington Legal Foundation by *Lyle Roberts*, *George E. Anhang*, *Cory L. Andrews*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for Institutional Investors by *Kevin K. Russell*, *Charles H. Davis*, *Erica Oleszczuk Evans*, *Cheryl George*, *Jay Eisenhofer*, *Carol V. Gilden*, *Jeremy A. Lieberman*, and *James W. Johnson*; for Legal Scholars by *Edward Labaton*, *Marc I. Gross*, *Darren Check*, and *Darren J. Robbins*; and for the North American Securities Administrators Association, Inc., by *Ruthanne M. Deutsch* and *Hyland Hunt*.

Alan E. Golomb filed a brief for Phillip Goldstein as *amicus curiae*.

Syllabus

LAMPS PLUS, INC., ET AL. *v.* VARELA

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

No. 17–988. Argued October 29, 2018—Decided April 24, 2019

In 2016, a hacker tricked an employee of petitioner Lamps Plus, Inc., into disclosing tax information of about 1,300 company employees. After a fraudulent federal income tax return was filed in the name of respondent Frank Varela, a Lamps Plus employee, Varela filed a putative class action against Lamps Plus in Federal District Court on behalf of employees whose information had been compromised. Relying on the arbitration agreement in Varela's employment contract, Lamps Plus sought to compel arbitration—on an individual rather than a classwide basis—and to dismiss the suit. The District Court rejected the individual arbitration request, but authorized class arbitration and dismissed Varela's claims. Lamps Plus appealed, arguing that the District Court erred by compelling class arbitration, but the Ninth Circuit affirmed. This Court had held in *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, that a court may not compel classwide arbitration when an agreement is silent on the availability of such arbitration. The Ninth Circuit ruled that *Stolt-Nielsen* was not controlling because the agreement in this case was ambiguous rather than silent on the issue of class arbitration.

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Held:

1. This Court has jurisdiction. An order that both compels arbitration and dismisses the underlying claims qualifies as "a final decision with respect to an arbitration" within the meaning of 9 U. S. C. § 16(a)(3), the jurisdictional provision on which Lamps Plus relies. See *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79, 89. Varela attempts to distinguish *Randolph* on the ground that the appeal here was taken by the party who had already secured the relief it requested, *i. e.*, Lamps Plus had already obtained an order dismissing the claim and compelling arbitration. But Lamps Plus did not secure the relief it requested, since it sought individual rather than class arbitration. The shift from individual to class arbitration is a "fundamental" change, *Stolt-Nielsen*, 559 U. S., at 686, that "sacrifices the principal advantage of arbitration" and "greatly increases risks to defendants," *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 348, 350. Avoiding these consequences gives Lamps Plus the "necessary personal stake" to appeal. *Camreta* v. *Greene*, 563 U. S. 692, 702. Pp. 180–182.

Syllabus

2. Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. Pp. 182–189.

(a) "Arbitration is strictly a matter of consent," *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (internal quotation marks omitted), and the task for courts and arbitrators is "to give effect to the intent of the parties," *Stolt-Nielsen*, 559 U. S., at 684. In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. Class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U. S., at 348. Because of such "crucial differences," *Stolt-Nielsen*, 559 U. S., at 687, this Court has held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so," *id.*, at 684. Silence is not enough. *Id.*, at 687. That reasoning controls here. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[ ] the principal advantage of arbitration." *Concepcion*, 563 U. S., at 348. This conclusion aligns with the Court's refusal to infer consent when it comes to other fundamental arbitration questions. See, *e. g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945. Pp. 183–186.

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(b) The Ninth Circuit's contrary conclusion was based on the state law *contra proferentem* doctrine, which counsels that contractual ambiguities should be construed against the drafter. That default rule is based on public policy considerations and seeks ends other than the intent of the parties. Such an approach is flatly inconsistent with "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684. Varela claims that the rule is nondiscriminatory and gives equal treatment to arbitration agreements and other contracts alike, but an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration,'" *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 508. This conclusion is consistent with the Court's precedents holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. See, *e. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626. Pp. 186–189.

701 Fed. Appx. 670, reversed and remanded.

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

ring opinion, *post*, p. 189. GINSBURG, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 191. BREYER, J., *post*, p. 195, and SOTOMAYOR, J., *post*, p. 203, filed dissenting opinions. KAGAN, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, and in which SOTOMAYOR, J., joined as to Part II, *post*, p. 205.

Andrew J. Pincus argued the cause for petitioners. With him on the briefs were *Archis A. Parasharami*, *Daniel E. Jones*, *Donald M. Falk*, *Jeffry A. Miller*, *Eric Y. Kizirian*, and *Michael K. Grimaldi*.

Michele M. Vercoski argued the cause for respondent. With her on the brief were *Scott L. Nelson* and *Allison M. Zieve*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms. See 9 U. S. C. § 2. In *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), we held that a court may not compel arbitration on a classwide basis when an agreement is "silent" on the availability of such arbitration. Because class arbitration fundamentally changes the nature of the "traditional individualized arbitration" envisioned by the FAA, *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 509 (2018), "a party may not be compelled under the FAA to submit

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*Briefs of *amici curiae* urging reversal were filed for the Center for Workplace Compliance by *John R. Annand* and *Rae T. Vann*; for the Chamber of Commerce of the United States of America by *Thomas R. McCarthy* and *J. Michael Connolly*; for DRI–The Voice of the Defense Bar by *Mary Massaron* and *Hilary A. Ballentine*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for the Retail Litigation Center, Inc., by *Adam G. Unikowsky* and *Deborah R. White*.

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Deepak Gupta*, *Matthew Wessler*, *Greg Beck*, and *Jeffrey R. White*; and for Contract Law Scholars by *Matthew A. Seligman*, *pro se*.

to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *Stolt-Nielsen*, 559 U. S., at 684 (emphasis in original). We now consider whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather "ambiguous" about the availability of such arbitration.

I

Petitioner Lamps Plus is a company that sells light fixtures and related products. In 2016, a hacker impersonating a company official tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees. Soon after, a fraudulent federal income tax return was filed in the name of Frank Varela, a Lamps Plus employee and respondent here.

Like most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. But after the data breach, he sued Lamps Plus in Federal District Court in California, bringing state and federal claims on behalf of a putative class of employees whose tax information had been compromised. Lamps Plus moved to compel arbitration on an individual rather than classwide basis, and to dismiss the lawsuit. In a single order, the District Court granted the motion to compel arbitration and dismissed Varela's claims without prejudice. But the court rejected Lamps Plus's request for individual arbitration, instead authorizing arbitration on a classwide basis. Lamps Plus appealed the order, arguing that the court erred by compelling class arbitration.

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The Ninth Circuit affirmed. 701 Fed. Appx. 670 (2017). The court acknowledged that *Stolt-Nielsen* prohibits forcing a party "to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" and that Varela's agreement "include[d] no express mention of class proceedings." 701 Fed. Appx., at 672. But that did not end the inquiry, the court reasoned, because the fact that

the agreement "does not expressly refer to class arbitration is not the 'silence' contemplated in *Stolt-Nielsen*." *Ibid.* In *Stolt-Nielsen*, the parties had *stipulated* that their agreement was silent about class arbitration. Because there was no such stipulation here, the court concluded that *Stolt-Nielsen* was not controlling.

The Ninth Circuit then determined that the agreement was ambiguous on the issue of class arbitration. On the one hand, as Lamps Plus argued, certain phrases in the agreement seemed to contemplate "purely binary claims." 701 Fed. Appx., at 672. At the same time, as Varela asserted, other phrases were capacious enough to include class arbitration, such as one stating that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." *Ibid.* The Ninth Circuit followed California law to construe the ambiguity against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion" such as this. *Ibid.* (quoting *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 248, 376 P. 3d 506, 514 (2016)). Because Lamps Plus had drafted the agreement, the court adopted Varela's interpretation authorizing class arbitration. Judge Fernandez dissented. In his view, the agreement was not ambiguous, and the majority's holding was a "palpable evasion of *Stolt-Nielsen*." 701 Fed. Appx., at 673.

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Lamps Plus petitioned for a writ of certiorari, arguing that the Ninth Circuit's decision contravened *Stolt-Nielsen* and created a conflict among the Courts of Appeals. In opposition, Varela not only disputed those contentions but also argued for the first time that the Ninth Circuit lacked jurisdiction over the appeal, and that this Court therefore lacked jurisdiction in turn. We granted certiorari. 584 U. S. 959 (2018).

II

We begin with jurisdiction. Section 16 of the FAA governs appellate review of arbitration orders. 9 U. S. C. § 16. Varela contends that the Ninth Circuit lacked statutory

jurisdiction because section 16 permits appeal from orders *denying* motions to compel arbitration, § 16(a)(1)(B), but not orders *granting* such motions, § 16(b)(2). Brief for Respondent 9–12; see also *post*, at 196–197 (BREYER, J., dissenting). This argument is beside the point, however, because Lamps Plus relies for jurisdiction on a different provision of section 16, section 16(a)(3).

Section 16(a)(3) provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." We construed that provision in *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79 (2000), a case where, as here, the District Court had issued an order both compelling arbitration and dismissing the underlying claims. We held that such an order directing "the parties to proceed to arbitration, and dismiss[ing] all the claims before [the court], . . . is 'final' within the meaning of § 16(a)(3), and therefore appealable." *Id.*, at 89.[1]

Varela attempts to distinguish *Randolph* on the ground that the appeal here was taken by the party who sought an

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[1] JUSTICE BREYER repeatedly refers to the order in this case as "interlocutory," *post*, at 199–201 (dissenting opinion), but—as the language quoted above makes clear—*Randolph* expressly held that such an order is "final" under the FAA. JUSTICE BREYER also claims that *Randolph* "explicitly reserved the [jurisdictional] question that we face now," *post*, at 201, but *Randolph* reserved a different question. In that case, the District Court had denied a motion to stay. We noted that, if the District Court had entered a stay instead of dismissing the case, an appeal would have been barred by 9 U. S. C. § 16(b)(1). That said, we expressly refrained from addressing whether the District Court *should have* granted the stay. See 531 U. S., at 87, n. 2. That is the question we reserved. JUSTICE BREYER would have us take up that question today, *post*, at 197, 201, but there is no basis for doing so. The FAA provides that a district court "shall *on application of one of the parties* stay" the case pending the arbitration. 9 U. S. C. § 3 (emphasis added). Here, no party sought a stay. Thus, JUSTICE BREYER's jurisdictional analysis is premised on two events that did not happen—a District Court ruling that was never issued denying a stay request that was never made. In short, JUSTICE BREYER has written an opinion for a case other than the one before us.

order to dismiss the claim and compel arbitration, Lamps Plus. He claims the company "lacked standing to appeal the dismissal," because the District Court's order "provided precisely the relief Lamps Plus sought." Brief for Respondent 13, 15.

But Lamps Plus did not secure the relief it requested. It sought an order compelling *individual* arbitration. What it got was an order rejecting that relief and instead compelling arbitration on a classwide basis. We have explained—and will elaborate further below—that shifting from individual to class arbitration is a "fundamental" change, *Stolt-Nielsen*, 559 U. S., at 686, that "sacrifices the principal advantage of arbitration" and "greatly increases risks to defendants," *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 348, 350 (2011). Lamps Plus's interest in avoiding those consequences gives it the "necessary personal stake in the appeal" required by our precedent. *Camreta* v. *Greene*, 563 U. S. 692, 702 (2011).[2]

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III

The Ninth Circuit applied California contract law to conclude that the parties' agreement was ambiguous on the availability of class arbitration. In California, an agreement is ambiguous "when it is capable of two or more constructions, both of which are reasonable." 701 Fed. Appx., at 672 (quoting *Powerine Oil Co.* v. *Superior Ct. of Los Angeles Cty.*, 37 Cal. 4th 377, 390, 118 P. 3d 589, 598 (2005)). Following our normal practice, we defer to the Ninth Circuit's interpretation and application of state law and thus accept that the agreement should be regarded as ambiguous. See, *e. g.*, *Expres-*

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[2] And contrary to Varela's contention, Brief for Respondent 14–15, and JUSTICE BREYER's dissent, *post*, at 200–201, this is hardly a case like *Microsoft Corp.* v. *Baker*, 582 U. S. 23 (2017). There, we held that plaintiffs cannot generate a final appealable order by *voluntarily* dismissing their claim. Here, Lamps Plus was the defendant, and the District Court compelled class arbitration over the company's vigorous opposition.

sions Hair Design v. *Schneiderman*, 581 U. S. 37, 45 (2017).[3]

We therefore face the question whether, consistent with the FAA, an ambiguous agreement can provide the necessary "contractual basis" for compelling class arbitration. *Stolt-Nielsen*, 559 U. S., at 684. We hold that it cannot—a conclusion that follows directly from our decision in *Stolt-Nielsen*. Class arbitration is not only markedly different from the "traditional individualized arbitration" contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration. *Epic Systems*, 584 U. S., at 509; see *Stolt-Nielsen*, 559 U. S., at 686–687. The statute therefore requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class-wide basis.

A

The FAA requires courts to "enforce arbitration agreements according to their terms." *Epic Systems*, 584 U. S., at 506 (quoting *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013)). Although courts may ordinarily accomplish that end by relying on state contract principles, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995), state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, *Concepcion*, 563 U. S., at 352 (internal quotation marks omitted). At

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[3] JUSTICE KAGAN offers her own interpretation of the contract, concludes that it unambiguously authorizes class arbitration, *post*, at 206–208 (dissenting opinion), and criticizes us for "disregard[ing] the actual contract the parties signed," *post*, at 217. JUSTICE SOTOMAYOR, on the other hand, concludes that the contract is ambiguous about class arbitration but criticizes us for treating the contract as . . . ambiguous. *Post*, at 204–205 (dissenting opinion). Again, we simply follow this Court's ordinary approach, which "accord[s] great deference" to the courts of appeals in their interpretation of state law. *Expressions Hair Design*, 581 U. S., at 45, (quoting *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484, n. 13 (1986) (collecting cases)).

issue in this case is the interaction between a state contract principle for addressing ambiguity and a "rule[ ] of fundamental importance" under the FAA, namely, that arbitration "is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U. S., at 681 (internal quotation marks omitted).

"[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent." *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (internal quotation marks omitted). We have emphasized that "foundational FAA principle" many times. *Stolt-Nielsen*, 559 U. S., at 684; see also, *e. g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002); *First Options*, 514 U. S., at 943; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995); *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985).

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Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their "powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen*, 559 U. S., at 682. Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. *Id.*, at 683–684. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: "to give effect to the intent of the parties." *Id.*, at 684.

In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. *Epic Systems*, 584 U. S., at 509; see also *Concepcion*, 563 U. S., at 349, 351; *Stolt-Nielsen*, 559 U. S., at 686–687. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the

benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.*, at 685. Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U. S., at 348. Indeed, we recognized just last Term that with class arbitration "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." *Epic Systems*, 584 U. S., at 509. Class arbitration not only "introduce[s] new risks and costs for both sides," *ibid.*, it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review. See *Concepcion*, 563 U. S., at 349; see also *Stolt-Nielsen*, 559 U. S., at 686 (citing *Ortiz* v. *Fibreboard Corp.*, 527 U. S. 815, 846 (1999)).

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Because of these "crucial differences" between individual and class arbitration, *Stolt-Nielsen* explained that there is "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." 559 U. S., at 687, 685–686. And for that reason, we held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684. Silence is not enough; the "FAA requires more." *Id.*, at 687.

Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[ ] the principal advantage of arbitration." *Concepcion*, 563 U. S., at 348.

This conclusion aligns with our refusal to infer consent when it comes to other fundamental arbitration questions. For example, we presume that parties have *not* authorized

arbitrators to resolve certain "gateway" questions, such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion). Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence *or* ambiguity" in their agreement, because "doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U. S., at 945 (emphasis added); see also *Howsam*, 537 U. S., at 83–84. We relied on that same reasoning in *Stolt-Nielsen*, 559 U. S., at 686–687, and it applies with equal force here. Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.[4]

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B

The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. The rule applies "only as a last resort" when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation. 3 A. Corbin, Contracts § 559, pp. 268–270 (1960). At that point, *contra proferentem* resolves the ambiguity against the drafter based on public policy factors, primarily equitable considerations about the parties' relative bargaining strength. See 2 E. Farnsworth, Contracts § 7.11, pp. 300–304 (3d ed. 2004); see

[4] This Court has not decided whether the availability of class arbitration is a so-called "question of arbitrability," which includes these gateway matters. *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 569, n. 2 (2013). We have no occasion to address that question here because the parties agreed that a court, not an arbitrator, should resolve the question about class arbitration.

also 11 R. Lord, Williston on Contracts § 32:12, pp. 788–792 (4th ed. 2012) (stating that application of the rule may vary based on "the degree of sophistication of the contracting parties or the degree to which the contract was negotiated"); Restatement (Second) of Contracts § 206, pp. 80–81, 105–107 (1979) (classifying *contra proferentem* under "Considerations of Fairness and the Public Interest" rather than with rules for interpreting "The Meaning of Agreements"); 3 Corbin, Contracts § 559, at 270 (noting that *contra proferentem* is "chiefly a rule of public policy"). Although the rule enjoys a place in every hornbook and treatise on contracts, we noted in a recent FAA case that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. 47, 58 (2015). This case brings those limits into focus.

Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties. When a contract is ambiguous, *contra proferentem* provides a default rule based on public policy considerations; "it can scarcely be said to be designed to ascertain the meanings attached by the parties." 2 Farnsworth, Contracts § 7.11, at 303. Like the contract rule preferring interpretations that favor the public interest, see *id.*, at 304, *contra proferentem* seeks ends other than the intent of the parties.

"[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." *Concepcion*, 563 U. S., at 348. We recently reiterated that courts may not rely on state contract principles to "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Systems*, 584 U. S., at 509. But that is precisely what the court below did, requiring class arbitration on the basis of a doctrine that "does not help to determine the meaning that the two parties gave to the words, or even

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the meaning that a reasonable person would have given to the language used." 3 Corbin, Contracts § 559, at 269–270. Such an approach is flatly inconsistent with "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684.

Varela and JUSTICE KAGAN defend application of the rule on the basis that it is nondiscriminatory. It does not conflict with the FAA, they argue, because it is a neutral rule that gives equal treatment to arbitration agreements and other contracts alike. See Brief for Respondent 18, 25–26; *post*, at 210–213 (KAGAN, J., dissenting). We have explained, however, that such an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Epic Systems*, 584 U. S., at 508 (quoting *Concepcion*, 563 U. S., at 344).

That was the case in *Concepcion*. There, the Court considered the general contract defense of unconscionability, which had been interpreted by the state court to bar class action waivers in consumer contracts, whether in the litigation or arbitration context. See *id.*, at 341–344. The general applicability of the rule did not save it from preemption under the FAA with respect to arbitration agreements, because it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings "without the parties' consent." *Epic Systems*, 584 U. S., at 508 (describing the "essential insight" of *Concepcion*). That, for the reasons we have explained, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U. S., at 344; see *Epic Systems*, 584 U. S., at 509. The same reasoning applies here: The general *contra proferentem* rule cannot be applied to impose class arbitration in the absence of the parties' consent.[5]

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[5] Varela and JUSTICE KAGAN contend that our use of *contra proferentem* in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 57 (1995), establishes that the rule is not preempted by the FAA. Brief for Re-

Our opinion today is far from the watershed JUSTICE KAGAN claims it to be. Rather, it is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration. See, *e. g.*, *Mitsubishi Motors Corp.*, 473 U. S., at 626; *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983). In those cases, we did not seek to resolve the ambiguity by asking who drafted the agreement. Instead, we held that the FAA itself provided the rule. As in those cases, the FAA provides the default rule for resolving ambiguity here.

* * *

Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of *contra proferentem* cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] *agreed* to [class arbitration]." *Stolt-Nielsen*, 559 U. S., at 684.

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

It is so ordered.

JUSTICE THOMAS, concurring.

As our precedents make clear and the Court acknowledges, the Federal Arbitration Act (FAA) requires federal

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spondent 33–35; *post*, at 212 (dissenting opinion). In *Mastrobuono*, however, we had no occasion to consider a conflict between the FAA and *contra proferentem* because both rules led to the same result. Our holding was primarily based on the FAA policy favoring arbitration, 514 U. S., at 62, and only after establishing that did we apply *contra proferentem*, noting that the rule was "well suited to the facts of this case," *id.*, at 63. See also *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279, 293, n. 9 (2002) (explaining that *Mastrobuono* resolved an ambiguous provision by "read[ing] the agreement to favor arbitration under the FAA rules").

courts to enforce arbitration agreements "just as they would ordinary contracts: in accordance with their terms." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 87 (2002) (THOMAS, J., concurring in judgment). Federal courts must therefore apply "background principles of state contract law" when evaluating arbitration agreements. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009); *Perry* v. *Thomas*, 482 U. S. 483, 492, n. 9 (1987). "In this endeavor, 'as with any other contract, the parties' intentions control.'" *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 682 (2010) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985)). Thus, where an agreement is silent as to class arbitration, a court may not infer from that silence that the parties agreed to arbitrate on a class basis. 559 U. S., at 687.

Here, the arbitration agreement between Varela and Lamps Plus is silent as to class arbitration. If anything, the agreement suggests that the parties contemplated only bilateral arbitration.* App. to Pet. for Cert. 24a (waiving "any right *I* may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company" (emphasis added)); *ibid.* ("*The Company and I* mutually consent to the resolution by arbitration of all claims . . . that *I* may have against the Company" (emphasis added)); *id.*, at 24a–25a ("Specifically, *the Company and I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment" (emphasis added)). This agreement provides no "contractual basis" for

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*Two intermediate California courts have held, based on similar language, that an arbitration agreement did not authorize class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1129–1131, 144 Cal. Rptr. 3d 198, 210–211 (2012); *Kinecta Alternative Financial Solutions, Inc.* v. *Superior Ct. of Los Angeles Cty.*, 205 Cal. App. 4th 506, 517–519, 140 Cal. Rptr. 3d 347, 356–357 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 376 P. 3d 506 (2016).

concluding that the parties agreed to class arbitration, *Stolt-Nielsen*, *supra*, at 684, and I would therefore reverse on that basis.

The Court instead evaluates whether California's *contra proferentem* rule, as applied here, "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Ante*, at 183 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 352 (2011)). I remain skeptical of this Court's implied pre-emption precedents, see *Wyeth* v. *Levine*, 555 U. S. 555, 582–604 (2009) (opinion concurring in judgment), but I join the opinion of the Court because it correctly applies our FAA precedents, see *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497 (2018); *Concepcion*, *supra*.

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

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Joining JUSTICE KAGAN's dissenting opinion in full, I write separately to emphasize once again how treacherously the Court has strayed from the principle that "arbitration is a matter of consent, not coercion." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 681 (2010) (internal quotation marks omitted).

Congress enacted the Federal Arbitration Act (FAA) in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 543 (2018) (GINSBURG, J., dissenting) (emphasis in original). The Act was not designed to govern contracts "in which one of the parties characteristically has little bargaining power." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967); see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 42 (1991) (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA] expected it to apply . . . to form contracts between parties of unequal bargaining power, or to the arbitration of

disputes arising out of the employment relationship."); Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N. Y. U. L. Rev. 286, 323 (2013) (The FAA was "enacted in 1925 with the seemingly limited purpose of overcoming the then-existing 'judicial hostility' to the arbitration of contract disputes between businesses.").

The Court has relied on the FAA, not simply to overcome once-prevalent judicial resistance to enforcement of arbitration disputes between businesses. In relatively recent years, it has routinely deployed the law to deny to employees and consumers "effective relief against powerful economic entities." *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. 47, 67 (2015) (GINSBURG, J., dissenting). Arbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter. See *Epic*, 584 U. S., at 545–546 (GINSBURG, J., dissenting) (surveying "court decisions expansively interpreting" the FAA); *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it."); Miller, *supra*, at 324 (describing as "extraordinary" "judicial extension of the [FAA] to a vast array of consumer contracts . . . characterized by their adhesive nature and by the individual's complete lack of bargaining power"). Propelled by the Court's decisions, mandatory arbitration clauses in employment and consumer contracts have proliferated. See, *e. g.*, Economic Policy Institute, A. Colvin, The Growing Use of Mandatory Arbitration 2, 4–6 (Apr. 6, 2018) (mandatory arbitration imposed by private-sector employers on nonunionized employees notably increased between 1995 and 2017), online at https://www.epi.org/files/pdf/144131.pdf (all Internet materials as last visited Apr. 22, 2019); Consumer Financial Protection Bureau, Arbi-

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tration Study § 1.4.1 (Mar. 2015) ("Tens of millions of consumers use consumer financial products or services that are subject to . . . arbitration clauses."), online at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Piling Pelion on Ossa, the Court has hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum. See *Epic*, 584 U. S., at 546, n. 12 (GINSBURG, J., dissenting) (noting Court decisions enforcing class-action waivers imposed by the party in command, who wants no collective proceedings). The Court has pursued this course even though "neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself." *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 362 (2011) (BREYER, J., dissenting).

Employees and consumers forced to arbitrate solo face severe impediments to the "vindication of their rights." *Stolt-Nielsen*, 559 U. S., at 699 (GINSBURG, J., dissenting). "Expenses entailed in mounting individual claims will often far outweigh potential recoveries." *Epic*, 584 U. S., at 550 (GINSBURG, J., dissenting); see *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 246 (2013) (KAGAN, J., dissenting) ("[The defendant] has put [the plaintiff] to this choice: Spend way, way, way more money than your claim is worth, or relinquish your . . . rights."); *Concepcion*, 563 U. S., at 365 (BREYER, J., dissenting) ("What rational lawyer would have signed on to represent the [plaintiffs] for the possibility of fees stemming from a $30.22 [individual] claim?"); Resnik, Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System, 91 Notre Dame L. Rev. 1831, 1888 (2016) ("Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their 'effective vindication.' ").

Today's decision underscores the irony of invoking "the first principle" that "arbitration is strictly a matter of con-

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sent," *ante*, at 184 (internal quotation marks and alterations omitted), to justify imposing individual arbitration on employees who surely would not choose to proceed solo. Respondent Frank Varela sought redress for negligence by his employer leading to a data breach affecting 1,300 employees. See Complaint in No. 5:16–cv–00577 (CD Cal.), Doc. 1, ¶¶1, 59. The widely experienced neglect he identified cries out for collective treatment. Blocking Varela's path to concerted action, the Court aims to ensure the authenticity of consent to class procedures in arbitration. *Ante*, at 184–185. Shut from the Court's sight is the "Hobson's choice" employees face: "accept arbitration on their employer's terms or give up their jobs." *Epic*, 584 U. S., at 531, n. 2 (GINSBURG, J., dissenting); see *Circuit City*, 532 U. S., at 139 (Souter, J., dissenting) (employees often "lack the bargaining power to resist an arbitration clause if their prospective employers insist on one").

Recent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned. Some companies have ceased requiring employees to arbitrate sexual harassment claims, see McGregor, Firms May Follow Tech Giants on Forced Arbitration, Washington Post, Nov. 13, 2018, p. A15, col. 1, or have extended their no-forced-arbitration policy to a broader range of claims, see Wakabayashi, Google Scraps Forced Arbitration Policy, N. Y. Times, Feb. 22, 2019, p. B5, col. 4. And some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court. See, *e. g.*, N. Y. Civ. Prac. Law Ann. §7515 (West 2019) (rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims). These developments are sanguine, for "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 750 (1981) (Burger, C. J., dissenting).

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Notwithstanding recent steps to counter the Court's current jurisprudence, mandatory individual arbitration continues to thwart "effective access to justice" for those encountering diverse violations of their legal rights. *DIRECTV*, 577 U. S., at 60 (GINSBURG, J., dissenting). The Court, paradoxically reciting the mantra that "[c]onsent is essential," *ante*, at 184, has facilitated companies' efforts to deny employees and consumers the "important right" to sue in court, and to do so collectively, by inserting solo-arbitration-only clauses that parties lacking bargaining clout cannot remove. *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 115 (2012) (GINSBURG, J., dissenting). When companies can "muffl[e] grievance[s] in the cloakroom of arbitration," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117, 136 (1973), the result is inevitable: curtailed enforcement of laws "designed to advance the well-being of [the] vulnerable." *Epic*, 584 U. S., at 550 (GINSBURG, J., dissenting). "Congressional correction of the Court's elevation of the FAA over" the rights of employees and consumers "to act in concert" remains "urgently in order." *Id.*, at 527.

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JUSTICE BREYER, dissenting.

Although I join JUSTICE GINSBURG's and JUSTICE KAGAN's dissents in full, I also dissent for another reason. In my view, the Court of Appeals lacked jurisdiction to hear this case. Consequently, we lack jurisdiction as well. See 28 U. S. C. § 1254. My reason for reaching this conclusion is the following. The Federal Arbitration Act, at § 4, says that a "court," upon being satisfied that the parties have agreed to arbitrate a claim, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U. S. C. § 4. Section 16 of the Act then says that "an appeal *may not be taken* from an interlocutory order . . . directing arbitration to proceed under section 4 of this title." § 16(b)(2) (emphasis added). And directing

arbitration to proceed is just what the District Court did here. App. to Pet. for Cert. 23a.

I

These statutory provisions reflect a congressional effort (in respect to a specific subject matter) to help resolve a more general problem. Too few interlocutory appeals will too often impose upon parties delay and expense that an interlocutory appeal, by quickly correcting a lower court error, might have spared them. But too many interlocutory appeals will too often unnecessarily delay proceedings while a party appeals and loses. And delays can clog the appellate system, thereby slowing down the workings, and adding to the costs, of the judicial system seen as a whole. Congress' jurisdictional statutes consequently compromise, providing, for example, for interlocutory appeals in some instances, such as cases involving injunctive orders, see, *e. g.*, 28 U. S. C. § 1292(a)(1), or where important separable legal questions are at issue, see, *e. g.*, *Ashcroft* v. *Iqbal*, 556 U. S. 662, 671 (2009), or where a district court certifies an open legal question to a court of appeals for determination, see, *e. g.*, 28 U. S. C. § 1292(b). But often statutes and rules require the parties to proceed to the end of a trial before obtaining appellate review. See, *e. g.*, § 1291.

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The statutory provisions before us are a local species of this jurisdictional genus. In them, Congress limited interlocutory review of orders concerning arbitration in a way that favors arbitration. Consequently, § 16(a) of the FAA will normally allow an immediate appeal where arbitration is denied, but § 16(b) will normally require parties to wait until the end of the arbitration in order to bring legal questions about that proceeding to a court of appeals.

A couple of examples illustrate the point. Take first § 4 of the FAA. Section 4 provides that a "court," upon being satisfied that the parties have agreed to arbitrate a claim, "shall make an order directing the parties to proceed to arbi-

tration in accordance with the terms of the agreement." 9 U. S. C. § 4. Section 16(a) of the FAA provides that a party *may* immediately appeal a district court order *refusing to compel arbitration* under § 4, while § 16(b) provides that a party generally *may not* immediately appeal a district court order *compelling arbitration* under § 4. Compare § 16(a)(1)(B) ("An appeal may be taken from" an order "denying a petition under section 4 of this title") with § 16(b)(2) ("[A]n appeal may not be taken from an interlocutory order . . . directing arbitration to proceed under section 4 of this title").

Section 3 of the FAA provides another good example. Where a suit contains several claims, and the district court has determined that the parties agreed to arbitrate only a subset of those claims, § 3 of the FAA provides that the district court must stay the litigation at the request of either party. See § 3 (providing that a court, when referring claims for arbitration, "shall on application of one of the parties stay" the case "until such arbitration has been had"). The stay relieves the parties of the burden and distraction of continuing to litigate any remaining claims while the arbitration is ongoing. And true to the FAA's proarbitration appellate scheme, § 16(a) *permits* immediate appeals of district court orders *refusing to enter a stay*, while § 16(b) generally *prohibits* immediate appeals of district court orders *granting a stay*. Compare § 16(a)(1)(A) ("An appeal may be taken from" an order "refusing a stay of any action under section 3 of this title") with § 16(b)(1) ("[A]n appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title").

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I could go on. Section 16(a) of the FAA permits immediate appeal of an interlocutory order granting an injunction against arbitration, while § 16(b) generally prohibits immediate appeal of an order refusing to enjoin an arbitration. Compare § 16(a)(2) with § 16(b)(4). Section 16(a) of the FAA permits immediate appeal of an order denying an application

to compel arbitration pursuant to § 206, while § 16(b) generally prohibits immediate appeal of an order compelling arbitration pursuant to § 206. Compare § 16(a)(1)(C) with § 16(b)(3). Et cetera.

The point, however, is that the appellate scheme of the FAA reflects Congress' policy decision that, if a district court determines that arbitration of a claim is called for, there should be no appellate interference with the arbitral process unless and until that process has run its course.

With § 16's structure, and Congress' policy in mind, we can turn to the facts of this case.

II

Respondent Frank Varela is an employee of petitioner Lamps Plus, Inc. At the outset of their employment relationship, Varela and Lamps Plus agreed to arbitrate employment-related claims. Varela later filed suit against Lamps Plus on behalf of himself and a class of Lamps Plus' employees. Lamps Plus asked the District Court to compel arbitration. And the District Court granted Lamps Plus' request. Despite having won the relief that it requested, Lamps Plus appealed the District Court's order because Lamps Plus objected to the District Court's conclusion that the parties' agreement permitted arbitration on a classwide basis. The Court of Appeals affirmed the District Court's judgment. And we granted Lamps Plus' petition for certiorari to consider whether the Court of Appeals erred in so ruling.

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But on those facts, I think that the Court lacks jurisdiction over Lamps Plus' petition. When Lamps Plus responded to Varela's lawsuit by seeking a motion to compel arbitration, and the District Court granted that motion, this case fell neatly into § 16(b)'s description of unappealable district court orders under the FAA. The parties were obligated by the FAA to arbitrate their dispute without the expense and delay of further litigation. If, after arbitration, the parties

were dissatisfied with the award or with the District Court's arbitration related decisions, § 16(a) of the FAA provides for an appeal at that later date. See §§ 16(a)(1)(D)–(E) (permitting appeals of orders confirming, modifying, or vacating an award); see also § 16(a)(3) (permitting appeal of "a final decision with respect to an arbitration"). But, in the interim, § 16(b) deprived the Court of Appeals of jurisdiction to hear any such complaint. See §§ 16(b)(1)–(4). I recognize that Lamps Plus is dissatisfied with the arbitration that the District Court ordered here. But the District Court's order nonetheless granted the motion compelling arbitration, leaving Lamps Plus to bring its claim to an appellate court only after the arbitration is completed. See § 16(b)(2). I believe we should enforce the statutory provisions that lead to this conclusion.

Lamps Plus offers three arguments in response. *First*, Lamps Plus suggests the Court of Appeals had jurisdiction over Lamps Plus' appeal because the District Court order at issue here not only granted Lamps Plus' motion to compel arbitration, but also granted Lamps Plus' motion to dismiss the case. See Brief for Petitioners 29. Lamps Plus points out that § 16(a) permits the appeal of "a final decision with respect to an arbitration." 9 U. S. C. § 16(a)(3). Lamps Plus reasons that, so long as a decision is final, it is appealable under the FAA.

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I disagree because I do not believe that the District Court had the discretion to dismiss the case immediately after granting Lamps Plus' motion to compel arbitration. Section 4 of the FAA permits a district court to compel the parties to arbitrate their claim, and § 16(b)(2) explains that "an appeal *may not be taken* from an interlocutory order . . . directing arbitration to proceed under section 4 of this title." Thus, the District Court order compelling arbitration was interlocutory and generally unappealable. As I have just explained, to read the statute any other way would contravene § 16's proarbitration appeal scheme by turning an inter-

locutory order that would have been unappealable under § 16(b) of the Act into a dismissal order that is appealable under § 16(a).

And because the order granting Lamps Plus' motion to compel was interlocutory, the District Court's dismissal of the case—in the very same order, see App. to Pet. for Cert. 23a—did not give the Court of Appeals jurisdiction over Lamps Plus' appeal. An improper dismissal cannot create appellate jurisdiction to review an interlocutory order.

Our decision in *Microsoft Corp.* v. *Baker*, 582 U. S. 23 (2017), holds as much. The plaintiffs in *Microsoft* sought to appeal a District Court order denying certification of a class. Under Federal Rule of Appellate Procedure 23(f), plaintiffs can ordinarily bring such an appeal only with the court of appeals' permission. But the plaintiffs in *Baker*, who had been denied permission to appeal, tried to circumvent that denial by stipulating to a voluntary dismissal of their claims. The voluntary dismissal, they claimed, was an appealable "final decisio[n]" under 28 U. S. C. § 1291. And in their appeal of the dismissal, they would be free to also seek review of the order denying class certification. We disagreed. As we explained there, to permit plaintiffs to "transform a tentative interlocutory order into a final judgment . . . simply by dismissing their claims with prejudice" would be to "undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders." *Microsoft*, *supra*, at 27, 41 (citation omitted).

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The same reasoning applies here. Section 16(a)(3) of the FAA, like 28 U. S. C. § 1291, creates appellate jurisdiction only over "final decision[s]." Despite that jurisdictional limit, Lamps Plus, like the plaintiffs in *Microsoft*, seeks review of an interlocutory order. Like the plaintiffs in *Microsoft*, Lamps Plus attempts to obtain appellate review by "transform[ing]" an interlocutory order into a final decision. 582 U. S., at 41. Like the plaintiffs in *Microsoft*, Lamps Plus

has done so based on an order "purporting to end the litigation"—an order that Lamps Plus itself "persuade[d] a district court to issue." *Ibid.* And like the plaintiffs in *Microsoft*, Lamps Plus does not "'complain of the "final" order that dismissed [the] case,'" but instead seeks "'review of only the inherently interlocutory order'" compelling arbitration. *Id.*, at 40–41 (alterations omitted). Therefore, like the Court in *Microsoft*, I would hold that Lamps Plus cannot, by securing an unlawful dismissal, find a way around the appellate jurisdiction scheme that Congress wrote into the FAA.

Second, Lamps Plus suggests that this Court has already decided that a district court order compelling arbitration and dismissing a plaintiff's complaint creates no jurisdictional problem. Brief for Petitioners 29–30. Lamps Plus cites *Green Tree Financial Corp.-Ala.* v. *Randolph*, 531 U. S. 79 (2000), in support of that argument. And according to Lamps Plus, "this Court held in *Randolph*" that "when a district court orders arbitration and dismisses the plaintiff's claims," the order is "final" and therefore appealable under § 16 of the FAA. Brief for Petitioners 29–30.

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But *Randolph* does not control the jurisdictional aspect of this case. The *Randolph* Court explicitly reserved the question that we face now, stating: "Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable. 9 U. S. C. § 16(b)(1). *The question whether the District Court should have taken that course is not before us, and we do not address it.*" *Randolph*, *supra*, at 87, n. 2 (emphasis added). Thus, although the *Randolph* Court stated that § 16(a)(3) of the FAA permits appeals of final orders entered under the FAA, the Court did not decide whether a district court could convert an interlocutory, unappealable order under § 16(b) into an appealable order under § 16(a) by entering a dismissal instead of a stay. For that reason, *Randolph* does not answer the jurisdictional question here.

Third, and finally, Lamps Plus suggests that the Court of Appeals had jurisdiction because the District Court "effectively denied Lamps Plus's motion to compel arbitration" when the District Court interpreted the arbitration agreement to permit class arbitration. Brief for Petitioners 31 (emphasis deleted). Leaning heavily on dicta from *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), Lamps Plus argues that class arbitration is so "fundamental[ly]" different from individual arbitration that the fact that "the district court purported to grant Lamps Plus's motion is not controlling." Brief for Petitioners 31.

But *Stolt-Nielsen* cannot bear the weight Lamps Plus would place on it. We held in *Stolt-Nielsen* that a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U. S., at 684. We did *not* hold that class arbitration is not arbitration at all. And because class arbitration *is* arbitration, the District Court's interpretation of Lamps Plus and Varela's arbitration agreement to permit class arbitration could not create appellate jurisdiction over the District Court order compelling the parties to arbitrate their dispute. See 9 U. S. C. § 16(b)(2) (prohibiting interlocutory appeals of district court orders "directing arbitration to proceed").

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Nor did we hold in *Stolt-Nielsen* (or anywhere else) that § 16 of the FAA permits appeals of interlocutory orders directing arbitration to proceed, so long as the order incorporates some ruling that one party dislikes. If that were the rule, then § 16's limitations on appellate jurisdiction would be near meaningless. Consequently, the courts of appeals have—rightly, I believe—long recognized that they lack jurisdiction over appeals from orders that compel arbitration, "'albeit not in the "first-choice"'" manner of the party that moved to compel. *Al Rushaid* v. *National Oilwell Varco, Inc.*, 814 F. 3d 300, 304 (CA5 2016). See also, *e. g.*, *Blue Cross Blue Shield of Mass., Inc.* v. *BCS Ins. Co.*, 671 F. 3d

635, 638 (CA7 2011) (concluding that the Court of Appeals lacked jurisdiction over an order compelling arbitration but denying a motion to direct arbitrators to "hold separate rather than consolidated proceedings"); *Bushley* v. *Credit Suisse First Boston*, 360 F. 3d 1149, 1154 (CA9 2004) (similar holding with respect to a request that arbitration take place before a different forum); *Augustea Impb Et Salvataggi* v. *Mitsubishi Corp.*, 126 F. 3d 95, 98 (CA2 1997) (similar holding with respect to a request that the parties arbitrate in a different location). As one of those courts explained, "[p]ursuant to the plain meaning of th[e] statute . . . a party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Id.*, at 99. And Lamps Plus' characterization of the District Court's order compelling arbitration as an "effectiv[e] den[ial]" of Lamps Plus' motion "does not make it so." *Blue Cross Blue Shield*, *supra*, at 637.

Consequently, I would hold that we lack jurisdiction over this case. But because the Court accepts jurisdiction and decides the substantive legal question before us, I shall do the same. And in respect to that question I agree with JUSTICE GINSBURG and JUSTICE KAGAN, and I join their dissents.

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JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE GINSBURG's dissent in full and Part II of JUSTICE KAGAN's dissent.[1] This Court went wrong years ago in concluding that a "shift from bilateral arbitration to class-action arbitration" imposes such "fundamental changes," *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559

[1] I am not persuaded at this point that the Court of Appeals lacked jurisdiction over this case, and for that reason I do not join JUSTICE BREYER's dissenting opinion. Nevertheless, I believe that JUSTICE BREYER's opinion raises weighty issues that are worthy of further consideration if raised in the appropriate circumstances in the lower federal courts.

U. S. 662, 686 (2010), that class-action arbitration "is not arbitration as envisioned by the" Federal Arbitration Act (FAA), *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 351 (2011). See, *e. g.*, *id.*, at 362–365 (BREYER, J., dissenting). A class action is simply "a procedural device" that allows multiple plaintiffs to aggregate their claims, 1 W. Rubenstein, Newberg on Class Actions § 1:1 (5th ed. 2011) (emphasis deleted), "[f]or convenience . . . and to prevent a failure of justice," *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363 (1921). Where, as here, an employment agreement provides for arbitration as a forum for all disputes relating to a person's employment and the rules of that forum allow for class actions, an employee who signs an arbitration agreement should not be expected to realize that she is giving up access to that procedural device.

In any event, as JUSTICE KAGAN explains, the employment contract that Frank Varela signed went further. It states that "'any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration.'" *Post*, at 206 (dissenting opinion) (quoting App. to Pet. for Cert. 24a). It adds that Varela and Lamps Plus "consent to the resolution by arbitration of all claims that may hereafter arise in connection with [Varela's] employment." *Id.*, at 24a–25a. And it provides for arbitration "'in accordance with'" the rules of the arbitral forum, which in turn allow for class arbitration. *Post*, at 207 (opinion of KAGAN, J.) (citing App. to Pet. for Cert. 25a–26a). That is enough to persuade me that the contract was at least ambiguous as to whether Varela in fact agreed that no class-action procedures would be available in arbitration if he and his co-workers all suffered the same harm "relating to" and "in connection with" their "employment." See *id.*, at 24a–25a. And the court below was correct to turn to state law to resolve the ambiguity.

The Court today reads the FAA to pre-empt the neutral principle of state contract law on which the court below re-

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lied. I cannot agree. I also note that the majority reaches its holding without actually agreeing that the contract is ambiguous. See *ante*, at 182 ("[W]e defer to the Ninth Circuit's interpretation and application of state law"). The concurrence, meanwhile, offers reasons to conclude that the contract unambiguously precludes class arbitration, see *ante*, at 190–191, and n. (opinion of THOMAS, J.), which would avoid the need to displace state law at all.[2] This Court normally acts with great solicitude when it comes to the possible preemption of state law, see, *e. g.*, *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996), but the majority today invades California contract law without pausing to address whether its incursion is necessary. Such haste is as ill advised as the new federal common law of arbitration contracts it has begotten.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOTOMAYOR joins as to Part II, dissenting.

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The Federal Arbitration Act (FAA or Act) requires courts to enforce arbitration agreements according to their terms. See *ante*, at 183. But the Act does not federalize basic contract law. Under the FAA, state law governs the interpretation of arbitration agreements, so long as that law treats other types of contracts in the same way. See *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. 47, 54 (2015). That well-established principle ought to resolve this case against Lamps Plus's request for individual arbitration. In my view, the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a classwide basis. But even if the Court is right to view the agreement as am-

[2] The majority notes that I criticize it for not checking for such an off-ramp while being unable to take one myself. See *ante*, at 183, n. 3. But the majority never suggests that it shares my rationale as to why the contract is ambiguous. In other words, the reasons that I reach the issue that the majority decides say nothing about whether the majority would get there itself, short of deferring to the lower federal court.

biguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here. See *Sandquist* v. *Lebo Automotive, Inc.*, 1 Cal. 5th 233, 247, 376 P. 3d 506, 514 (2016). The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration. That holding has no basis in the Act—or in any of our decisions relating to it (including the heavily relied-on *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 686 (2010)). Today's opinion is rooted instead in the majority's belief that class arbitration "undermine[s] the central benefits of arbitration itself." *Ante,* at 186. But that policy view—of a piece with the majority's ideas about class litigation—cannot justify displacing generally applicable state law about how to interpret ambiguous contracts. I respectfully dissent.

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I

From its very beginning, the arbitration agreement between Lamps Plus and Frank Varela announces its comprehensive scope. The first sentence states: "[T]he parties agree that any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration." App. to Pet. for Cert. 24a. The phrase "any and all disputes, claims or controversies" encompasses both their individual and their class variants—just as any other general category (*e. g.*, any and all chairs) includes all particular types (*e. g.*, desk and reclining). So Varela's class action (which arose out of or related to his employment) was a "dispute, claim or controversy" that belonged in arbitration.

The next paragraph continues in the same vein, by describing what Varela gave up by signing the agreement. "[A]rbitration," the agreement says, "shall be in lieu of any and all lawsuits or other civil legal proceedings relating to

my employment." *Ibid.*; see *ibid.* (similarly waiving the right "to file a lawsuit or other civil action or proceeding"). That is the language of forum selection: Any and all actions (both individual and class) that I could once have brought in court, I am agreeing now to bring in arbitration. The provision carries no hint of consent to surrender altogether—in arbitration as well as court—the ability to bring a class proceeding.

Further on, the remedial and procedural terms of the agreement support reading it to authorize class arbitration. The arbitrator, according to the contract, may "award any remedy allowed by applicable law." *Id.*, at 26a. That sweeping provision easily encompasses classwide relief when the "any and all disputes" that the contract's first sentence places in arbitration call for such remedies.[1] And under the agreement, the arbitration shall be conducted "in accordance with" the rules of either of two designated arbitration providers—both of which furnish rules for arbitrators to conduct class proceedings. *Id.*, at 25a–26a; see, *e. g.*, American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

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Even the section Lamps Plus cites in arguing that the agreement bars class arbitration instead points to the opposite conclusion. In describing what the agreement covers, one provision states: "The Company and I mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present or future that I may have against the Company." App. to Pet. for Cert. 24a; see *id.*, at 24a–25a

[1] In discussing another arbitration provision, this Court identically reasoned: "[I]t would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 61–62, n. 7 (1995) (internal quotation marks omitted). Here, that means sending to arbitration (among other things) class disputes seeking class relief.

("Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment"). Lamps Plus (along with the concurrence, see *ante*, at 190–191 (opinion of THOMAS, J.)) highlights "th[e] repeated use of singular personal pronouns" there, contending that it is incompatible with a form of arbitration that also involves other parties' claims. Brief for Petitioners 17. But the use of the first person singular merely reflects that the agreement is bilateral in nature—between Varela and Lamps Plus. Those pronouns do not resolve whether one of those parties ("I") can bring to arbitration class disputes, as well as individual disputes, relating to his employment. The part of the quoted section addressing that question is instead the phrase "all claims or controversies." And that phrase supplies the same answer as the agreement's other provisions. For it too is broad enough to cover both individual and class actions—the ones Varela brings alone and the ones he shares with co-workers.[2]

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II

Suppose, though, you think that my view of the agreement goes too far. Maybe you aren't sure whether the phrase

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[2] An additional semantic point that Lamps Plus makes essentially concedes my reading of the agreement. At oral argument, Lamps Plus acknowledged that the contract would authorize class arbitration if it provided that Varela could bring to the arbitral forum any "lawsuits," rather than any "claims," he had or could have brought against the company. Tr. of Oral Arg. 31–32. The idea is apparently that suits can be classwide while claims must be personal. But even assuming (without accepting) that is so, the agreement never speaks only of "claims." Even when that word appears alone (rather than alongside "disputes" or "controversies"), it in fact functions as a defined term meaning "claims or controversies." See App. to Pet. for Cert. 24a (referring to "all claims or controversies ('claims')"). And if lawsuits are not necessarily personal (as Lamps Plus admits), then neither are controversies. So by Lamps Plus's own reasoning, Varela should be able to bring to arbitration all controversies (including classwide ones) he had or could have brought to court.

"any and all disputes, claims or controversies" must be read to include *class* "disputes, claims or controversies." Or maybe you wonder whether the surrounding "I" and "my" references limit that phrase's scope, rather than merely referring to one of the contract's signatories. In short, you can see reasonable arguments on both sides of the interpretive dispute—for allowing, but also for barring, class arbitration. You are then in the majority's position, "accept[ing]" the arbitration agreement as "ambiguous." *Ante*, at 182. What should follow?

Under California law (which applies unless preempted) the answer is clear: The agreement must be read to authorize class arbitration. That is because California—like every other State in the country—applies a default rule construing "ambiguities" in contracts "against their drafters." *Sandquist*, 1 Cal. 5th, at 247, 376 P. 3d, at 514; see Cal. Civ. Code Ann. §1654 (West 2011); see also Brief for Contract Law Scholars as *Amici Curiae* 10–12, and n. 4 (listing decisions from all 50 States applying that rule). This anti-drafter canon—which "applies with peculiar force" to form contracts like Lamps Plus's—promotes clarity in contracting by resolving ambiguities against the party who held the pen. *Sandquist*, 1 Cal. 5th, at 248, 376 P. 3d, at 514 (quoting *Graham* v. *Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819, n. 16, 623 P. 2d 165, 172, n. 16 (1981)); see Ayres & Gertner, Filling Gaps in Incomplete Contracts, 99 Yale L. J. 87, 91, 105, n. 80 (1989). And the rule makes quick work of interpreting the arbitration agreement here. Lamps Plus drafted the agreement. It therefore had the opportunity to insert language expressly barring class arbitration if that was what it wanted. It did not do so. It instead (at best) left an ambiguity about the availability of class arbitration. So California law holds that Lamps Plus cannot now claim the benefit of the doubt as to the agreement's meaning. Even the majority does not dispute that point. See *ante*, at 182, 186.

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And contrary to the rest of the majority's opinion,[3] the FAA contemplates that such a state contract rule will control the interpretation of arbitration agreements. Under the FAA, courts must "enforce arbitration agreements according to their terms." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 506 (2018) (internal quotation marks omitted); see 9 U. S. C. § 4 (requiring that "arbitration proceed in the manner provided for in such agreement"). But the construction of those contractual terms (save for in limited circumstances, addressed below) is "a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989). The Court has made that crucial point many times. Nothing in the FAA (as contrasted to today's majority opinion) "purports to alter background principles of state contract law regarding" the scope or content of agreements. *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009). Or again: When ruling on an arbitration agreement's meaning, courts "should apply ordinary state-law principles." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995). Or yet again: The interpretation of such an agreement is "a matter of state law to which we defer." *DIRECTV, Inc.*, 577 U. S., at 54. In short, the FAA does not federalize contract law.

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Except when state contract law discriminates against arbitration agreements. As this Court has explained, the FAA came about because courts had shown themselves "unduly hostile to arbitration." *Epic Systems*, 584 U. S., at 505. To remedy that problem, Congress built an "equal-treatment principle" into the Act, requiring courts to "place arbitration agreements on an equal footing with other contracts." *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. 246, 248 (2017); *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339 (2011) (internal quotation marks omitted); see 9 U. S. C. § 2 (making

[3] I say "the majority's," but although five Justices have joined today's opinion, only four embrace its reasoning. See n. 8, *infra*.

arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). So any state rule treating arbitration agreements worse than other contracts "stand[s] as an obstacle" to achieving the Act's purposes—and is preempted. *Concepcion*, 563 U. S., at 343. That means the FAA displaces any state rule discriminating on its face against arbitration. See *id.*, at 341. And the Act likewise preempts any more subtle law "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 581 U. S., at 251. What matters, as this Court reiterated last Term, is whether the state law in question "target[s]" arbitration agreements, blatantly or covertly, for substandard treatment. *Epic Systems*, 584 U. S., at 508.[4] When the law does so, it cannot operate; when, conversely, it treats arbitration agreements the same as all other contracts, the FAA leaves it alone.

Here, California's anti-drafter rule is as even-handed as contract rules come. It does not apply only to arbitration contracts. Nor does it apply (as the rule we rejected in *Concepcion* did) only a tad more broadly to "dispute-resolution contracts," pertaining to both arbitration and litigation. 563 U. S., at 341 (holding that a ban on collective-action waivers in those contracts worked to "disfavor[ ] arbitration"). Instead, the anti-drafter rule, as even the majority admits, applies to every conceivable type of contract—and treats each

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[4] In its many decades of FAA caselaw, the Court has preempted state law in just one other, "narrow" circumstance: Whatever state law might say, courts must find "clear and unmistakable evidence" before deciding that an agreement authorizes an arbitrator to decide a so-called "question of arbitrability." *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion) (internal quotation marks and alterations omitted); *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 569, n. 2 (2013). As the majority acknowledges, that requirement is not at issue here because Varela and Lamps Plus agreed that a judge should decide the availability of class arbitration (even assuming that question is one of arbitrability). See *ante*, at 186, n. 4.

identically to all others. See *Sandquist*, 1 Cal. 5th, at 248, 376 P. 3d, at 514 ("This general principle of contract interpretation applies equally to the construction of arbitration provisions"); *ante*, at 186–187. And contrary to what the majority is left to insist, the rule does not "target arbitration" by "interfer[ing] with [one of its] fundamental attributes"—*i. e.*, its supposed individualized nature. *Ante*, at 188 (internal quotation marks omitted); see *ante*, at 183–186. The anti-drafter rule (again, quite unlike *Concepcion*'s ban on class-action waivers) takes no side—favors no outcome—as between class and individualized dispute resolution. All the anti-drafter rule asks about is who wrote the contract. So if, for example, Varela had drafted the agreement here, the rule would have prevented, rather than permitted, class arbitration.[5] Small wonder, then, that this Court has itself used the anti-drafter canon to interpret an arbitration agreement. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 62 (1995) (construing an ambiguous arbitration agreement against the drafter's interest). In that case (as properly in any other), the rule's through-and-through neutrality made preemption unthinkable.[6]

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So this case should come out Varela's way even if the agreement is ambiguous. To repeat the simple logic applicable here: Under the FAA, state law controls the interpretation of arbitration agreements unless that law discriminates against arbitration; the anti-drafter default rule is subject to

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[5] Similarly, if Lamps Plus, as the agreement's author, had wanted class arbitration (perhaps because that would resolve many related cases at once) and Varela had resisted it (perhaps because he thought his case better than the others), the anti-drafter rule would have prevented, rather than permitted, class arbitration.

[6] Our decision in *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. 47 (2015), also assumed that a court may generally apply a State's anti-drafter rule to arbitration agreements. It was only because the court there applied that rule to an *un*ambiguous contract—in contrast to what the court would have done in a non-arbitration case—that we reversed its decision. See *id.*, at 55, 58.

no such objection; the rule therefore compels this Court to hold that the agreement here authorizes class arbitration. That the majority thinks the contract, as so read, seriously disadvantages Lamps Plus, see *ante*, at 184–185, is of no moment (any more than if state law had instead construed the contract to produce adverse consequences for Varela). The FAA was enacted to protect against judicial hostility toward arbitration agreements. See *supra*, at 210. But the Act provides no warrant for courts to disregard neutral state law in service of ensuring that those agreements give defendants the best terms possible. Or said otherwise: Nothing in the FAA shields a contracting party, operating against the backdrop of impartial state law, from the consequences of its own drafting decisions. How, then, could the majority go so wrong?

Stolt-Nielsen offers the majority no excuse: Far from "control[ling]" this case, *ante*, at 185, that decision addressed a different situation—and explicitly reserved decision of the question here. In *Stolt-Nielsen*, the contracting parties entered into a formal stipulation that "they had not reached any agreement on the issue of class arbitration." 559 U. S., at 673. The case thus involved not the mere absence of express language about class arbitration, but a joint avowal that the parties had never resolved the issue. Facing that oddity, an arbitral panel compelled class arbitration based solely on its "own conception of sound policy." *Id.*, at 675; see *id.*, at 676 ("[T]he panel did [nothing] other than impose its own policy preference"). This Court rejected the panel's decision for that reason, holding that a party need not "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684. But the Court went no further. In particular, it did not resolve cases like this one, where a neutral interpretive rule (even if not an express term) enables an adjudicator to determine a contract's meaning. To the contrary, the Court disclaimed any view on that question. Yes, the Court held, "*a* contrac-

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tual basis" was needed for class arbitration. *Ibid.* (emphasis added). But given the panel's reliance on policy alone, the Court explained that it had "no occasion to decide *what* contractual basis" was required. *Id.*, at 687, n. 10 (emphasis added); see *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 571 (2013) ("We overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures," not because it relied on an inadequate one).

Indeed, parts of *Stolt-Nielsen*—as well as later decisions—indicate that applying the anti-drafter rule to ambiguous language provides a sufficient contractual basis for class arbitration. In *Stolt-Nielsen*, we faulted the arbitrators for failing to inquire whether the relevant law "contain[ed] a default rule" that would construe an arbitration clause "as allowing class arbitration in the absence of express consent." 559 U. S., at 673 (internal quotation marks omitted). We thus implied that such a default rule—like the anti-drafter canon here—can operate to authorize class arbitration when an agreement's language is ambiguous. And that is just how *Concepcion* (the other decision the majority relies on, see *ante*, at 184–185, 187–188) understood *Stolt-Nielsen*'s reasoning. Said *Concepcion*: We held in *Stolt-Nielsen* "that an arbitration panel exceeded its power [by] imposing class procedures based on policy judgments rather than the arbitration agreement itself *or* some background principle of contract law that would affect its interpretation." 563 U. S., at 347 (emphasis added); see *Oxford Health*, 569 U. S., at 571 (similarly noting that *Stolt-Nielsen* criticized the arbitrators for failing to consider whether a "default rule" resolved the class arbitration question (internal quotation marks omitted)). The Court has thus (rightly) viewed the use of default rules as a run-of-the-mill aspect of contract interpretation, which (so long as neutrally applied) can support class arbitration.

And nothing particular to the anti-drafter rule justifies a different conclusion, as the majority elsewhere suggests, see

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ante, at 186–188.[7] That rule, proclaims the majority, reflects "public policy considerations," rather than "help[ing] to interpret the meaning of a term" as understood by the parties. *Ante*, at 187. The majority here notes that some commentators have viewed some equitable factors as supporting the rule, see *ante*, at 186–187—which is no doubt right. But see 11 R. Lord, Williston on Contracts § 30:1, p. 11 (4th ed. 2012) (Williston) (stating that the rule is *not* justified by public interest considerations). But if the majority means to claim—as it must to prove its point—that the anti-drafter rule has no concern with what "the part[ies] *agreed* to," *Stolt-Nielsen*, 559 U. S., at 684, then the majority is flat-out wrong. From an *ex ante* perspective, the rule encourages the drafter to set out its intent in clear contractual language, for the other party then to see and agree to. See Ayres & Gertner, 99 Yale L. J., at 91, 105, n. 80 (stating the modern view); 2 W. Blackstone, Commentaries on the Laws of England 380 (1766) (anticipating that view by 200-plus years). And from an *ex post* perspective, the rule enables an interpreter to resolve any remaining uncertainty in line with the parties' likely expectations. See 11 Williston § 30:1, at 11. Consider this very contract. Lamps Plus, knowing about the anti-drafter rule, still chose *not* to include a term prohib-

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[7] The majority actually sends conflicting signals about the extent to which its holding extends beyond the anti-drafter rule to other background principles that serve to discern the meaning of ambiguous contract language. Many of the majority's statements indicate that any tool for resolving contractual ambiguity is forbidden if it leads to class arbitration. See, *e. g.*, *ante*, at 183 (stating flatly that "an ambiguous agreement [cannot] provide the necessary 'contractual basis' for compelling class arbitration"). But the part of the opinion focusing on the anti-drafter rule suggests that today's holding applies to only a subset of contract default rules—to wit, those (supposedly) sounding in "public policy considerations." See *ante*, at 186–188. On that theory of the decision, courts and arbitrators will have to work out over time which interpretive principles fall within that category. The majority's own flawed analysis of the anti-drafter canon, see *supra*, at 214, and this page, *infra*, at 216, indicates the perils of that undertaking.

iting class arbitration. And Varela, seeing only the language sending "any and all disputes, claims or controversies" to arbitration, had no reason to think class disputes barred. Cf. *ibid.* ("[T]he party addressed will understand ambiguous language in the sense most favorable to itself"). The upshot is that the rule (as this Court recognized in another arbitration case) protects against "unintended" consequences. *Mastrobuono*, 514 U. S., at 63.

And even if that were not so evident, the FAA does not empower a court to halt the operation of such a garden-variety principle of state law. Nothing in the Act's text requires the displacement of state contract rules, as the majority implicitly concedes. See *ante*, at 183. Nor do the Act's purposes, so long as the state rule (as is true here) extends to all contracts alike, without disfavoring arbitration. See *supra*, at 210–211. The idea that the FAA blocks a state rule satisfying that standard because (a court finds) the rule has too much "public policy" in it comes only from the majority's collective mind. That approach disrespects the preeminent role of the States in designing and enforcing contract rules. It discards a universally accepted principle of contract interpretation in favor of unsupported assertions about what the parties must have (or could not possibly have) consented to. It subordinates authoritative state law to (at most) the impalpable emanations of federal policy, impossible to see except in just the right light.[8] For that reason, it would never

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[8] Given this extraordinary displacement of state law—which, as I have shown, no precedent commands, see *supra*, at 213–214—I must admit to not understanding JUSTICE THOMAS's full concurrence in today's opinion. See *ante*, at 191 (expressing "skeptic[ism]" about the majority's reasoning but joining its opinion out of a (misplaced) respect for precedent). I would think the opinion a hard pill to swallow for someone who believes that *any* implied preemption "leads to the illegitimate—and thus, unconstitutional—invalidation of state laws." *Wyeth* v. *Levine*, 555 U. S. 555, 604 (2009) (THOMAS, J., concurring in judgment); see, *e. g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 459 (2005) (THOMAS, J., concurring in judgment in part and dissenting in part) ("[P]re-emption analysis is not a freewheeling judi-

have graced the pages of the U. S. Reports save that this case involves . . . class proceedings.

The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. See *ante*, at 184–185. In that respect, the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions. See, *e. g.*, *Concepcion*, 563 U. S., at 350 (lamenting that class arbitration "greatly increases risks to defendants" by "aggregat[ing] and decid[ing] at once" the "damages allegedly owed to tens of thousands of potential claimants"); *Epic Systems*, 584 U. S., at 508–509 (similarly bemoaning the greater costs and complexity of class proceedings). The opinion likewise has more than a little in common with this Court's efforts to pare back class litigation. See, *e. g.*, *Comcast Corp.* v. *Behrend*, 569 U. S. 27 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 348–360 (2011). In this case, the result is to disregard the actual contract the parties signed. And to dismiss the neutral and commonplace default rule that would construe that contract against the drafting party. No matter what either requires, the majority will prohibit class arbitration. Does that approach remind you of anything? It should. Here (again) is *Stolt-Nielsen* as *Concepcion* described it: The panel exceeded its authority by "imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." 563 U. S., at 347; see *supra*, at 214. Substitute "foreclosing" for "imposing" and that is what the Court today has done. It should instead—as the FAA contemplates—have left the parties' agreement, as construed by state law, alone.

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cial inquiry into whether a state statute is in tension with federal objectives" (internal quotation marks and alteration omitted)).

Syllabus

THACKER ET UX. *v.* TENNESSEE VALLEY AUTHORITY

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

No. 17–1201. Argued January 14, 2019—Decided April 29, 2019

The Tennessee Valley Authority (TVA), a Government-owned corporation, provides electric power to millions of Americans. In creating the TVA, Congress decided that the corporation could "sue and be sued in its corporate name," 16 U. S. C. § 831c(b), thus waiving at least some of the sovereign immunity from suit that it would have enjoyed as a Federal Government entity. Congress subsequently waived immunity from tort suits involving agencies across the Government in the Federal Tort Claims Act (FTCA), but it carved out an exception for claims based on a federal employee's performance of a "discretionary function." 28 U. S. C. § 2680(a). Congress specifically excluded from the FTCA's provisions—including the discretionary function exception—"[a]ny claim arising from the activities of the [TVA]." § 2680(*l*).

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In this case, TVA employees were raising a downed power line that was partially submerged in the Tennessee River when petitioner Gary Thacker drove his boat into the area at high speed. Thacker's boat collided with the power line, seriously injuring him and killing his passenger. He sued for negligence. The TVA moved to dismiss, claiming sovereign immunity, and the District Court granted the motion. Affirming, the Eleventh Circuit used the same test it applies when evaluating whether the Government is immune from suit under the discretionary function exception to the FTCA, and it held that Thacker's suit was foreclosed because the challenged actions were "a matter of choice."

Held:

1. The waiver of immunity in the TVA's sue-and-be-sued clause is not subject to a discretionary function exception of the kind in the FTCA. By the terms of the Tennessee Valley Authority Act of 1933, the TVA's sue-and-be-sued clause contains no exception for suits based on discretionary functions. Nor does the FTCA's discretionary function exception apply to the TVA. See 28 U. S. C. § 2680(*l*). But this Court recognized in *Federal Housing Administration* v. *Burr*, 309 U. S. 242, that a sue-and-be-sued clause might be subject to an "implied restriction," *id.*, at 245. In particular, a court should recognize such a restriction if the type of suit at issue is "not consistent with the statutory or constitutional scheme" or the restriction is "necessary to avoid grave interfer-

ence with the performance of a governmental function." *Ibid.* The Government tries to use the framework of *Burr* to argue that this Court should imply an FTCA-like limit on the TVA's sue-and-be-sued clause for all suits challenging discretionary functions because those suits would conflict with separation-of-powers principles and interfere with important governmental functions. At the outset, Congress made a considered decision *not* to apply the FTCA to the TVA, and the Government is effectively asking this Court to negate that legislative choice. In any event, the Government errs in arguing that waiving the TVA's immunity from suits based on discretionary functions would offend the separation of powers. And the Government overreaches when it says that all suits based on the TVA's discretionary conduct would interfere with governmental functions. The discretionary acts of hybrid entities like the TVA may be commercial in nature, and a suit challenging a commercial act will not interfere with governmental functions. *Ibid.* Pp. 223–228.

2. The courts below, which wrongly relied on the discretionary function exception, should have the first chance to address the issues this Court finds relevant in deciding whether this suit may go forward. To determine if the TVA has immunity, the court on remand must first decide whether the conduct alleged to be negligent is governmental or commercial in nature. If it is commercial, the TVA cannot invoke sovereign immunity. If it is governmental, the court might decide that an implied limitation on the clause bars the suit, but only if it finds that prohibiting the "type[ ] of suit [at issue] is necessary to avoid grave interference" with that function's performance. *Burr*, 309 U. S., at 245. Pp. 228–229.

868 F. 3d 979, reversed and remanded.

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

Franklin Taylor Rouse argued the cause for petitioners. With him on the briefs was *Craig N. Rosler.*

Ann O'Connell Adams argued the cause for respondent. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Sherry A. Quirk*, and *David D. Ayliffe.*

JUSTICE KAGAN delivered the opinion of the Court.

Federal law provides that the Tennessee Valley Authority (TVA), a Government-owned corporation supplying electric

power to millions of Americans, "[m]ay sue and be sued in its corporate name." Tennessee Valley Authority Act of 1933 (TVA Act), 48 Stat. 60, 16 U. S. C. § 831c(b). That provision serves to waive sovereign immunity from suit. Today, we consider how far the waiver goes. We reject the view, adopted below and pressed by the Government, that the TVA remains immune from all tort suits arising from its performance of so-called discretionary functions. The TVA's sue-and-be-sued clause is broad and contains no such limit. Under the clause—and consistent with our precedents construing similar ones—the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties. We remand this case for consideration of whether that limited immunity could apply here.

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I

Congress created the TVA—a "wholly owned public corporation of the United States"—in the throes of the Great Depression to promote the Tennessee Valley's economic development. *TVA* v. *Hill*, 437 U. S. 153, 157 (1978). In its early decades, the TVA focused on reforesting the countryside, improving farmers' fertilization practices, and building dams on the Tennessee River. See Brief for Respondent 3. The corporation also soon began constructing new power plants for the region. And over the years, as it completed other projects, the TVA devoted more and more of its efforts to producing and selling electric power. Today, the TVA operates around 60 power plants and provides electricity to more than nine million people in seven States. See *id.*, at 3–4. The rates it charges (along with the bonds it issues) bring in over $10 billion in annual revenues, making federal appropriations unnecessary. See *ibid.*; GAO, FY 2018 Financial Report of the United States Government 53 (GAO–19–294R, 2019).

As even that short description may suggest, the TVA is something of a hybrid, combining traditionally governmental functions with typically commercial ones. On the one hand, the TVA possesses powers and responsibilities reserved to sovereign actors. It may, for example, "exercise the right of eminent domain" and "condemn all property" necessary to carry out its goals. 16 U. S. C. §§ 831c(h), (i). Similarly, it may appoint employees as "law enforcement agents" with powers to investigate crimes and make arrests. § 831c–3(a); see § 831c–3(b)(2). But on the other hand, much of what the TVA does could be done—no, *is* done routinely—by non-governmental parties. Just as the TVA produces and sells electricity in its region, privately owned power companies (*e. g.*, Con Edison, Dominion Energy) do so in theirs. As to those commonplace commercial functions, the emphasis in the oft-used label "public corporation" rests heavily on the latter word. *Hill*, 437 U. S., at 157.

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In establishing this mixed entity, Congress decided (as it had for similar government businesses) that the TVA could "sue and be sued in its corporate name." § 831c(b); see, *e. g.*, Reconstruction Finance Corporation Act, § 4, 47 Stat. 6; Federal Home Loan Bank Act, § 12, 47 Stat. 735. Without such a clause, the TVA (as an entity of the Federal Government) would have enjoyed sovereign immunity from suit. See *Loeffler* v. *Frank*, 486 U. S. 549, 554 (1988). By instead providing that the TVA could "be sued," Congress waived at least some of the corporation's immunity. (Just how much is the question here.) Slightly more than a decade after creating the TVA, Congress enacted the Federal Tort Claims Act of 1946 (FTCA), 28 U. S. C. §§ 1346(b), 2671 *et seq.*, to waive immunity from tort suits involving agencies across the Government. See § 1346(b)(1) (waiving immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government"). That statute carved out an exception for claims based on a federal employee's performance of a "discretionary function." § 2680(a). But Congress specifically excluded from all the

FTCA's provisions—including the discretionary function exception—"[a]ny claim arising from the activities of the [TVA]." §2680(*l*).

This case involves such a claim. See App. 22–33 (Complaint). One summer day, TVA employees embarked on work to replace a power line over the Tennessee River. When a cable they were using failed, the power line fell into the water. The TVA informed the Coast Guard, which announced that it was closing part of the river; and the TVA itself positioned two patrol boats near the downed line. But several hours later, just as the TVA workers began to raise the line, petitioner Gary Thacker drove his boat into the area at high speed. The boat and line collided, seriously injuring Thacker and killing a passenger. Thacker sued for negligence, alleging that the TVA had failed to "exercise reasonable care" in "assembl[ing] and install[ing] power lines" and in "warning boaters" like him "of the hazards it created." *Id.*, at 31.

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The TVA moved to dismiss the suit, claiming sovereign immunity. The District Court granted the motion. It reasoned that the TVA, no less than other government agencies, is entitled to immunity from any suit based on an employee's exercise of discretionary functions. See 188 F. Supp. 3d 1243, 1245 (ND Ala. 2016). And it thought that the TVA's actions surrounding the boating accident were discretionary because "they involve[d] some judgment and choice." *Ibid.* The Court of Appeals for the Eleventh Circuit affirmed on the same ground. According to the circuit court, the TVA has immunity for discretionary functions even when they are part of the "TVA's commercial, power-generating activities." 868 F. 3d 979, 981 (2017) (*per curiam*). In deciding whether a suit implicates those functions, the court explained that it "use[s] the same test that applies when the government invokes the discretionary-function exception to the [FTCA]." *Id.*, at 982. And that test, the court agreed,

foreclosed Thacker's suit because the challenged actions were "a matter of choice." *Ibid.* (internal quotation marks omitted).

We granted certiorari to decide whether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary function exception, of the kind in the FTCA. 585 U. S. 1057 (2018). We hold it is not.

II

Nothing in the statute establishing the TVA (again, the TVA Act for short) expressly recognizes immunity for discretionary functions. As noted above, that law provides simply that the TVA "[m]ay sue and be sued." 16 U. S. C. § 831c(b); see *supra*, at 221. Such a sue-and-be-sued clause serves to waive sovereign immunity otherwise belonging to an agency of the Federal Government. See *Loeffler*, 486 U. S., at 554. By the TVA Act's terms, that waiver is subject to "[e]xcept[ions]" as "specifically provided in" the statute itself. § 831c. But the TVA Act contains no exceptions relevant to tort claims, let alone one turning on whether the challenged conduct is discretionary.

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Nor does the FTCA's exception for discretionary functions apply to the TVA. As described earlier, see *supra*, at 221, the FTCA retained the Federal Government's immunity from tort suits challenging discretionary conduct, even while allowing other tort claims to go forward. See 28 U. S. C. §§ 1346(b), 2680(a); *United States* v. *Gaubert*, 499 U. S. 315, 322–325 (1991) (describing the discretionary function exception's scope). But Congress made clear that the FTCA does "not apply to[ ] [a]ny claim arising from the activities of the [TVA]." § 2680(*l*). That means the FTCA's discretionary function provision has no relevance to this case. Even the Government concedes as much. It acknowledges that the FTCA's discretionary function exception "does not govern [Thacker's] suit." Brief for Respondent 15. Rather, it

says, the TVA Act's sue-and-be-sued clause does so. See *id.*, at 6. And that is the very clause we have just described as containing no express exception for discretionary functions.

But that is not quite the end of the story because in *Federal Housing Administration* v. *Burr*, 309 U. S. 242 (1940), this Court recognized that a sue-and-be-sued clause might contain "implied exceptions." *Id.*, at 245. The Court in that case permitted a suit to proceed against a government entity (providing mortgage insurance) whose organic statute had a sue-and-be-sued clause much like the TVA Act's. And the Court made clear that in green-lighting the suit, it was doing what courts normally should. Sue-and-be-sued clauses, the Court explained, "should be liberally construed." *Ibid.*; see *FDIC* v. *Meyer*, 510 U. S. 471, 475 (1994) (similarly calling such clauses "broad"). Those words "in their usual and ordinary sense," the Court noted, "embrace all civil process incident to the commencement or continuance of legal proceedings." *Burr*, 309 U. S., at 245–246. And Congress generally "intend[s] the full consequences of what it sa[ys]"—even if "inconvenient, costly, and inefficient." *Id.*, at 249 (quotation modified). But not quite always, the Court continued. And when not—when Congress meant to use the words "sue and be sued" in a more "narrow sense"—a court should recognize "an implied restriction." *Id.*, at 245. In particular, *Burr* stated, a court should take that route if one of the following circumstances is "clearly shown": either the "type[ ] of suit[ ]" at issue is "not consistent with the statutory or constitutional scheme" or the restriction is "necessary to avoid grave interference with the performance of a governmental function." *Ibid.*

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Although the courts below never considered *Burr*, the Government tries to use its framework to defend their decisions. See Brief for Respondent 17–40. According to the Government, we should establish a limit on the TVA's sue-and-be-sued clause—like the one in the FTCA—for all suits challenging discretionary functions. That is for two reasons, tracking *Burr*'s statement of when to recognize an

"implied exception[ ]" to a sue-and-be-sued clause. 309 U. S., at 245. First, the Government argues that allowing those suits would conflict with the "constitutional scheme"—more precisely, with "separation-of-powers principles"—by subjecting the TVA's discretionary conduct to "judicial second-guessing." Brief for Respondent 19, 21 (internal quotation marks omitted). Second, the Government maintains that permitting those suits would necessarily "interfere[ ] with important governmental functions." *Id.*, at 36; see *id.*, at 39–40; Tr. of Oral Arg. 39–41. We disagree.

At the outset, we balk at using *Burr* to provide a government entity excluded from the FTCA with a replica of that statute's discretionary function exception. Congress made a considered decision *not* to apply the FTCA to the TVA (even as Congress applied that legislation to some other public corporations, see 28 U. S. C. § 2679(a)). See *supra*, at 221–222. The Government effectively asks us to negate that legislative choice. Or otherwise put, it asks us to let the FTCA in through the back door, when Congress has locked the front one. We have once before rejected such a maneuver. In *FDIC* v. *Meyer*, a plaintiff brought a constitutional tort claim against a government agency with another broad sue-and-be-sued clause. The agency claimed immunity, stressing that the claim would have fallen outside the FTCA's immunity waiver (which extends only to conventional torts). We dismissed the argument. "In essence," we observed, the "FDIC asks us to engraft" a part of the FTCA "onto [the agency's] sue-and-be-sued clause." 510 U. S., at 480. But that would mean doing what Congress had not. See *id.*, at 483. And so too here, if we were to bestow the FTCA's discretionary function exception on the TVA through the conduit of *Burr*. Indeed, the Government's proposal would make the TVA's tort liability largely coextensive with that of all the agencies the FTCA governs. See Tr. of Oral Arg. 33–34. Far from acting to achieve such parity, Congress did everything possible to avoid it.

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In any event, the Government is wrong to think that waiving the TVA's immunity from suits based on discretionary functions would offend the separation of powers. As this Court explained in *Burr*, the scope of immunity that federal corporations enjoy is up to Congress. That body "has full power to endow [such an entity] with the government's immunity from suit." 309 U. S., at 244. And equally, it has full power to "waive [that] immunity" and "subject [the entity] to the judicial process" to whatever extent it wishes. *Ibid.* When Congress takes the latter route—even when it goes so far as to waive the corporation's immunity for discretionary functions—its action raises no separation of powers problems. The right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment. Indeed, the Government itself conceded at oral argument that Congress, when creating a public corporation, may constitutionally waive its "immunity [for] discretionary functions." Tr. of Oral Arg. 37. But once that is acknowledged, the Government's argument from "separation-of-powers principles" collapses. Brief for Respondent 19. Those principles can offer no reason to limit a statutory waiver that even without any emendation complies with the constitutional scheme.

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Finally, the Government overreaches when it says that all suits based on the TVA's discretionary conduct will "grave[ly] interfere[ ]" with "governmental function[s]." *Burr*, 309 U. S., at 245. That is so, at the least, because the discretionary acts of hybrid entities like the TVA may be not governmental but commercial in nature. And a suit challenging a commercial act will not "grave[ly]"—or, indeed, at all—interfere with the "governmental functions" *Burr* cared about protecting. The Government contests that point, arguing that this Court has not meant to distinguish between the governmental and the commercial in construing sue-and-be-sued clauses. See Brief for Respondent 39–40. But

both *Burr* and later decisions do so explicitly. *Burr* took as its "premise" that an agency "launched [with such a clause] into the commercial world" and "authorize[d] to engage" in "business transactions with the public" should have the same "amenab[ility] to judicial process [as] a private enterprise under like circumstances." 309 U. S., at 245. *Meyer* also made clear that such an agency "could not escape the liability a private enterprise would face in similar circumstances." 510 U. S., at 482; see *ibid.* ("[T]he liability of a private enterprise [is] a *floor* below which the agency's liability [may] not fall"). And twice the Court held that the liability of the Postal Service (another sue-and-be-sued agency) should be "similar[ ] to [that of] other self-sustaining commercial ventures." *Franchise Tax Bd. of Cal.* v. *Postal Service*, 467 U. S. 512, 525 (1984); see *Loeffler*, 486 U. S., at 556. The point of those decisions, contra the Government, is that (barring special constitutional or statutory issues not present here) suits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's *governmental* activity may run into an implied limit on its sue-and-be-sued clause.

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Burr and its progeny thus require a far more refined analysis than the Government offers here. The reasons those decisions give to recognize a restriction on a sue-and-be-sued clause do not justify the wholesale incorporation of the discretionary function exception. As explained above, the "constitutional scheme" has nothing to say about lawsuits challenging a public corporation's discretionary activity—except to leave their fate to Congress. *Burr*, 309 U. S., at 245; see *supra*, at 226. For its part, Congress has not said in enacting sue-and-be-sued clauses that it wants to prohibit all such suits—quite the contrary. And no concern for "governmental functions" can immunize discretionary activities that are commercial in kind. *Burr*, 309 U. S., at 245; see *supra*, at 226. When the TVA or similar body operates in the marketplace as private companies do, it is as liable as they are

for choices and judgments. The possibility of immunity arises only when a suit challenges governmental activities—the kinds of functions private parties typically do not perform. And even then, an entity with a sue-and-be-sued clause may receive immunity only if it is "clearly shown" that prohibiting the "type[ ] of suit[ ]" at issue "is necessary to avoid grave interference" with a governmental function's performance. *Burr*, 309 U. S., at 245. That is a high bar. But it is no higher than appropriate given Congress's enactment of so broad an immunity waiver—which demands, as we have held, a "liberal construction." *Ibid.* (quotation modified).

III

All that remains is to decide this case in accord with what we have said so far. But as we often note at this point, "we are a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). In wrongly relying on the discretionary function exception, the courts below never addressed the issues we have found relevant in deciding whether this suit may go forward. Those courts should have the first chance to do so, as guided by the principles set out above and a few last remarks about applying them here.

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As described earlier, the TVA sometimes resembles a government actor, sometimes a commercial one. See *supra*, at 221. Consider a few diverse examples. When the TVA exercises the power of eminent domain, taking landowners' property for public purposes, no one would confuse it for a private company. So too when the TVA exercises its law enforcement powers to arrest individuals. But in other operations—and over the years, a growing number—the TVA acts like any other company producing and supplying electric power. It is an accident of history, not a difference in function, that explains why most Tennesseans get their electricity from a public enterprise and most Virginians get theirs from a private one. Whatever their ownership struc-

tures, the two companies do basically the same things to deliver power to customers.

So to determine if the TVA has immunity here, the court on remand must first decide whether the conduct alleged to be negligent is governmental or commercial in nature. For the reasons given above, if the conduct is commercial—the kind of thing any power company might do—the TVA cannot invoke sovereign immunity. In that event, the TVA's sue-and-be-sued clause renders it liable to the same extent as a private party. Only if the conduct at issue is governmental might the court decide that an implied limit on the clause bars the suit. But even assuming governmental activity, the court must find that prohibiting the "type[ ] of suit[ ]" at issue "is necessary to avoid grave interference" with that function's performance. *Burr*, 309 U. S., at 245. Unless it is, Congress's express statement that the TVA may "be sued" continues to demand that this suit go forward.

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

It is so ordered.

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Syllabus

FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 17–1299. Argued January 9, 2019—Decided May 13, 2019

Respondent Hyatt sued petitioner Franchise Tax Board of California (Board) in Nevada state court for alleged torts committed during a tax audit. The Nevada Supreme Court rejected the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California law and immunize the Board from liability. The court held instead that general principles of comity entitled the Board only to the same immunity that Nevada law afforded Nevada agencies. This Court affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law. On remand, the Nevada Supreme Court declined to apply a cap on tort liability applicable to Nevada state agencies. This Court reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. The Court was equally divided, however, on whether to overrule *Nevada* v. *Hall*, 440 U. S. 410, which held that the Constitution does not bar suits brought by an individual against a State in the courts of another State. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with Nevada's statutory cap. The Board sought certiorari a third time, raising only the question whether *Nevada* v. *Hall* should be overruled.

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Held: *Nevada* v. *Hall* is overruled; States retain their sovereign immunity from private suits brought in courts of other States. Pp. 236–249.

(a) The *Hall* majority held that nothing "implicit in the Constitution" requires States to adhere to the sovereign immunity that prevailed at the time of the founding. 440 U. S., at 417–418, 424–427. The Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.*, at 419. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do. Pp. 236–237.

(b) *Hall*'s determination misreads the historical record and misapprehends the constitutional design created by the Framers. Although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails the States' ability, as sover-

eigns, to decline to recognize each other's immunity in their own courts. Pp. 237–248.

(1) At the time of the founding, it was well settled that States were immune from suit both under the common law and under the law of nations. The States retained these aspects of sovereignty, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U. S. 706, 713. Pp. 237–241.

(2) Article III abrogated certain aspects of the States' traditional immunity by providing a neutral federal forum in which the States agreed to be amenable to suits brought by other States. And in ratifying the Constitution, the States similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. When this Court held in *Chisholm* v. *Georgia*, 2 Dall. 419, that Article III extended the federal judicial power over controversies between a State and citizens of another State, Congress and the States acted swiftly to draft and ratify the Eleventh Amendment, which confirms that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted," *Hans* v. *Louisiana*, 134 U. S. 1, 18. The "natural inference" from the Amendment's speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, *supra*, at 723–724. This view of the States' sovereign immunity accorded with the understanding of the Constitution by its leading advocates, including Hamilton, Madison, and Marshall, when it was ratified. Pp. 241–244.

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(3) State sovereign immunity in another State's courts is integral to the structure of the Constitution. The problem with Hyatt's argument—that interstate sovereign immunity exists only as a matter of comity and can be disregarded by the forum State—is that the Constitution affirmatively altered the relationships between the States so that they no longer relate to each other as true foreign sovereigns. Numerous provisions reflect this reality. Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. And Article IV imposes duties on the States not required by international law. The Constitution also reflects alterations to the States' relationships with each other, confirming that they are no longer fully independent nations free to disregard each other's sovereignty. See *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90. Hyatt's argument is precisely the type of "ahistorical literalism" this Court has rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden*, *supra*, at 730. Moreover, his argument proves too much. Many constitutional doctrines not spelled

out in the Constitution are nevertheless implicit in its structure and supported by historical practice, *e. g.*, judicial review, *Marbury* v. *Madison*, 1 Cranch 137, 176–180. Pp. 244–248.

(c) *Stare decisis* is "'not an inexorable command,'" *Pearson* v. *Callahan*, 555 U. S. 223, 233, and is "at its weakest" when interpreting the Constitution, *Agostini* v. *Felton*, 521 U. S. 203, 235. The Court's precedents identify, as relevant here, four factors to consider: the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 918–919. The first three factors support overruling *Hall*. As to the fourth, case-specific reliance interests are not sufficient to persuade this Court to adhere to an incorrect resolution of an important constitutional question. Pp. 248–249.

133 Nev. 826, 407 P. 3d 717, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and KAVANAUGH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 249.

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Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Paul R. Q. Wolfson*, *Daniel Winik*, *Joshua M. Koppel*, *James Barton*, *William C. Hilson, Jr.*, *Scott W. DePeel*, *Ann Hodges*, *James W. Bradshaw*, *Pat Lundvall*, and *Debbie Leonard*.

Erwin Chemerinsky argued the cause for respondent. With him on the brief were *Donald J. Kula*, *Joel W. Nomkin*, *Mark D. Rosenbaum*, *Alisa Hartz*, and *Paul Hoffman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Kian Hudson* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General of their respective States as follows: *Steve Marshall* of Alabama, *Jahna Lindemuth* of Alaska, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell A. Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota,

JUSTICE THOMAS delivered the opinion of the Court.

This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in *Nevada* v. *Hall*, 440 U. S. 410 (1979).

I

In the early 1990s, respondent Gilbert Hyatt earned substantial income from a technology patent for a computer formed on a single integrated circuit chip. Although Hyatt's claim was later canceled, see *Hyatt* v. *Boone*, 146 F. 3d 1348 (CA Fed. 1998), his royalties in the interim totaled millions of dollars. Prior to receiving the patent, Hyatt had been a long-time resident of California. But in 1991, Hyatt sold his house in California and rented an apartment, registered to vote, obtained insurance, opened a bank account, and acquired a driver's license in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada—which collects no personal income tax, see Nev. Const., Art. 10, §1(9)—as his primary place of residence.

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Jim Hood of Mississippi, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Laxalt* of Nevada, *Gurbir S. Grewal* of New Jersey, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Mark Herring* of Virginia, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for Law Professors by *Benjamin L. Hatch*; and for the Multistate Tax Commission et al. by *Gregory S. Matson*, *Helen Hecht*, and *David Parkhurst*.

Stephen I. Vladeck, *pro se*, and *Lindsay C. Harrison* filed a brief for Professors of Federal Jurisdiction as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for Alan B. Morrison et al. by *Mr. Morrison*, *pro se*; for James C. Giudici by *Mr. Giudici*, *pro se*; and for William Baude et al. by *Stephen E. Sachs*.

Petitioner Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham. Thus, in 1993, the Board launched an audit to determine whether Hyatt underpaid his 1991 and 1992 state income taxes by misrepresenting his residency. In the course of the audit, employees of the Board traveled to Nevada to conduct interviews with Hyatt's estranged family members and shared his personal information with business contacts. In total, the Board sent more than 100 letters and demands for information to third parties. The Board ultimately concluded that Hyatt had not moved to Nevada until April 1992 and owed California more than $10 million in back taxes, interest, and penalties. Hyatt protested the audit before the Board, which upheld the audit after an 11-year administrative proceeding. The appeal of that decision remains pending before the California Office of Tax Appeals.

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In 1998, Hyatt sued the Board in Nevada state court for torts he alleged the agency committed during the audit. After the trial court denied in part the Board's motion for summary judgment, the Board petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal on the ground that the State of California was immune from suit. The Board argued that, under the Full Faith and Credit Clause, Nevada courts must apply California's statute immunizing the Board from liability for all injuries caused by its tax collection. See U. S. Const., Art. IV, § 1; Cal. Govt. Code Ann. § 860.2 (West 1995). The Nevada Supreme Court rejected that argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies—that is, immunity for negligent but not intentional torts. We granted certiorari and unanimously affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the case. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U. S. 488, 498–499 (2003)

(*Hyatt I*). Because the Board did not ask us to overrule *Nevada* v. *Hall*, *supra*, we did not revisit that decision. *Hyatt I*, *supra*, at 497.

On remand, the trial court conducted a 4-month jury trial that culminated in a verdict for Hyatt that, with prejudgment interest and costs, exceeded $490 million. On appeal, the Nevada Supreme Court rejected most of the damages awarded by the lower court, upholding only a $1 million judgment on one of Hyatt's claims and remanding for a new damages trial on another. Although the court recognized that tort liability for Nevada state agencies was capped at $50,000 under state law, it nonetheless held that Nevada public policy precluded it from applying that limitation to the California agency in this case. We again granted certiorari and this time reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 578 U. S. 171, 176–180 (2016) (*Hyatt II*). Although the question was briefed and argued, the Court was equally divided on whether to overrule *Hall* and thus affirmed the jurisdiction of the Nevada Supreme Court. *Hyatt II*, *supra*, at 173. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with the statutory cap for Nevada agencies. 133 Nev. 826, 407 P. 3d 717 (2017).

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We granted, for a third time, the Board's petition for certiorari, 585 U. S. 1029 (2018). The sole question presented is whether *Nevada* v. *Hall* should be overruled.[1]

[1] Hyatt argues that the law-of-the-case doctrine precludes our review of this question, but he failed to raise that nonjurisdictional issue in his brief in opposition. We therefore deem this argument waived. See this Court's Rule 15.2; *Arizona* v. *California*, 460 U. S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"). We also reject Hyatt's argument that the Board waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause.

II

Nevada v. *Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent. We therefore overrule *Hall* and hold that States retain their sovereign immunity from private suits brought in the courts of other States.

A

Hall held that the Constitution does not bar private suits against a State in the courts of another State. 440 U. S., at 416–421. The opinion conceded that States were immune from such actions at the time of the founding, but it nonetheless concluded that nothing "implicit in the Constitution" requires States "to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.*, at 417–418, 424–427. Instead, the Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.*, at 419. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do, meaning that immunity is available only if the forum State "voluntar[ily]" decides "to respect the dignity of the [defendant State] as a matter of comity." *Id.*, at 416; see also *id.*, at 424–427.

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The *Hall* majority was unpersuaded that the Constitution implicitly altered the relationship between the States. In the Court's view, the ratification debates, the Eleventh Amendment, and our sovereign-immunity precedents did not bear on the question because they "concerned questions of federal-court jurisdiction." *Id.*, at 420. The Court also found unpersuasive the fact that the Constitution delineates several limitations on States' authority, such as Article I

powers granted exclusively to Congress and Article IV requirements imposed on States. *Id.*, at 425. Despite acknowledging "that ours is not a union of 50 wholly independent sovereigns," *Hall* inferred from the lack of an express sovereign immunity granted to the States and from the Tenth Amendment that the States retained the power in their own courts to deny immunity to other States. *Ibid.*

Chief Justice Burger, Justice Blackmun, and Justice Rehnquist dissented.

B

Hall's determination that the Constitution does not contemplate sovereign immunity for each State in a sister State's courts misreads the historical record and misapprehends the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." *Id.*, at 433 (Rehnquist, J., dissenting). As Chief Justice Marshall explained, the Founders did not state every postulate on which they formed our Republic—"we must never forget, that it is *a constitution* we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). And although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity.

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1

After independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Declaration of Independence ¶4. Under international law, then, independence "en-

titled" the Colonies "to all the rights and powers of sovereign states." *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209, 212 (1808).

"An integral component" of the States' sovereignty was "their immunity from private suits." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751–752 (2002); see *Alden* v. *Maine*, 527 U. S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . "). This fundamental aspect of the States' "inviolable sovereignty" was well established and widely accepted at the founding. The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); see *Alden*, *supra*, at 715–716 ("[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified"). As Alexander Hamilton explained:

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> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." The Federalist No. 81, at 487 (emphasis deleted).

The Founders believed that both "common law sovereign immunity" and "law-of-nations sovereign immunity" prevented States from being amenable to process in any court without their consent. See Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 581–588 (1994); see also Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1574–1579 (2002). The common-law rule was that "no suit or action can be brought against the king, even

in civil matters, because no court can have jurisdiction over him." 1 W. Blackstone, Commentaries on the Laws of England 235 (1765) (Blackstone). The law-of-nations rule followed from the "perfect equality and absolute independence of sovereigns" under that body of international law. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 137 (1812); see C. Phillipson, Wheaton's Elements of International Law 261 (5th ed. 1916) (recognizing that sovereigns "enjoy equality before international law"); 1 J. Kent, Commentaries on American Law 20 (G. Comstock ed. 1867). According to the founding era's foremost expert on the law of nations, "[i]t does not . . . belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." 2 E. de Vattel, The Law of Nations § 55, p. 155 (J. Chitty ed. 1883). The sovereign is "exemp[t] . . . from all [foreign] jurisdiction." 4 *id.*, § 108, at 486.

The founding generation thus took as given that States could not be haled involuntarily before each other's courts. See Woolhandler, Interstate Sovereign Immunity, 2006 S. Ct. Rev. 249, 254–259. This understanding is perhaps best illustrated by preratification examples. In 1781, a creditor named Simon Nathan tried to recover a debt that Virginia allegedly owed him by attaching some of its property in Philadelphia. James Madison and other Virginia delegates to the Confederation Congress responded by sending a communique to Pennsylvania requesting that its executive branch have the action dismissed. See Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), in 3 The Papers of James Madison 184–185 (W. Hutchinson & W. Rachal eds. 1963). As Madison framed it, the Commonwealth's property could not be attached by process issuing from a court of "any other State in the Union." *Id.*, at 184. To permit otherwise would require Virginia to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." *Ibid.* Pennsylvania Attorney

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General William Bradford intervened, urging the Court of Common Pleas to dismiss the action. See *Nathan* v. *Virginia*, 1 Dall. 77, n. (C. P. Phila. Cty. 1781). According to Bradford, the suit violated international law because "all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction." *Id.*, at 78, n. "[A]ll jurisdiction implies superiority over the party," Bradford argued, "but there could be no superiority" between the States, and thus no jurisdiction, because the States were "perfect[ly] equa[l]" and "entire[ly] independen[t]." *Ibid.* The court agreed and refused to grant Nathan the writ of attachment. *Id.*, at 80.

Similarly, a Pennsylvania Admiralty Court that very same year dismissed a libel action against a South Carolina warship, brought by its crew to recover unpaid wages. The court reasoned that the vessel was owned by a "sovereign independent state." *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (No. 9,697) (1781).

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The Founders were well aware of the international-law immunity principles behind these cases. Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued in the courts of other States. One Federalist, who argued that Article III would waive the States' immunity in federal court, admitted that the waiver was desirable because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." 3 Debates on the Constitution 549 (J. Elliot ed. 1876) (Pendleton) (Elliot's Debates). Two of the most prominent Antifederalists—Federal Farmer and Brutus—disagreed with the Federalists about the desirability of a federal forum in which States could be sued, but did so for the very reason that the States had previously been "subject to no such actions" in any court and were not "oblige[d]" "to answer to an individual in a court of law." Federal Farmer No. 3 (Oct. 10, 1787), in 4 The Founders' Constitution 227 (P. Kurland & R. Lerner eds. 1987). They found it "humiliating and degrading" that

a State might have to answer "the suit of an individual." Brutus No. 13 (Feb. 21, 1788), in *id.*, at 238.

In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations. The Constitution's use of the term "States" reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U. S., at 713.

2

One constitutional provision that abrogated certain aspects of this traditional immunity was Article III, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States. Art. III, § 2; see *Alden*, *supra*, at 755. "The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union." *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 328 (1934). As James Madison explained during the Convention debates, "there can be no impropriety in referring such disputes" between coequal sovereigns to a superior tribunal. Elliot's Debates 532.

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The States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. See *Monaco*, *supra*, at 328; *Federal Maritime Comm'n*, 535 U. S., at 752. "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Monaco*, *supra*, at 329. Given that "all jurisdiction implies superiority of power," Blackstone 235, the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts. See *Federal Maritime Comm'n*, *supra*, at 752.

The Antifederalists worried that Article III went even further by extending the federal judicial power over controversies "between a State and Citizens of another State." They suggested that this provision implicitly waived the States' sovereign immunity against *private* suits in federal courts. But "[t]he leading advocates of the Constitution assured the people in no uncertain terms" that this reading was incorrect. *Alden*, 527 U. S., at 716; see *id.*, at 716–718 (citing arguments by Hamilton, Madison, and John Marshall). According to Madison:

> "[A federal court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." Elliot's Debates 533.

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John Marshall echoed these sentiments:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." *Id.*, at 555 (emphasis in original).

Not long after the founding, however, the Antifederalists' fears were realized. In *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), the Court held that Article III allowed the very suits that the "Madison-Marshall-Hamilton triumvirate" insisted it did not. *Hall*, 440 U. S., at 437 (Rehnquist, J., dissenting). That decision precipitated an immediate "furor" and "up-

roar" across the country. 1 J. Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States 734, 737 (1971); see *id.*, at 734–741. Congress and the States accordingly acted swiftly to remedy the Court's blunder by drafting and ratifying the Eleventh Amendment.[2] See *Edelman* v. *Jordan*, 415 U. S. 651, 660–662 (1974); see also *Federal Maritime Comm'n*, *supra*, at 753 (acknowledging that *Chisholm* was incorrect); *Alden*, *supra*, at 721–722 (same).

The Eleventh Amendment confirmed that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted." *Hans* v. *Louisiana*, 134 U. S. 1, 18 (1890). Although the terms of that Amendment address only "the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision," the "natural inference" from its speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, *supra*, at 723–724. We have often emphasized that "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 146 (1993). In proposing the Amendment, "Congress acted not to change but to restore the original constitutional design." *Alden*, 527 U. S., at 722. The "sovereign immunity of the States," we have said, "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.*, at 713.

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Consistent with this understanding of state sovereign immunity, this Court has held that the Constitution bars suits

[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

against nonconsenting States in a wide range of cases. See, *e. g.*, *Federal Maritime Comm'n*, 535 U. S. 743 (actions by private parties before federal administrative agencies); *Alden*, *supra* (suits by private parties against a State in its own courts); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991) (suits by Indian tribes in federal court); *Monaco*, 292 U. S. 313 (suits by foreign states in federal court); *Ex parte New York*, 256 U. S. 490 (1921) (admiralty suits by private parties in federal court); *Smith* v. *Reeves*, 178 U. S. 436 (1900) (suits by federal corporations in federal court).

3

Despite this historical evidence that interstate sovereign immunity is preserved in the constitutional design, Hyatt insists that such immunity exists only as a "matter of comity" and can be disregarded by the forum State. *Hall*, *supra*, at 416. He reasons that, before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns; thus, the States must retain that power today with respect to each other because "nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states." Brief for Respondent 14. Like the majority in *Hall*, he relies primarily on our early foreign immunity decisions. For instance, he cites *Schooner Exchange* v. *McFaddon*, in which the Court dismissed a libel action against a French warship docked in Philadelphia because, under the law of nations, a sovereign's warships entering the ports of a friendly nation are exempt from the jurisdiction of its courts. 7 *Cranch*, at 145–146. But whether the host nation respects that sovereign immunity, Chief Justice Marshall noted, is for the host nation to decide, for "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*, at 136. Similar reasoning is found in *The Santissima Trinidad*, 7 Wheat. 283, 353 (1822), where Justice Story noted that

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the host nation's consent to provide immunity "may be withdrawn upon notice at any time, without just offence."

The problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional "limitation[s] on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 293 (1980). One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. Numerous provisions reflect this reality.

To begin, Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. Specifically, the States can no longer prevent or remedy departures from customary international law because the Constitution deprives them of the independent power to lay imposts or duties on imports and exports, to enter into treaties or compacts, and to wage war. Compare Art. I, § 10, with Declaration of Independence ¶4 (asserting the power to "levy War, conclude Peace, contract Alliances, [and] establish Commerce"); see *Kansas* v. *Colorado*, 185 U. S. 125, 143 (1902).

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Article IV also imposes duties on the States not required by international law. The Court's Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from "adopt[ing] any policy of hostility to the public Acts" of other States. *Hyatt II*, 578 U. S., at 176 (internal quotation marks omitted); see Art. IV, § 1. States must also afford citizens of each State "all Privileges and Immunities of Citizens in the several States" and honor extradition requests upon "Demand of the executive Authority

of the State" from which the fugitive fled. Art. IV, § 2. Foreign sovereigns cannot demand these kinds of reciprocal responsibilities absent consent or compact. But the Constitution imposes them as part of its transformation of the States from a loose league of friendship into a perpetual Union based on the "fundamental principle of *equal* sovereignty among the States." *Shelby County* v. *Holder*, 570 U. S. 529, 544 (2013) (emphasis in original and internal quotation marks omitted).

The Constitution also reflects implicit alterations to the States' relationships with each other, confirming that they are no longer fully independent nations. See *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90 (1883). For example, States may not supply rules of decision governing "disputes implicating the[ir] conflicting rights." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641 (1981). Thus, no State can apply its own law to interstate disputes over borders, *Cissna* v. *Tennessee*, 246 U. S. 289, 295 (1918), water rights, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938), or the interpretation of interstate compacts, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 278–279 (1959). The States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because the "interstate . . . nature of the controversy makes it inappropriate for state law to control." *Texas Industries*, *supra*, at 641. Some subjects that were decided by pure "political power" before ratification now turn on federal "rules of law." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737 (1838). See Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1322–1331 (1996).

Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between

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sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is "implied as an essential component of federalism." *Hall*, 440 U. S., at 430–431 (Blackmun, J., dissenting).

Hyatt argues that we should find no right to sovereign immunity in another State's courts because no constitutional provision explicitly grants that immunity. But this is precisely the type of "ahistorical literalism" that we have rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden*, 527 U. S., at 730; see *id.*, at 736 ("[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit"). In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment after the Court departed from this understanding in *Chisholm*, "[i]t is not rational to suppose that the sovereign power should be dragged before a court." Elliot's Debates 555 (Marshall). Indeed, the spirited historical debate over Article III courts and the immediate reaction to *Chisholm* make little sense if the Eleventh Amendment were the only source of sovereign immunity and private suits against the States could already be brought in "partial, local tribunals." Elliot's Debates 532 (Madison). Nor would the Founders have objected so strenuously to a neutral federal forum for private suits against States if they were open to a State being sued in a different State's courts. Hyatt's view thus inverts the Founders' concerns about state-court parochialism. *Hall*, *supra*, at 439 (Rehnquist, J., dissenting).

Moreover, Hyatt's ahistorical literalism proves too much. There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review, *Marbury* v. *Madison*, 1

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Cranch 137, 176–180 (1803); intergovernmental tax immunity, *McCulloch*, 4 Wheat., at 435–436; executive privilege, *United States* v. *Nixon*, 418 U. S. 683, 705–706 (1974); executive immunity, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 755–758 (1982); and the President's removal power, *Myers* v. *United States*, 272 U. S. 52, 163–164 (1926). Like these doctrines, the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.

C

With the historical record and precedent against him, Hyatt defends *Hall* on the basis of *stare decisis*. But *stare decisis* is "'not an inexorable command,'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009), and we have held that it is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment," *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). The Court's precedents identify a number of factors to consider, four of which warrant mention here: the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 918–919 (2018); *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

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The first three factors support our decision to overrule *Hall*. We have already explained that *Hall* failed to account for the historical understanding of state sovereign immunity and that it failed to consider how the deprivation of traditional diplomatic tools reordered the States' relationships with one another. We have also demonstrated that *Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions.

As to the fourth factor, we acknowledge that some plaintiffs, such as Hyatt, have relied on *Hall* by suing sovereign States. Because of our decision to overrule *Hall*, Hyatt un-

fortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct. But in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.

* * *

Nevada v. *Hall* is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts. We therefore overrule that decision. Because the Board is thus immune from Hyatt's suit in Nevada's courts, the judgment of the Nevada Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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

Can a private citizen sue one State in the courts of another? Normally the answer to this question is no, because the State where the suit is brought will choose to grant its sister States immunity. But the question here is whether the Federal Constitution *requires* each State to grant its sister States immunity, or whether the Constitution instead *permits* a State to grant or deny its sister States immunity as it chooses.

We answered that question 40 years ago in *Nevada* v. *Hall*, 440 U. S. 410 (1979). The Court in *Hall* held that the Constitution took the permissive approach, leaving it up to each State to decide whether to grant or deny its sister States sovereign immunity. Today, the majority takes the contrary

approach—the absolute approach—and overrules *Hall*. I can find no good reason to overrule *Hall*, however, and I consequently dissent.

I

Hall involved a suit brought by a California resident against the State of Nevada in the California courts. We rejected the claim that the Constitution entitled Nevada to absolute immunity. We first considered the immunity that States possessed as independent sovereigns before the Constitution was ratified. And we then asked whether ratification of the Constitution altered the principles of state sovereign immunity in any relevant respect. At both steps, we concluded, the relevant history and precedent refuted the claim that States are entitled to absolute immunity in each other's courts.

A

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Hall first considered the immunity that States possessed before ratification. "States considered themselves fully sovereign nations" during this period, *ante*, at 237, and the Court in *Hall* therefore asked whether sovereign nations would have enjoyed absolute immunity in each other's courts at the time of our founding.

The answer was no. At the time of the founding, nations granted other nations sovereign immunity in their courts not as a matter of legal obligation but as a matter of choice, *i. e.*, of comity or grace or consent. Foreign sovereign immunity was a doctrine "of implied consent by the territorial sovereign . . . deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect." *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 362 (1955). Since customary international law made the matter one of choice, a nation could withdraw that sovereign immunity if it so chose.

This Court took that view of foreign sovereign immunity in two founding-era decisions that forecast the result in *Hall*.

In *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), when considering whether an American citizen could impose a lien upon a French warship, Chief Justice John Marshall wrote for the Court that international law did not *require* the United States to grant France sovereign immunity. Any such requirement, he reasoned, "would imply a diminution" of American "sovereignty." *Id.*, at 136. Instead, Chief Justice Marshall observed that any "exceptions" to "the full and complete power of a nation within its own territories, must be traced up to *the consent of the nation itself*" and "can flow from no other legitimate source." *Ibid.* (emphasis added).

The Court ultimately held in *Schooner Exchange* that the United States had consented implicitly to give immunity to the French warship. See *id.*, at 147. But that was because "national ships of war, entering the port of a friendly power open for their reception, [we]re to be considered as exempted by the consent of that power from its jurisdiction." *Id.*, at 145–146. And the Chief Justice was careful to note that this implication of consent could be "destroy[ed]" in various ways, including by subjecting the foreign nation "to the ordinary tribunals." *Id.*, at 146.

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Ten years later, in *The Santissima Trinidad*, 7 Wheat. 283 (1822), this Court unanimously reaffirmed *Schooner Exchange*'s conclusion that foreign sovereign immunity was not an absolute right. The Court in *Santissima Trinidad* was called upon to determine whether the cargo of an Argentine ship, found in Baltimore Harbor, was immune from seizure. The ship's commander asserted that Argentina had an absolute right to immunity from suit, claiming that "no sovereign is answerable for his acts to the tribunals of any foreign sovereign." *Id.*, at 352. But Justice Joseph Story, writing for the Court, squarely rejected the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory." *Ibid.*

Rather, any exception to jurisdiction, including sovereign immunity, "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations." *Id.*, at 353. Accordingly, Justice Story explained, the right to assert sovereign immunity "*may be withdrawn upon notice at any time, without just offence.*" *Ibid.* (emphasis added). Justice Story then held that the Argentine ship's cargo was not immune from seizure. *Id.*, at 354.

The Court in *Hall* relied on this reasoning. See 440 U. S., at 416–417. Drawing on the comparison to foreign nations, the Court in *Hall* emphasized that California had made a sovereign decision not to "exten[d] immunity to Nevada as a matter of comity." *Id.*, at 418. Unless some constitutional rule required California to grant immunity that it had chosen to withhold, the Court "ha[d] no power to disturb the judgment of the California courts." *Ibid.*

B

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The Court in *Hall* next held that ratification of the Constitution did not alter principles of state sovereign immunity in any relevant respect. The Court concluded that express provisions of the Constitution—such as the Eleventh Amendment and the Full Faith and Credit Clause of Article IV—did not require States to accord each other sovereign immunity. See *id.*, at 418–424. And the Court held that nothing "implicit in the Constitution" treats States differently in respect to immunity than international law treats sovereign nations. *Id.*, at 418; see also *id.*, at 424–427.

To the contrary, the Court in *Hall* observed that an express provision of the Constitution undermined the assertion that States were absolutely immune in each other's courts. Unlike suits brought against a State in the State's own courts, *Hall* noted, a suit against a State in the courts of a different State "necessarily implicates the power and authority of" both States. *Id.*, at 416. The defendant State has a sovereign interest in immunity from suit, while the forum

State has a sovereign interest in defining the jurisdiction of its own courts. The Court in *Hall* therefore justified its decision in part by reference to "the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people." *Id.*, at 425. Compelling States to grant immunity to their sister States would risk interfering with sovereign rights that the Tenth Amendment leaves to the States.

To illustrate that principle, *Hall* cited *Georgia* v. *Chattanooga*, 264 U. S. 472 (1924), which concerned condemnation proceedings brought by a municipality against property owned by a neighboring State. See *Hall*, 440 U. S., at 426, n. 29. The Court in *Chattanooga* held that one State (Georgia) that had purchased property for a railroad in a neighboring State (Tennessee) could not exempt itself from the eminent domain power of the Tennessee city in which the property was located. 264 U. S., at 480. The reason was obvious: "The power of eminent domain is an attribute of sovereignty," and Tennessee did not surrender that sovereign power simply by selling land to Georgia. *Ibid.* In light of the competing sovereignty interests on both sides of the matter, the Court in *Chattanooga* found no basis to interpose a federally mandated resolution.

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Similar reasoning applied in *Hall*. Mandating absolute interstate immunity "by inference from the structure of our Constitution and nothing else" would "intru[de] on the sovereignty of the States—and the power of the people—in our Union." 440 U. S., at 426–427.

II

The majority disputes both *Hall*'s historical conclusion regarding state immunity before ratification and its conclusion that the Constitution did not alter that immunity. But I do not find the majority's arguments convincing.

A

The majority asserts that before ratification "it was well settled that States were immune under both the common law and the law of nations." *Ante*, at 241. The majority thus maintains that States were exempt from suit in each other's courts.

But the question in *Hall* concerned the *basis* for that exemption. Did one sovereign have an absolute right to an exemption from the jurisdiction of the courts of another, or was that exemption a customary matter, a matter of consent that a sovereign might withdraw? As to that question, nothing in the majority's opinion casts doubt on *Hall*'s conclusion that States—like foreign nations—were accorded immunity as a matter of consent rather than absolute right.

The majority refers to "the founding era's foremost expert on the law of nations," Emer de Vattel, who stated that a "sovereign is 'exempt from all foreign jurisdiction.'" *Ante*, at 239 (quoting 4 E. de Vattel, The Law of Nations 486 (J. Chitty ed. 1883) (Vattel); alterations omitted). But Vattel made clear that the source of a sovereign's immunity in a foreign sovereign's courts is the "'consen[t]'" of the foreign sovereign, which, he added, reflects a "'tacit convention'" among nations. *Schooner Exchange*, 7 Cranch, at 143 (quoting 4 Vattel 472). And *Schooner Exchange* and *Santissima Trinidad* underscore that such a tacit convention can be rejected, and that consent can be "withdrawn upon notice at any time." *Santissima Trinidad*, 7 Wheat., at 353.

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The majority also draws on statements of the Founders concerning the importance of sovereign immunity generally. But, as *Hall* noted, those statements concerned matters entirely distinct from the question of state immunity at issue here. Those statements instead "concerned questions of *federal-court* jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." 440 U. S., at 420–421 (emphasis added). That issue was "a mat-

ter of importance in the early days of independence," for it concerned the ability of holders of Revolutionary War debt owed by States to collect that debt in a federal forum. *Id.*, at 418. There is no evidence that the Founders who made those statements intended to express views on the question before us. And it seems particularly unlikely that John Marshall, one of those to whom the Court refers, see *ante*, at 242, would have held views of the law in respect to States that he later repudiated in respect to sovereign nations.

The majority cites *Nathan* v. *Virginia*, 1 Dall. 77, n. (C. P. Phila. Cty. 1781). As the majority points out, that case involved a Pennsylvania citizen who filed a suit in Pennsylvania's courts seeking to attach property belonging to Virginia. The Pennsylvania Court of Common Pleas accepted Virginia's claim of sovereign immunity and dismissed the suit. But it did so only after "delegates in Congress from Virginia . . . applied to the supreme executive council of Pennsylvania" for immunity, and Pennsylvania's attorney general, representing its executive, asked the court to dismiss the case. *Id.*, at 78, n. The Pennsylvania court thus granted immunity only after Virginia "followed the usual diplomatic course." Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 585 (1994). Given the participation of Pennsylvania's executive in this diplomatic matter, the case likely involved Pennsylvania's consent to a claim of sovereign immunity rather than a view that Virginia had an absolute right to immunity.

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B

The majority next argues that "the Constitution affirmatively altered the relationships between the States" by giving them immunity that they did not possess when they were fully independent. *Ante*, at 245. The majority thus maintains that, whatever the nature of state immunity before ratification, the Constitution accorded States an absolute immunity that they did not previously possess.

The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other's courts. The majority does not attempt to situate its newfound constitutional immunity in any provision of the Constitution itself. Instead, the majority maintains that a State's immunity in other States' courts is "implicit" in the Constitution, *ante*, at 247, "embed[ded] . . . within the constitutional design," *ante*, at 245, and reflected in "'the plan of the Convention,'" *ante*, at 241. See also *Hall*, 440 U. S., at 430 (Blackmun, J., dissenting) (arguing that immunity in this context is found "not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism").

I agree with today's majority and the dissenters in *Hall* that the Constitution contains implicit guarantees as well as explicit ones. But, as I have previously noted, concepts like the "'constitutional design'" and "'plan of the convention'" are "highly abstract, making them difficult to apply"—at least absent support in "considerations of history, of constitutional purpose, or of related consequence." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 778 (2002) (BREYER, J., dissenting). Such concepts "invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases" such as "'due process'" and "'liberty,'" and "they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution." *Ibid.*

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At any rate, I can find nothing in the "plan of the Convention" or elsewhere to suggest that the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw. None of the majority's arguments indicates that the Constitution accomplished any such transformation.

The majority argues that the Constitution sought to preserve States' "equal dignity and sovereignty." *Ante*, at 245.

That is true, but tells us nothing useful here. When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. In contrast to a State's power to assert sovereign immunity in its own courts, sovereignty interests here lie on both sides of the constitutional equation.

The majority also says—also correctly—that the Constitution demanded that States give up certain sovereign rights that they would have retained had they remained independent nations. From there the majority infers that the Constitution must have implicitly given States immunity in each other's courts to provide protection that they gave up when they entered the Federal Union.

But where the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly. The Import-Export Clause cited by the majority, for example, creates "harmony among the States" by preventing them from "burden[ing] commerce . . . among themselves." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 283, 285 (1976). The Full Faith and Credit Clause, also invoked by the majority, prohibits States from adopting a "policy of hostility to the public Acts" of another State. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 578 U. S. 171, 173 (2016) (internal quotation marks omitted). By contrast, the Constitution says nothing explicit about interstate sovereign immunity.

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Nor does there seem to be any need to create implicit constitutional protections for States. As the history of this case shows, the Constitution's express provisions seem adequate to prohibit one State from treating its sister States unfairly—even if the State permits suits against its sister States in its courts. See *id.*, at 176 (holding that the Full Faith and Credit Clause prohibits Nevada from subjecting the Board to greater liability than Nevada would impose upon its own agency in similar circumstances).

The majority may believe that the distinction between permissive and absolute immunity was too nuanced for

the Framers. The Framers might have understood that most nations did in fact allow other nations to assert sovereign immunity in their courts. And they might have stopped there, ignoring the fact that, under international law, a nation had the sovereign power to change its mind.

But there is simply nothing in the Constitution or its history to suggest that anyone reasoned in that way. No constitutional language supports that view. Chief Justice Marshall, Justice Story, and the Court itself took a somewhat contrary view without mentioning the matter. And there is no strong reason for treating States differently than foreign nations in this context. Why would the Framers, silently and without any evident reason, have transformed sovereign immunity from a permissive immunity predicated on comity and consent into an absolute immunity that States must accord one another? The Court in *Hall* could identify no such reason. Nor can I.

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III

In any event, *stare decisis* requires us to follow *Hall*, not overrule it. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992); see also *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455–456 (2015). Overruling a case always requires "'special justification.'" *Id.*, at 456. What could that justification be in this case? The majority does not find one.

The majority believes that *Hall* was wrongly decided. But "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U. S., at 455. Three dissenters in *Hall* also believed that *Hall* was wrong, but they recognized that the Court's opinion was "plausible." 440 U. S., at 427 (opinion of Blackmun, J.). While reasonable jurists might disagree about whether *Hall* was correct, that very fact—that *Hall* is not obviously wrong—shows that today's majority is obviously wrong to overrule it.

The law has not changed significantly since this Court decided *Hall* and has not left *Hall* a relic of an abandoned doctrine. To the contrary, *Hall* relied on this Court's precedent in reaching its conclusion, and this Court's subsequent cases are consistent with *Hall*. As noted earlier, *Hall* drew its historical analysis from earlier decisions such as *Schooner Exchange*, written by Chief Justice Marshall. And our post-*Hall* decisions regarding the immunity of foreign nations are consistent with those earlier decisions. The Court has recently reaffirmed "Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U. S. 677, 689 (2004). And the Court has reiterated that a nation may decline to grant other nations sovereign immunity in its courts. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).

Nor has our understanding of state sovereign immunity evolved to undermine *Hall*. The Court has decided several state sovereign immunity cases since *Hall*, but these cases have all involved a State's immunity in a federal forum or in the State's own courts. Compare *Federal Maritime Comm'n*, 535 U. S., at 769 (state immunity in a federal forum); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 47 (1996) (same); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 782 (1991) (same), with *Alden* v. *Maine*, 527 U. S. 706, 715 (1999) (state immunity in a State's "own courts"); *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 67 (1989) (same). None involved immunity asserted by one State in the courts of another. And our most recent case to address *Hall* in any detail endorses it. See *Alden*, 527 U. S., at 739–740 (noting that *Hall*'s distinction "between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign" is "consistent with, and even support[s]," modern cases).

The dissenters in *Hall* feared its "practical implications." 440 U. S., at 443 (opinion of Rehnquist, J.). But I can find

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nothing in the intervening 40 years to suggest that this fear was well founded. The Board and its *amici* have, by my count, identified only 14 cases in 40 years in which one State has entertained a private citizen's suit against another State in its courts. See Brief for Petitioner 46–47; Brief for State of Indiana et al. as *Amici Curiae* 13–14. In at least one of those 14 cases, moreover, the state court eventually agreed to dismiss the suit against its sister State as a matter of comity. See *Montaño* v. *Frezza*, 2017–NMSC–015, 393 P. 3d 700, 710. How can it be that these cases, decided over a period of four decades, show *Hall* to be unworkable?

The *Hall* issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally. Thus, even in the absence of constitutionally mandated immunity, States normally grant sovereign immunity voluntarily. States that fear that this practice will be insufficiently protective are free to enter into an interstate compact to guarantee that the normal practice of granting immunity will continue. See *Cuyler* v. *Adams*, 449 U. S. 433, 440 (1981).

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Although many States have filed an *amicus* brief in this case asking us to overturn *Hall*, I can find nothing in the brief that indicates that reaffirming *Hall* would affront "the dignity and respect due sovereign entities." *Federal Maritime Comm'n*, 535 U. S., at 769. As already explained, sovereign interests fall on both sides of this question. While reaffirming *Hall* might harm States seeking sovereign immunity, overruling *Hall* would harm States seeking to control their own courts.

Perhaps the majority believes that there has been insufficient reliance on *Hall* to justify preserving it. But any such belief would ignore an important feature of reliance. The people of this Nation rely upon stability in the law. Legal stability allows lawyers to give clients sound advice and allows ordinary citizens to plan their lives. Each time the Court overrules a case, the Court produces increased uncer-

tainty. To overrule a sound decision like *Hall* is to encourage litigants to seek to overrule other cases; it is to make it more difficult for lawyers to refrain from challenging settled law; and it is to cause the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay.

I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error. And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it.

* * *

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It is one thing to overrule a case when it "def[ies] practical workability," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U. S., at 854–855. It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question. The majority has surrendered to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today's decision can only cause one to wonder which cases the Court will overrule next. I respectfully dissent.

Syllabus

COCHISE CONSULTANCY, INC., ET AL. *v.* UNITED STATES EX REL. HUNT

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

No. 18–315. Argued March 19, 2019—Decided May 13, 2019

The False Claims Act permits a private person, known as a relator, to bring a *qui tam* civil action "in the name of the [Federal] Government," 31 U. S. C. §3730(b), against "any person" who "knowingly presents . . . a false or fraudulent claim for payment" to the Government or to certain third parties acting on the Government's behalf, §§3729(a), (b)(2). The Government may choose to intervene in the action. See §§3730(b)(2), (4). Two limitations periods apply to a "civil action under section 3730." §3731(b). An action must be brought within either 6 years after the statutory violation occurred, §3731(b)(1), or 3 years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation, §3731(b)(2). The period providing the later date serves as the limitations period.

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In November 2013, respondent Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false payment claims for providing security services in Iraq up until early 2007. Hunt claims that he revealed Cochise's allegedly fraudulent scheme during a November 30, 2010, interview with federal officials about his role in an unrelated contracting fraud in Iraq. The United States declined to intervene in the action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt countered that his complaint was timely under §3731(b)(2). In dismissing the action, the District Court considered three potential interpretations: that §3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to intervene; that §3731(b)(2) applies in nonintervened actions, and the limitations period begins when the relator knew or should have known the relevant facts; or that §3731(b)(2) applies in nonintervened actions, and the limitations period begins when the Government official responsible for acting knew or should have known the relevant facts. The court rejected the third interpretation and found that Hunt's complaint would be untimely under either of the first two. The Eleventh Circuit reversed and remanded, adopting the third interpretation.

Syllabus

Held:

1. The limitations period in § 3731(b)(2) applies in a relator-initiated suit in which the Government has declined to intervene. Both Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits. Cochise claims that starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should apply only when the Government is a party. But treating a relator-initiated, nonintervened suit as a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2) is at odds with fundamental rules of statutory interpretation. Because a single use of a statutory phrase generally must have a fixed meaning, see *Ratzlaf* v. *United States*, 510 U. S. 135, 143, interpretations that would "attribute different meanings to the same phrase" should be avoided, *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329. Here, the clear text of the statute controls. Cochise's reliance on *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, is misplaced. Nothing in *Graham County* supports giving the phrase "civil action under section 3730" in § 3731(b) two different meanings depending on whether the Government intervenes. While the *Graham County* Court sought "a construction that avoids . . . counterintuitive results," there the text "admit[ted] of two plausible interpretations." *Id.*, at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462. Pp. 268–271.

2. The relator in a nonintervened suit is not "the official of the United States" whose knowledge triggers § 3731(b)(2)'s 3-year limitations period. The statute provides no support for such a reading. First, a private relator is neither appointed as an officer of the United States nor employed by the United States. Second, the provision authorizing *qui tam* suits is entitled "Actions by Private Persons." § 3730(b). Third, the statute refers to "the" official "charged with responsibility to act in the circumstances." Regardless of precisely which official or officials the statute is referring to, § 3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434. Nor are private relators "charged with responsibility to act" in the sense contemplated by § 3731(b), as they are not required to investigate or prosecute a False Claims Act action. Pp. 271–272.

887 F. 3d 1081, affirmed.

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

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Theodore J. Boutrous, Jr., argued the cause for petitioners. With him on the briefs were *Lauren M. Blas*, *Amir C. Tayrani*, and *Duane A. Daiker*.

Earl N. Mayfield III argued the cause for respondent. With him on the brief were *Christopher M. Day*, *Sarah O. Schrup*, and *Jocelyn D. Francoeur*.

Matthew Guarnieri argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Charles W. Scarborough*, and *Martin V. Totaro*.*

JUSTICE THOMAS delivered the opinion of the Court.

The False Claims Act contains two limitations periods that apply to a "civil action under section 3730"—that is, an action asserting that a person presented false claims to the United

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Jonathan G. Cedarbaum*, *Peter C. Tolsdorf*, *James C. Stansel*, and *Melissa B. Kimmel*; for the Coalition for Government Procurement by *Dan Himmelfarb*; for DRI–The Voice of the Defense Bar et al. by *Zach Chaffee-McClure*; and for the Washington Legal Foundation by *Corbin K. Barthold* and *Cory L. Andrews*.

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Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Kian J. Hudson*, Deputy Solicitor General, and *Aaron T. Craft* and *Julia C. Payne*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Ashley Moody* of Florida, *Clare E. Connors* of Hawaii, *Thomas John Miller* of Iowa, *Jeff Landry* of Louisiana, *Dana Nessel* of Michigan, *Keith M. Ellison* of Minnesota, *Gurbir Singh Grewal* of New Jersey, *Joshua H. Stein* of North Carolina, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Sean D. Reyes* of Utah, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washington, and *Josh Kaul* of Wisconsin; for the National Whistleblower Center by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; for the Taxpayers Against Fraud Education Fund by *Tejinder Singh*; and for Joel D. Hesch by *Mr. Hesch*, *pro se*.

States Government. 31 U. S. C. §3731(b). The first period requires that the action be brought within six years after the statutory violation occurred. The second period requires that the action be brought within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation. Whichever period provides the later date serves as the limitations period.

This case requires us to decide how to calculate the limitations period for *qui tam* suits in which the United States does not intervene. The Court of Appeals held that these suits are "civil action[s] under section 3730" and that the limitations periods in §3731(b) apply in accordance with their terms, regardless of whether the United States intervenes. It further held that, for purposes of the second period, the private person who initiates the *qui tam* suit cannot be deemed the official of the United States. We agree, and therefore affirm.

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I

As relevant, the False Claims Act imposes civil liability on "any person" who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government or to certain third parties acting on the Government's behalf. 31 U. S. C. §§3729(a), (b)(2). Section 3730 authorizes two types of actions: First, the Attorney General, who "diligently shall investigate a violation under section 3729," may bring a civil action against the alleged false claimant. §3730(a). Second, a private person, known as a relator, may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." §3730(b).

If a relator initiates the action, he must deliver a copy of the complaint and supporting evidence to the Government, which then has 60 days to intervene in the action. §§3730(b)(2), (4). During this time, the complaint remains sealed. §3730(b)(2). If the Government intervenes, it as-

sumes primary responsibility for prosecuting the action, though the relator may continue to participate. § 3730(c). Otherwise, the relator has the right to pursue the action. §§ 3730(b)(4), (c)(3). Even if it does not intervene, the Government is entitled to be served with all pleadings upon request and may intervene at any time with good cause. § 3730(c)(3). The relator receives a share of any proceeds from the action—generally 15 to 25 percent if the Government intervenes, and 25 to 30 percent if it does not—plus attorney's fees and costs. §§ 3730(d)(1)–(2). See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 769–770 (2000).

At issue here is the Act's statute of limitations, which provides:

> "(b) A civil action under section 3730 may not be brought—
>
> "(1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> "(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> "whichever occurs last." § 3731(b).

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On November 27, 2013, respondent Billy Joe Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false claims for payment under a subcontract to provide security services in Iraq "from some time prior to January 2006 until early 2007." App. 43a. A little less than three years before bringing his complaint, Hunt was interviewed by federal agents about his role in an unrelated contracting fraud in Iraq. Hunt claims to have revealed Cochise's allegedly fraudulent scheme during this November 30, 2010, interview.

The United States declined to intervene in Hunt's action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt conceded that the 6-year limitations period in § 3731(b)(1) had elapsed before he filed suit on November 27, 2013. But Hunt argued that his complaint was timely under § 3731(b)(2) because it was filed within 3 years of the interview in which he informed federal agents about the alleged fraud (and within 10 years after the violation occurred).

The District Court dismissed the action. It considered three potential interpretations of § 3731(b). Under the first interpretation, § 3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to intervene, so any such action must be filed within six years after the violation. Under the second interpretation, § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when the relator knew or should have known the relevant facts. Under the third interpretation, § 3731(b)(2) applies in nonintervened actions, and the limitations period begins when "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts. The District Court rejected the third interpretation and declined to choose between the first two because it found that Hunt's complaint would be untimely under either. The Court of Appeals reversed and remanded, adopting the third interpretation. 887 F. 3d 1081 (CA11 2018).

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Given a conflict between the Courts of Appeals,* we granted certiorari. 586 U. S. 1018 (2018).

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*Compare 887 F. 3d 1081, 1089–1097 (CA11 2018) (adopting the third interpretation), with *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F. 3d 1211, 1216–1218 (CA9 1996) (adopting the second interpretation); *United States ex rel. Sanders* v. *North Am. Bus Industries, Inc.*, 546 F. 3d 288, 293–294 (CA4 2008) (adopting the first interpretation); and *United States ex rel. Sikkenga* v. *Regence BlueCross BlueShield of Utah*, 472 F. 3d 702, 725–726 (CA10 2006) (same).

II

The first question before us is whether the limitations period in § 3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene. If so, the second question is whether the relator in such a case should be considered "the official of the United States" whose knowledge triggers § 3731(b)(2)'s 3-year limitations period.

A

Section 3731(b) sets forth two limitations periods that apply to "civil action[s] under section 3730." Both Government-initiated suits under § 3730(a) and relator-initiated suits under § 3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits.

Cochise agrees with that view as to the limitations period in § 3731(b)(1), but argues that the period in § 3731(b)(2) is available in a relator-initiated suit only if the Government intervenes. According to Cochise, starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should be read to apply only when the Government is a party. In short, under Cochise's reading, a relator-initiated, nonintervened suit is a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2).

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This reading is at odds with fundamental rules of statutory interpretation. In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. See *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994). We therefore avoid interpretations that would "attribute different meanings to the same phrase." *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329 (2000). Here, either a relator-initiated, nonintervened suit is a "civil action under section 3730"—and thus subject to the limitations periods in subsections (b)(1) and (b)(2)—or it is not. It is such an action.

Whatever the default tolling rule might be, the clear text of the statute controls this case.

Under Cochise's reading, a relator-initiated civil action would convert to "[a] civil action under section 3730" for purposes of subsection (b)(2) if and when the Government intervenes. That reading cannot be correct. If the Government intervenes, the civil action remains the same—it simply has one additional party. There is no textual basis to base the meaning of "[a] civil action under section 3730" on whether the Government has intervened.

Cochise relies on our decision in *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409 (2005), which addressed the question whether § 3731(b)(1) or federal common law provided the limitations period for § 3730(h) retaliation actions. Section 3730(h) creates a cause of action for an employee who suffers retaliation for, among other things, assisting with the prosecution of a False Claims Act action. At the time, § 3730(h) did not specify a time limit for bringing a retaliation action, so the question before us was whether the phrase "civil action under section 3730" in § 3731(b) encompassed actions under § 3730(h). We considered the statute "ambiguous because its text, literally read, admits of two plausible interpretations." *Id.*, at 419, n. 2. One reading was that a "civil action under section 3730" includes § 3730(h) actions because such actions arise under § 3730. *Id.*, at 415. "Another reasonable reading" was that a "civil action under section 3730" "applies only to actions arising under §§ 3730(a) and (b)" because "§ 3731(b)(1) t[ies] the start of the time limit to 'the date on which the violation of section 3729 is committed.'" *Ibid.* That reading had force because retaliation claims need not involve an actual violation of § 3729. *Ibid.* Looking to statutory context, we explained that the phrase "'civil action under section 3730' means only those civil actions under § 3730 that have as an element a 'violation of section

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3729,' that is, §§ 3730(a) and (b) actions"—not § 3730(h) retaliation actions. *Id.*, at 421–422.

A relator-initiated, nonintervened suit arises under § 3730(b) and has as an element a violation of § 3729. *Graham County* supports our reading. Nonetheless, Cochise points out that in considering the statutory context, we discussed a similar phrase contained in § 3731(c) (now § 3731(d)), which stated: "In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." (Emphasis added.) We explained that § 3731(c) "use[d] the similarly unqualified phrase 'action brought under section 3730' to refer only to §§ 3730(a) and (b) actions." *Id.*, at 417–418. We then stated: "As [respondent] and the United States concede, the context of this provision implies that the phrase 'any action brought under section 3730' is limited to § 3730(a) actions brought by the United States and § 3730(b) actions in which the United States intervenes as a party, as those are the types of § 3730 actions in which the United States necessarily participates." *Id.*, at 418.

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Cochise contends that we should adopt a similar construction of the phrase "civil action under section 3730" in § 3731(b). We disagree. Our discussion of § 3731(c) was focused on "the context of th[at] provision" and on whether it could be read to impose the burden of proof on the Government even in cases where the Government did not participate. *Id.*, at 418. Those considerations do not apply here; there is nothing illogical about reading § 3731(b) to apply in accordance with its plain terms. Moreover, if a "civil action under section 3730" included only an action in which the Government participates for purposes of § 3731(b)(2), then we would be obligated to give it a like meaning for purposes of § 3731(b)(1). This would mean that a relator-initiated, nonintervened suit would be subject to neither § 3731(b)(1) nor § 3731(b)(2)—a reading Cochise expressly disclaims.

See Brief for Petitioners 20, n. 3. Nothing in *Graham County* supports giving the same phrase in § 3731(b) two different meanings depending on whether the Government intervenes.

Again pointing to *Graham County*, Cochise next contends that our reading would lead to "'counterintuitive results.'" Brief for Petitioners 26. For instance, if the Government discovers the fraud on the day it occurred, it would have 6 years to bring suit, but if a relator instead discovers the fraud on the day it occurred and the Government does not discover it, the relator could have as many as 10 years to bring suit. That discrepancy arises because § 3731(b)(2) begins its limitations period on the date that "the official of the United States charged with responsibility to act" obtained knowledge of the relevant facts. But we see nothing unusual about extending the limitations period when the Government official did not know and should not reasonably have known the relevant facts, given that the Government is the party harmed by the false claim and will receive the bulk of any recovery. See § 3730(d). In any event, a result that "may seem odd . . . is not absurd." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 565 (2005). Although in *Graham County* we sought "a construction that avoids . . . counterintuitive results," there the text "admit[ted] of two plausible interpretations." 545 U. S., at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

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B

Cochise's fallback argument is that the relator in a nonintervened suit should be considered "the official of the United States charged with responsibility to act in the circumstances," meaning that § 3731(b)(2)'s 3-year limitations period would start when the relator knew or should have known about the fraud. But the statute provides no support

for reading "the official of the United States" to encompass a private relator.

First, a private relator is not an "official of the United States" in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States, see U. S. Const., Art. II, § 2, cl. 2, nor employed by the United States. Indeed, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." § 3730(b). Although that provision explains that the action is brought "for the person and for the United States Government" and "in the name of the Government," *ibid.*, it does not make the relator anything other than a private person, much less "the official of the United States" referenced by the statute. Cf. *Stevens*, 529 U. S., at 773, n. 4 ("[A] *qui tam* relator is, in effect, suing as a partial assignee of the United States" (emphasis deleted)).

Second, the statute refers to "the" official "charged with responsibility to act in the circumstances." The Government argues that, in context, "the" official refers to the Attorney General (or his delegate), who by statute "shall investigate a violation under section 3729." § 3730(a). Regardless of precisely which official or officials the statute is referring to, § 3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for any and all private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434 (2004) (explaining that the "use of the definite article . . . indicates that there is generally only one" person covered). More fundamentally, private relators are not "charged with responsibility to act" in the sense contemplated by § 3731(b), as they are not required to investigate or prosecute a False Claims Act action.

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For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

Syllabus

APPLE INC. *v.* PEPPER ET AL.

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

No. 17–204. Argued November 26, 2018—Decided May 13, 2019

Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store—the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a $99 annual membership fee, allows them to set the retail price of the apps, and charges a 30 percent commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

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Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. Pp. 278–288.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court's precedent. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U. S. C. § 15(a). That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying § 4, this Court has consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators, *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. Pp. 278–281.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and

precedent by requiring the Court to rewrite the rationale of *Illinois Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that "any person" injured by an antitrust violation may sue to recover damages. Second, Apple's theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement. Pp. 281–285.

(c) Contrary to Apple's argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut strongly in respondents' favor. First, Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id.*, at 726–727. Pp. 285–288.

846 F. 3d 313, affirmed.

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KAVANAUGH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 288.

Daniel M. Wall argued the cause for petitioner. With him on the briefs were *Christopher S. Yates*, *Sadik Huseny*, *Aaron T. Chiu*, and *J. Scott Ballenger*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him

Counsel

on the brief were *Assistant Attorney General Delrahim*, *Deputy Solicitor General Stewart*, *Principal Deputy Assistant Attorney General Finch*, *Zachary D. Tripp*, *Kristen C. Limarzi*, and *Adam D. Chandler*.

David C. Frederick argued the cause for respondents. With him on the brief were *Aaron M. Panner*, *Gregory G. Rapawy*, *Mark C. Rifkin*, and *Matthew M. Guiney*.*

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*Briefs of *amici curiae* urging reversal were filed for ACT | The App Association by *Brian Scarpelli*; for BSA | The Software Alliance by *Andrew J. Pincus*, *Michael B. Kimberly*, and *Matthew A. Waring*; for the Chamber of Commerce of the United States of America by *Theodore J. Boutrous, Jr.*, and *Daniel G. Swanson*; for the Computer & Communications Industry Association by *Beth Brinkmann*, *Thomas O. Barnett*, and *Derek Ludwin*; for the R Street Institute by *Charles Duan*; and for the Washington Legal Foundation by *Cory L. Andrews* and *Corbin K. Barthold*.

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Kyle D. Hawkins*, Solicitor General, *J. Campbell Barker*, Deputy Solicitor General, *Joseph D. Hughes*, Assistant Solicitor General, *Kim Van Winkle*, Deputy Chief, Antitrust Division, *Brett Fulkerson*, *David M. Ashton*, and *Nicholas G. Grimmer*, Assistant Attorneys General, and *Tom Miller*, Attorney General of Iowa, *Nathan Blake*, Deputy Attorney General, and *Max M. Miller*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *Cynthia H. Coffman* of Colorado, *George Jepsen* of Connecticut, *Matthew Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Hector Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Wayne Stenehjem* of North Dakota, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, and *Mark R. Herring* of Virginia; for the American Antitrust Institute by *Richard M. Brunell*, *Randy M. Stutz*, and *Jay L. Himes*; for Antitrust Scholars by *Lauren M. Weinstein*, *Robert K. Kry*, and *William J. Cooper*; and for Open Markets Institute by *Deepak Gupta* and *Jonathan E. Taylor*.

Thomas R. McCarthy and *Jeffrey M. Harris* filed a brief for Verizon Communications Inc. as *amicus curiae*.

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JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 745–746 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

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I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $99 annual membership fee. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30% fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." *Id.*, at 45a. According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." *Id.*, at 54a–55a. The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." *Id.*, at 55a. And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market." *Id.*, at 53a.

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Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not

direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices. *Id.*, at 324. We granted certiorari. 585 U. S. 1003 (2018).

II

A

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The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. *Illinois Brick*, 431 U. S., at 745–746. It is undisputed that the iPhone owners bought the apps directly from Apple. There-

fore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 26 Stat. 209, 15 U. S. C. § 2. Section 4 of the Clayton Act in turn provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U. S. C. § 15(a) (emphasis added). The broad text of § 4—"any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

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Second is precedent: Applying § 4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207 (1990); see also *Illinois Brick*, 431 U. S., at 745–746. At the same time, incorporating principles of proximate cause into § 4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers. *Id.*, at 746.[1]

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete

[1] *Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid.*

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The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp*, 497 U. S., at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc.* v. *Sumitomo Corp.*, 306 F. 3d 469, 481–482 (CA7 2002) (Wood, J.).[2]

[2] Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

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We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of § 4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price.

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suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

Rather, *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

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Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay noth-

ing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." 846 F. 3d, at 324. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream

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manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

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Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for

the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

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C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. 497 U. S., at 216. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.*, at 217.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737.

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Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain. Cf. *id.*, at 726–727; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 483–484 (1968). If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." 431 U. S., at 741.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

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Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive

price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not persuade us to remake *Illinois Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

* * *

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

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

More than 40 years ago, in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), this Court held that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed.

It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how antitrust law is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Hanover sued United, a company that supplied machinery Hanover used to make shoes. Hanover alleged that United's illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United replied that Hanover hadn't been damaged at all because, United asserted, Hanover had not absorbed the supposedly "illegal overcharge" but had "passed the cost on to its customers" by raising the prices it charged for shoes. *Id.*, at 487–488, and n. 6. This Court called United's argument a "'passing-on' defense" because it suggested that a court should consider whether an antitrust plaintiff had "passed on" the defendant's overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant's anticompetitive conduct. *Id.*, at 488.

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This Court rejected that defense. While § 4 of the Clayton Act allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, *e. g.*, *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–531 (1983). And under ancient rules of proximate causation, the "'general tendency of the law, in regard to damages at

least, is not to go beyond the first step.'" *Hanover Shoe*, 392 U. S., at 490, n. 8 (quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). In *Hanover Shoe*, the first step was United's overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed to avoid. "[N]early insuperable" questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoemaking market United's alleged monopoly rent from the separate shoe-making-machinery market. 392 U. S., at 493. Resolving those questions would, in turn, necessitate a trial within a trial about Hanover's power and conduct in its own market, with the attendant risk that proceedings would become "long and complicated" and would "involv[e] massive evidence and complicated theories." *Ibid.*

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Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants' price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a "pass-on theory" defensively, the Court declined to "permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense." 431 U. S., at 735. "Permitting the use of pass-on theories under § 4," the Court reasoned, would require determining how much of the manufacturer's monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id.*, at 737.

Allowing pass-on theories would, as well, allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 132 (2014). That proximate cause requirement typically bars suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts." *Id.*, at 133 (internal quotation marks omitted). So, for example, if a defendant's false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the Lanham Act. But if the competitor is unable to pay its rent as a result, the competitor's landlord can't sue the false advertiser, because the landlord's harm derives from the harm to the competitor. *Id.*, at 134; see also, *e. g.*, *Bank of America Corp.* v. *Miami*, 581 U. S. 189, 201–203 (2017); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346 (2005); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268–270 (1992). This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors*, 459 U. S., at 532–535, 544–545.[1]

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[1] For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante*, at 279, n. 1. Under our normal rule of construction, a plaintiff who's not proximately harmed

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer . . . we're going to take this 30 percent commission . . . what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." App. 143.

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Because this is *exactly* the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these

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by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 135 (2014) (although a plaintiff that "cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief," the requirement of proximate causation "must be met in every case").

difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with "'complicated theories'" about "how the relevant market variables would have behaved had there been no overcharge." *Illinois Brick*, 431 U. S., at 741–743. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

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This causation inquiry will be complicated further by Apple's requirement that all app prices end in $0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $0.99. Brief for Respondents 44. And a developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs

suffered as a result of Apple's allegedly excessive 30% commission.[2]

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. *Illinois Brick*, 431 U. S., at 737. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that *Illinois Brick* doesn't govern this situation surely must mean *Hanover Shoe* doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); *Illinois Brick*, 431 U. S., at 739 (explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder").[3]

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[2] Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

[3] The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will "result in 'conflicting claims to a common fund'" as *Illinois Brick* feared. *Ante*, at 286. But

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante*, at 281. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then

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Apple charged only one commission on each sale. So even assuming for argument's sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because "there is only *one 30% markup*," any claim by the developers against Apple would necessarily be seeking "a piece of the same 30% pie." Brief in Opposition 12. It's a mystery why the Court refuses to accept that sensible concession.

remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 763, 772–774 (1984) (rejecting an "'artificial distinction'" that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*'s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the "general tendency of the law . . . not to go beyond" the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra*, at 289–290. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

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Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante*, at 286–288. The Court even tells us that any "ambiguity" about the permissibility of pass-on damages should be

resolved "in the direction of the statutory text," *ante*, at 282—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common-law principles of proximate cause. Last but not least, the Court suggests that the traditional understanding of *Illinois Brick* leads to "arbitrary and unprincipled" results. *Ante*, at 282. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a "markup" scenario in which a monopolistic retailer buys a product from a manufacturer for $6 and then decides to sell the product to a consumer for $10, applying a supracompetitive $4 markup. The second is a "commission" scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer's product to a consumer for $10 and the retailer keeps a supracompetitive 40% commission, sending $6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

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But there is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those

directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

Some *amici* share the Court's skepticism of *Illinois Brick*. They even urge us to overrule *Illinois Brick*, assuring us that "modern economic techniques" can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe not. But there's plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they've disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

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Syllabus

MERCK SHARP & DOHME CORP. *v.* ALBRECHT ET AL.

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

No. 17–290. Argued January 7, 2019—Decided May 20, 2019

Petitioner Merck Sharp & Dohme Corp. manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. However, the mechanism through which Fosamax treats and prevents osteoporosis may increase the risk that patients will suffer "atypical femoral fractures," that is, a rare type of complete, low-energy fracture that affects the thigh bone. When the Food and Drug Administration first approved of the manufacture and sale of Fosamax in 1995, the Fosamax label did not warn of the then-speculative risk of atypical femoral fractures associated with the drug. But stronger evidence connecting Fosamax to atypical femoral fractures developed after 1995. And the FDA ultimately ordered Merck to add a warning about atypical femoral fractures to the Fosamax label in 2011.

Respondents are more than 500 individuals who took Fosamax and suffered atypical femoral fractures between 1999 and 2010. Respondents sued Merck seeking tort damages on the ground that state law imposed upon Merck a legal duty to warn respondents and their doctors about the risk of atypical femoral fractures associated with using Fosamax. Merck, in defense, argued that respondents' state-law failure-to-warn claims should be dismissed as pre-empted by federal law. Merck conceded that the FDA regulations would have permitted Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt. In particular, Merck claimed that the FDA's rejection of Merck's 2008 attempt to warn of a risk of "stress fractures" showed that the FDA would also have rejected any attempt by Merck to warn of the risk of atypical femoral fractures associated with the drug.

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The District Court agreed with Merck's pre-emption argument and granted summary judgment to Merck, but the Third Circuit vacated and remanded. The Court of Appeals recognized that its pre-emption analysis was controlled by this Court's decision in *Wyeth* v. *Levine*, 555 U. S. 555, which held that a state-law failure-to-warn claim is pre-empted where there is "clear evidence" that the FDA would not have approved a change to the label. The Court of Appeals, however, suggested that the "clear evidence" standard had led to varying lower court applications and that it would be helpful for this Court to "clarif[y] or buil[d] out the doctrine." 852 F. 3d 268, 284.

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Held:

1. "Clear evidence" is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning. Pp. 310–316.

(a) The *Wyeth* Court undertook a careful review of the history of federal regulation of drugs and drug labeling and found both a reluctance by Congress to displace state laws that would penalize drug manufacturers for failing to warn consumers of the risks associated with their drugs and an insistence by Congress that drug manufacturers bear the responsibility for the content of their drug labels. Accordingly, this Court held in *Wyeth* that "absent clear evidence that the FDA would not have approved a change" to the label, the Court "will not conclude that it was impossible . . . to comply with both federal and state requirements." 555 U. S., at 571. Applying that rule to the facts of that case, the Court said that Wyeth's evidence of pre-emption fell short for two reasons. First, the record did not show that Wyeth "supplied the FDA with an evaluation or analysis concerning the specific dangers" that would have merited the warning. *Id.*, at 572–573. And second, the record did not show that Wyeth "attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA." *Ibid.*, and n. 5. Pp. 310–313.

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(b) Thus, in a case like *Wyeth*, showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning. These conclusions flow from this Court's precedents on impossibility pre-emption and the statutory and regulatory scheme that the Court reviewed in *Wyeth*. See 555 U. S., at 578. In particular, this Court has refused to find clear evidence of impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit. And as explained in *Wyeth*, FDA regulations permit drug manufacturers to change a label to "reflect newly acquired information" if the changes "add or strengthen a . . . warning" for which there is "evidence of a causal association." 21 CFR § 314.70(c)(6)(iii)(A). Pp. 313–315.

(c) The only agency actions that can determine the answer to the pre-emption question are agency actions taken pursuant to the FDA's congressionally delegated authority. The Supremacy Clause grants "supreme" status only to the "the *Laws* of the United States." U. S.

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Const., Art. VI, cl. 2. And pre-emption takes place "'only when and if [the agency] is acting within the scope of its congressionally delegated authority.'" *New York* v. *FERC*, 535 U. S. 1, 18 (some alterations omitted). Pp. 315–316.

2. The question of agency disapproval is primarily one of law for a judge to decide. The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination, and are better suited to understand and to interpret agency decisions in light of the governing statutory and regulatory context. While contested brute facts will sometimes prove relevant to a court's legal determination about the meaning and effect of an agency decision, such factual questions are subsumed within an already tightly circumscribed legal analysis and do not warrant submission alone or together with the larger pre-emption question to a jury. Pp. 316–318.

852 F. 3d 268, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 318. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., and KAVANAUGH, J., joined, *post*, p. 323.

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Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *Jeffrey R. Johnson*, *Stephanie Parker*, and *Benjamin M. Flowers*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Wall*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Anthony A. Yang*, *Scott R. McIntosh*, *Joshua M. Salzman*, and *Karen E. Schifter*.

David C. Frederick argued the cause for respondents. With him on the brief were *Brendan J. Crimmins* and *Jeremy S. B. Newman*.*

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*Briefs of *amici curiae* urging reversal were filed for Pharmaceutical Research and Manufacturers of America et al. by *Robert A. Long, Jr.*, *Michael X. Imbroscio*, and *Paul W. Schmidt*; for the Product Liability Advisory Council, Inc., et al. by *Alan E. Untereiner* and *Daryl Joseffer*;

JUSTICE BREYER delivered the opinion of the Court.

When Congress enacted the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, it charged the Food and Drug Administration with ensuring that prescription drugs are "safe for use under the conditions prescribed, recommended, or suggested" in the drug's "labeling." § 355(d). When the FDA exercises this authority, it makes careful judgments about what warnings should appear on a drug's label for the safety of consumers.

For that reason, we have previously held that "clear evidence" that the FDA would not have approved a change to the drug's label pre-empts a claim, grounded in state law,

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and for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Virginia et al. by *Mark R. Herring*, Attorney General of Virginia, *Toby J. Heytens*, Solicitor General, *Matthew R. McGuire*, Principal Deputy Solicitor General, and *Michelle S. Kallen*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepson* of Connecticut, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the American Association for Justice by *Matthew W. H. Wessler* and *Jeffrey R. White*; for the CATO Institute by *Erik S. Jaffe*, *Gene C. Schaerr*, *W. Mark Lanier*, *Arthur R. Miller*, *Kenneth W. Starr*, *Kevin P. Parker*, and *Ilya Shapiro*; for the Medshadow Foundation et al. by *William B. Schultz* and *Margaret M. Dotzel*; for Public Citizen by *Allison M. Zieve* and *Scott L. Nelson*; for Public Law Scholars by *Elizabeth J. Cabraser* and *Ernest A. Young*; for Jerome P. Kassirer, M. D., et al. by *Robert S. Peck*, *Michael L. Baum*, *Bijan Esfandiari*, and *Stephen J. Herman*; for John C. P. Goldberg et al. by *Earl Landers Vickery* and *Gary L. Wilson*; and for Joseph Lane, M. D., et al. by *Karen Barth Menzies* and *Andre M. Mura.*

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that a drug manufacturer failed to warn consumers of the change-related risks associated with using the drug. See *Wyeth* v. *Levine*, 555 U. S. 555, 571 (2009). We here determine that this question of pre-emption is one for a judge to decide, not a jury. We also hold that "clear evidence" is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning.

I

The central issue in this case concerns federal pre-emption, which as relevant here, takes place when it is "'impossible for a private party to comply with both state and federal requirements.'" *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472, 480 (2013). See also U. S. Const., Art. VI, cl. 2. The state law that we consider is state common law or state statutes that require drug manufacturers to warn drug consumers of the risks associated with drugs. The federal law that we consider is the statutory and regulatory scheme through which the FDA regulates the information that appears on brand-name prescription drug labels. The alleged conflict between state and federal law in this case has to do with a drug that was manufactured by petitioner Merck Sharp & Dohme and was administered to respondents without a warning of certain associated risks.

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A

The FDA regulates the safety information that appears on the labels of prescription drugs that are marketed in the United States. 21 U. S. C. § 355(b)(1)(F); 21 CFR § 201.57(a) (2018). Although we commonly understand a drug's "label" to refer to the sticker affixed to a prescription bottle, in this context the term refers more broadly to the written material that is sent to the physician who prescribes the drug and the

written material that comes with the prescription bottle when the drug is handed to the patient at the pharmacy. 21 U. S. C. § 321(m). These (often lengthy) package inserts contain detailed information about the drug's medical uses and health risks. § 355(b)(1)(F); 21 CFR § 201.57(a).

FDA regulations set out requirements for the content, the format, and the order of the safety information on the drug label. § 201.57(c). Those regulations require drug labels to include, among other things: (1) prominent "boxed" warnings about risks that may lead to death or serious injury; (2) contraindications describing any situation in which the drug should not be used because the risk of use outweighs any therapeutic benefit; (3) warnings and precautions about other potential safety hazards; and (4) any adverse reactions for which there is some basis to believe a causal relationship exists between the drug and the occurrence of the adverse event. *Ibid.*

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As those requirements make clear, the category in which a particular risk appears on a drug label is an indicator of the likelihood and severity of the risk. The hierarchy of label information is designed to "prevent overwarning" so that less important information does not "overshadow" more important information. 73 Fed. Reg. 49605–49606 (2008). It is also designed to exclude "[e]xaggeration of risk, or inclusion of speculative or hypothetical risks," that "could discourage appropriate use of a beneficial drug." *Id.*, at 2851.

Prospective drug manufacturers work with the FDA to develop an appropriate label when they apply for FDA approval of a new drug. 21 U. S. C. §§ 355(a), 355(b), 355(d)(7); 21 CFR § 314.125(b)(6). But FDA regulations also acknowledge that information about drug safety may change over time, and that new information may require changes to the drug label. §§ 314.80(c), 314.81(b)(2)(i). Drug manufacturers generally seek advance permission from the FDA to make substantive changes to their drug labels. However, an FDA regulation called the "changes being effected" or

"CBE" regulation permits drug manufacturers to change a label without prior FDA approval if the change is designed to "add or strengthen a . . . warning" where there is "newly acquired information" about the "evidence of a causal association" between the drug and a risk of harm. 21 CFR §314.70(c)(6)(iii)(A).

B

Petitioner Merck Sharp & Dohme manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. App. 192; *In re Fosamax (Alendronate Sodium) Prods. Liability Litigation*, 852 F. 3d 268, 271, 274–275 (CA3 2017). Fosamax belongs to a class of drugs called bisphosphonates. Fosamax and other bisphosphonates work by affecting the "bone remodeling process," that is, the process through which bones are continuously broken down and built back up again. App. 102, 111. For some postmenopausal women, the two parts of the bone remodeling process fall out of sync; the body removes old bone cells faster than it can replace them. That imbalance can lead to osteoporosis, a disease that is characterized by low bone mass and an increased risk of bone fractures. Fosamax (like other bisphosphonates) slows the breakdown of old bone cells and thereby helps postmenopausal women avoid osteoporotic fractures. *Id.*, at 102.

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However, the mechanism through which Fosamax decreases the risk of osteoporotic fractures may increase the risk of a different type of fracture. *Id.*, at 400–444, 661–663. That is because all bones—healthy and osteoporotic alike—sometimes develop microscopic cracks that are not due to any trauma, but are instead caused by the mechanical stress of everyday activity. *Id.*, at 102. Those so-called stress fractures ordinarily heal on their own through the bone remodeling process. But, by slowing the breakdown of old bone cells, Fosamax and other bisphosphonates may cause stress fractures to progress to complete breaks that cause great pain and require surgical intervention to repair. *Id.*,

at 106–109, 139, 144–145. When that rare type of complete, low-energy fracture affects the thigh bone, it is called an Atypical Femoral Fracture. *Id.*, at 101.

The Fosamax label that the FDA approved in 1995 did not warn of the risk of atypical femoral fractures. 852 F. 3d, at 274–275. At that time, Merck's scientists were aware of at least a theoretical risk of those fractures. Indeed, as far back as 1990 and 1991, when Fosamax was undergoing preapproval clinical trials, Merck scientists expressed concern in internal discussions that Fosamax could inhibit bone remodeling to such a "'profound'" degree that "inadequate repair may take place" and "'micro-fractures would not heal.'" App. 111–113. When Merck applied to the FDA for approval of Fosamax, Merck brought those theoretical considerations to the FDA's attention. 852 F. 3d, at 274–275. But, perhaps because the concerns were only theoretical, the FDA approved Fosamax's label without requiring any mention of this risk. *Ibid.*

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Evidence connecting Fosamax to atypical femoral fractures developed after 1995. Merck began receiving adverse event reports from the medical community indicating that long-term Fosamax users were suffering atypical femoral fractures. App. 122–125. For example, Merck received a report from a doctor who said that hospital staff had begun calling atypical femoral fractures the "'Fosamax Fracture'" because "'100% of patients in his practice who have experienced femoral fractures (without being hit by a taxicab), were taking Fosamax . . . for over 5 years.'" *Id.*, at 126. Merck performed a statistical analysis of Fosamax adverse event reports, concluding that these reports revealed a statistically significant incidence of femur fractures. 3 App. in No. 14–1900 (CA3), pp. A1272–A1273, A1443. And about the same time, Merck began to see numerous scholarly articles and case studies documenting possible connections between long-term Fosamax use and atypical femoral fractures. App. 106–110, 116–122.

In 2008, Merck applied to the FDA for preapproval to change Fosamax's label to add language to both the "Adverse Reaction[s]" and the "Precaution[s]" sections of the label. *Id.*, at 670. In particular, Merck proposed adding a reference to "'low-energy femoral shaft fracture'" in the Adverse Reactions section, and cross-referencing a longer discussion in the Precautions section that focused on the risk of stress fractures associated with Fosamax. *Id.*, at 728. The FDA approved the addition to the Adverse Reactions section, but rejected Merck's proposal to warn of a risk of "stress fractures." *Id.*, at 511–512. The FDA explained that Merck's "justification" for the proposed change to the Precautions section was "inadequate," because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature." *Id.*, at 511. The FDA invited Merck to "resubmit" its application and to "fully address all the deficiencies listed." *Id.*, at 512; see 21 CFR §314.110(b). But Merck instead withdrew its application and decided to make the changes to the Adverse Reactions section through the CBE process. App. 654–660. Merck made no changes to the Precautions section at issue here. *Id.*, at 274.

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A warning about "atypical femoral fractures" did not appear on the Fosamax label until 2011, when the FDA ordered that change based on its own analyses. *Id.*, at 246–252, 526–534. Merck was initially resistant to the change, proposing revised language that, once again, referred to the risk of "stress fractures." *Id.*, at 629–634. But the FDA, once again, rejected that language. And this time, the FDA explained that "the term 'stress fracture' was considered and was not accepted" because, "for most practitioners, the term 'stress fracture' represents a minor fracture and this would contradict the seriousness of the atypical femoral fractures associated with bisphosphonate use." *Id.*, at 566. In January 2011, Merck and the FDA ultimately agreed upon adding a three-paragraph discussion of atypical femoral fractures to

the Warnings and Precautions section of the Fosamax label. *Id.*, at 223–224. The label now refers to the fractures five times as "atypical" without using the term "stress fracture." *Ibid.*

C

Respondents here are more than 500 individuals who took Fosamax and who suffered atypical femoral fractures between 1999 and 2010. Brief for Respondents 7. Respondents, invoking federal diversity jurisdiction, filed separate actions seeking tort damages on the ground that, during the relevant period, state law imposed upon Merck a legal duty to warn them and their doctors about the risk of atypical femoral fractures associated with using Fosamax. *Id.*, at 1. One respondent, for example, filed a complaint alleging that she took Fosamax for roughly 10 years and suffered an atypical femoral fracture. One day in 2009, when the respondent was 70 years old, she turned to unlock the front door of her house, heard a popping sound, and suddenly felt her left leg give out beneath her. She needed surgery, in which doctors repaired her leg with a rod and screws. She explained she would not have used Fosamax for so many years if she had known that she might suffer an atypical femoral fracture as a result. See *id.*, at 18–19.

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Merck, in defense, argued that respondents' state-law failure-to-warn claims should be dismissed as pre-empted by federal law. Both Merck and the FDA have long been aware that Fosamax could theoretically increase the risk of atypical femoral fractures. But for some period of time between 1995 (when the FDA first approved a drug label for Fosamax) and 2010 (when the FDA decided to require Merck to add a warning about atypical femoral fractures to Fosamax's label), both Merck and the FDA were unsure whether the developing evidence of a causal link between Fosamax and atypical femoral fractures was strong enough to require adding a warning to the Fosamax drug label. Merck conceded that the FDA's CBE regulation would have permitted

Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt. In particular, Merck pointed to the FDA's rejection of Merck's 2008 attempt to amend the Fosamax label to warn of the risk of "stress fractures" associated with Fosamax. On that basis, Merck claimed that federal law prevented Merck from complying with any state-law duty to warn respondents of the risk of atypical femoral fractures associated with Fosamax.

The District Court agreed with Merck's pre-emption argument and granted summary judgment to Merck, *In re Fosamax (Alendronate Sodium): Prods. Liability Litigation*, 2014 WL 1266994, *17 (D NJ, Mar. 22, 2017), but the Court of Appeals vacated and remanded, 852 F. 3d, at 302. The Court of Appeals concluded that its pre-emption analysis was controlled by this Court's decision in *Wyeth*. 852 F. 3d, at 302. The Court of Appeals understood that case as making clear that a failure-to-warn claim grounded in state law is pre-empted where there is "'clear evidence that the FDA would not have approved a change to the . . . label.'" *Id.*, at 280 (quoting *Wyeth*, 555 U. S., at 571). The Court of Appeals, however, suggested that this statement had led to varying lower court applications and that it would be helpful for this Court to "clarif[y] or buil[d] out the doctrine." 852 F. 3d, at 284.

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In attempting to do so itself, the Court of Appeals held that "the Supreme Court intended to announce a standard of proof when it used the term 'clear evidence' in *Wyeth*." *Ibid.* That is, the Court of Appeals believed that "[t]he term 'clear evidence' . . . does not refer directly to the *type* of facts that a manufacturer must show, or to the circumstances in which preemption will be appropriate." *Id.*, at 285. "Rather, it specifies how *difficult* it will be for the manufacturer to convince the factfinder that the FDA would have rejected a proposed label change." *Ibid.* And in the Court of Appeals' view, "for a defendant to establish a pre-emption defense under *Wyeth*, the factfinder must conclude

that it is highly probable that the FDA would not have approved a change to the drug's label." *Id.*, at 286. Moreover and importantly, the Court of Appeals also held that "whether the FDA would have rejected a proposed label change is a question of fact that must be answered by a jury." *Ibid.*

Merck filed a petition for a writ of certiorari. Merck's petition asked the Court to decide whether Merck's case and others like it "must . . . go to a jury" to determine whether the FDA, in effect, has disapproved a state-law-required labeling change. In light of differences and uncertainties among the courts of appeals and state supreme courts in respect to the application of *Wyeth*, we granted certiorari. See, *e. g.*, *Mason* v. *SmithKline Beecham Corp.*, 596 F. 3d 387, 391 (CA7 2010) ("The Supreme Court . . . did not clarify what constitutes 'clear evidence' "); *Reckis* v. *Johnson & Johnson*, 471 Mass. 272, 286, 28 N. E. 3d 445, 457 (2015) ("*Wyeth* did not define 'clear evidence' . . . " (some internal quotation marks omitted)).

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II

We stated in *Wyeth* v. *Levine* that state-law failure-to-warn claims are pre-empted by the Federal Food, Drug, and Cosmetic Act (FDCA) and related labeling regulations when there is "clear evidence" that the FDA would not have approved the warning that state law requires. 555 U. S., at 571. We here decide that a judge, not the jury, must decide the pre-emption question. And we elaborate *Wyeth*'s requirements along the way.

A

We begin by describing *Wyeth.* In that case, the plaintiff developed gangrene after a physician's assistant injected her with Phenergan, an antinausea drug. The plaintiff brought a state-law failure-to-warn claim against Wyeth, the drug's manufacturer, for failing to provide an adequate warning about the risks that accompany various methods of adminis-

tering the drug. In particular, the plaintiff claimed that directly injecting Phenergan into a patient's vein (the "IV-push" method of administration) creates a significant risk of catastrophic consequences. And those consequences could be avoided by introducing the drug into a saline solution that slowly descends into a patient's vein (the "IV-drip" method of administration). A jury concluded that Wyeth's warning label was inadequate, and that the label's inadequacy caused the plaintiff's injury. On appeal, Wyeth argued that the plaintiff's state-law failure-to-warn claims were pre-empted because it was impossible for Wyeth to comply with both state-law duties and federal labeling obligations. The Vermont Supreme Court rejected Wyeth's pre-emption claim. *Id.*, at 563.

We too considered Wyeth's pre-emption argument, and we too rejected it. In rejecting Wyeth's argument, we undertook a careful review of the history of federal regulation of drugs and drug labeling. *Id.*, at 566–568. In doing so, we "assum[ed] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 565 (internal quotation marks omitted). And we found nothing within that history to indicate that the FDA's power to approve or to disapprove labeling changes, by itself, pre-empts state law.

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Rather, we concluded that Congress enacted the FDCA "to bolster consumer protection against harmful products"; that Congress provided no "*federal* remedy for consumers harmed by unsafe or ineffective drugs"; that Congress was "awar[e] of the prevalence of state tort litigation"; and that, whether Congress' general purpose was to protect consumers, to provide safety-related incentives to manufacturers, or both, language, history, and purpose all indicate that "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.*, at 574–575 (emphasis added). See also *id.*, at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it

surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history").

We also observed that "through many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times." *Id.*, at 570–571. A drug manufacturer "is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." *Id.*, at 571. Thus, when the risks of a particular drug become apparent, the manufacturer has "a duty to provide a warning that adequately describe[s] that risk." *Ibid.* "Indeed," we noted, "prior to 2007, the FDA lacked the authority to order manufacturers to revise their labels." *Ibid.* And even when "Congress granted the FDA this authority," in the 2007 amendments to the FDCA, Congress simultaneously "reaffirmed the manufacturer's obligations and referred specifically to the CBE regulation, which both reflects the manufacturer's ultimate responsibility for its label and provides a mechanism for adding safety information to the label prior to FDA approval." *Ibid.*

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In light of Congress' reluctance to displace state laws that would penalize drug manufacturers for failing to warn consumers of the risks associated with their drugs, and Congress' insistence on requiring drug manufacturers to bear the responsibility for the content of their drug labels, we were unpersuaded by Wyeth's pre-emption argument. In Wyeth's case, we concluded, "when the risk of gangrene from IV-push injection of Phenergan became apparent, Wyeth had a duty" under state law "to provide a warning that adequately described that risk, and the CBE regulation permitted it to provide such a warning before receiving the FDA's approval." *Ibid.*

At the same time, and more directly relevant here, we pointed out that "the FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its re-

view of the manufacturer's supplemental application, just as it retains such authority in reviewing all supplemental applications." *Ibid.* We then said that, nonetheless, "*absent clear evidence that the FDA would not have approved a change* to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Ibid.* (emphasis added).

We reviewed the record and concluded that "Wyeth has offered no such evidence." *Id.*, at 572. We said that Wyeth's evidence of pre-emption fell short for two reasons. First, the record did not show that Wyeth "supplied the FDA with an evaluation or analysis concerning the specific dangers" that would have merited the warning. *Id.*, at 572–573. We could find "no evidence in this record that either the FDA or the manufacturer gave more than passing attention to the issue of IV-push versus IV-drip administration"—the matter at issue in the case. *Id.*, at 572 (internal quotation marks omitted). Second, the record did not show that Wyeth "attempted to give the kind of warning required by [state law] but was prohibited from doing so by the FDA." *Ibid.*, and n. 5. The "FDA had not made an affirmative decision to preserve" the warning as it was or "to prohibit Wyeth from strengthening its warning." *Id.*, at 572. For those reasons, we could not "credit Wyeth's contention that the FDA would have prevented it from adding a stronger warning about the IV-push method of intravenous administration." *Id.*, at 573. And we could not conclude that "it was impossible for Wyeth to comply with both federal and state requirements." *Ibid.* We acknowledged that meeting the standard we set forth would be difficult, but, we said, "[i]mpossibility pre-emption is a demanding defense." *Ibid.*

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B

The underlying question for this type of impossibility pre-emption defense is whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from

adding any and all warnings to the drug label that would satisfy state law. And, of course, in order to succeed with that defense the manufacturer must show that the answer to this question is yes. But in *Wyeth*, we confronted that question in the context of a particular set of circumstances. Accordingly, for purposes of this case, we assume—but do not decide—that, as was true of the warning at issue in *Wyeth*, there is sufficient evidence to find that Merck violated state law by failing to add a warning about atypical femoral fractures to the Fosamax label. In a case like *Wyeth*, showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning.

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These conclusions flow from our precedents on impossibility pre-emption and the statutory and regulatory scheme that we reviewed in *Wyeth*. See 555 U. S., at 578. In particular, "it has long been settled that state laws that conflict with federal law are without effect." *Mutual Pharmaceutical Co.*, 570 U. S., at 479–480. But as we have cautioned many times before, the "possibility of impossibility [is] not enough." *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 625, n. 8 (2011) (internal quotation marks omitted). Consequently, we have refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit. See, *e. g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 31 (1996); *Michigan Canners & Freezers Assn., Inc.* v. *Agricultural Marketing and Bargaining Bd.*, 467 U. S. 461, 478, and n. 21 (1984).

And, as we explained in *Wyeth*, 555 U. S., at 571–573, federal law—the FDA's CBE regulation—permits drug manufacturers to change a label to "reflect newly acquired infor-

mation" if the changes "add or strengthen a . . . warning" for which there is "evidence of a causal association," without prior approval from the FDA. 21 CFR § 314.70(c)(6)(iii)(A). Of course, the FDA reviews CBE submissions and can reject label changes even after the manufacturer has made them. See §§ 314.70(c)(6), (7). And manufacturers cannot propose a change that is not based on reasonable evidence. § 314.70(c)(6)(iii)(A). But in the interim, the CBE regulation permits changes, so a drug manufacturer will not ordinarily be able to show that there is an actual conflict between state and federal law such that it was impossible to comply with both.

We do not further define *Wyeth*'s use of the words "clear evidence" in terms of evidentiary standards, such as "preponderance of the evidence" or "clear and convincing evidence" and so forth, because, as we shall discuss, *infra*, at 316–318, courts should treat the critical question not as a matter of fact for a jury but as a matter of law for the judge to decide. And where that is so, the judge must simply ask himself or herself whether the relevant federal and state laws "irreconcilably conflic[t]." *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982); see *ibid.* ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute").

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We do note, however, that the only agency actions that can determine the answer to the pre-emption question, of course, are agency actions taken pursuant to the FDA's congressionally delegated authority. The Supremacy Clause grants "supreme" status only to "the *Laws* of the United States." U. S. Const., Art. VI, cl. 2. And pre-emption takes place "'only when and if [the agency] is acting within the scope of its congressionally delegated authority, . . . for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York* v. *FERC*, 535 U. S. 1, 18 (2002) (some alterations omitted). Federal law

permits the FDA to communicate its disapproval of a warning by means of notice-and-comment rulemaking setting forth labeling standards, see, *e. g.*, 21 U. S. C. § 355(d); 21 CFR §§ 201.57, 314.105; by formally rejecting a warning label that would have been adequate under state law, see, *e. g.*, 21 CFR §§ 314.110(a), 314.125(b)(6); or with other agency action carrying the force of law, cf., *e. g.*, 21 U. S. C. § 355(*o*)(4)(A). The question of disapproval "method" is not now before us. And we make only the obvious point that, whatever the means the FDA uses to exercise its authority, those means must lie within the scope of the authority Congress has lawfully delegated.

III

We turn now to what is the determinative question before us: Is the question of agency disapproval primarily one of fact, normally for juries to decide, or is it a question of law, normally for a judge to decide without a jury?

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The complexity of the preceding discussion of the law helps to illustrate why we answer this question by concluding that the question is a legal one for the judge, not a jury. The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination. Judges are experienced in "[t]he construction of written instruments," such as those normally produced by a federal agency to memorialize its considered judgments. *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 388 (1996). And judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context. Cf. 5 U. S. C. § 706 (specifying that a "reviewing court," not a jury, "shall . . . determine the meaning or applicability of the terms of an agency action"); see also H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946) (noting longstanding view that "questions respecting the . . . terms of any agency action"

and its "application" are "questions of law"). To understand the question as a legal question for judges makes sense given the fact that judges are normally familiar with principles of administrative law. Doing so should produce greater uniformity among courts; and greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of federal agency action. Cf. *Markman*, 517 U. S., at 390–391.

We understand that sometimes contested brute facts will prove relevant to a court's legal determination about the meaning and effect of an agency decision. For example, if the FDA rejected a drug manufacturer's supplemental application to change a drug label on the ground that the information supporting the application was insufficient to warrant a labeling change, the meaning and scope of that decision might depend on what information the FDA had before it. Yet in litigation between a drug consumer and a drug manufacturer (which will ordinarily lack an official administrative record for an FDA decision), the litigants may dispute whether the drug manufacturer submitted all material information to the FDA.

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But we consider these factual questions to be subsumed within an already tightly circumscribed legal analysis. And we do not believe that they warrant submission alone or together with the larger pre-emption question to a jury. Rather, in those contexts where we have determined that the question is "for the judge and not the jury," we have also held that "courts may have to resolve subsidiary factual disputes" that are part and parcel of the broader legal question. *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318, 326–327 (2015). And, as in contexts as diverse as the proper construction of patent claims and the voluntariness of criminal confessions, they create a question that "'falls somewhere between a pristine legal standard and a simple historical fact.'" *Markman*, 517 U. S., at 388 (quoting *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985)). In those

circumstances, "'the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Markman*, 517 U. S., at 388 (quoting *Miller*, 474 U. S., at 114). In this context, that "better positioned" decisionmaker is the judge.

IV

Because the Court of Appeals treated the pre-emption question as one of fact, not law, and because it did not have an opportunity to consider fully the standards we have described in Part II of our opinion, we vacate its judgment and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

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I join the Court's opinion and write separately to explain my understanding of the relevant pre-emption principles and how they apply to this case.

The Supremacy Clause of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Under this Clause, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 617 (2011). Although the Court has articulated several theories of pre-emption, Merck's sole argument here is that state law is pre-empted because it is impossible for Merck to comply with federal and state law. I remain skeptical that "physical impossibility" is a proper test for

deciding whether a direct conflict exists between federal and state law. But even under our impossibility precedents, Merck's pre-emption defense fails.

I

As I have explained before, it is not obvious that the "'physical impossibility' standard is the best proxy for determining when state and federal laws 'directly conflict' for purposes of the Supremacy Clause." *Wyeth* v. *Levine*, 555 U. S. 555, 590 (2009) (opinion concurring in judgment). Evidence from the founding suggests that, under the original meaning of the Supremacy Clause, federal law pre-empts state law only if the two are in logical contradiction. See *ibid.*; Nelson, Preemption, 86 Va. L. Rev. 225, 260–261 (2000). Sometimes, federal law will logically contradict state law even if it is possible for a person to comply with both. For instance, "if federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior." *Wyeth*, 555 U. S., at 590 (opinion of THOMAS, J.).

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Merck does not advance this logical-contradiction standard, and it is doubtful that a pre-emption defense along these lines would succeed here. "To say, as the statute does, that [Merck] may not market a drug without federal approval (*i. e.*, without [a Food and Drug Administration (FDA)] approved label) is not to say that federal approval gives [Merck] the unfettered right, for all time, to market its drug with the specific label that was federally approved." *Id.*, at 592. Nothing in the federal brand-name-drug "statutory or regulatory scheme necessarily insulates [Merck] from liability under state law simply because the FDA has approved a particular label." *Id.*, at 593. The relevant question would be whether federal law gives Merck "an unconditional right to market [a] federally approved drug at all times with the

precise label initially approved by the FDA," *id.*, at 592, or whether it instead provides a federal floor that can be supplemented by different state standards, see Brief for Cato Institute as *Amicus Curiae* 14, n. 4. Absent a federal statutory right to sell a brand-name drug with an FDA-approved label, FDA approval "does not represent a finding that the drug, as labeled, can never be deemed unsafe by later federal action, or as in this case, the application of state law." *Wyeth*, *supra*, at 592 (opinion of THOMAS, J.).

II

Applying the Court's impossibility precedents leads to the same conclusion. The question for impossibility is whether it was "lawful under federal law for [Merck] to do what state law required of" it. *Mensing*, 564 U. S., at 618. Because "[p]re-emption analysis requires us to compare federal and state law," I "begin by identifying the [relevant] state tort duties and federal labeling requirements." *Id.*, at 611. Respondents' claim here is "that state law obligated Merck to add a warning about atypical femur fractures" to the Warnings and Precautions section of Fosamax's label. *In re Fosamax (Alendronate Sodium) Prods. Liability Litigation*, 852 F. 3d 268, 282 (CA3 2017). Under the Federal Food, Drug, and Cosmetic Act, a manufacturer of a brand-name drug "bears responsibility for the content of its label at all times." *Wyeth*, 555 U. S., at 570–571 (majority opinion). The manufacturer "is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." *Id.*, at 571. Generally, to propose labeling changes, the manufacturer can submit a Prior Approval Supplement (PAS) application, which requires FDA approval before the changes are made. 21 CFR §314.70(b) (2018). Alternatively, under the FDA's Changes Being Effected (CBE) regulation, if the manufacturer would like to change a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" "to reflect

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newly acquired information," it can change the label immediately upon filing its supplemental application with the FDA, without waiting for FDA approval. § 314.70(c)(6)(iii); see *Wyeth*, *supra*, at 568. If the FDA later disapproves the CBE application, "it may order the manufacturer to cease distribution of the drug product(s)" with the new labeling. § 314.70(c)(7).

Here, Merck's impossibility pre-emption defense fails because it does not identify any federal law that "prohibited [it] from adding any and all warnings . . . that would satisfy state law." *Ante*, at 313–314. By its reference to "the Laws of the United States," the Supremacy Clause "requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, *supra*, at 586 (opinion of THOMAS, J.). Merck's primary argument, based on various agency communications, is that the FDA would have rejected a hypothetical labeling change submitted via the CBE process. But neither agency musings nor hypothetical future rejections constitute pre-emptive "Laws" under the Supremacy Clause.

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As the Court describes, in 2008, Merck submitted PAS applications to add certain language regarding fractures to the Adverse Reactions and the Warnings and Precautions sections of Fosamax's label. *Ante*, at 307–308. In 2009, the FDA sent Merck a "complete response" letter "agree[ing] that atypical and subtrochanteric fractures should be added" to the Adverse Reactions section. App. 510–511. But the letter said that Merck's proposed Warnings and Precautions language, which focused on "the risk factors for stress fractures," was "inadequate" because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature." *Id.*, at 511. In accord with FDA regulations, the letter required Merck to take one of three actions: (1) "[r]esubmit the appli-

cation . . . , addressing all deficiencies identified in the complete response letter"; (2) "[w]ithdraw the application . . . without prejudice to a subsequent submission"; or (3) "[a]sk the agency to provide . . . an opportunity for a hearing," after which "the agency will either approve" or "refuse to approve the application." 21 CFR §314.110(b); see App. 512. As this regulation suggests and the FDA has explained, complete response letters merely "infor[m] sponsors of changes that must be made before an application can be approved, *with no implication as to the ultimate approvability of the application.*" 73 Fed. Reg. 39588 (2008) (emphasis added). In other words, the 2009 letter neither marked "the consummation of the agency's decisionmaking process" nor determined Merck's "rights or obligations." *Bennett* v. *Spear*, 520 U. S. 154, 178 (1997) (internal quotation marks omitted). Instead, it was "of a merely tentative or interlocutory nature." *Ibid.* Therefore, the letter was not a final agency action with the force of law, so it cannot be "Law" with preemptive effect.

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Merck's argument that the 2009 letter and other agency communications suggest that the FDA would have denied a future labeling change fares no better: hypothetical agency action is not "Law." As Merck acknowledges, it could have resubmitted its PAS applications, sought a hearing, or changed its label at any time through the CBE process. See Reply Brief 13. Indeed, when Merck instead decided to withdraw its PAS applications, it added atypical femoral fractures to the Adverse Reactions section through the CBE process. That process also enabled Merck to add language to the Warnings and Precautions section, but Merck did not do so. If it had, it could have satisfied its federal and alleged state-law duties—meaning that it was possible for Merck to independently satisfy both sets of duties. Merck's belief that the FDA would have eventually rejected a CBE application does not make an earlier CBE change impossible. As the Court correctly explains, "'the possibility of impossibil-

ity [is] not enough.'" *Ante*, at 314. The very point of the CBE process is that a manufacturer can "unilaterally" make a labeling change that does not violate other federal law, *Wyeth*, 555 U. S., at 573; see *id.*, at 570; *e. g.*, 21 U. S. C. § 352, at least until the FDA rules on its application.*

Because Merck points to no statute, regulation, or other agency action with the force of law that would have prohibited it from complying with its alleged state-law duties, its pre-emption defense should fail as a matter of law.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KAVANAUGH join, concurring in the judgment.

I concur in the judgment because I agree with the Court's decision on the only question that it actually decides, namely, that whether federal law allowed Merck to include in the Fosamax label the warning alleged to be required by state law is a question of law to be decided by the courts, not a question of fact. I do not, however, join the opinion of the Court because I am concerned that its discussion of the law and the facts may be misleading on remand.

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*In 2007, Congress "granted the FDA statutory authority to require a manufacturer to change its drug label based on safety information that becomes available after a drug's initial approval," but even after this amendment, brand-name-drug "manufacturers remain responsible for updating their labels." *Wyeth*, 555 U. S., at 567–568; see 21 U. S. C. § 355(*o*)(4). As I understand the Court's opinion, if proper agency actions pursuant to this amendment, or other federal law, "prohibited the drug manufacturer from . . . satisfy[ing] state law," state law would be pre-empted under our impossibility precedents regardless of whether the manufacturer "show[ed] that it fully informed the FDA of the justifications for the warning required by state law." *Ante*, at 314; see, *e. g.*, *Wyeth*, 555 U. S., at 576; *id.*, at 582 (BREYER, J., concurring). Of course, the only proper agency actions are those "that are set forth in, or necessarily follow from, the statutory text," and they must have the force of law to be pre-emptive. *Id.*, at 586 (opinion of THOMAS, J.). I am aware of no such agency action here that prevented Merck from complying with state law.

I

I begin with the law. The Court correctly notes that a drug manufacturer may prove impossibility pre-emption by showing that "federal law (including appropriate [Food and Drug Administration (FDA)] actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law." *Ante*, at 313–314. But in expounding further on the pre-emption analysis, the Court provides a skewed summary. While dwelling on our decision in *Wyeth* v. *Levine*, 555 U. S. 555 (2009), see *ante*, at 310–315, the Court barely notes a statutory provision enacted after the underlying events in that case that may have an important bearing on the ultimate pre-emption analysis in this case.

Under 21 U. S. C. §355(*o*)(4)(A), which was enacted in 2007, Congress has imposed on the FDA a duty to initiate a label change "[i]f the Secretary becomes aware of new information, including any new safety information . . . that the Secretary determines should be included in the labeling of the drug."* This provision does not relieve drug manufacturers of their own responsibility to maintain their drug labels, see §355(*o*)(4)(I), but the FDA's "actions," *ante*, at 313, taken pursuant to this duty arguably affect the pre-emption analysis. This is so because, if the FDA declines to require a label change despite having received and considered information regarding a new risk, the logical conclusion is that the FDA determined that a label change was unjustified. See *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). The FDA's duty does not depend on whether the relevant drug manufacturer, as

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*Prior to October 2018, §355(*o*)(4)(A)'s language contained slight differences not relevant here. See Substance Use–Disorder Prevention That Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. 115–271, §3041(b), 132 Stat. 3942–3943, effective Oct. 24, 2018.

opposed to some other entity or individual, brought the new information to the FDA's attention. Cf. *ante*, at 314 ("[T]he drug manufacturer [must] show that it fully informed the FDA of the justifications for the warning required by state law"). Nor does § 355(*o*)(4)(A) require the FDA to communicate to the relevant drug manufacturer that a label change is unwarranted; instead, the FDA could simply consider the new information and decide not to act. Cf. *ante*, at 314 ("[T]he FDA, in turn, [must have] informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning").

Section 355(*o*)(4)(A) is thus highly relevant to the pre-emption analysis, which turns on whether "federal law (*including appropriate FDA actions*) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law." *Ante*, at 313–314 (emphasis added). On remand, I assume that the Court of Appeals will consider the effect of § 355(*o*)(4)(A) on the pre-emption issue in this case.

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Two other aspects of the Court's discussion of the legal background must also be mentioned. First, although the Court's discussion of the point is a bit opaque, the Court holds—correctly, in my view—that *Wyeth*'s use of the phrase "clear evidence" was merely a rhetorical flourish. As the Court explains, a judge, in determining whether federal law would permit a label change allegedly required by state law, "must simply ask himself or herself whether the relevant federal and state laws 'irreconcilably conflic[t].'" *Ante*, at 315 (quoting *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982)). Standards of proof, such as preponderance of the evidence and clear and convincing evidence, have no place in the resolution of this question of law.

Second, for reasons that entirely escape me, the Court refuses to acknowledge that there are two ways in which a drug manufacturer may attempt to alter a drug's label. The Court notes that a manufacturer may proceed under the

FDA's "'changes being effected'" or "'CBE'" regulation, which permits a manufacturer to change a label without prior FDA approval under some circumstances. See *ante*, at 304–305, 315. But the Court refuses to note that a manufacturer may (and, in many circumstances, must) submit a Prior Approval Supplement (PAS). 21 CFR §314.70(b) (2018). As the name suggests, changes proposed in a PAS must receive FDA approval before drug manufacturers may make the changes. §314.70(b)(3). And "[h]istorically," the FDA has "accepted PAS applications instead of CBE supplements, as occurred in this case, particularly where significant questions exist on whether to revise or how to modify existing drug labeling." Brief for United States as *Amicus Curiae* 5.

II

I now turn to the facts. Resolution of the legal question that the Court decides does not require much discussion of the facts, but if the Court wishes to include such a summary, its presentation should be balanced. Instead, the Court provides a one-sided account. For example, it highlights historical accounts dating back to the 1990s that purportedly linked atypical femoral fractures with Fosamax use, see *ante*, at 306, 308, but it omits any mention of the extensive communication between Merck and the FDA during the relevant period.

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A reader of the Court's opinion will inevitably be left with the impression that, once the FDA rejected Merck's proposed warning in 2009, neither the FDA nor Merck took any other actions related to atypical femoral fractures "until 2011," *ante*, at 307. But that is simply not true.

While Merck's 2008 proposal was pending, the FDA remained in contact with Merck about the issue of atypical femoral fractures, which Merck, at the time, labeled as a type of stress fracture. See, *e. g.*, App. 707, 746–748. An internal Merck memorandum describes a phone call in which an FDA official allegedly told Merck that "[t]he conflicting nature of the literature does not provide a clear path forward,

and more time will be need[ed] for FDA to formulate a formal opinion on the issue of a precaution around these data." *Id.*, at 767. In an e-mail about a week later, another FDA official told Merck that the FDA would "close out" Merck's applications if Merck "agree[d] to hold off on the [Precautions] language at this time." *Id.*, at 508. The official went on to say that the FDA "would then work with . . . Merck to decide on language for a [Precautions] atypical fracture language, if it is warranted." *Ibid.*

Then, months after the FDA rejected Merck's proposed warning, the FDA issued a Safety Announcement regarding its "[o]ngoing safety review of oral bisphosphonates and atypical subtrochanteric femur fractures." *Id.*, at 519. The Safety Announcement stated that, "[a]t this point, the data that FDA has reviewed have not shown a clear connection between bisphosphonate use and a risk of atypical subtrochanteric femur fractures." *Ibid.* Nonetheless, the Safety Announcement announced the FDA's intent to further study the issue alongside a task force formed to address the atypical fractures. *Id.*, at 519–520. And the Safety Announcement concluded by admonishing healthcare professionals to "continue to follow the recommendations in the drug label when prescribing oral bisphosphonates" and patients to "not stop taking their medication unless told to do so by their healthcare professional." *Id.*, at 520–521.

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In September 2010, the task force published its report, which concluded that, although there was no established "causal association" between bisphosphonates and atypical femoral fractures, "recent observations suggest that the risk rises with increasing duration of exposure, and there is concern that lack of awareness and underreporting may mask the true incidence of the problem." *Id.*, at 284. The same day, the FDA issued a statement acknowledging the task force report and committing to "considering label revisions." *Id.*, at 523–525. And in October 2010, the FDA issued another Safety Announcement in which the FDA stated that it

would initiate changes in the Precautions section of bisphosphonate drug labels to warn of atypical femoral fractures. *Id.*, at 246–249. It was not until then that, pursuant to its §355(*o*)(4)(A) obligations, the FDA instructed Merck to include a warning about such fractures in its Fosamax drug labels. *Id.*, at 526–534.

Thus, for years the FDA was: aware of this issue, communicating with drug manufacturers, studying all relevant information, and instructing healthcare professionals and patients alike to continue to use Fosamax as directed. For this reason, the FDA itself, speaking through the Solicitor General, takes the position that the FDA's decision not to require a label change prior to October 2010 reflected the FDA's "determin[ation]" that a new warning "should [not] be included in the labeling of the drug," §355(*o*)(4)(A). See Brief for United States as *Amicus Curiae* 30, 33–34.

For these reasons, I concur in the judgment only.

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Syllabus

HERRERA *v.* WYOMING

CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

No. 17–532. Argued January 8, 2019—Decided May 20, 2019

An 1868 treaty between the United States and the Crow Tribe promised that in exchange for most of the Tribe's territory in modern-day Montana and Wyoming, its members would "have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts." 15 Stat. 650. In 2014, Wyoming charged petitioner Clayvin Herrera with off-season hunting in Bighorn National Forest and being an accessory to the same. The state trial court rejected Herrera's argument that he had a protected right to hunt in the forest pursuant to the 1868 Treaty, and a jury convicted him. On appeal, the state appellate court relied on the reasoning of the Tenth Circuit's decision in *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982—which in turn relied upon this Court's decision in *Ward* v. *Race Horse*, 163 U. S. 504—and held that the treaty right expired upon Wyoming's statehood. The court rejected Herrera's argument that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, repudiated *Race Horse* and therefore undercut the logic of *Repsis*. In any event, the court concluded, Herrera was precluded from arguing that the treaty right survived Wyoming's statehood because the Crow Tribe had litigated *Repsis* on behalf of itself and its members. Even if the 1868 Treaty right survived Wyoming's statehood, the court added, it did not permit Herrera to hunt in Bighorn National Forest because the treaty right applies only on unoccupied lands and the national forest became categorically occupied when it was created.

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Held:

1. The Crow Tribe's hunting rights under the 1868 Treaty did not expire upon Wyoming's statehood. Pp. 337–348.

(a) This case is controlled by *Mille Lacs*, not *Race Horse*. *Race Horse* concerned a hunting right guaranteed in an 1868 treaty with the Shoshone and Bannock Tribes containing language identical to that at issue here. Relying on two lines of reasoning, the *Race Horse* Court held that Wyoming's admission to the United States in 1890 extinguished the Shoshone-Bannock Treaty right. First, the doctrine that new States are admitted to the Union on an "equal footing" with existing States led the Court to conclude that affording the Tribes a pro-

tected hunting right lasting after statehood would conflict with the power vested in those States—and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 514. Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* established that the crucial inquiry for treaty termination analysis is whether Congress has "clearly express[ed]" an intent to abrogate an Indian treaty right, 526 U. S., at 202, or whether a termination point identified in the treaty itself has been satisfied, *id.*, at 207. Thus, while *Race Horse* "was not expressly overruled" in *Mille Lacs*, it "retain[s] no vitality," *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361, and is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. Pp. 337–342.

(b) *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood. Even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834. Here, *Mille Lacs*' repudiation of *Race Horse*'s reasoning—on which *Repsis* relied—justifies such an exception. Pp. 342–344.

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(c) Applying *Mille Lacs*, Wyoming's admission into the Union did not abrogate the Crow Tribe's off-reservation treaty hunting right. First, the Wyoming Statehood Act does not show that Congress "clearly expressed" an intent to end the 1868 Treaty hunting right. See 526 U. S., at 202. There is also no evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. Nor does the historical record support such a reading of the treaty. The State counters that statehood, as a practical matter, rendered all the lands in the State occupied. Even assuming that Wyoming presents an accurate historical picture, the State, by using statehood as a proxy for occupation, subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Id.*, at 207. To the extent that the State seeks to rely on historical evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. Pp. 344–348.

2. Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created. Construing the treaty's terms as "'they would naturally be understood by the Indians,'" *Washington* v. *Washington State Commer-*

Syllabus

cial Passenger Fishing Vessel Assn., 443 U. S. 658, 676, it is clear that the Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians. That interpretation follows from several cues in the treaty's text. For example, the treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," 15 Stat. 650, thus contrasting the unoccupied hunting districts with areas of white settlement. Historical evidence confirms this reading of "unoccupied." Wyoming's counterarguments are unavailing. The Federal Government's exercise of control and withdrawing of the forest lands from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would mining and logging of the forest lands prior to 1897 have caused the Tribe to view the Bighorn Mountains as occupied. Pp. 348–352.

3. This decision is limited in two ways. First, the Court holds that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation," an issue not reached by the appellate court. The Court also does not address the viability of the State's arguments on this issue. P. 352.

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Vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and KAVANAUGH, JJ., joined, *post*, p. 353.

George W. Hicks, Jr., argued the cause for petitioner. With him on the briefs were *Andrew C. Lawrence*, *Kyle A. Gray*, *Steven T. Small*, and *Hadassah Reimer*.

Frederick Liu argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *Elizabeth Ann Peterson*, and *Rachel Heron*.

John G. Knepper, Chief Deputy Attorney General of Wyoming, argued the cause for respondent. With him on the brief were *Peter K. Michael*, Attorney General of Wyoming, *Jay Jerde*, Special Assistant Attorney General, *James Kaste*,

Deputy Attorney General, and *Erik Petersen* and *D. David Dewald*, Senior Assistant Attorneys General.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists . . . on the borders of the hunting districts." Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member

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*Briefs of *amici curiae* urging reversal were filed for the Crow Tribe of Indians by *Heather Daphne Whiteman Runs Him*, *Daniel David Lewerenz*, and *Joel West Williams*; for the Eastern Shoshone Tribe by *Richard Verri*; for Indian Law Professors by *Monte Mills* and *Alexander Blewett III*; for the National Congress of American Indians et al. by *Marc D. Slonim*; for Natural Resources Law Professors by *Colette Routel*; for the Pacific and Inland Northwest Treaty Tribes by *Maryanne E. Mohan*, *Anne E. Tweedy*, and *Rob Roy Smith*; for the Shoshone-Bannock Tribes of the Fort Hall Reservation by *William F. Bacon*, *Monte Gray*, *Douglas B. L. Endreson*, *Anne D. Noto*, and *Frank S. Holleman IV*; for the Southern Ute Indian Tribe et al. by *Thomas H. Shipps* and *David C. Smith*; and for Timothy P. McCleary et al. by *Ashley C. Parrish* and *Jeremy M. Bylund*.

Briefs of *amici curiae* urging affirmance were filed for the State of Nebraska et al. by *Douglas J. Peterson*, Attorney General of Nebraska, *James D. Smith*, Solicitor General, *David A. Lopez*, Deputy Solicitor General, and *Ryan S. Post* and *Chris C. Di Lorenzo*, Assistant Attorneys General, and by the Attorneys General of their respective States as follows: *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Wayne Stenehjem* of North Dakota, *Marty J. Jackley* of South Dakota, and *Ken Paxton* of Texas; for the Association of Fish and Wildlife Agencies by *Carol Frampton*; for the Citizen Equal Rights Foundation et al. by *Gary R. Leistico*; for Safari Club International by *Anna M. Seidman* and *Douglas S. Burdin*; for the Western Association of Fish and Wildlife Agencies et al. by *Jennifer A. MacLean*; and for the Wyoming Stock Growers Association et al. by *William Perry Pendley*.

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of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve.

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana* v. *United States*, 450 U. S. 544, 547 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming "historically made up both the geographic and the spiritual heart" of the Tribe's territory. Brief for Crow Tribe of Indians as *Amicus Curiae* 5.

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The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U. S., at 547–548. The Treaty of Fort Laramie specified that "the tribes did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands in dispute" by entering the treaty. *Id.*, at 548.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, Parading Through

History 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that "settlements ha[d] been made" upon the Crow Tribe's lands and that their "game [was] being driven away." Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 86 (1975) (hereinafter Proceedings). He told the assembled tribal leaders that the United States wished to "set apart a tract of [Crow Tribe] country as a home" for the Tribe "forever" and to buy the rest of the Tribe's land. *Ibid.* Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." *Ibid.*

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See *id.*, at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm. . . . That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); *id.*, at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. *Id.*, at 90.

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The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U. S., at 547–548; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members

with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, *id.*, at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

> "The Indians . . . shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.*, at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming "into the Union on an equal footing with the original States in all respects," in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land "reserved from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 985 (CA10 1995).

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B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014,

Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss. See Nos. CT–2015–2687, CT–2015–2688 (4th Jud. Dist. C. C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

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Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U. S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians* v. *Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d, at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward* v. *Race Horse*, 163 U. S. 504, 516 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that *Mille Lacs* had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon

Wyoming's statehood. No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on "unoccupied" lands and that the national forest became categorically "occupied" when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d, at 994. The state appellate court affirmed the trial court's judgment and sentence.

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The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U. S. 1029 (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid. Relying on this Court's decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The

Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [*sic*] and the Bannack [*sic*] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"). The *Race Horse* Court concluded that Wyoming's admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U. S., at 505, 514–515.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an "equal footing" with existing States. *Id.*, at 511–514 (citing, *e.g.*, *Lessee of Pollard* v. *Hagan*, 3 How. 212 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes' hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be "irreconcilably in conflict" with the power—"vested in all other States of the Union" and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U. S., at 509, 514.

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Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." *Id.*, at 514–515. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. *Id.*, at 509. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were "essentially perishable" and afforded the Tribes only a "temporary and precarious" privilege. *Id.*, at 515.

More than a century after *Race Horse* and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut

both pillars of *Race Horse*'s reasoning. *Mille Lacs* considered an 1837 treaty that guaranteed to several bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands " 'during the pleasure of the President.' " 526 U. S., at 177 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U. S., at 202–208.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquiries roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U. S., at 203. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

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To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U. S., at 514. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U. S., at 204. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. *Id.*, at 204–205 (citing *Washington* v. *Washington*

State Commercial Passenger Fishing Vessel Assn., 443 U. S. 658, 682 (1979); *Antoine* v. *Washington*, 420 U. S. 194, 207–208 (1975); *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 398 (1968)). "[B]ecause treaty rights are reconcilable with state sovereignty over natural resources," the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient "to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U. S., at 205.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U. S., at 202 (citing *United States* v. *Dion*, 476 U. S. 734, 738–740 (1986); *Fishing Vessel Assn.*, 443 U. S., at 690; *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968)). The Court found no such "'clear evidence'" in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U. S., at 203.

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The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U. S., at 206. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are "'"of such a nature as to imply their perpetuity,"'" rather than "'temporary and precarious.'" 526 U. S., at 206. The Court rejected such an approach. The Court found the "'temporary and precarious'" language "too broad to be useful," given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U. S., at 738—could be described in those terms. 526 U. S., at 206–207. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate "intended the rights secured by the . . . Treaty to survive statehood." 526 U. S., at 207. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the

Chippewa bands' treaty rights. The Chippewa Treaty itself defined the specific "circumstances under which the rights would terminate," and there was no suggestion that statehood would satisfy those circumstances. *Ibid.*

Maintaining its focus on the treaty's language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse.* Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, "tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]"—*i. e.*, to whenever the hunting grounds would cease to "remai[n] unoccupied and owned by the United States." 526 U. S., at 207. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the "Treaty itself." *Ibid.* Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was "impliedly repealed," *Mille Lacs* disavowed that earlier holding. 526 U. S., at 207. "Treaty rights," the Court clarified, "are not impliedly terminated upon statehood." *Ibid.* The Court further explained that "[t]he *Race Horse* Court's decision to the contrary"—that Wyoming's statehood did imply repeal of Indian treaty rights—"was informed by" that Court's erroneous conclusion "that the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.*, at 207–208.

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In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse.* The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U. S., at 207. "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that

they can be extinguished by *implication* at statehood." *Ibid.*

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*' analysis with the Court's prior reasoning in *Race Horse*.[1]

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs*, "it must be regarded as retaining no vitality" after that decision. *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353, 361 (1984). To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

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B

Because this Court's intervening decision in *Mille Lacs* repudiated the reasoning on which the Tenth Circuit relied in *Repsis*, *Repsis* does not preclude Herrera from arguing that the 1868 Treaty right survived Wyoming's statehood.

Under the doctrine of issue preclusion, "a prior judgment . . . foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire* v. *Maine*,

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[1] Notably, the four Justices who dissented in *Mille Lacs* protested that the Court "effectively overrule[d] *Race Horse sub silentio*." 526 U. S., at 219 (Rehnquist, C. J., dissenting). Others have agreed with this assessment. See, *e.g.*, *State* v. *Buchanan*, 138 Wash. 2d 186, 211–212, 978 P. 2d 1070, 1083 (1999) ("[T]he United States Supreme Court effectively overruled *Race Horse* in *Minnesota* v. *Mille Lacs*").

532 U. S. 742, 748–749 (2001). Even when the elements of issue preclusion are met, however, an exception may be warranted if there has been an intervening "'change in [the] applicable legal context.'" *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009) (quoting Restatement (Second) of Judgments §28, Comment *c* (1980)); see *Limbach*, 466 U. S., at 363 (refusing to find a party bound by "an early decision based upon a now repudiated legal doctrine"); see also *Montana* v. *United States*, 440 U. S. 147, 155 (1979) (asking "whether controlling facts or legal principles ha[d] changed significantly" since a judgment before giving it preclusive effect); *id.*, at 157–158 (explaining that a prior judgment was conclusive "[a]bsent significant changes in controlling facts or legal principles" since the judgment); *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948) (issue preclusion "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally"). The change-in-law exception recognizes that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U. S., at 836–837.[2]

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We conclude that a change in law justifies an exception to preclusion in this case. There is no question that the Tenth

[2] The dissent does not disagree outright with this conclusion, noting only that "there is a respectable argument on the other side," *post*, at 363. The dissent argues that the cases cited above are distinguishable, but we do not read them as narrowly as does the dissent. We note, too, that the lower federal courts have long applied the change-in-law exception in a variety of contexts. See, *e. g.*, *Dow Chemical Co.* v. *Nova Chemicals Corp. (Canada)*, 803 F. 3d 620, 627–630 (CA Fed. 2015), cert. denied, 578 U. S. 1003 (2016); *Coors Brewing Co.* v. *Mendez-Torres*, 562 F. 3d 3, 11 (CA1 2009), abrogated on other grounds by *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413 (2010); *Ginters* v. *Frazier*, 614 F. 3d 822, 826–827 (CA8 2010); *Faulkner* v. *National Geographic Enterprises Inc.*, 409 F. 3d 26, 37–38 (CA2 2005); *Chippewa & Flambeau Improvement Co.* v. *FERC*, 325 F. 3d 353, 356–357 (CADC 2003); *Spradling* v. *Tulsa*, 198 F. 3d 1219, 1222–1223 (CA10 2000); *Mendelovitz* v. *Adolph Coors Co.*, 693 F. 2d 570, 579 (CA5 1982).

Circuit in *Repsis* relied on this Court's binding decision in *Race Horse* to conclude that the 1868 Treaty right terminated upon Wyoming's statehood. See 73 F. 3d, at 994. When the Tenth Circuit reached its decision in *Repsis*, it had no authority to disregard this Court's holding in *Race Horse* and no ability to predict the analysis this Court would adopt in *Mille Lacs*. *Mille Lacs* repudiated *Race Horse*'s reasoning. Although we recognize that it may be difficult at the margins to discern whether a particular legal shift warrants an exception to issue preclusion, this is not a marginal case. At a minimum, a repudiated decision does not retain preclusive force. See *Limbach*, 466 U. S., at 363.[3]

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

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First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U. S., at 202. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to re-

[3] We do not address whether a different outcome would be justified if the State had identified "compelling concerns of repose or reliance." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4425, p. 726 (3d ed. 2016). Wyoming here has not done so. The State suggests that public support for its conservation efforts may be jeopardized if it no longer has "unquestioned" authority over wildlife management in the Bighorn Mountains. Brief for Respondent 54. Wyoming does not explain why its authority to regulate Indians exercising their treaty rights when necessary for conservation is not sufficient to preserve that public support, see *infra*, at 344. The State's passing reference to upsetting the settled expectations of private property owners is unconvincing because the 1868 Treaty right applies only to "unoccupied lands of the United States."

solve that conflict by abrogating the treaty.'" *Id.*, at 202–203 (quoting *Dion*, 476 U. S., at 740); see *Menominee Tribe*, 391 U. S., at 412. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." Cf. *Mille Lacs*, 526 U. S., at 203; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the "'clear evidence'" this Court's precedent requires. *Mille Lacs*, 526 U. S., at 203.[4]

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is "essentially a contract between two sovereign nations." *Fishing Vessel Assn.*, 443 U. S., at 675. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U. S., at 206, and the words of a treaty must be construed "'in the sense in which they would naturally be understood by the Indians,'" *Fishing Vessel Assn.*, 443 U. S., at 676. If a treaty "itself defines the circumstances under which the rights would terminate," it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille Lacs*, 526 U. S., at 207.

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Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found

[4] Recall also that the Act establishing the Wyoming Territory declared that the creation of the Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory" unless a treaty extinguished those rights. Wyoming Territory Act, 15 Stat. 178.

thereon"; and (4) the Tribe and non-Indians are no longer at "peace . . . on the borders of the hunting districts." Art. IV, 15 Stat. 650. Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U. S., at 207.

The historical record likewise does not support the State's position. See *Choctaw Nation* v. *United States*, 318 U. S. 423, 432 (1943) (explaining that courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine a treaty's meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, *e.g.*, Proceedings 88, and Commissioner Taylor assured them that the Tribe would have "the right to hunt upon [the ceded land] as long as the game lasts," *id.*, at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota, May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical mat-

ter, marked the arrival of "civilization" in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming's arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members "'wholly within the limits of their respective reservations'"; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting §237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. §492 (1884)).

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Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 495 (1873) (Black Foot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain"). As for the Indian Department regulations, there are reports that a group of Crow Tribe members "regularly hunted along the Little Bighorn River" even after the regulation the State cites was in effect. Hoxie, Parading Through History, at 26. In 1889, the Office of Indian Affairs wrote to U. S. Indian Agents in the Northwest that "[f]requent complaints have been made to this Department that Indians are in the habit of leaving their reservations for the purpose of hunting." 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State's mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming sub-

verts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Mille Lacs*, 526 U. S., at 207.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 350–351. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case's reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U. S., at 514; *Mille Lacs*, 526 U. S., at 207–208.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

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III

We turn next to the question whether the 1868 Treaty right, even if still valid after Wyoming's statehood, does not protect hunting in Bighorn National Forest because the forest lands are "occupied." We agree with Herrera and the United States that Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.[5]

[5] Wyoming argues that the judgment below should be affirmed because the Tenth Circuit held in *Repsis* that the creation of the forest rendered the land "occupied," see 73 F. 3d, at 994, and thus Herrera is precluded from raising this issue. We did not grant certiorari on the question of how preclusion principles would apply to the alternative judgment in *Repsis*, and—although our dissenting colleagues disagree, see *post*, at 364, and n. 6—the decision below did not address that issue.

The Wyoming appellate court agreed with the State that "the primary issue in [Herrera's] case is identical to the *primary issue* in the *Repsis*

Treaty analysis begins with the text, and treaty terms are construed as "'they would naturally be understood by the Indians.'" *Fishing Vessel Assn.*, 443 U. S., at 676. Here it

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case." No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 13 (emphasis added). That "primary issue" was the *Race Horse* ground of decision, not the "occupation" ground, which *Repsis* referred to as "an alternative basis for affirmance," *Repsis*, 73 F. 3d, at 993, and which the Wyoming court itself described as an "alternativ[e]" holding, No. 2016–242, App. to Pet. for Cert. 33. Reading the state court's decision to give preclusive effect to the occupation ground as well would not fit with the Wyoming court's preclusion analysis, which, among other things, relied on a decision of the Federal District Court in *Repsis* that did not address the occupation issue. See No. 2016–242, App. to Pet. for Cert. 14, 18; see also *Repsis*, 73 F. 3d, at 993 (explaining that "the district court did not reach [the occupation] issue"). Context thus makes clear that the state court gave issue-preclusive effect only to *Repsis*' holding that the 1868 Treaty was no longer valid, not to *Repsis*' independent, narrower holding that Bighorn National Forest in particular was "occupied" land. The court may not have addressed the issue-preclusive effect of the latter holding because of ambiguity in the State's briefing. See Appellee's Supplemental Brief in No. 2016–242, pp. 4, 11–12.

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While the dissent questions whether forfeiture could have played a part in the state court's analysis given that the court invited the parties to submit supplemental briefs on preclusion, *post*, at 364, n. 6, the parties suggest that Wyoming failed adequately to raise the claim even in its supplemental brief. See Brief for Petitioner 49 ("the state made no such argument before" the state court); Brief for United States as *Amicus Curiae* 31 (noting ambiguity in the State's supplemental brief).

It can be "appropriate in special circumstances" for a court to address a preclusion argument *sua sponte*. *Arizona* v. *California*, 530 U. S. 392, 412 (2000). But because the Wyoming District Court "did not address" this contention, "we decline to address it here." *County of Los Angeles* v. *Mendez*, 581 U. S. 420, 429, n. (2017); see *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005); *Archer* v. *Warner*, 538 U. S. 314, 322–323 (2003). Resolution of this question would require fact-intensive analyses of whether this issue was fully and fairly litigated in *Repsis* or was forfeited in this litigation, among other matters. These gateway issues should be decided before this Court addresses them, especially given that even the dissent acknowledges that one of the preclusion issues raised by the parties is important and undecided, *post*, at 365, and some of the parties' other arguments are equally weighty. Unlike the dissent, we do not address these issues in the first instance.

is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty's text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word "occupation" to refer to the Tribe's residence inside the reservation boundaries and referred to the Tribe members as "settlers" on the new reservation. Arts. II, VI, *id.*, at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make "no permanent settlement" other than on the new reservation, but could hunt on the "unoccupied lands" of the United States. Art. IV, *id.*, at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, A Dictionary of Law 725 (1889) (defining "occupy" as "[t]o hold in possession; to hold or keep for use" and noting that the word "[i]mplies actual use, possession or cultivation by a particular person"); *id.*, at 944 (defining "settle" as "[t]o establish one's self upon; to occupy, reside upon").

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Historical evidence confirms this reading of the word "unoccupied." At the treaty negotiations, Commissioner Taylor commented that "settlements ha[d] been made upon [Crow Tribe] lands" and that "white people [were] rapidly increasing and . . . occupying all the valuable lands." Proceedings 86. It was against this backdrop of white settlement that the United States proposed to buy "the right to use and settle" the ceded lands, retaining for the Tribe the right to hunt. *Ibid.* A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area "as long

as there are any buffalo, and as long as the white men are not [in that area] with farms." Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 500.

Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not "occupy" that area within the treaty's meaning. To the contrary, the President "reserved" the lands "from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning . . . to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." *Id.*, at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Wyoming's counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government's "exercise of dominion and control" over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§241.2, 241.3 (Supp. 1941); §261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was "very little" settlement of Bighorn National For-

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est around the time the forest was created. Dept. of Interior, 19th Ann. Rep. of the U. S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

IV

Finally, we note two ways in which our decision is limited. First, we hold that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was "occupied" within the meaning of the 1868 Treaty. See *State* v. *Cutler*, 109 Idaho 448, 451, 708 P. 2d 853, 856 (1985) (stating that the Federal Government may not be foreclosed from using land in such a way that the Indians would have considered it occupied).

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Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation." Nos. CT–2015–2687, CT–2015–2688, App. to Pet. for Cert. 39–41; see *Antoine*, 420 U. S., at 207. The appellate court did not reach this issue. No. 2016–242, App. to Pet. for Cert. 14, n. 3. On remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation. We do not pass on the viability of those arguments today.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The Court's opinion in this case takes a puzzling course. The Court holds that members of the Crow Tribe retain a virtually unqualified right under the Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty) to hunt on land that is now part of the Bighorn National Forest. This interpretation of the treaty is debatable and is plainly contrary to the decision in *Ward* v. *Race Horse*, 163 U. S. 504 (1896), which construed identical language in a closely related treaty. But even if the Court's interpretation of the treaty is correct, its decision will have no effect if the members of the Crow Tribe are bound under the doctrine of issue preclusion by the judgment in *Crow Tribe of Indians* v. *Repsis*, 73 F. 3d 982, 992–993 (CA10 1995) (holding that the hunting right conferred by that treaty is no longer in force).

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That judgment was based on two independent grounds, and the Court deals with only one of them. The Court holds that the first ground no longer provides an adequate reason to give the judgment preclusive effect due to an intervening change in the legal context. But the Court sidesteps the second ground and thus leaves it up to the state courts to decide whether the *Repsis* judgment continues to have binding effect. If it is still binding—and I think it is—then no member of the Tribe will be able to assert the hunting right that the Court addresses. Thus, the Court's decision to plow ahead on the treaty-interpretation issue is hard to understand, and its discourse on that issue is likely, in the end, to be so much wasted ink.

I

A

As the Court notes, the Crow Indians eventually settled in what is now Montana, where they subsequently came into contact with early white explorers and trappers. F. Hoxie,

The Crow 26–28, 33 (1989). In an effort to promote peace between Indians and white settlers and to mitigate conflicts between different tribes, the United States negotiated treaties that marked out a territory for each tribe to use as a hunting district. See 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (2d ed. 1904) (Kappler). The Treaty of Fort Laramie of 1851 (1851 Treaty), 11 Stat. 749, created such a hunting district for the Crow.

As white settlement increased, the United States entered into a series of treaties establishing reservations for the Crow and neighboring tribes, and the 1868 Treaty was one such treaty. 15 Stat. 649; Kappler 1008. It set out an 8-million-acre reservation for the Crow Tribe but required the Tribe to cede ownership of all land outside this reservation, including 30 million acres that lay within the hunting district defined by the 1851 Treaty. Under this treaty, however, the Crow kept certain enumerated rights with respect to the use of those lands, and among these was "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, Art. IV, 15 Stat. 650.

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Shortly after the signing of the 1868 Treaty, Congress created the Wyoming Territory, which was adjacent to and immediately south of the Crow Tribe's reservation. The Act creating the Territory provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." Act of July 25, 1868, ch. 235, 15 Stat. 178. Twenty-two years later, Congress admitted Wyoming as a State "on an equal footing with the original States in all respects whatever." Act of July 10, 1890, ch. 664, 26 Stat. 222. The following year, Congress passed an Act empowering the President to "set apart and reserve" tracts of public lands owned by the United States

as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority, President Cleveland designated some lands in Wyoming that remained under federal ownership as a forest reservation. Presidential Proclamation No. 30, 29 Stat. 909. Today, those lands make up the Bighorn National Forest. Bighorn abuts the Crow Reservation along the border between Wyoming and Montana and includes land that was previously part of the Crow Tribe's hunting district.

These enactments did not end legal conflicts between the white settlers and Indians. Almost immediately after Wyoming's admission to the Union, this Court had to determine the extent of the State's regulatory power in light of a tribe's reserved hunting rights. A member of the Shoshone-Bannock Tribes named Race Horse had been arrested by Wyoming officials for taking elk in violation of state hunting laws. *Race Horse*, *supra*, at 506. The Shoshone-Bannock Tribes, like the Crow, had accepted a reservation while retaining the right to hunt in the lands previously within their hunting district. Their treaty reserves the same right, using the same language, as the Crow Tribe's treaty.[1] Race Horse argued that he had the right to hunt at the spot of his alleged offense, as the nearest settlement lay more than 60 miles distant, making the land where he was hunting "unoccupied lands of the United States." *In re Race Horse*, 70 F. 598, 599–600 (Wyo. 1895).

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This Court rejected Race Horse's argument, holding that the admission of Wyoming to the Union terminated the hunting right. 163 U. S., at 514. Although the opinion of the Court is not a model of clarity, this conclusion appears to rest on two grounds.

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[1] The Shoshone-Bannock Treaty reserved "'the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.'" *Race Horse*, 163 U. S., at 507; Kappler 1020, 1021.

First, the Court held that Wyoming's admission necessarily ended the Tribe's hunting right because otherwise the State would lack the power, possessed by every other State, "to regulate the killing of game within [its] borders." *Ibid.* Limiting Wyoming's power in this way, the Court reasoned, would contravene the equal-footing doctrine, which dictates that all States enter the Union with the full panoply of powers enjoyed by the original 13 States at the adoption of the Constitution. *Ibid.* Under this rationale, the Act of Congress admitting Wyoming could not have preserved the hunting right even if that had been Congress's wish.

After providing this basis for its holding, however, the Court quickly turned to a second ground, namely, that even if Congress could have limited Wyoming's authority in this way, it had not attempted to do so. *Id.*, at 515. The Court thought that Congress's intention not to impose such a restriction on the State was "conveyed by the express terms of the act of admission," but the Court did not identify the terms to which it was referring. *Ibid.* It did, however, see support for its decision in the nature of the hunting right reserved under the treaty. This right, the Court observed, was not "of such a nature as to imply [its] perpetuity" but was instead "temporary and precarious," since it depended on the continuation of several conditions, including at least one condition wholly within the control of the Government—continued federal ownership of the land. *Ibid.*

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Race Horse did not mark a final resolution of the conflict between Wyoming's regulatory power and tribal hunting rights. Nearly a century later, Thomas Ten Bear, a member of the Crow Tribe, crossed into Wyoming to hunt elk in the Bighorn National Forest, just as Herrera did in this case. Wyoming game officials cited Ten Bear, and he was ultimately convicted of hunting elk without the requisite license.[2]

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[2] Wyoming officials enforce the State's hunting laws on national forest lands pursuant to a memorandum of understanding between the State and Federal Governments. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521, n. 1 (Wyo. 1994).

Ten Bear, like Race Horse before him, filed a lawsuit in federal court disputing Wyoming's authority to regulate hunting by members of his Tribe. *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 521 (Wyo. 1994). Joined by the Crow Tribe, he argued that the 1868 Treaty—the same treaty at issue here—gave him the right to take elk in the national forest.

The District Court found that challenge indistinguishable from the one addressed in *Race Horse*. The District Court noted that Race Horse had pointed to "identical treaty language" and had "advanced the identical contention now made by" Ten Bear and the Tribe. *Repsis*, 866 F. Supp., at 522. Because *Race Horse* "remain[ed] controlling," the District Court granted summary judgment to the State. 866 F. Supp., at 524.

The Tenth Circuit affirmed that judgment on two independent grounds. First, the Tenth Circuit agreed with the District Court that, under *Race Horse*, "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming into the Union." *Repsis*, 73 F. 3d, at 992. Second, as an independent alternative ground for affirmance, the Tenth Circuit held that the Tribe's hunting right had expired because "'the treaty reserved an off-reservation hunting right on 'unoccupied' lands and the lands of the Big Horn National Forest are 'occupied.'" *Id.*, at 993. The Tenth Circuit reasoned that "unoccupied" land within the meaning of the treaty meant land that was open for commercial or residential use, and since the creation of the national forest precluded those activities, it followed that the land was no longer "unoccupied" in the relevant sense. *Ibid.*

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B

The events giving rise to the present case are essentially the same as those in *Race Horse* and *Repsis*. During the winter of 2013, Herrera, who was an officer in the Crow Tribe's fish and game department, contacted Wyoming game

officials to offer assistance investigating a number of poaching incidents along the border between Bighorn and the Crow Reservation.[3] After a lengthy discussion in which Herrera asked detailed questions about the State's investigative capabilities, the Wyoming officials became suspicious of Herrera's motives. The officials conducted a web search for Herrera's name and found photographs posted on trophy-hunting and social media websites that showed him posing with bull elk. The officers recognized from the scenery in the pictures that the elk had been killed in Bighorn and were able to locate the sites where the pictures had been taken. At those sites, about a mile south of the fence running along the Bighorn National Forest boundary, state officials discovered elk carcasses. The heads had been taken from the carcasses but much of the meat was abandoned in the field. State officials confronted Herrera, who confessed to the shootings and turned over the heads that he and his companions had taken as trophies. The Wyoming officials cited Herrera for hunting out of season.

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Herrera moved to dismiss the citations, arguing that he had a treaty right to hunt in Bighorn. The trial court rejected this argument, concluding that it was foreclosed by the Tenth Circuit's analysis in *Repsis*, and the jury found Herrera guilty. On appeal, Herrera continued to argue that he had a treaty right to hunt in Bighorn. The appellate court held that the judgment in *Repsis* precluded him from asserting a treaty hunting right, and it also held, in the alternative, that Herrera's treaty rights did not allow him to hunt in Bighorn. This Court granted certiorari.

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[3] Such cooperative law enforcement is valuable because the Crow Reservation and Bighorn National Forest face one another along the border between Montana, where the Crow Reservation is located, and Wyoming, where Bighorn is located. *Supra*, at 354–355. The border is delineated by a high fence intermittently posted with markers.

II

In seeking review in this Court, Herrera framed this case as implicating only a question of treaty interpretation. But unless the state court was wrong in holding that Herrera is bound by the judgment in *Repsis*, there is no reason to reach the treaty-interpretation question. For this reason, I would begin with the question of issue preclusion, and because I believe that Herrera is bound by the adverse decision on that issue in *Repsis*, I would not reach the treaty-interpretation issue.

A

It is "a fundamental precept of common-law adjudication" that "an issue once determined by a competent court is conclusive." *Arizona* v. *California*, 460 U. S. 605, 619 (1983). "The idea is straightforward: Once a court has decided an issue, it is forever settled as between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts." *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 147 (2015) (internal quotation marks, citation, and alterations omitted). Succinctly put, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

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Under federal issue-preclusion principles,[4] "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*,

[4] The preclusive effect of the judgment of a federal court is governed by federal law, regardless of whether that judgment's preclusive effect is later asserted in a state or federal forum. *Taylor* v. *Sturgell*, 553 U. S. 880, 892 (2008). This means that the preclusive effect of *Repsis*, decided by a federal court, is governed by federal law, not Wyoming law, even though preclusion was asserted in a Wyoming court.

440 U. S. 147, 153 (1979). That standard for issue preclusion is met here.

In *Repsis*, the central issue—and the question on which the Crow Tribe sought a declaratory judgment—was whether members of the Tribe "have an unrestricted right to hunt and fish on Big Horn National Forest lands." 866 F. Supp., at 521. The Tenth Circuit's judgment settled that question by holding that "the Tribe and its members are subject to the game laws of Wyoming." 73 F. 3d, at 994. In this case, Herrera asserts the same hunting right that was actually litigated and decided against his Tribe in *Repsis*. He does not suggest that either the Federal District Court or the Tenth Circuit lacked jurisdiction to decide *Repsis*. And, because Herrera's asserted right is based on his membership in the Tribe, a judgment binding on the Tribe is also binding on him. As a result, the Wyoming appellate court held that *Repsis* bound Herrera and precluded him from asserting a treaty-rights defense. That holding was correct.

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B

The majority concludes otherwise based on an exception to issue preclusion that applies when there has been an intervening "change in the applicable legal context." *Ante*, at 343 (internal quotation marks and alteration omitted). Specifically, the majority reasons that the *Repsis* judgment was based on *Race Horse* and that our subsequent decision in *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172 (1999), represents a change in the applicable law that is sufficient to abrogate the *Repsis* judgment's preclusive effect. There is support in the Restatement (Second) of Judgments for the general proposition that a change in law may alter a judgment's preclusive effect, § 28, Comment *c*, p. 276 (1980), and in a prior case, *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009), we invoked that provision. But we have never actually held that a prior judgment lacked preclusive effect on this ground. Nor have we ever defined how much

the relevant "legal context" must change in order for the exception to apply. If the exception is applied too aggressively, it could dangerously undermine the important interests served by issue preclusion. So caution is in order in relying on that exception here.

The majority thinks that the exception applies because *Mille Lacs* effectively overruled *Race Horse*, even though it did not say that in so many words. But that is a questionable interpretation. The fact of the matter is that the *Mille Lacs* majority held back from actually overruling *Race Horse*, even though the dissent claimed that it had effectively done so. See *Mille Lacs*, 526 U. S., at 207 (applying the "*Race Horse* inquiry" but factually distinguishing that case from the facts present in *Mille Lacs*); *id.*, at 219 (Rehnquist, C. J., dissenting) (noting the Court's "apparent overruling *sub silentio*" of *Race Horse*). And while the opinion of the Court repudiated one of the two grounds that the *Race Horse* Court gave for its decision (the equal-footing doctrine), it is by no means clear that *Mille Lacs* also rejected the second ground (the conclusion that the terms of the Act admitting Wyoming to the Union manifested a congressional intent not to burden the State with the right created by the 1868 Treaty). With respect to this latter ground, the *Mille Lacs* Court characterized the proper inquiry as follows: "whether Congress (more precisely, because this is a treaty, the Senate) intended the rights secured by the 1837 Treaty to survive statehood." 526 U. S., at 207. And the Court then went on to analyze the terms of the particular treaty at issue in that case and to contrast those terms with those of the treaty in *Race Horse*. *Mille Lacs*, *supra*, at 207.

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On this reading, it appears that *Mille Lacs* did not reject the second ground for the decision in *Race Horse* but simply found it inapplicable to the facts of the case at hand. I do not claim that this reading of *Mille Lacs* is indisputable, but it is certainly reasonable, and if it is correct, *Mille Lacs* did not change the legal context as much as the majority sug-

gests. It knocked out some of *Race Horse*'s reasoning but did not effectively overrule the decision. Is that enough to eliminate the preclusive effect of the first ground for the *Repsis* judgment?

The majority cites no authority holding that a decision like *Mille Lacs* is sufficient to deprive a prior judgment of its issue-preclusive effect. Certainly, *Bies*, *supra*, upon which the majority relies, is not such authority. In that case, Bies had been convicted of murder and sentenced to death at a time when what was then termed "mental retardation" did not render a defendant ineligible for a death sentence but was treated as simply a mitigating factor to be taken into account in weighing whether such a sentence should be imposed. When Bies contested his death sentence on appeal, the state appellate court observed that he suffered from a mild form of intellectual disability, but it nevertheless affirmed his sentence. Years later, in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court ruled that an intellectually disabled individual cannot be executed, and the Sixth Circuit then held that the state court's prior statements about Bies's condition barred his execution under issue-preclusion principles.

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This Court reversed, and its primary reason for doing so has no relation to the question presented here. We found that issue preclusion was not available to Bies because he had not prevailed in the first action; despite the state court's recognition of mild intellectual disability as a mitigating factor, it had affirmed his sentence. As we put it, "[i]ssue preclusion . . . does not transform final judgment losers . . . into partially prevailing parties." *Bies*, 556 U. S., at 829; see also *id.*, at 835.

Only after providing this dispositive reason for rejecting the Sixth Circuit's invocation of issue preclusion did we go on to cite the Restatement's discussion of the change-in-law exception. And we then quickly noted that the issue addressed by the state appellate courts prior to *Atkins* ("[m]en-

tal retardation as a mitigator") was not even the same issue as the issue later addressed after *Atkins*. *Bies*, *supra*, at 836 (the two "are discrete legal issues"). So *Bies* is very far afield.[5]

Although the majority in the present case believes that *Mille Lacs* unquestionably constitutes a sufficient change in the legal context, see *ante*, at 341–342, there is a respectable argument on the other side. I would not decide that question because Herrera and other members of the Crow Tribe are bound by the judgment in *Repsis* even if the change-in-legal-context exception applies.

C

That is so because the *Repsis* judgment was based on a second, independently sufficient ground that has nothing to do with *Race Horse*, namely, that the Bighorn National Forest is not "unoccupied." Herrera and the United States, appearing as an *amicus* in his support, try to escape the effect of this alternative ground based on other exceptions to the general rule of issue preclusion. But accepting any of those exceptions would work a substantial change in established principles, and it is fortunate that the majority has not taken that route.

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Unfortunately, the track that the majority has chosen is no solution because today's decision will not prevent the Wyoming courts on remand in this case or in future cases presenting the same issue from holding that the *Repsis* judg-

[5] Nor are the other cases cited by the majority more helpful to the Court's position. *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), and *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353 (1984)—and, indeed, *Montana* v. *United States*, 440 U. S. 147 (1979)—are tax cases that hold, consistent with the general policy against "discriminatory distinctions in tax liability," *Sunnen*, 333 U. S., at 599, that issue preclusion has limited application when the conduct in the second litigation occurred in a different tax year than the conduct that was the subject of the earlier judgment. We have not, prior to today, applied *Sunnen*'s tax-specific policy in cases that do not involve tax liability and do not create a possibility of "inequalities in the administration of the revenue laws." *Ibid.*

ment binds all members of the Crow Tribe who hunt within the Bighorn National Forest. And for the reasons I will explain, such a holding would be correct.

1

Attempting to justify its approach, the majority claims that the decision below gave preclusive effect to only the first ground adopted by the Tenth Circuit in *Repsis*—that is, the ground that relied on *Race Horse*. *Ante*, at 348–349, n. 5. But nowhere in the decision below can any such limitation be found. The Wyoming appellate court discussed the second ground for the *Repsis* judgment, see App. to Pet. for Cert. 22 ("[T]he creation of the Big Horn National Forest resulted in the 'occupation' of the land, extinguishing the off-reservation hunting right"), and it concluded that *the judgment* in *Repsis*, not just one of the grounds for that judgment, "preclude[s] Herrera from attempting to relitigate the validity of the off-reservation hunting right that was previously held to be invalid," App. to Pet. for Cert. 31.[6]

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[6] The decision below, in other words, held that the issue that was precluded was whether members of the Crow Tribe have a treaty right to hunt in Bighorn. The majority rejects this definition of the issue, and instead asks only whether the first line of reasoning in *Repsis* retains preclusive effect. Such hairsplitting conflicts with the fundamental purpose of issue preclusion—laying legal disputes at rest. If courts allow a party to escape preclusion whenever a decision on one legal question can be divided into multiple or alternative parts, the doctrine of preclusion would lose its value. The majority's "[n]arrower definition of the issues resolved augments the risk of apparently inconsistent results" and undermines the objectives of finality and economy served by preclusion. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4417, p. 470 (3d ed. 2016).

The Court also hints that the state court might have thought that Wyoming forfeited reliance on issue preclusion, *ante*, at 348–349, n. 5, but there is no basis for that suggestion. The Wyoming appellate court invited the parties to submit supplemental briefs on issue preclusion and specifically held that "it [was] proper for the Court to raise this issue *sua sponte* when no factual development is required, and the parties are given an opportunity to fully brief the issues." App. to Pet. for Cert. 10, n. 2.

2

Herrera takes a different approach in attempting to circumvent the effect of the alternative *Repsis* ground. When a judgment rests on two independently sufficient grounds, he contends, neither ground should be regarded as having an issue-preclusive effect. This argument raises an important question that this Court has never decided and one on which the First and Second Restatements of Judgments take differing views. According to the First Restatement, a judgment based on alternative grounds "is determinative on both grounds, although either alone would have been sufficient to support the judgment." Restatement of Judgments § 68, Comment *n* (1942). Other authorities agree. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4421, p. 613 (3d ed. 2016) (noting "substantial support in federal decisions" for this approach).[7] But the Second Restatement reversed this view, recommending that a judgment based on the determination of two independent issues "is not conclusive with respect to either issue standing alone." § 27, Comment *i*, at 259.

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There is scant explanation for this change in position beyond a reference in the Reporter's Note to a single decision of the United States Court of Appeals for the Second Circuit. *Id.*, Reporter's Note, Comment *i*, at 270 (discussing *Halpern* v. *Schwartz*, 426 F. 2d 102 (1970)). But even that court has subsequently explained that *Halpern* was "not intended to have . . . broad impact outside the [bankruptcy] context," and it continues to follow the rule of the First Restatement "in circumstances divergent from those in *Halpern*." *Winters* v. *Lavine*, 574 F. 2d 46, 67 (1978). It thus appears that in this portion of the Second Restatement, the Reporters

[7] See, *e. g.*, *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 251–257 (CA3 2006) (collecting cases); *In re Westgate-California Corp.*, 642 F. 2d 1174, 1176–1177 (CA9 1981); *Winters* v. *Lavine*, 574 F. 2d 46, 66–67 (CA2 1978); *Irving Nat. Bank* v. *Law*, 10 F. 2d 721, 724 (CA2 1926) (Hand, J.).

adopted a prescriptive rather than a descriptive approach. In such situations, the Restatement loses much of its value. See *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

The First Restatement has the more compelling position. There appear to be two principal objections to giving alternative grounds preclusive effect. The first is that the court rendering the judgment may not have given each of the grounds "the careful deliberation and analysis normally applied to essential issues." *Halpern*, *supra*, at 105. This argument is based on an unjustified assessment of the way in which courts do their work. Even when a court bases its decision on multiple grounds, "it is reasonable to expect that such a finding is the product of careful judicial reasoning." *Jean Alexander Cosmetics, Inc.* v. *L'Oreal USA, Inc.*, 458 F. 3d 244, 254 (CA3 2006).

The other argument cited for the Second Restatement's rule is that the losing party may decline to appeal if one of the two bases for a judgment is strong and the other is weak. § 27, Comment *i*, at 259. There are reasons to be skeptical of this argument as well. While there may be cases in which the presence of multiple grounds causes the losing party to forgo an appeal, that is likely to be true in only a small subset of cases involving such judgments.

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Moreover, other aspects of issue-preclusion doctrine protect against giving binding effect to decisions that result from unreliable litigation. Issue preclusion applies only to questions "actually and necessarily determined," *Montana*, 440 U. S., at 153, and a party may be able to avoid preclusion by showing that it "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5)(c). To be sure, this exception should not be applied "without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous." *Id.*, § 28, Comment *j*, at 284. This exception provides an important safety valve, but it is narrow and clearly

does not apply here. Not only did the Tribe have an opportunity in *Repsis* to litigate the subject of the alternative ground, it actually did so.[8]

Finally, regardless of whether alternative grounds *always* have preclusive effect, it is sufficient to say that, at least in a declaratory judgment action, each conclusion provides an independent basis for preclusion. "Since the very purpose of declaratory relief is to achieve a final and reliable determination of legal issues, there should be no quibbling about the necessity principle. Every issue that the parties have litigated and that the court has undertaken to resolve is necessary to the judgment, and should be precluded." 18 Wright, Federal Practice and Procedure § 4421, at 630; see *Henglein* v. *Colt Industries Operating Corp.*, 260 F. 3d 201, 212 (CA3 2001). Because *Repsis* was a declaratory judgment action aimed at settling the Tribe's hunting rights, that principle suffices to bind Herrera to *Repsis*'s resolution of the occupied-land issue.

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D

Herrera and the United States offer a variety of other arguments to avoid the preclusive effect of *Repsis*, but all are unavailing.

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[8] From the beginning of the *Repsis* litigation, Wyoming argued that Bighorn was occupied land, and the Tribe argued that it was not. Wyoming pressed this argument in its answer to the Tribe's declaratory judgment complaint. Record in No. 92–cv–1002, Doc. 29, p. 4. Wyoming reiterated that argument in its motion for summary judgment and repeated it in its reply. *Id.*, Doc. 34, pp. 1, 6; *id.*, Doc. 54, pp. 7–8. The Tribe dedicated a full 10 pages of its summary judgment brief to the argument that "[t]he Big Horn National Forest [l]ands [are] '[u]noccupied [l]ands' " of the United States. *Id.*, Doc. 52, pp. 6–15. Both parties repeated these arguments in their briefs before the Tenth Circuit. Brief for Appellees 20–29 and Reply Brief for Appellants 2–3, and n. 6, in No. 94–8097 (1995). And the Tribe pressed this argument as an independent basis for this Court's review in its petition for certiorari, which this Court denied. Pet. for Cert. in *Crow Tribe of Indians* v. *Repsis*, O. T. 1995, No. 95–1560, pp. i, 22–24, cert. denied, 517 U. S. 1221 (1996).

Herrera contends that he is not bound by the *Repsis* judgment because he was not a party, but this argument is clearly wrong. Indian hunting rights, like most Indian treaty rights, are reserved to the Tribe as a whole. Herrera's entitlement derives solely from his membership in the Tribe; it is not personal to him. As a result, a judgment determining the rights of the Tribe has preclusive effect in subsequent litigation involving an individual member of the Tribe. Cf. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 106–108 (1938) (judgment as to water rights of a State is binding on individual residents of State). That rule applies equally to binding judgments finding in favor of and against asserted tribal rights.

Herrera also argues that a judgment in a civil action should not have preclusive effect in a subsequent criminal prosecution, but this argument would unjustifiably prevent the use of the declaratory judgment device to determine potential criminal exposure. The Declaratory Judgment Act provides an equitable remedy allowing a party to ask a federal court to "declare [the party's] rights" through an order with "the force and effect of a final judgment." 28 U. S. C. §2201(a). The Act thus allows a person to obtain a definitive *ex ante* determination of his or her right to engage in conduct that might otherwise be criminally punishable. It thereby avoids "putting the challenger to the choice between abandoning his rights or risking prosecution." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 129 (2007). If the Tribe had prevailed in *Repsis*, surely Herrera would expect that Wyoming could not attempt to relitigate the question in this case and in prosecutions of other members of the Tribe. A declaratory judgment "is conclusive . . . as to the matters declared" when the State prevails just as it would be when the party challenging the State is the winning party. Restatement (Second) of Judgments §33, at 332.

It is true that we have been cautious about applying the doctrine of issue preclusion in criminal proceedings. See

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e. g., *Currier* v. *Virginia*, 585 U. S. 493, 504 (2018); *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 10 (2016). But we have never adopted the blanket prohibition that Herrera advances. Instead, we have said that preclusion doctrines should have "guarded application." *Ibid.*

We employ such caution because preclusion rests on "an underlying confidence that the result achieved in the initial litigation was substantially correct," and that confidence, in turn, is bolstered by the availability of appellate review. *Standefer* v. *United States*, 447 U. S. 10, 23, n. 18 (1980); see also Restatement (Second) of Judgments § 28, Comment *a*, at 274. In *Currier* and *Bravo-Fernandez*, we were reluctant to apply issue preclusion not because the *subsequent* trial was criminal but because the *initial* trial was. While a defense verdict in a criminal trial is generally not subject to testing on appeal, summary judgment in a civil declaratory judgment action can be appealed. Indeed, the Crow Tribe did appeal the District Court's decision to the Tenth Circuit and petitioned for our review of the Tenth Circuit's decision. The concerns that we articulated in *Currier* and *Bravo-Fernandez* have no bearing here.[9]

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* * *

For these reasons, Herrera is precluded by the judgment in *Repsis* from relitigating the continuing validity of the hunting right conferred by the 1868 Treaty. Because the majority has chosen to disregard this threshold problem and issue a potentially pointless disquisition on the proper interpretation of the 1868 Treaty, I respectfully dissent.

[9] Nor is that the only distinction between those cases and this one. In both *Currier* and *Bravo-Fernandez* a party sought preclusion as to an element of the charged offense. The elements of the charged offense are not disputed here—Herrera's asserted treaty right is an affirmative defense. And while the State bears the burden of proof as to elements of the offense, under Wyoming law, the defendant asserting an affirmative defense must state a prima facie case before any burden shifts to the State. See *Duckett* v. *State*, 966 P. 2d 941, 948 (Wyo. 1998).

Syllabus

MISSION PRODUCT HOLDINGS, INC. *v.* TEMPNOLOGY, LLC, NKA OLD COLD LLC

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

No. 17–1657. Argued February 20, 2019—Decided May 20, 2019

Petitioner Mission Product Holdings, Inc., entered into a contract with respondent Tempnology, LLC, which gave Mission a license to use Tempnology's trademarks in connection with the distribution of certain clothing and accessories. Tempnology filed for Chapter 11 bankruptcy and sought to reject its agreement with Mission. Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. § 365(a). It further provides that rejection "constitutes a breach of such contract." § 365(g). The Bankruptcy Court approved Tempnology's rejection and further held that the rejection terminated Mission's rights to use Tempnology's trademarks. The Bankruptcy Appellate Panel reversed, relying on Section 365(g)'s statement that rejection "constitutes a breach" to hold that rejection does not terminate rights that would survive a breach of contract outside bankruptcy. The First Circuit rejected the Panel's judgment and reinstated the Bankruptcy Court's decision.

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Held:

1. This case is not moot. Mission presents a plausible claim for money damages arising from its inability to use Tempnology's trademarks, which is sufficient to preserve a live controversy. See *Chafin* v. *Chafin*, 568 U. S. 165, 172. Tempnology's various arguments that Mission is not entitled to damages do not so clearly preclude recovery as to render this case moot. Pp. 376–378.

2. A debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Pp. 378–387.

(a) Section 365(g) provides that rejection "constitutes a breach." And "breach" is neither a defined nor a specialized bankruptcy term—it means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69. Outside bankruptcy, a licensor's breach cannot revoke continuing rights given to a counterparty under a contract (assuming no special contract term or state law). And because rejection "constitutes a breach," the same result must follow from rejec-

tion in bankruptcy. In preserving a counterparty's rights, Section 365 reflects the general bankruptcy rule that the estate cannot possess anything more than the debtor did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15. And conversely, allowing rejection to rescind a counterparty's rights would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which debtors may unwind pre-bankruptcy transfers that undermine the bankruptcy process. See, *e. g.*, § 548(a). Pp. 379–382.

(b) Tempnology's principal counterargument rests on a negative inference drawn from provisions of Section 365 identifying categories of contracts under which a counterparty may retain specified rights after rejection. See §§ 365(h), (i), (n). Tempnology argues that these provisions indicate that the ordinary consequence of rejection must be something different—*i. e.*, the termination of contractual rights previously granted. But that argument offers no account of how to read Section 365(g) (rejection "constitutes a breach") to say essentially its opposite. And the provisions Tempnology treats as a reticulated scheme of exceptions each emerged at a different time and responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges.

Tempnology's remaining argument turns on how the special features of trademark law may affect the fulfillment of the Code's goals. Unless rejection terminates a licensee's right to use a trademark, Tempnology argues, a debtor must choose between monitoring the goods sold under a license or risking the loss of its trademark, either of which would impede a debtor's ability to reorganize. But the distinctive features of trademarks do not persuade this Court to adopt a construction of Section 365 that will govern much more than trademark licenses. And Tempnology's plea to facilitate reorganizations cannot overcome what Sections 365(a) and (g) direct. In delineating the burdens a debtor may and may not escape, Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges. Pp. 382–387.

879 F. 3d 389, reversed and remanded.

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KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 387. GORSUCH, J., filed a dissenting opinion, *post*, p. 389.

Danielle Spinelli argued the cause for petitioner. With her on the briefs were *Craig Goldblatt*, *Joel Millar*, *James Barton*, *Robert J. Keach*, and *Lindsay Z. Milne.*

Zachary D. Tripp argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, and *Mark B. Stern*.

Douglas Hallward-Driemeier argued the cause for respondent. With him on the brief were *Jonathan Ference-Burke*, *Gregg Galardi*, *Christopher M. Desiderio*, *James Wilton*, *Patricia Chen*, *Lee Harrington*, *George Skelly*, and *Daniel W. Sklar*.*

JUSTICE KAGAN delivered the opinion of the Court.

Section 365 of the Bankruptcy Code enables a debtor to "reject any executory contract"—meaning a contract that neither party has finished performing. 11 U. S. C. §365(a). The section further provides that a debtor's rejection of a contract under that authority "constitutes a breach of such contract." §365(g).

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Today we consider the meaning of those provisions in the context of a trademark licensing agreement. The question is whether the debtor-licensor's rejection of that contract deprives the licensee of its rights to use the trademark. We hold it does not. A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach, including those conveyed here, remain in place.

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*Briefs of *amici curiae* urging reversal were filed for the Intellectual Property Owners Association by *Wendy C. Larson*, *Travis R. Wimberly*, and *Mark W. Lauroesch*; for the International Trademark Association by *David H. Bernstein*, *Jeffrey P. Cunard*, *Jeremy Feigelson*, *Henry Lebowitz*, *Jared I. Kagan*, and *Eleanor M. Lackman*; and for Law Professors by *Eric F. Citron* and *Jay Lawrence Westbrook*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Theodore H. Davis, Jr.*, and *Sheldon H. Klein*; and for the New York Intellectual Property Law Association by *Stephen J. Smirti, Jr.*, *Michael C. Cannata*, *Frank Misiti*, *Stuart I. Gordon*, *Robert M. Isackson*, *Richard Levy, Jr.*, and *Dyan Finguerra-DuCharme*.

I

This case arises from a licensing agreement gone wrong. Respondent Tempnology, LLC, manufactured clothing and accessories designed to stay cool when used in exercise. It marketed those products under the brand name "Coolcore," using trademarks (*e. g.*, logos and labels) to distinguish the gear from other athletic apparel. In 2012, Tempnology entered into a contract with petitioner Mission Product Holdings, Inc. See App. 203–255. The agreement gave Mission an exclusive license to distribute certain Coolcore products in the United States. And more important here, it granted Mission a non-exclusive license to use the Coolcore trademarks, both in the United States and around the world. The agreement was set to expire in July 2016. But in September 2015, Tempnology filed a petition for Chapter 11 bankruptcy. And it soon afterward asked the Bankruptcy Court to allow it to "reject" the licensing agreement. § 365(a).

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Chapter 11 of the Bankruptcy Code sets out a framework for reorganizing a bankrupt business. See §§ 1101–1174. The filing of a petition creates a bankruptcy estate consisting of all the debtor's assets and rights. See § 541. The estate is the pot out of which creditors' claims are paid. It is administered by either a trustee or, as in this case, the debtor itself. See §§ 1101, 1107.

Section 365(a) of the Code provides that a "trustee [or debtor], subject to the court's approval, may assume or reject any executory contract." § 365(a). A contract is executory if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 522, n. 6 (1984) (internal quotation marks omitted). Such an agreement represents both an asset (the debtor's right to the counterparty's future performance) and a liability (the debtor's own obligations to perform). Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its

obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential "business judgment" rule. *Id.*, at 523.

According to Section 365(g), "the rejection of an executory contract[ ] constitutes a breach of such contract." As both parties here agree, the counterparty thus has a claim against the estate for damages resulting from the debtor's nonperformance. See Brief for Petitioner 17, 19; Brief for Respondent 30–31. But such a claim is unlikely to ever be paid in full. That is because the debtor's breach is deemed to occur "immediately before the date of the filing of the [bankruptcy] petition," rather than on the actual post-petition rejection date. §365(g)(1). By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar. See *Bildisco*, 465 U. S., at 531–532 (noting the higher priority of post-petition claims).

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In this case, the Bankruptcy Court (per usual) approved Tempnology's proposed rejection of its executory licensing agreement with Mission. See App. to Pet. for Cert. 83–84. That meant, as laid out above, two things on which the parties agree. First, Tempnology could stop performing under the contract. And second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from Tempnology's nonperformance.

But Tempnology thought still another consequence ensued, and it returned to the Bankruptcy Court for a declaratory judgment confirming its view. According to Tempnology, its rejection of the contract also terminated the rights it had granted Mission to use the Coolcore trademarks. Tempnology based its argument on a negative inference. See Motion in No. 15–11400 (Bkrtcy. Ct. NH), pp. 9–14. Several provisions in Section 365 state that a counterparty to specific

kinds of agreements may keep exercising contractual rights after a debtor's rejection. For example, Section 365(h) provides that if a bankrupt landlord rejects a lease, the tenant need not move out; instead, she may stay and pay rent (just as she did before) until the lease term expires. And still closer to home, Section 365(n) sets out a similar rule for some types of intellectual property licenses: If the debtor-licensor rejects the agreement, the licensee can continue to use the property (typically, a patent), so long as it makes whatever payments the contract demands. But Tempnology pointed out that neither Section 365(n) nor any similar provision covers trademark licenses. So, it reasoned, in that sort of contract a different rule must apply: The debtor's rejection must extinguish the rights that the agreement had conferred on the trademark licensee. The Bankruptcy Court agreed. See *In re Tempnology, LLC*, 541 B. R. 1 (Bkrtcy. Ct. NH 2015). It held, relying on the same "negative inference," that Tempnology's rejection of the licensing agreement revoked Mission's right to use the Coolcore marks. *Id.*, at 7.

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The Bankruptcy Appellate Panel reversed, relying heavily on a decision of the Court of Appeals for the Seventh Circuit about the effects of rejection on trademark licensing agreements. See *In re Tempnology, LLC*, 559 B. R. 809, 820–823 (Bkrtcy. App. Panel CA1 2016); *Sunbeam Products, Inc.* v. *Chicago Am. Mfg., LLC*, 686 F. 3d 372, 376–377 (CA7 2012). Rather than reason backward from Section 365(n) or similar provisions, the Panel focused on Section 365(g)'s statement that rejection of a contract "constitutes a breach." Outside bankruptcy, the court explained, the breach of an agreement does not eliminate rights the contract had already conferred on the non-breaching party. See 559 B. R., at 820. So neither could a rejection of an agreement in bankruptcy have that effect. A rejection "convert[s]" a "debtor's unfulfilled obligations" to a pre-petition damages claim. *Id.*, at 822 (quoting *Sunbeam*, 686 F. 3d, at 377). But it does not "terminate the contract" or "vaporize[ ]" the counterparty's rights. 559 B. R., at 820, 822 (quoting *Sunbeam*, 686 F. 3d,

at 377). Mission could thus continue to use the Coolcore trademarks.

But the Court of Appeals for the First Circuit rejected the Panel's and Seventh Circuit's view, and reinstated the Bankruptcy Court decision terminating Mission's license. See *In re Tempnology, LLC*, 879 F. 3d 389 (2018). The majority first endorsed that court's inference from Section 365(n) and similar provisions. It next reasoned that special features of trademark law counsel against allowing a licensee to retain rights to a mark after the licensing agreement's rejection. Under that body of law, the majority stated, the trademark owner's "failure to monitor and exercise [quality] control" over goods associated with a trademark "jeopardiz[es] the continued validity of [its] own trademark rights." *Id.*, at 402. So if (the majority continued) a licensee can keep using a mark after an agreement's rejection, the licensor will need to carry on its monitoring activities. And according to the majority, that would frustrate "Congress's principal aim in providing for rejection": to "release the debtor's estate from burdensome obligations." *Ibid.* (internal quotation marks omitted). Judge Torruella dissented, mainly for the Seventh Circuit's reasons. See *id.*, at 405–407.

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We granted certiorari to resolve the division between the First and Seventh Circuits. 586 U. S. 960 (2018). We now affirm the Seventh's reasoning and reverse the decision below.[1]

II

Before reaching the merits, we pause to consider Tempnology's claim that this case is moot. Under settled law, we

[1] In its briefing before this Court, Mission contends that its exclusive distribution rights survived the licensing agreement's rejection for the same reason as its trademark rights did. See Brief for Petitioner 40–44; *supra*, at 373. But the First Circuit held that Mission had waived that argument, see 879 F. 3d, at 401, and we have no reason to doubt that conclusion. Our decision thus affects only Mission's trademark rights.

may dismiss the case for that reason only if "it is impossible for a court to grant any effectual relief whatever" to Mission assuming it prevails. *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013) (internal quotation marks omitted). That demanding standard is not met here.

Mission has presented a claim for money damages—essentially lost profits—arising from its inability to use the Coolcore trademarks between the time Tempnology rejected the licensing agreement and its scheduled expiration date. See Reply Brief 22, and n. 8. Such claims, if at all plausible, ensure a live controversy. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8–9 (1978). For better or worse, nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 2 (3d ed. 2008) (Wright & Miller) ("[A] case is not moot so long as a claim for monetary relief survives"). Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons, in this case as in others. But that is of no moment. If there is any chance of money changing hands, Mission's suit remains live. See *Chafin*, 568 U. S., at 172.

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Tempnology makes a flurry of arguments about why Mission is not entitled to damages, but none so clearly precludes recovery as to make this case moot. First, Tempnology contends that Mission suffered no injury because it "never used the trademark[s] during [the post-rejection] period." Brief for Respondent 24; see Tr. of Oral Arg. 33. But that gets things backward. Mission's non-use of the marks during that time is precisely what gives rise to its damages claim; had it employed the marks, it would not have lost any profits. So next, Tempnology argues that Mission's non-use was its own "choice," for which damages cannot lie. See *id.*, at 26. But recall that the Bankruptcy Court held that Mission *could not* use the marks after rejection (and its decision remained in effect through the agreement's expiration). See

supra, at 375. And although (as Tempnology counters) the court issued "no injunction," Brief for Respondent 26, that difference does not matter: Mission need not have flouted a crystal-clear ruling and courted yet more legal trouble to preserve its claim. Cf. 13B Wright & Miller § 3533.2.2, at 852 ("[C]ompliance [with a judicial decision] does not moot [a case] if it remains possible to undo the effects of compliance," as through compensation). So last, Tempnology claims that it bears no blame (and thus should not have to pay) for Mission's injury because all it did was "ask[ ] the court to make a ruling." Tr. of Oral Arg. 34–35. But whether Tempnology did anything to Mission amounting to a legal wrong is a prototypical merits question, which no court has addressed and which has no obvious answer. That means it is no reason to find this case moot.

And so too for Tempnology's further argument that Mission will be unable to convert any judgment in its favor to hard cash. Here, Tempnology notes that the bankruptcy estate has recently distributed all of its assets, leaving nothing to satisfy Mission's judgment. See Brief for Respondent 27. But courts often adjudicate disputes whose "practical impact" is unsure at best, as when "a defendant is insolvent." *Chafin*, 568 U. S., at 175. And Mission notes that if it prevails, it can seek the unwinding of prior distributions to get its fair share of the estate. See Reply Brief 23. So although this suit "may not make [Mission] rich," or even better off, it remains a live controversy—allowing us to proceed. *Chafin*, 568 U. S., at 176.

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III

What is the effect of a debtor's (or trustee's) rejection of a contract under Section 365 of the Bankruptcy Code? The parties and courts of appeals have offered us two starkly different answers. According to one view, a rejection has the same consequence as a contract breach outside bankruptcy: It gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under

the contract. According to the other view, a rejection (except in a few spheres) has more the effect of a contract rescission in the non-bankruptcy world: Though also allowing a damages claim, the rejection terminates the whole agreement along with all rights it conferred. Today, we hold that both Section 365's text and fundamental principles of bankruptcy law command the first, rejection-as-breach approach. We reject the competing claim that by specifically enabling the counterparties in some contracts to retain rights after rejection, Congress showed that it wanted the counterparties in all other contracts to lose their rights. And we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.

A

We start with the text of the Code's principal provisions on rejection—and find that it does much of the work. As noted earlier, Section 365(a) gives a debtor the option, subject to court approval, to "assume or reject any executory contract." See *supra*, at 373. And Section 365(g) describes what rejection means. Rejection "constitutes a breach of [an executory] contract," deemed to occur "immediately before the date of the filing of the petition." See *supra*, at 374. Or said more pithily for current purposes, a rejection is a breach. And "breach" is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy. See *Field* v. *Mans*, 516 U. S. 59, 69 (1995) (Congress generally meant for the Bankruptcy Code to "incorporate the established meaning" of "terms that have accumulated settled meaning" (internal quotation marks omitted)). So the first place to go in divining the effects of rejection is to non-bankruptcy contract law, which can tell us the effects of breach.

Consider a made-up executory contract to see how the law of breach works outside bankruptcy. A dealer leases a pho-

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tocopier to a law firm, while agreeing to service it every month; in exchange, the firm commits to pay a monthly fee. During the lease term, the dealer decides to stop servicing the machine, thus breaching the agreement in a material way. The law firm now has a choice (assuming no special contract term or state law). The firm can keep up its side of the bargain, continuing to pay for use of the copier, while suing the dealer for damages from the service breach. Or the firm can call the whole deal off, halting its own payments and returning the copier, while suing for any damages incurred. See 13 R. Lord, Williston on Contracts § 39:32, pp. 701–702 (4th ed. 2013) ("[W]hen a contract is breached in the course of performance, the injured party may elect to continue the contract or refuse to perform further"). But to repeat: The choice to terminate the agreement and send back the copier is for the *law firm*. By contrast, the *dealer* has no ability, based on its own breach, to terminate the agreement. Or otherwise said, the dealer cannot get back the copier just by refusing to show up for a service appointment. The contract gave the law firm continuing rights in the copier, which the dealer cannot unilaterally revoke.

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And now to return to bankruptcy: If the rejection of the photocopier contract "constitutes a breach," as the Code says, then the same results should follow (save for one twist as to timing). Assume here that the dealer files a Chapter 11 petition and decides to reject its agreement with the law firm. That means, as above, that the dealer will stop servicing the copier. It means, too, that the law firm has an option about how to respond—continue the contract or walk away, while suing for whatever damages go with its choice. (Here is where the twist comes in: Because the rejection is deemed to occur "immediately before" bankruptcy, the firm's damages suit is treated as a pre-petition claim on the estate, which will likely receive only cents on the dollar. See *supra*, at 374.) And most important, it means that assuming the law firm wants to keep using the copier, the dealer cannot

take it back. A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

All of this, it will hardly surprise you to learn, is not just about photocopier leases. Sections 365(a) and (g) speak broadly, to "any executory contract[s]." Many licensing agreements involving trademarks or other property are of that kind (including, all agree, the Tempnology-Mission contract). The licensor not only grants a license, but provides associated goods or services during its term; the licensee pays continuing royalties or fees. If the licensor breaches the agreement outside bankruptcy (again, barring any special contract term or state law), everything said above goes. In particular, the breach does not revoke the license or stop the licensee from doing what it allows. See, *e. g.*, *Sunbeam*, 686 F. 3d, at 376 ("Outside of bankruptcy, a licensor's breach does not terminate a licensee's right to use [the licensed] intellectual property"). And because rejection "constitutes a breach," § 365(g), the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.

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In preserving those rights, Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy. See *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 15 (1924) (establishing that principle); § 541(a)(1) (defining the estate to include the "interests *of the debtor* in property" (emphasis added)). As one bankruptcy scholar has put the point: Whatever "limitation[s] on the debtor's property [apply] outside of bankruptcy[ ] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either." D. Baird, Elements of Bank-

ruptcy 97 (6th ed. 2014). So if the not-yet debtor was subject to a counterparty's contractual right (say, to retain a copier or use a trademark), so too is the trustee or debtor once the bankruptcy petition has been filed. The rejection-as-breach rule (but *not* the rejection-as-rescission rule) ensures that result. By insisting that the same counterparty rights survive rejection as survive breach, the rule prevents a debtor in bankruptcy from recapturing interests it had given up.

And conversely, the rejection-as-rescission approach would circumvent the Code's stringent limits on "avoidance" actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process. The most notable example is for fraudulent conveyances—usually, something-for-nothing transfers that deplete the estate (and so cheat creditors) on the eve of bankruptcy. See § 548(a). A trustee's avoidance powers are laid out in a discrete set of sections in the Code, see §§ 544–553, far away from Section 365. And they can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason. See, *e. g.*, § 548(a) (describing the requirements for avoiding fraudulent transfers); *supra*, at 373–374. If trustees (or debtors) could use rejection to rescind previously granted interests, then rejection would become functionally equivalent to avoidance. Both, that is, would roll back a prior transfer. And that result would subvert everything the Code does to keep avoidances cabined—so they do not threaten the rule that the estate can take only what the debtor possessed before filing. Again, then, core tenets of bankruptcy law push in the same direction as Section 365's text: Rejection is breach, and has only its consequences.

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B

Tempnology's main argument to the contrary, here as in the courts below, rests on a negative inference. See Brief

for Respondent 33–41; *supra*, at 374–375. Several provisions of Section 365, Tempnology notes, "identif[y] categories of contracts under which a counterparty" may retain specified contract rights "notwithstanding rejection." Brief for Respondent 34. Sections 365(h) and (i) make clear that certain purchasers and lessees of real property and timeshare interests can continue to exercise rights after a debtor has rejected the lease or sales contract. See § 365(h)(1) (real-property leases); § 365(i) (real-property sales contracts); §§ 365(h)(2), (i) (timeshare interests). And Section 365(n) similarly provides that licensees of some intellectual property—but not trademarks—retain contractual rights after rejection. See § 365(n); § 101(35A); *supra*, at 375. Tempnology argues from those provisions that the ordinary consequence of rejection must be something different—*i. e.*, the termination, rather than survival, of contractual rights previously granted. Otherwise, Tempnology concludes, the statute's "general rule" would "swallow the exceptions." Brief for Respondent 19.

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But that argument pays too little heed to the main provisions governing rejection and too much to subsidiary ones. On the one hand, it offers no account of how to read Section 365(g) (recall, rejection "constitutes a breach") to say essentially its opposite (*i. e.*, that rejection and breach have divergent consequences). On the other hand, it treats as a neat, reticulated scheme of "narrowly tailored exception[s]," *id.*, at 36 (emphasis deleted), what history reveals to be anything but. Each of the provisions Tempnology highlights emerged at a different time, over a span of half a century. See, *e. g.*, 52 Stat. 881 (1938) (real-property leases); § 1(b), 102 Stat. 2538 (1988) (intellectual property). And each responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges. See Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 911–912, 916–919 (1988) (identifying judicial decisions that the provisions overturned); compare, *e. g.*, *In re Som-*

brero Reef Club, Inc., 18 B. R. 612, 618–619 (Bkrtcy. Ct. SD Fla. 1982), with, *e. g.*, §§ 365(h)(2), (i). Read as generously as possible to Tempnology, this mash-up of legislative interventions says nothing much of anything about the content of Section 365(g)'s general rule. Read less generously, it affirmatively refutes Tempnology's rendition. As one bankruptcy scholar noted after an exhaustive review of the history: "What the legislative record [reflects] is that whenever Congress has been confronted with the consequences of the [view that rejection terminates all contractual rights], it has expressed its disapproval." Andrew, 59 U. Colo. L. Rev., at 928. On that account, Congress enacted the provisions, as and when needed, to reinforce or clarify the general rule that contractual rights survive rejection.[2]

Consider more closely, for example, Congress's enactment of Section 365(n), which addresses certain intellectual property licensing agreements. No one disputes how that provision came about. In *Lubrizol Enterprises* v. *Richmond Metal Finishers*, the Fourth Circuit held that a debtor's rejection of an executory contract worked to revoke its grant of a patent license. See 756 F. 2d 1043, 1045–1048 (1985). In other words, *Lubrizol* adopted the same rule for patent licenses that the First Circuit announced for trademark licenses here. Congress sprang into action, drafting Section 365(n) to reverse *Lubrizol* and ensure the continuation of patent (and some other intellectual property) licensees' rights. See 102 Stat. 2538 (1988); S. Rep. No. 100–505,

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[2] At the same time, Congress took the opportunity when drafting those provisions to fill in certain details, generally left to state law, about the post-rejection relationship between the debtor and counterparty. See, *e. g.*, Andrew, Executory Contracts in Bankruptcy, 59 U. Colo. L. Rev. 845, 903, n. 200 (1988) (describing Congress's addition of subsidiary rules for real-property leases in Section 365(h)); Brief for United States as *Amicus Curiae* 29 (noting that Congress similarly set out detailed rules for patent licenses in Section 365(n)). The provisions are therefore not redundant of Section 365(g): Each sets out a remedial scheme embellishing on or tweaking the general rejection-as-breach rule.

pp. 2–4 (1988) (explaining that Section 365(n) "corrects [*Lubrizol*'s] perception" that "Section 365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights"). As Tempnology highlights, that provision does not cover trademark licensing agreements, which continue to fall, along with most other contracts, within Section 365(g)'s general rule. See Brief for Respondent 38. But what of that? Even put aside the claim that Section 365(n) is part of a pattern—that Congress whacked Tempnology's view of rejection wherever it raised its head. See *supra*, at 384. Still, Congress's repudiation of *Lubrizol* for patent contracts does not show any intent to *ratify* that decision's approach for almost all others. Which is to say that no negative inference arises. Congress did nothing in adding Section 365(n) to alter the natural reading of Section 365(g)—that rejection and breach have the same results.

Tempnology's remaining argument turns on the way special features of trademark law may affect the fulfillment of the Code's goals. Like the First Circuit below, Tempnology here focuses on a trademark licensor's duty to monitor and "exercise quality control over the goods and services sold" under a license. Brief for Respondent 20; see *supra*, at 376. Absent those efforts to keep up quality, the mark will naturally decline in value and may eventually become altogether invalid. See 3 J. McCarthy, Trademarks and Unfair Competition § 18:48, pp. 18–129, 18–133 (5th ed. 2018). So (Tempnology argues) unless rejection of a trademark licensing agreement terminates the licensee's rights to use the mark, the debtor will have to choose between expending scarce resources on quality control and risking the loss of a valuable asset. See Brief for Respondent 59. "Either choice," Tempnology concludes, "would impede a [debtor's] ability to reorganize," thus "undermining a fundamental purpose of the Code." *Id.*, at 59–60.

To begin with, that argument is a mismatch with Tempnology's reading of Section 365. The argument is trademark-

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specific. But Tempnology's reading of Section 365 is not. Remember, Tempnology construes that section to mean that a debtor's rejection of a contract terminates the counterparty's rights "unless the contract falls within an express statutory exception." *Id.*, at 27–28; see *supra*, at 382–383. That construction treats trademark agreements identically to most other contracts; the only agreements getting different treatment are those falling within the discrete provisions just discussed. And indeed, Tempnology could not have discovered, however hard it looked, any trademark-specific rule in Section 365. That section's special provisions, as all agree, do not mention trademarks; and the general provisions speak, well, generally. So Tempnology is essentially arguing that distinctive features of trademarks should persuade us to adopt a construction of Section 365 that will govern not just trademark agreements, but pretty nearly every executory contract. However serious Tempnology's trademark-related concerns, that would allow the tail to wag the Doberman.

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And even putting aside that incongruity, Tempnology's plea to facilitate trademark licensors' reorganizations cannot overcome what Sections 365(a) and (g) direct. The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal. See, *e. g.*, *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 51 (2008) (observing that in enacting Chapter 11, Congress did not have "a single purpose," but "str[uck] a balance" among multiple competing interests (internal quotation marks omitted)). Here, Section 365 provides a debtor like Tempnology with a powerful tool: Through rejection, the debtor can escape all of its future contract obligations, without having to pay much of anything in return. See *supra*, at 374. But in allowing rejection of those contractual duties, Section 365 does not grant the debtor an exemption from all the burdens that generally applicable law—whether involving contracts or trademarks—

imposes on property owners. See 28 U. S. C. § 959(b) (requiring a trustee to manage the estate in accordance with applicable law). Nor does Section 365 relieve the debtor of the need, against the backdrop of that law, to make economic decisions about preserving the estate's value—such as whether to invest the resources needed to maintain a trademark. In thus delineating the burdens that a debtor may and may not escape, Congress also weighed (among other things) the legitimate interests and expectations of the debtor's counterparties. The resulting balance may indeed impede some reorganizations, of trademark licensors and others. But that is only to say that Section 365's edict that rejection is breach expresses a more complex set of aims than Tempnology acknowledges.

IV

For the reasons stated above, we hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted. Here, that construction of Section 365 means that the debtor-licensor's rejection cannot revoke the trademark license.

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

I agree with the Court that a debtor's choice to reject an executory contact under 11 U. S. C. § 365(a) functions as a breach of the contract rather than unwinding the rejected contract as if it never existed. *Ante*, at 379–381. This result follows from traditional bankruptcy principles and from the general rule set out in § 365(g) of the Bankruptcy Code. I also agree that no specific aspects of trademark law compel

a contrary rule that equates rejection with rescission. I therefore join the Court's opinion in full. I write separately to highlight two potentially significant features of today's holding.

First, the Court does not decide that every trademark licensee has the unfettered right to continue using licensed marks postrejection. The Court granted certiorari to decide whether rejection "terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law." Pet. for Cert. i. The answer is no, for the reasons the Court explains. But the baseline inquiry remains whether the licensee's rights would survive a breach under applicable nonbankruptcy law. Special terms in a licensing contract or state law could bear on that question in individual cases. See *ante*, at 379–381; Brief for American Intellectual Property Law Association as *Amicus Curiae* 20–25 (discussing examples of contract terms that could potentially lead a bankruptcy court to limit licensee rights postrejection).

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Second, the Court's holding confirms that trademark licensees' postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property. Those variances stem from § 365(n), one of several subject-specific provisions in the Bankruptcy Code that "embellis[h] on or twea[k]" the general rejection rule. *Ante*, at 384, n. 2. Section 365(n)—which applies to patents, copyrights, and four other types of intellectual property, but not to trademarks, § 101(35A)—alters the general rejection rule in several respects. For example, a covered licensee that chooses to retain its rights postrejection must make all of its royalty payments; the licensee has no right to deduct damages from its payments even if it otherwise could have done so under nonbankruptcy law. § 365(n)(2)(C)(i). This provision and others in § 365(n) mean that the covered intellectual property types are governed by different rules than trademark licenses.

Although these differences may prove significant for individual licensors and licensees, they do not alter the outcome here. The Court rightly rejects Tempnology's argument that the presence of § 365(n) changes what § 365(g) says. As the Senate Report accompanying § 365(n) explained, the bill did not "address or intend any inference to be drawn concerning the treatment of executory contracts" under § 365's general rule. S. Rep. No. 100–505, p. 5 (1988); see *ante*, at 384–385. To the extent trademark licensees are treated differently from licensees of other forms of intellectual property, that outcome leaves Congress with the option to tailor a provision for trademark licenses, as it has repeatedly in other contexts. See *ante*, at 384–385.

With these observations, I join the Court's opinion.

JUSTICE GORSUCH, dissenting.

This Court is not in the business of deciding abstract questions, no matter how interesting. Under the Constitution, our power extends only to deciding "Cases" and "Controversies" where the outcome matters to real parties in the real world. Art. III, § 2. Because it's unclear whether we have anything like that here, I would dismiss the petition as improvidently granted.

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This case began when Mission licensed the right to use certain of Tempnology's trademarks. After Tempnology entered bankruptcy, it sought and won from a bankruptcy court an order declaring that Mission could no longer use those trademarks. On appeal and now in this Court, Mission seeks a ruling that the bankruptcy court's declaration was wrong. But whoever is right about that, it isn't clear how it would make a difference: After the bankruptcy court ruled, the license agreement expired by its own terms, so nothing we might say here could restore Mission's ability to use Tempnology's trademarks.

Recognizing that its original case seems to have become moot, Mission attempts an alternative theory in briefing be-

fore us. Now Mission says that if it prevails here it will, on remand, seek money damages from Tempnology's estate for the profits it lost when, out of respect for the bankruptcy court's order, it refrained from using the trademarks while its license still existed.

But it's far from clear whether even this theory can keep the case alive. A damages claim "suffices to avoid mootness only if viable," which means damages must at least be "legally available for [the alleged] wrong." 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 22 (3d ed. 2008). Yet, as far as Mission has told us, Tempnology did nothing that could lawfully give rise to a damages claim. After all, when Tempnology asked the bankruptcy court to issue a declaratory ruling on a question of law, it was exercising its protected "First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983). And petitioning a court normally isn't an actionable wrong that can give rise to a claim for damages. Absent a claim of malice (which Mission hasn't suggested would have any basis here), the ordinary rule is that "'no action lies against a party for resort to civil courts'" or for "the assertion of a legal argument." *Lucsik* v. *Board of Ed. of Brunswick City School Dist.*, 621 F. 2d 841, 842 (CA6 1980) (*per curiam*); see, *e. g.*, *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 770, n. 14 (1983); *Russell* v. *Farley*, 105 U. S. 433, 437–438 (1882).

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Maybe Mission's able lawyers will conjure something better on remand. But, so far at least, the company hasn't come close to articulating a viable legal theory on which a claim for damages could succeed. And where our jurisdiction is so much in doubt, I would decline to proceed to the merits. If the legal questions here are of sufficient importance, a live case presenting them will come along soon enough; there is no need to press the bounds of our constitutional authority to reach them today.

Syllabus

NIEVES ET AL. *v.* BARTLETT

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

No. 17–1174. Argued November 26, 2018—Decided May 28, 2019

Respondent Russell Bartlett was arrested by police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest during "Arctic Man," a raucous winter sports festival held in a remote part of Alaska. According to Sergeant Nieves, he was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Rather than escalate the situation, Nieves left. Bartlett disputes that account, claiming that he was not drunk at that time and did not yell at Nieves. Minutes later, Trooper Weight says, Bartlett approached him in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back. Nieves saw the confrontation and initiated an arrest. When Bartlett was slow to comply, the officers forced him to the ground. Bartlett denies being aggressive and claims that he was slow to comply because of a back injury. After he was handcuffed, Bartlett claims that Nieves said "bet you wish you would have talked to me now."

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Bartlett sued under 42 U. S. C. § 1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech—*i. e.*, his initial refusal to speak with Nieves and his intervention in Weight's discussion with the minor. The District Court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed. It held that probable cause does not defeat a retaliatory arrest claim and concluded that Bartlett's affidavit about what Nieves allegedly said after the arrest could enable Bartlett to prove that the officers' desire to chill his speech was a but-for cause of the arrest.

Held: Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law. Pp. 397–409.

(a) To prevail on a claim such as Bartlett's, the plaintiff must show not only that the official acted with a retaliatory motive and that the plaintiff was injured, but also that the motive was a "but-for" cause of the injury. *Hartman* v. *Moore*, 547 U. S. 250, 259–260. Establishing that causal connection may be straightforward in some cases, see, *e. g.*,

Mt. Healthy City Bd. of Ed. v. *Doyle*, 429 U. S. 274, but other times it is not so simple. In retaliatory prosecution cases, for example, the causal inquiry is particularly complex because the official alleged to have the retaliatory motive does not carry out the retaliatory action himself. Instead, the decision to bring charges is made by a prosecutor—who is generally immune from suit and whose decisions receive a presumption of regularity. To account for that "problem of causation," plaintiffs in retaliatory prosecution cases must prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause. *Hartman*, 547 U. S., at 263. Pp. 398–401.

(b) Because First Amendment retaliatory arrest claims involve causal complexities akin to those identified in *Hartman*—see, *e. g.*, *Reichle* v. *Howards*, 566 U. S. 658; *Lozman* v. *Riviera Beach*, 585 U. S. 87—the same no-probable-cause requirement generally should apply. The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. *Reichle*, 566 U. S., at 668. In addition, "evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Ibid.* Its absence will generally provide weighty evidence that the officers' animus caused the arrest, whereas its presence will suggest the opposite. While retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors, the ultimate problem remains the same: For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officers' malice or by the plaintiff's potentially criminal conduct.

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Bartlett's proposed approach disregards the causal complexity involved in these cases and dismisses the need for any threshold objective showing, moving directly to consideration of the officers' subjective intent. In the Fourth Amendment context, however, this Court has "almost uniformly rejected invitations to probe [officers'] subjective intent," *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 737. A purely subjective approach would undermine that precedent, would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire* v. *Biddle*, 177 F. 2d 579, 581, would compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers, *Devenpeck* v. *Alford*, 543 U. S. 146, 154, and would encourage officers to minimize communication during arrests to avoid having their words scrutinized for hints of improper motive. Pp. 401–404.

(c) When defining the contours of a § 1983 claim, this Court looks to "common-law principles that were well settled at the time of its enact-

Syllabus

ment." *Kalina* v. *Fletcher*, 522 U. S. 118, 123. In 1871, when § 1983 was enacted, there was no common law tort for retaliatory arrest based on protected speech. Turning to the "closest analog[s]," *Heck* v. *Humphrey*, 512 U. S. 477, 484, both false imprisonment and malicious prosecution suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim. Pp. 405–406.

(d) Because States today permit warrantless misdemeanor arrests for minor criminal offenses in a wide range of situations—whereas such arrests were privileged only in limited circumstances when § 1983 was adopted—a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. An unyielding requirement to show the absence of probable cause in such cases could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 585 U. S., at 99. Thus, the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 465. Because this inquiry is objective, the statements and motivations of the particular arresting officer are irrelevant at this stage. After making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause. Pp. 406–409.

712 Fed. Appx. 613, reversed and remanded.

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ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, ALITO, KAGAN, and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined except as to Part II–D. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 409. GORSUCH, J., filed an opinion concurring in part and dissenting in part, *post*, p. 412. GINSBURG, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 420. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 421.

Dario Borghesan, Assistant Attorney General of Alaska, argued the cause for petitioners. With him on the briefs were *Jahna Lindemuth*, Attorney General, and *Anna R. Jay* and *Stephanie Galbraith Moore*, Assistant Attorneys General.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal. With him

on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Michael R. Huston*, *Barbara L. Herwig*, and *Lowell V. Sturgill, Jr.*

Zane D. Wilson argued the cause for respondent. With him on the brief were *Jeffrey L. Fisher*, *Pamela S. Karlan*, *Leah M. Litman*, and *Kerri L. Barsh*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Respondent Russell Bartlett sued petitioners—two police officers—alleging that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest. The officers had probable cause to arrest Bartlett, and we now decide whether

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*Briefs of *amici curiae* urging reversal were filed for the District of Columbia et al. by *Loren L. Alikhan*, Solicitor General of the District of Columbia, *Karl A. Racine*, Attorney General, *Caroline S. Van Zile*, Deputy Solicitor General, and *Carl J. Schifferle*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Cynthia H. Coffman* of Colorado, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Hector Balderas* of New Mexico, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; and for the National Association of Counties et al. by *Sean R. Gallagher*, *Bennett L. Cohen*, and *Lisa E. Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle*; for the First Amendment Foundation et al. by *Ginger D. Anders* and *Christopher M. Lynch*; for the Institute for Free Speech by *Floyd Abrams* and *Allen Dickerson*; for the Institute for Justice by *Michael B. Kimberly*, *Matthew A. Waring*, and *Paul M. Sherman*; for the National Police Accountability Project et al. by *David M. Shapiro*, *David D. Cole*, and *Esha Bhandari*; for the National Press Photographers Association et al. by *Charles S. Sims*, *Mickey H. Osterreicher*, and *Robert D. Balin*; for The Rutherford Institute by *Erin Glenn Busby*, *Lisa R. Eskow*, and *John W. Whitehead*; and for Three Individual Activists by *Michelle Otero Valdés*.

that fact defeats Bartlett's First Amendment claim as a matter of law.

I

A

Bartlett was arrested during "Arctic Man," a weeklong winter sports festival held in the remote Hoodoo Mountains near Paxson, Alaska. Paxson is a small community that normally consists of a few dozen residents. But once a year, upwards of 10,000 people descend on the area for Arctic Man, an event known for both extreme sports and extreme alcohol consumption. The mainstays are high-speed ski and snowmobile races, bonfires, and parties. During that week, the Arctic Man campground briefly becomes one of the largest and most raucous cities in Alaska.

The event poses special challenges for law enforcement. Snowmobiles, alcohol, and freezing temperatures do not always mix well, and officers spend much of the week responding to snowmobile crashes, breaking up fights, and policing underage drinking. Given the remote location of the event, Alaska flies in additional officers from around the State to provide support. Still, the number of police remains limited. Even during the busiest periods of the event, only six to eight officers are on patrol at a time.

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On the last night of Arctic Man 2014, Sergeant Luis Nieves and Trooper Bryce Weight arrested Bartlett. The parties dispute certain details about the arrest but agree on the general course of events, some of which were captured on video by a local news reporter.

At around 1:30 a.m., Sergeant Nieves and Bartlett first crossed paths. Nieves was asking some partygoers to move their beer keg inside their RV because minors had been making off with alcohol. According to Nieves, Bartlett began belligerently yelling to the RV owners that they should not speak with the police. Nieves approached Bartlett to explain the situation, but Bartlett was highly intoxicated and

yelled at him to leave. Rather than escalate the situation, Nieves left. Bartlett disputes that account. According to Bartlett, he was not drunk at that time and never yelled at Nieves. He claims it was Nieves who became aggressive when Bartlett refused to speak with him.

Several minutes later, Bartlett saw Trooper Weight asking a minor whether he and his underage friends had been drinking. According to Weight, Bartlett approached in an aggressive manner, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. Weight claims that Bartlett then stepped very close to him in a combative way, so Weight pushed him back. Sergeant Nieves saw the confrontation and rushed over, arriving right after Weight pushed Bartlett. Nieves immediately initiated an arrest, and when Bartlett was slow to comply with his orders, the officers forced him to the ground and threatened to tase him.

Again, Bartlett tells a different story. He denies being aggressive, and claims that he stood close to Weight only in an effort to speak over the loud background music. And he was slow to comply with Nieves's orders, not because he was resisting arrest, but because he did not want to aggravate a back injury. After Bartlett was handcuffed, he claims that Nieves said: "[B]et you wish you would have talked to me now." 712 Fed. Appx. 613, 616 (CA9 2017).

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The officers took Bartlett to a holding tent, where he was charged with disorderly conduct and resisting arrest. He had sustained no injuries during the episode and was released a few hours later.

B

The State ultimately dismissed the criminal charges against Bartlett, and Bartlett then sued the officers under 42 U. S. C. § 1983, which provides a cause of action for state deprivations of federal rights. As relevant here, he claimed that the officers violated his First Amendment rights by arresting him in retaliation for his speech. The protected

speech, according to Bartlett, was his refusal to speak with Nieves earlier in the evening and his intervention in Weight's discussion with the underage partygoer. The officers responded that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with Weight. The District Court granted summary judgment for the officers. The court determined that the officers had probable cause to arrest Bartlett and held that the existence of probable cause precluded Bartlett's First Amendment retaliatory arrest claim.

The Ninth Circuit disagreed. 712 Fed. Appx. 613. Relying on its prior decision in *Ford* v. *Yakima*, 706 F. 3d 1188 (2013), the court held that a plaintiff can prevail on a First Amendment retaliatory arrest claim even in the face of probable cause for the arrest. According to the Ninth Circuit, Bartlett needed to show only (1) that the officers' conduct would "chill a person of ordinary firmness from future First Amendment activity," and (2) that he had advanced evidence that would "enable him ultimately to prove that the officers' desire to chill his speech was a but-for cause" of the arrest. 712 Fed. Appx., at 616 (internal quotation marks omitted). The court concluded that Bartlett had satisfied both requirements: A retaliatory arrest is sufficiently chilling, and Bartlett had presented enough evidence that his speech was a but-for cause of the arrest. The only causal evidence relied on by the court was Bartlett's affidavit alleging that Sergeant Nieves said "bet you wish you would have talked to me now." If that allegation were true, the court reasoned, a jury might conclude that the officers arrested Bartlett in retaliation for his statements earlier that night.

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The officers petitioned for review in this Court, and we granted certiorari. 585 U. S. 1029 (2018).

II

We are asked to resolve whether probable cause to make an arrest defeats a claim that the arrest was in retaliation

for speech protected by the First Amendment. We have considered this issue twice in recent years. On the first occasion, we ultimately left the question unanswered because we decided the case on the alternative ground of qualified immunity. See *Reichle* v. *Howards*, 566 U. S. 658 (2012). We took up the question again last Term in *Lozman* v. *Riviera Beach*, 585 U. S. 87 (2018). *Lozman* involved unusual circumstances in which the plaintiff was arrested pursuant to an alleged "official municipal policy" of retaliation. *Id.*, at 99. Because those facts were "far afield from the typical retaliatory arrest claim," we reserved judgment on the broader question presented and limited our holding to arrests that result from official policies of retaliation. *Ibid.* In such cases, we held, probable cause does not categorically bar a plaintiff from suing the municipality. *Id.*, at 100–101. We now take up the question once again, this time in a more representative case.

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A

"[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman* v. *Moore*, 547 U. S. 250, 256 (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. *Ibid.* (citing *Crawford-El* v. *Britton*, 523 U. S. 574, 593 (1998); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 283–284 (1977)).

To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." *Hartman*, 547 U. S., at 259. It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury.

Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Id.*, at 260 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

For example, in *Mt. Healthy*, a teacher claimed that a school district refused to rehire him in retaliation for his protected speech. We held that even if the teacher's "protected conduct played a part, substantial or otherwise, in [the] decision not to rehire," he was not entitled to reinstatement "if the same decision would have been reached" absent his protected speech. 429 U. S., at 285. Regardless of the motives of the school district, we concluded that the First Amendment "principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected speech]." *Id.*, at 285–286.

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For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context "have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other," shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. *Hartman*, 547 U. S., at 260 (citing *Mt. Healthy*, 429 U. S., at 287; *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270, n. 21 (1977)). But the consideration of causation is not so straightforward in other types of retaliation cases.

In *Hartman*, for example, we addressed retaliatory prosecution cases, where "proving the link between the defendant's retaliatory animus and the plaintiff's injury . . . 'is usually more complex than it is in other retaliation cases.'" *Lozman*, 585 U. S., at 97 (quoting *Hartman*, 547 U. S., at

261). Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity. *Lozman*, 585 U. S., at 97–98. Thus, even when an officer's animus is clear, it does not necessarily show that the officer "induced the action of a prosecutor who would not have pressed charges otherwise." *Hartman*, 547 U. S., at 263.

To account for this "problem of causation" in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs plead and prove the absence of probable cause for the underlying criminal charge. *Ibid.*; see *id.*, at 265–266. As *Hartman* explained, that showing provides a "distinct body of highly valuable circumstantial evidence" that is "apt to prove or disprove" whether retaliatory animus actually caused the injury: "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Id.*, at 261. Requiring plaintiffs to plead and prove the absence of probable cause made sense, we reasoned, because the existence of probable cause will be at issue in "practically all" retaliatory prosecution cases, has "high probative force," and thus "can be made mandatory with little or no added cost." *Id.*, at 265. Moreover, imposing that burden on plaintiffs was necessary to suspend the presumption of regularity underlying the prosecutor's charging decision—a presumption we "do not lightly discard." *Id.*, at 263; see also *id.*, at 265. Thus, *Hartman* requires plaintiffs in retaliatory prosecution cases to show more than the subjective animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the deci-

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sion to press charges was objectively unreasonable because it was not supported by probable cause.

B

Officers Nieves and Weight argue that the same no-probable-cause requirement should apply to First Amendment retaliatory arrest claims. Their primary contention is that retaliatory arrest claims involve causal complexities akin to those we identified in *Hartman*, and thus warrant the same requirement that plaintiffs plead and prove the absence of probable cause. Brief for Petitioners 20–30.

As a general matter, we agree. As we recognized in *Reichle* and reaffirmed in *Lozman*, retaliatory arrest claims face some of the same challenges we identified in *Hartman*: Like retaliatory prosecution cases, "retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U. S., at 668. The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. *Ibid.*; *Lozman*, 585 U. S., at 98. Officers frequently must make "split-second judgments" when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is "ready to cooperate" or rather "present[s] a continuing threat." *Ibid.* (citing *District of Columbia* v. *Wesby*, 583 U. S. 48, 60 (2018) ("suspect's untruthful and evasive answers to police questioning could support probable cause")). Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

In addition, "[l]ike retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case."

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Reichle, 566 U. S., at 668. And because probable cause speaks to the objective reasonableness of an arrest, see *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 736 (2011), its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite.

To be sure, *Reichle* and *Lozman* also recognized that the two claims give rise to complex causal inquiries for somewhat different reasons. Unlike retaliatory prosecution cases, retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors (although this case did). *Reichle*, 566 U. S., at 668–669; *Lozman*, 585 U. S., at 98–99. But regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct. See *id.*, at 98 (referring to "the complexity of proving (or disproving) causation" in retaliatory arrest cases). Because of the "close relationship" between the two claims, *Reichle*, 566 U. S., at 667, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.

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Bartlett, in defending the decision below, argues that the "causation in retaliatory-arrest cases is not inherently complex" because the "factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech." Brief for Respondent 36–37; see also *post*, at 425 (SOTOMAYOR, J., dissenting). That approach fails to account for the fact that protected speech is often a legitimate consideration when deciding whether to make an arrest, and disregards the resulting causal complexity previously recognized by this Court. See *Reichle*, 566 U. S., at 668; *Lozman*, 585 U. S., at 98.

Bartlett's approach dismisses the need for any threshold showing, moving directly to consideration of the subjective intent of the officers. In the Fourth Amendment context, however, "we have almost uniformly rejected invitations to probe subjective intent." *al-Kidd*, 563 U. S., at 737; see also *Kentucky* v. *King*, 563 U. S. 452, 464 (2011) ("Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." (internal quotation marks omitted)). Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in "circumstances that are tense, uncertain, and rapidly evolving." *Graham* v. *Connor*, 490 U. S. 386, 397 (1989). To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness. See *Atwater* v. *Lago Vista*, 532 U. S. 318, 351, and n. 22 (2001); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814–819 (1982). Thus, when reviewing an arrest, we ask "whether the circumstances, viewed objectively, justify [the challenged] action," and if so, conclude "that action was reasonable *whatever* the subjective intent motivating the relevant officials." *al-Kidd*, 563 U. S., at 736 (internal quotation marks omitted). A particular officer's state of mind is simply "irrelevant," and it provides "no basis for invalidating an arrest." *Devenpeck* v. *Alford*, 543 U. S. 146, 153, 155 (2004).

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Bartlett's purely subjective approach would undermine that precedent by allowing even doubtful retaliatory arrest suits to proceed based solely on allegations about an arresting officer's mental state. See *Lozman*, 585 U. S., at 98. Because a state of mind is "easy to allege and hard to disprove," *Crawford-El*, 523 U. S., at 585, a subjective inquiry would threaten to set off "broad-ranging discovery" in which "there often is no clear end to the relevant evidence," *Har-*

low, 457 U. S., at 817. As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (Learned Hand, C. J.). It would also compromise evenhanded application of the law by making the constitutionality of an arrest "vary from place to place and from time to time" depending on the personal motives of individual officers. *Devenpeck*, 543 U. S., at 154. Yet another "predictable consequence" of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off. *Id.*, at 155.

Adopting *Hartman*'s no-probable-cause rule in this closely related context addresses those familiar concerns. Absent such a showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Lozman*, 585 U. S., at 97 (citing *Hartman*, 547 U. S., at 265–266).[1]

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[1] JUSTICE SOTOMAYOR would have us extend *Mt. Healthy* and rely on that "tried and true" approach as the exclusive standard in the retaliatory arrest context. See *post*, at 421–425, 433–434 (dissenting opinion). But not even respondent Bartlett argues for such a rule. And since our decisions in *Hartman* and *Reichle*, no court of appeals has applied that approach in retaliatory arrest cases of this sort. JUSTICE SOTOMAYOR criticizes the Court for spending "[m]uch of its opinion . . . analogizing to *Hartman*," *post*, at 424, but of course *Hartman* is our precedent most directly on point. To the extent retaliatory arrest cases raise concerns distinct from that

C

Our conclusion is confirmed by the common law approach to similar tort claims. When defining the contours of a claim under § 1983, we look to "common-law principles that were well settled at the time of its enactment." *Kalina* v. *Fletcher*, 522 U. S. 118, 123 (1997); *Manuel* v. *Joliet*, 580 U. S. 357, 370 (2017) (common law principles "guide" the definition of claims under § 1983).

As the parties acknowledge, when § 1983 was enacted in 1871, there was no common law tort for retaliatory arrest based on protected speech. See Brief for Petitioners 43; Brief for Respondent 20. We therefore turn to the common law torts that provide the "closest analogy" to retaliatory arrest claims. *Heck* v. *Humphrey*, 512 U. S. 477, 484 (1994). The parties dispute whether the better analog is false imprisonment or malicious prosecution. At common law, false imprisonment arose from a "detention without legal process," whereas malicious prosecution was marked "by *wrongful institution* of legal process." *Wallace* v. *Kato*, 549 U. S. 384, 389–390 (2007).[2] Here, both claims suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim. See generally *Lozman*, 585 U. S., at 104–107 (THOMAS, J., dissenting).

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Malicious prosecution required the plaintiff to show that the criminal charge against him "was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice." *Wheeler* v. *Nesbitt*, 24 How. 544, 549–550 (1861); see

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precedent, we have departed from *Hartman* to afford greater First Amendment protection. See *infra*, at 406–408.

[2] For our purposes, we need not distinguish between the torts of false imprisonment and false arrest, which are "virtually synonymous." 35 C. J. S., False Imprisonment § 2, p. 522 (2009); see also *Wallace*, 549 U. S., at 388–389.

also Restatement of Torts § 653 (1938). It has long been "settled law" that malicious prosecution requires proving "the want of probable cause," and Bartlett does not argue otherwise. *Brown* v. *Selfridge*, 224 U. S. 189, 191 (1912); see also *Wheeler*, 24 How., at 550 (noting that "[w]ant of reasonable and probable cause" is an "element in the action for a malicious criminal prosecution").

For claims of false imprisonment, the presence of probable cause was generally a complete defense for peace officers. See T. Cooley, Law of Torts 175 (1880); 1 F. Hilliard, The Law of Torts or Private Wrongs 207–208, and n. (a) (1859). In such cases, arresting officers were protected from liability if the arrest was "privileged." At common law, peace officers were privileged to make warrantless arrests based on probable cause of the commission of a felony or certain misdemeanors. See Restatement of Torts §§ 118, 119, 121 (1934); see also Cooley, Law of Torts, at 175–176 (stating that peace officers who make arrests based on probable cause "will be excused, even though it appear afterwards that in fact no felony had been committed"); see generally *Atwater*, 532 U. S., at 340–345 (reviewing the history of warrantless arrests for misdemeanors). Although the exact scope of the privilege varied somewhat depending on the jurisdiction, the consistent rule was that officers were not liable for arrests they were privileged to make based on probable cause.

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D

Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 585 U. S., at 99.

When § 1983 was adopted, officers were generally privileged to make warrantless arrests for misdemeanors only in limited circumstances. See Restatement of Torts § 121, Comments *e*, *h*, at 262–263. Today, however, "statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests" in a much wider range of situations—often whenever officers have probable cause for "even a very minor criminal offense." *Atwater*, 532 U. S., at 344–345, 354; see *id.*, at 355–360 (listing state statutes).

For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic.

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For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 465 (1996). That showing addresses *Hartman*'s causal concern by helping to establish that "nonretaliatory grounds [we]re in fact insufficient to provoke the adverse consequences." 547 U. S., at 256. And like a probable cause analysis, it provides an objective inquiry that avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard. Because this inquiry is objective, the statements and motivations of the particular arresting officer are "irrelevant" at this stage. *Devenpeck*, 543 U. S., at 153. After making the required showing, the plaintiff's claim may proceed in the

same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause. See *Lozman*, 585 U. S., at 97.

* * *

In light of the foregoing, Bartlett's retaliation claim cannot survive summary judgment. As an initial matter, the record contains insufficient evidence of retaliation on the part of Trooper Weight. The *only* evidence of retaliatory animus identified by the Ninth Circuit was Bartlett's affidavit stating that Sergeant Nieves said "bet you wish you would have talked to me now." 712 Fed. Appx., at 616. But that allegation about *Nieves* says nothing about what motivated *Weight*, who had no knowledge of Bartlett's prior run-in with Nieves. Cf. *Lozman*, 585 U. S., at 99 (plaintiff "likely could not have maintained a retaliation claim against the arresting officer" when there was "no showing that the officer had any knowledge of [the plaintiff's] prior speech").

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In any event, Bartlett's claim against both officers cannot succeed because they had probable cause to arrest him. As the Court of Appeals explained:

> "When Sergeant Nieves initiated Bartlett's arrest, he knew that Bartlett had been drinking, and he observed Bartlett speaking in a loud voice and standing close to Trooper Weight. He also saw Trooper Weight push Bartlett back. . . . [T]he test is whether the information the officer had at the time of making the arrest gave rise to probable cause. We agree with the district court that it did; a reasonable officer in Sergeant Nieves's position could have concluded that Bartlett stood close to Trooper Weight and spoke loudly in order to challenge him, provoking Trooper Weight to push him back." 712 Fed. Appx., at 615 (citations and internal quotation marks omitted).

Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law. Accord-

ingly, the judgment of the United States 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 THOMAS, concurring in part and concurring in the judgment.

When 42 U. S. C. § 1983 was enacted, "the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement." *Lozman* v. *Riviera Beach*, 585 U. S. 87, 106 (2018) (THOMAS, J., dissenting). Applying that principle resolves this case: "[P]laintiffs bringing a First Amendment retaliatory-arrest claim under § 1983 should have to plead and prove a lack of probable cause." *Id.*, at 107. The Court acknowledges as much, *ante*, at 405–406, and I join the portions of the Court's opinion adopting that rule.* I do not join Part II–D, however, because I do not agree that "a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Ante*, at 406. That qualification has no basis in either the common law or our First Amendment precedents.

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As the Court explains, "[w]hen defining the contours of a claim under § 1983, we look to 'common-law principles that were well settled at the time of its enactment.'" *Ante*, at 405. Because no common-law tort for retaliatory arrest in violation of the freedom of speech existed when § 1983 was enacted, we "look to the common-law torts that 'provid[e] the closest analogy' to this claim." *Lozman*, 585 U. S., at 104 (opinion of THOMAS, J.). Here, those torts are false

*Because no party questions whether § 1983 claims for retaliatory arrests under the First Amendment are actionable, I assume that § 1983 permits such claims. See *Lozman* v. *Riviera Beach*, 585 U. S. 87, 104, n. 2 (2018) (THOMAS, J., dissenting).

imprisonment, malicious arrest, and malicious prosecution. *Ibid.*

The existence of probable cause generally excused an officer from liability for these three torts, without regard to the treatment of similarly situated individuals. For instance, a constable who made an arrest "on reasonable grounds of belief" that a felony had been committed was "excused" from liability for false imprisonment. T. Cooley, Law of Torts 175 (1879) (Cooley); *Lozman*, *supra*, at 105 (opinion of THOMAS, J.). And the absence of probable cause was central to both malicious arrest and malicious prosecution. Cooley 180–181; *Lozman*, *supra*, at 106 (opinion of THOMAS, J.). As the Court puts it, "the consistent rule was that officers were not liable for arrests they were privileged to make based on probable cause." *Ante*, at 406.

Rather than adhere to this rule, the majority carves out an exception to the no-probable-cause requirement for plaintiffs who "presen[t] objective evidence" that they were "arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ante*, at 407. The common law provides no support for this exception. Indeed, the majority cites not a single common-law case that supports imposing liability based on an officer's treatment of similarly situated individuals. The majority instead suggests that its exception responds to the fact that States today "'permit warrantless misdemeanor arrests'" for many "'minor criminal offense[s],'" whereas "[w]hen § 1983 was adopted, officers were generally privileged to make warrantless arrests for misdemeanors only in limited circumstances." *Ibid.* But discomfort with the number of warrantless arrests that are privileged today is an issue for state legislatures, not a license for this Court to fashion an exception to a previously "consistent rule." *Ante*, at 406.

The majority's exception is also untethered from our First Amendment precedents. In *Hartman* v. *Moore*, 547 U. S. 250 (2006), we expressly declined to create *any* exceptions

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to the rule that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must plead and prove the absence of probable cause. See *id.*, at 264–266, and n. 10. The majority today imports its "qualification" from our jurisprudence on selective-prosecution claims. *Ante*, at 406, 407 (citing *United States* v. *Armstrong*, 517 U. S. 456, 465 (1996)). But "[t]he requirements for a selective-prosecution claim draw on 'ordinary equal protection standards,' " not the First Amendment. *Id.*, at 465. That jurisprudence therefore is not relevant here. Cf. *Whren* v. *United States*, 517 U. S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause . . . ").

With no guidance from the common law or relevant precedents, the majority crafts its exception as a matter of policy. But this "narrow" qualification threatens to derail our retaliation jurisprudence in several ways. For one, although the majority's stated concern is with " 'warrantless misdemeanor arrests' " for " 'very minor' " offenses like "jaywalking," *ante*, at 407, its exception apparently applies to *all* offenses, including serious felonies. This overbroad exception thus is likely to encourage protracted litigation about which individuals are "similarly situated," *ibid.*, while doing little to vindicate First Amendment rights. Moreover, the majority's rule risks chilling law enforcement officers from making arrests for fear of liability, thus flouting the reasoning behind the emphasis on probable cause in arrest-based torts at common law. *Lozman*, *supra*, at 105 (opinion of THOMAS, J.). In short, the majority's exception lacks the support of history, precedent, and sound policy.

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* * *

The requirement that plaintiffs bringing First Amendment retaliatory-arrest claims plead and prove the absence of probable cause is supported by the common law and our First Amendment precedents. The majority's new excep-

tion has no basis in either. Accordingly, I join all but Part II–D of the majority opinion.

JUSTICE GORSUCH, concurring in part and dissenting in part.

No one agrees who started the trouble at the 2014 Alaska Arctic Man Festival, but everyone agrees two troopers ended it by arresting Russell Bartlett for harassing one of them. And it's that arrest that led to this lawsuit. Mr. Bartlett alleges that the *real* reason the troopers arrested him had nothing to do with harassment and everything to do with his decision to exercise his First Amendment free speech rights by voicing his opinions to the troopers. Mr. Bartlett contends that the officers' retaliation against his First Amendment protected speech entitles him to damages under 42 U. S. C. § 1983. For their part, the troopers insist that the fact they had probable cause to arrest Mr. Bartlett for some crime, or really any crime, should be enough to shield them from liability.

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The parties approach their dispute from some common ground. Both sides accept that an officer violates the First Amendment when he arrests an individual in retaliation for his protected speech. They seem to agree, too, that the presence of probable cause does not undo that violation or erase its significance. And for good reason. History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age. The freedom to speak without risking arrest is

"one of the principal characteristics by which we distinguish a free nation." *Houston* v. *Hill*, 482 U. S. 451, 463 (1987).

So if probable cause can't erase a First Amendment violation, the question becomes whether its presence at least forecloses a civil claim for damages as a statutory matter under § 1983. But look at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit. Instead, the statute imposes liability on anyone who, under color of state law, subjects another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution." Maybe it would be good policy to graft a no-probable-cause requirement onto the statute, as the officers insist; or maybe not. Either way, that's an appeal better directed to Congress than to this Court. Our job isn't to write or revise legislative policy but to apply it faithfully.

Admittedly, though, that's not quite the end of the statutory story. Courts often assume that Congress adopts statutes against the backdrop of the common law. And, for this reason, we generally read § 1983's terms "in harmony with general principles of tort immunities and defenses" that existed at the time of the statute's adoption. *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976). As the officers before us are quick to point out, too, law enforcement agents who made a lawful arrest at the time of § 1983's adoption couldn't be held liable at common law for the tort of false arrest or false imprisonment. Of course, at common law a police officer often needed a warrant to execute a lawful arrest. But today warrantless arrests are often both authorized by state law and permitted by the Constitution (as this Court has interpreted it), so long as the officer possesses probable cause to believe a crime has been committed. And, given this development, you might wonder if the presence of probable cause should be enough to foreclose any First Amendment claim arising out of an arrest.

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But that much doesn't follow. As the officers' own reasoning exposes, the point of the common law tort of false arrest or false imprisonment was to remedy arrests and imprisonments effected *without lawful authority.* See *Director General of Railroads* v. *Kastenbaum*, 263 U. S. 25, 27 (1923); accord, Brief for United States as *Amicus Curiae* 9. So maybe probable cause should be enough today to defeat claims for false arrest or false imprisonment, given that arrests today are usually legally authorized if supported by probable cause. But that doesn't mean probable cause is *also* enough to defeat a First Amendment retaliatory arrest claim. The point of *this* kind of claim isn't to guard against officers who *lack* lawful authority to make an arrest. Rather, it's to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason.*

Here's another way to look at it. The common law tort of false arrest translates more or less into a *Fourth* Amendment claim. That's because our precedent considers a warrantless arrest unsupported by probable cause—the sort that gave rise to a false arrest claim at common law—to be an unreasonable seizure in violation of the Fourth Amendment. See *Manuel* v. *Joliet*, 580 U. S. 357, 368 (2017). But the *First* Amendment operates independently of the Fourth and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech.

Here's a way to test the point, too. Everyone accepts that a detention based on race, *even one otherwise authorized by law,* violates the Fourteenth Amendment's Equal Protection Clause. In *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), for example, San Francisco jailed many Chinese immigrants for operating laundries without permits but took no action against white persons guilty of the same infraction. Even if probable cause existed to believe the Chinese immigrants had broken a valid law—even if they had *in fact* violated the law—this Court held that the city's discriminatory enforce-

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ment violated the Fourteenth Amendment. *Id.*, at 373–374; see also *Whren* v. *United States*, 517 U. S. 806, 813 (1996). Following our lead, the courts of appeals have recognized that § 1983 plaintiffs alleging racially selective arrests in violation of the Fourteenth Amendment don't have to show a lack of probable cause, even though they might have to show a lack of probable cause to establish a violation of the Fourth Amendment: "[S]imply because a practice passes muster under the Fourth Amendment (arrest based on probable cause) does not mean that unequal treatment with respect to that practice is consistent with equal protection." *Hedgepeth* v. *Washington Metropolitan Area Transit Auth.*, 386 F. 3d 1148, 1156 (CADC 2004); see also *Gibson* v. *Superintendent of N. J. Dept. of Law and Public Safety–Div. of State Police*, 411 F. 3d 427, 440 (CA3 2005); *Marshall* v. *Columbia Lea Regional Hospital*, 345 F. 3d 1157, 1166 (CA10 2003); *Vakilian* v. *Shaw*, 335 F. 3d 509, 521 (CA6 2003); *Johnson* v. *Crooks*, 326 F. 3d 995, 999–1000 (CA8 2003); *Holland* v. *Portland*, 102 F. 3d 6, 11 (CA1 1996).

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I can think of no sound reason why the same shouldn't hold true here. Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause. We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.

But while it would be a mistake to think the absence of probable cause is an essential element of a First Amendment retaliatory arrest claim under § 1983—or that the presence of probable cause is an absolute defense to such a claim—I acknowledge that it may also be a mistake to assume probable cause is entirely irrelevant to the analysis. It seems to me that probable cause to arrest could still bear on the claim's viability in at least two ways that warrant further exploration in future cases.

First, consider causation. To show an arrest violated the First Amendment, everyone agrees a plaintiff must prove the officer would not have arrested him but for his protected speech. And if the only offense for which probable cause to arrest existed was a minor infraction of the sort that wouldn't normally trigger an arrest in the circumstances—or if the officer couldn't identify a crime for which probable cause existed until well after the arrest—then causation might be a question for the jury. By contrast, if the officer had probable cause at the time of the arrest to think the plaintiff committed a serious crime of the sort that would nearly always trigger an arrest regardless of speech, then (absent extraordinary circumstances) it's hard to see how a reasonable jury might find that the plaintiff's speech caused the arrest. In cases like that, it would seem that officers often will be entitled to dismissal on the pleadings or summary judgment.

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In the name of causation concerns, the officers ask us to go further still and hold that a plaintiff can *never* prove protected speech caused his arrest without first showing that the officers lacked probable cause to make an arrest. But that absolute rule doesn't wash with common experience. No one doubts that officers regularly choose against making arrests, especially for minor crimes, even when they possess probable cause. So the presence of probable cause does not necessarily negate the possibility that an arrest was caused by unlawful First Amendment retaliation.

If logic doesn't support their argument, the officers reply, at least precedent does. They point to *Hartman* v. *Moore*, 547 U. S. 250 (2006), where the plaintiff alleged that a law enforcement officer retaliated against him for his speech by convincing a prosecutor to bring criminal charges against him. This Court held the claim presented a "distinct problem of causation" that could be overcome only with proof that the prosecutor lacked probable cause for the charges.

Id., at 263. And as a matter of precedent, the officers argue, what was true there should hold true here.

But *Hartman* does not demand nearly as much of us as the officers suggest. *Hartman* justified its rule by explaining that the "causal connection required" in that case wasn't just between the officer's retaliatory intent and his *own* injurious action. Instead, it was between the officer's intent and the injurious action of *the prosecutor*, whose charging decision was subject to a "presumption of regularity." *Id.*, at 262–263. In that particular context, *Hartman* said, proof that the prosecutor lacked probable cause was necessary to "bridge the gap between the [officer's] motive and the prosecutor's action." *Id.*, at 263. But *Hartman* made equally clear that its reasoning did *not* extend to "ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Id.*, at 259–260. And *that* describes a retaliatory arrest claim like Mr. Bartlett's to a tee. So while probable cause may wind up defeating causation in some retaliatory arrest cases, nothing in our precedent (let alone logic) suggests that causation is always unprovable just because the officer had probable cause to arrest.

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Second, our precedent suggests the possibility that probable cause may play a role in light of the separation of powers and federalism. In *United States* v. *Armstrong*, 517 U. S. 456 (1996), a plaintiff alleged that he was prosecuted because of his race. This Court responded by acknowledging that racially selective prosecutions can violate the Equal Protection Clause even when the prosecutor possesses probable cause to believe a crime has been committed. But because the decision whether to institute criminal charges is one our Constitution vests in state and federal executive officials, not judges, this Court also held that, to respect the separation of powers and federalism, a plaintiff must present "'clear evidence'" of discrimination when a federal or state official

possesses probable cause to support his prosecution. *Id.*, at 465. Explaining the content of the clear evidence requirement, this Court indicated that a plaintiff generally must produce evidence that the prosecutor failed to charge other similarly situated persons. At the same time, however, the Court also suggested that equally clear evidence in the form of "'direct admissions by prosecutors of discriminatory purpose'" might be enough to allow a claim to proceed. *Id.*, at 469, n. 3 (alterations omitted).

Though this case involves a retaliatory arrest claim rather than a selective prosecution claim, it's at least an open question whether the concerns that drove this Court's decision in *Armstrong* may be in play here. No one before us argues that *Armstrong* was wrongly decided. And the Court today seems to indicate that something like *Armstrong*'s standard might govern a retaliatory arrest claim when probable cause exists to support an arrest. See *ante*, at 407 (citing *Armstrong*). Some courts of appeals, too, have already applied *Armstrong* to claims alleging selective arrest under the Fourteenth Amendment. See, *e. g.*, *United States* v. *Mason*, 774 F. 3d 824, 829–830 (CA4 2014); *United States* v. *Alcaraz-Arellano*, 441 F. 3d 1252, 1264 (CA10 2006); *Johnson*, 326 F. 3d, at 1000.

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At the same time, enough questions remain about *Armstrong*'s potential application that I hesitate to speak definitively about it today. Some courts of appeals have argued that *Armstrong* should not extend, at least without qualification, beyond prosecutorial decisions to arrests by police. These courts have suggested that the presumptions of regularity and immunity that usually attach to official prosecutorial decisions do not apply equally in the less formal setting of police arrests. They've reasoned, too, that comparative data about similarly situated individuals may be less readily available for arrests than for prosecutorial decisions, and that other kinds of evidence—such as an officer's questions and comments to the defendant—may be equally if not more

probative in the arrest context. See, *e. g.*, *United States* v. *Sellers*, 906 F. 3d 848, 856 (CA9 2018); *United States* v. *Washington*, 869 F. 3d 193, 219 (CA3 2017); *United States* v. *Davis*, 793 F. 3d 712, 720–721 (CA7 2015); *Marshall*, 345 F. 3d, at 1168. Importantly, we did not grant certiorari to resolve exactly how *Armstrong* might apply to retaliatory arrest claims. Nor did the briefing before us explore the competing arguments in this circuit split. And given all this, I believe it would be rash for us to do more at this point than acknowledge the possibility of *Armstrong*'s application.

Dissenting, JUSTICE SOTOMAYOR reads the majority opinion as adopting a rigid rule (more rigid, in fact, than *Armstrong*'s) that First Amendment retaliatory arrest plaintiffs who can't prove the absence of probable cause must produce "comparison-based evidence" in every case. *Post*, at 424. But I do not understand the majority as going that far. The only citation the majority offers in support of its new standard is *Armstrong*, which expressly left open the possibility that other kinds of evidence, such as admissions, might be enough to allow a claim to proceed. Given that, I retain hope that lower courts will apply today's decision "commonsensically," *post*, at 432, and with sensitivity to the competing arguments about whether and how *Armstrong* might apply in the arrest setting.

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For today, I believe it is enough to resolve the question on which we *did* grant certiorari—whether "probable cause defeats . . . a First Amendment retaliatory-arrest claim under § 1983." Pet. for Cert. i. I would hold, as the majority does, that the absence of probable cause is not an absolute requirement of such a claim and its presence is not an absolute defense. At the same time, I would also acknowledge that this does not mean the presence of probable cause is categorically irrelevant: It may bear on causation, and it may play a role under *Armstrong*. But rather than attempt to sort out precisely when and how probable cause plays a role in First Amendment claims, I would reserve decision on

those questions until they are properly presented to this Court and we can address them with the benefit of full adversarial testing.

JUSTICE GINSBURG, concurring in the judgment in part and dissenting in part.

Arrest authority, as several decisions indicate, can be abused to disrupt the exercise of First Amendment speech and press rights. See, *e. g.*, *Lacey* v. *Maricopa County*, 693 F. 3d 896, 907–910 (CA9 2012) (en banc) (newspaper publishers alleged they were arrested in nighttime raid after publishing story on law enforcement's investigation of the newspaper); *Roper* v. *New York*, 2017 WL 2483813, *1 (SDNY, June 7, 2017) (photographers documenting Black Lives Matter protest alleged they were arrested for standing in street and failing to use crosswalk; sidewalks and crosswalks were blocked by police); *Morse* v. *San Francisco Bay Area Rapid Transit Dist. (BART)*, 2014 WL 572352, *1–*7 (ND Cal., Feb. 11, 2014) (only journalist arrested at protest was journalist critical of Bay Area Rapid Transit Police). Given the array of laws proscribing, *e. g.*, breach of the peace, disorderly conduct, obstructing public ways, failure to comply with a peace officer's instruction, and loitering, police may justify an arrest as based on probable cause when the arrest was in fact prompted by a retaliatory motive. If failure to show lack of probable cause defeats an action under 42 U. S. C. § 1983, only entirely baseless arrests will be checked. I remain of the view that the Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), strikes the right balance: The plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of. See *Hartman* v. *Moore*, 547 U. S. 250, 266–267 (2006) (GINSBURG, J., dissenting).

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In this case, I would reverse the Ninth Circuit's judgment as to Trooper Weight. As the Court points out, the record is bereft of evidence of retaliation on Weight's part. See *ante*, at 408. As to Sergeant Nieves, there is some evidence of animus in Nieves' statement, "bet you wish you would have talked to me now," App. 376, but perhaps not enough to survive summary judgment. Cf. *Higginbotham* v. *Sylvester*, 741 Fed. Appx. 28, 31 (CA2 2018) ("[A] reasonable factfinder could not find that [the plaintiff's] exercise of his First Amendment right . . . was the 'but-for' cause of his arrest."). In any event, I would not use this thin case to state a rule that will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech.

JUSTICE SOTOMAYOR, dissenting.

We granted certiorari to decide whether probable cause alone always suffices to defeat a First Amendment retaliatory arrest claim under 42 U. S. C. §1983. The Court answers that question "no"—a correct and sensible bottom line on which eight Justices agree. There is no basis in §1983 or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred.

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Unfortunately, a slimmer majority of the Court chooses not to stop there. The majority instead announces a different rule: that a showing of probable cause will defeat a §1983 First Amendment retaliatory arrest claim unless the person arrested happens to be able to show that "otherwise similarly situated individuals" whose speech differed were not arrested. *Ante*, at 407. The Court barely attempts to explain where in the First Amendment or §1983 it finds any grounding for that rule, which risks letting flagrant violations go unremedied. Because the correct approach would be simply to apply the well-established, carefully calibrated

standards that govern First Amendment retaliation claims in other contexts, I respectfully dissent.

I

As JUSTICE GORSUCH explains, the issue here is not whether an arrest motivated by protected speech may violate the First Amendment despite probable cause for the arrest; the question is under what circumstances § 1983 permits a remedy for such a violation. See *ante*, at 412–413 (opinion concurring in part and dissenting in part). From that common starting point, JUSTICE GORSUCH and I travel far down the same path. I agree that neither the text nor the common-law backdrop of § 1983 supports imposing on First Amendment retaliatory arrest claims a probable-cause requirement that we would not impose in other contexts. See *ante*, at 413–415. I agree that *Hartman* v. *Moore*, 547 U. S. 250 (2006), turned on concerns specific to malicious prosecution, and that its automatic probable-cause bar therefore does not extend to claims like this one. See *ante*, at 417. And I agree that—while probable cause has undeniable evidentiary significance to the underlying question of what motivated an arrest—some arrests are demonstrably retaliation for protected speech, notwithstanding probable cause of some coincidental infraction. See *ante*, at 416; see also *ante*, at 420 (GINSBURG, J., concurring in judgment in part and dissenting in part). Plaintiffs should have a meaningful opportunity to prove such claims when they arise.

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I follow this logic to its natural conclusion: Courts should evaluate retaliatory arrest claims in the same manner as they would other First Amendment retaliation claims. Accord, *ibid.* The standard framework for distinguishing legitimate exercises of governmental authority from those intended to chill protected speech is well established. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977). The plaintiff must first establish that constitutionally protected conduct was a

"'substantial'" or "'motivating'" factor in the challenged governmental action (here, an arrest). *Ibid.* If the plaintiff can make that threshold showing, the question becomes whether the governmental actor (here, the arresting officer) can show that the same decision would have been made regardless of the protected conduct. *Ibid.* If not, the governmental actor is liable. *Ibid.* In other words, if retaliatory animus was not a "but-for cause" of an arrest, a suit seeking to hold the arresting officer liable will fail "for lack of causal connection between unconstitutional motive and resulting harm." *Hartman*, 547 U. S., at 260; see also *Lozman* v. *Riviera Beach*, 585 U. S. 87, 96 (2018).

This timeworn standard is by no means easily satisfied. Even in cases where there is "proof of some retaliatory animus," *Hartman*, 547 U. S., at 260, if evidence of retaliatory motive is weak, or evidence of nonretaliatory motive is strong, but-for causation will generally be lacking. That is why probable cause to believe that someone was a serial killer would defeat any First Amendment retaliatory arrest claim—even if, say, there were evidence that the officers also detested the suspect's political beliefs.

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With sufficient evidence of retaliatory motive and sufficiently weak evidence of probable cause, however, *Mt. Healthy* is surmountable. Its orderly framework thus "protects against the invasion of constitutional rights" while burdening legitimate exercises of governmental authority only so far as is "necessary to the assurance of those rights." 429 U. S., at 287; see *ante*, at 420 (opinion of GINSBURG, J.) (*Mt. Healthy* "strikes the right balance").

II

Regrettably, the Court casts aside the *Mt. Healthy* standard for many arrests. It instead announces that courts should look beyond the presence of probable cause only when (in its view) the evidence of a constitutional violation is "objective" enough to warrant further inquiry—namely, when a

plaintiff can muster evidence "that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Ante*, at 407. Plaintiffs who would rely on other evidence to prove a First Amendment retaliatory arrest claim appear to be out of luck, even if they could offer other, unassailable proof of an officer's unconstitutional "statements and motivations." *Ibid.*

To give partial credit where due: The Court sensibly rejects the absolute probable-cause bar urged by petitioners and embraced by JUSTICE THOMAS, see *ante*, at 409 (opinion concurring in part and concurring in judgment), and its contrary rule will at least allow the First Amendment to operate in some cases where it is sorely needed. The majority's reasons for imposing a probable-cause bar in some cases but not others, however, do not withstand scrutiny. And by arbitrarily insisting upon comparison-based evidence, the majority's rule fences out First Amendment violations for which redress is equally if not more "warranted," *ante*, at 406, leaving the public exposed potentially to flagrant abuses.

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A

The Court's rationale for the rule it ultimately adopts is hard to discern and, once unearthed, not persuasive. Much of its opinion is spent analogizing to *Hartman* and to common-law privileges. See *ante*, at 401–402, 405–406. For the reasons JUSTICE GORSUCH explains, that reasoning is not sound. See *ante*, at 413–415, 417. Those authorities, in any event, do not support the novel rule the Court imposes. What remains is the majority's practical concern about applying normal First Amendment standards in this context, as well as a handful of inapposite cases involving different constitutional rights.

On the practical side, the majority worries that because discerning the connection between an arrest and a retaliatory motive may involve "causal complexities," *ante*, at 401,

some plaintiffs who raise dubious challenges to lawful arrests may evade early dismissal under *Mt. Healthy*, see *ante*, at 403–404. Our precedents do not permit an interpretation of § 1983 to rest on such "a freewheeling policy choice," *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986), and in any event the majority's concerns do not withstand scrutiny.

With regard to the majority's concern that establishing a causal link to retaliatory animus will sometimes be complex: That is true of most unconstitutional motive claims, yet we generally trust that courts are up to the task of managing them. See *Crawford-El* v. *Britton*, 523 U. S. 574, 597–601 (1998). And the *Mt. Healthy* standard accounts for the delicacy of such inquiries with its but-for causation requirement, calibrated to balance governmental interests with individual rights. See 429 U. S., at 287.

As for the risk of litigating dubious claims, the Court pays too high a price to avoid what may well be a marginal inconvenience. Prevailing First Amendment standards have long governed retaliatory arrest cases in the Ninth Circuit, and experience there suggests that trials in these cases are rare—the parties point to only a handful of cases that have reached trial in more than a decade. See Brief for Petitioners 36–39 (identifying four examples); Brief for Respondent 42–49 (discussing those and other Ninth Circuit cases).[1]

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[1] The majority implies that the Ninth Circuit does not apply *Mt. Healthy*. *Ante*, at 404, n. 1 ("[S]ince . . . *Hartman* and *Reichle*, no court of appeals has applied [the *Mt. Healthy*] approach"). That is not readily apparent. Because *Hartman*'s no-probable-cause requirement does not apply to retaliatory police action in the Ninth Circuit, such claims are handled as "'ordinary' retaliation claim[s]," *Skoog* v. *County of Clackamas*, 469 F. 3d 1221, 1234 (2006), which in the Ninth Circuit (as elsewhere) means that retaliatory motive must be the "but-for cause of the defendant's action," *id.*, at 1232. That but-for causation requirement for retaliation claims derives from *Mt. Healthy*. See *Hartman* v. *Moore*, 547 U. S. 250, 260 (2006); *Crawford-El* v. *Britton*, 523 U. S. 574, 593 (1998); see also *Lacey* v. *Maricopa County*, 693 F. 3d 896, 916–917 (CA9 2012) (en banc) (retaliatory arrest plaintiff must show that deterrence of speech "'"was a substantial or

Even accepting that, every so often, a police officer who made a legitimate arrest might have to explain that arrest to a jury, that is insufficient reason to curtail the First Amendment. No legal standard bats a thousand, and district courts already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives. See *Crawford-El*, 523 U. S., at 597–601. In addition, the burden of a (presumably indemnified[2]) officer facing trial pales in comparison to the importance of guarding core First Amendment activity against the clear potential for abuse that accompanies the arrest power. See *Lozman*, 585 U. S., at 101; Part II–B–2, *infra*.

Finally, and more fundamentally, even if the majority's practical concerns were valid, they would not justify the Court's mix-and-match approach to constitutional law. The Court relies heavily on *Devenpeck* v. *Alford*, 543 U. S. 146, 153–154 (2004), which held that an arresting officer's state of mind does not matter for purposes of determining whether a Fourth Amendment seizure was supported by probable cause. From this Fourth Amendment holding, the Court extrapolates that First Amendment plaintiffs must show a lack of probable cause (or satisfy its new comparison-based workaround) before their retaliation claims can proceed. See *ante*, at 404, 407–408.

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This analogy is misguided, and the Court has rightly disavowed it before. In *Whren* v. *United States*, 517 U. S. 806 (1996), the Court explained that while "[s]ubjective in-

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motivating factor"'" and also "ultimately" be able to show "'but-for causation'" (quoting *Hartman*'s discussion of *Mt. Healthy*)).

In any event, the majority's criticism is a red herring. There is nothing novel about applying *Mt. Healthy* in the retaliatory arrest context. *E. g.*, *Lozman* v. *Riviera Beach*, 585 U. S. 87, 101 (2018). The same cannot be said of the test concocted by the majority.

[2] See generally Schwartz, Police Indemnification, 89 N. Y. U. L. Rev. 885, 890 (2014) (empirical study finding that "[p]olice officers are virtually always indemnified").

tentions play no role in ordinary, probable-cause Fourth Amendment analysis," that does not make evidence of an officer's "actual motivations" any less relevant to claims of "selective enforcement" under the Equal Protection Clause. *Id.*, at 813; accord, *ante*, at 414–415 (opinion of GORSUCH, J.). First Amendment retaliation claims and equal protection claims are indistinguishable for these purposes; both inherently require inquiry into "an official's motive." *Crawford-El*, 523 U. S., at 585. Thus, even if the "[s]ubjective intent of the arresting officer . . . is simply no basis for invalidating an arrest" under the Fourth Amendment, *Devenpeck*, 543 U. S., at 154–155, when it comes to First Amendment freedom of speech, "the government's reason" is often "what counts," *Heffernan* v. *City of Paterson*, 578 U. S. 266, 273 (2016). Far from supporting the novel burden the Court imposes on First Amendment retaliatory arrest plaintiffs, then, the analogy on which the majority's analysis depends is an unfounded exercise in hybridizing two different constitutional protections. The result is a Frankenstein-like constitutional tort that may do more harm than good.

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B

Were it simply an unorthodox solution to an illusory problem, the standard announced today would be benign. But by rejecting direct evidence of unconstitutional motives in favor of more convoluted comparative proof, the majority's standard proposes to ration First Amendment protection in an illogical manner. And those arbitrary legal results in turn will breed opportunities for the rare ill-intentioned officer to violate the First Amendment without consequence—and, in some cases, openly and unabashedly. These are costs the Court should not tolerate.

1

The basic error of the Court's new rule is that it arbitrarily fetishizes one specific type of motive evidence—treatment of

comparators—at the expense of other modes of proof.[3] In particular, the majority goes out of its way to forswear reliance on an officer's own "statements," *ante*, at 407, even though such direct admissions may often be the best available evidence of unconstitutional motive. As a result, the Court's standard in some cases will have the strange effect of requiring courts to blind themselves to smoking-gun evidence while simultaneously insisting upon an inferential sort of proof that, though potentially powerful, can be prohibitively difficult to obtain.

The Court's decision to cast aside evidence of the arresting officer's own statements is puzzling. See *ibid.* In other contexts, when the ultimate question is why a decisionmaker took a particular action, the Court considers the decisionmaker's own statements (favorable or not) to be highly relevant evidence. See, *e. g.*, *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 635–636 (2018); *Cooper* v. *Harris*, 581 U. S. 285, 299–301 (2017); *Foster* v. *Chatman*, 578 U. S. 488, 500–514 (2016); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–542 (1993); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270 (1977). There is no reason to treat the same sort of evidence so differently here.

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Perhaps the majority is worried that statements, like the mental states they evince, can be "'easy to allege and hard to disprove.'" *Ante*, at 403 (quoting *Crawford-El*, 523 U. S., at 585). Such concerns, whatever their merits, are insufficient reason "to change the burden of proof for an entire category of claims." *Id.*, at 594. Besides, more than ever before, an audiovisual record of key events is now often obtainable. Many police departments, for example, equip their

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[3] See Koerner, Note, Between *Healthy* and *Hartman*: Probable Cause in Retaliatory Arrest Cases, 109 Colum. L. Rev. 755, 790–794 (2009) (identifying different varieties of evidence potentially available to prove retaliatory motive).

officers with body-worn cameras.[4] Smartphones that become video cameras with the flick of a thumb are ubiquitous, creating still more potential records.[5] In this very case, a local news crew captured some of the relevant events on video, and the officers were wearing audio recorders (though neither had turned his on). The majority appears ready to forsake this body of probative evidence, even though it has the potential to narrow factual disputes and avert trials.

Instead, the majority suggests that comparison-based evidence is the sole gateway through the probable-cause barrier that it otherwise erects. Such evidence can be prohibitively difficult to come by in other selective-enforcement contexts, and it may be even harder for retaliatory arrest plaintiffs to muster.[6] After all, while records of arrests and prosecutions can be hard to obtain, it will be harder still to identify arrests that never happened. And unlike race, gender, or other protected characteristics, speech is not typically sorted into statistical buckets that are susceptible of ready categorization and comparison.

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The threshold exercise prescribed today—comparing and contrasting a plaintiff's protected speech and allegedly illegal actions with the speech and behavior of others who could have been arrested but were not—is likely to prove vexing

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[4] See Fan, Justice Visualized: Courts and the Body Camera Revolution, 50 U. C. D. L. Rev. 897, 930–931 (2017) (noting that police departments in 88 of the 100 largest cities in the United States had "piloted or used police body cameras or ha[d] plans to do so" as of December 2015).

[5] See Simonson, Beyond Body Cameras: Defending a Robust Right To Record the Police, 104 Geo. L. J. 1559, 1564–1565 (2016); Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right To Record, 159 U. Pa. L. Rev. 335, 340–341, 344–351 (2011).

[6] See, *e. g.*, McAdams, Race and Selective Prosecution: Discovering the Pitfalls of *Armstrong*, 73 Chi.-Kent L. Rev. 605, 618–623 (1998) (describing barriers to obtaining comparator evidence in selective-prosecution cases); Poulin, Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After *United States* v. *Armstrong*, 34 Am. Crim. L. Rev. 1071, 1102–1106 (1997) (discussing examples).

in most cases. I suspect that those who can navigate this requirement predominantly will be arrestees singled out at protests or other large public gatherings, where a robust pool of potential comparators happens to be within earshot, eyeshot, or camera-shot. See, *e. g.*, *Mam* v. *Fullerton*, 2013 WL 951401, *5 (CD Cal., Mar. 12, 2013) (denying summary judgment to an arresting officer where "the only difference between [the plaintiff] and those near him [in a crowd] was the cell phone being used to record"). While some who fit that bill undoubtedly need the protection, see, *e. g.*, Brief for National Press Photographers Association et al. as *Amici Curiae* 9–15 (collecting examples of journalists arrested during public protests or gatherings), it is hard to see why those plaintiffs are the only ones deserving of a § 1983 remedy.

2

Put into practice, the majority's approach will yield arbitrary results and shield willful misconduct from accountability. As one example, suppose police respond to reports of a man prowling a front porch. The man says that he is a locked-out homeowner; the police want ID. The man alleges profiling; the officers insist they are just doing their jobs. Tempers flare. A passerby, stepping into a next-door neighbor's yard for a clearer view of the confrontation, pulls out a cell phone camera and begins streaming video of the encounter to her social media followers. One of the officers notices and orders the passerby to stop recording. When the passerby persists, the officer places the passerby under arrest for trespassing.

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Will this citizen journalist have an opportunity to prove that the arrest violated her First Amendment rights? Under the majority's test, the answer seems to turn on how many other curious bystanders she can identify who were not arrested in a situation like hers. If she was one of a crowd to enter the neighbor's yard that night, she can sue using her readily available comparator neighbors. But if she was keeping a lonely vigil, she is out of luck (unless she

can find some other pool of comparable individuals). And the video of the officer demanding she stop recording moments before the arrest? Irrelevant, apparently. What sense does that make?

Worse, because the majority disclaims reliance on "statements and motivations" for its threshold inquiry, *ante*, at 407, it risks licensing even clear-cut abuses. Imagine that a reporter is investigating corruption in a police unit. An officer from that unit follows the reporter until the reporter exceeds the speed limit by five miles per hour, then delivers a steep ticket and an explicit message: "Until you find something else to write about, there will be many more where this came from." Cf. *Torries* v. *Hebert*, 111 F. Supp. 2d 806, 812 (WD La. 2000) (describing allegations that a sheriff arrested proprietors of a local business and "threatened to arrest them again if they continued to play [rap] music"). If even such objectively probative evidence is irrelevant, § 1983 will provide no redress for such flagrant conduct. Meanwhile, the majority's embrace of the *Devenpeck* rule suggests that a particularly brazen officer could arrest on transparently speech-based grounds and check the statute books later for a potential justification. See 543 U. S., at 153 (holding that probable cause need not be for an "offense actually invoked at the time of arrest").

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I do not mean to overstate the clarity of today's holding. What exactly the Court means by "objective evidence," "otherwise similarly situated," and "the same sort of protected speech" is far from clear. See *ante*, at 407.[7] I hope

[7] It is also unclear what the majority means when it says that because its threshold "inquiry is objective, the statements and motivations of the particular arresting officer are 'irrelevant.'" *Ante*, at 407. That could conceivably be read to mean that all statements are irrelevant, even objectively probative statements describing events in the world—*e. g.*, "I am arresting the libertarians, but not the nonlibertarian protesters who were also trespassing." The facts asserted therein—that libertarians were arrested, nonlibertarians were not, and all were similarly trespassing—are precisely the kind of objective evidence the Court seeks. Similarly, routine police reports—on which the majority surely must intend for plaintiffs

that courts approach this new standard commonsensically. It is hard to see what point is served by requiring a journalist arrested for jaywalking to point to specific other jaywalkers who got a free pass, for example, if statistics or common sense confirm that jaywalking arrests are extremely rare. Otherwise, there will be little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects.[8]

C

JUSTICE GORSUCH, alert to the illogic of the majority's position, instead contemplates borrowing a requirement to adduce "clear evidence" of prohibited purpose from our cases concerning equal-protection-based selective-prosecution claims. See *ante*, at 417–419 (citing *United States* v. *Armstrong*, 517 U. S. 456 (1996)).[9] This suggestion, though perhaps an

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to rely—are generally authored by, and thus "statements of," arresting officers. More likely, then, the majority means only that statements describing the officer's internal thought processes are irrelevant (*e. g.*, "I hate libertarians"). But many statements will fall somewhere in between (*e. g.*, "I'm only arresting you because I hate libertarians"). It is hard to see how workable lines can be drawn here.

[8] That could be the unintended result if courts interpret their new task too rigidly. Given the significant evidentiary challenges plaintiffs may face, the best assumption is that the Court intends courts to afford some latitude, especially at the outset of a case. That could mean relying on common experience to assess the most self-evidently minor infractions (such as the Court's jaywalking example); allowing plaintiffs to rely on rough comparisons or inexact statistical evidence where laboratory-like controls cannot realistically be expected; and permitting discovery into potential comparator evidence where a complaint raises a strong inference of unconstitutional motive. For similar reasons, I assume the Court intends courts to permit plaintiffs to draw from a broad universe of potential comparators. And because the test is "objective," *ante*, at 407, plaintiffs presumably can look beyond the practices of the specific officer or officers who arrested them, to see how other officers handle comparable infractions.

[9] To whatever extent the Court's opinion also seeks kinship with *Armstrong*, see *ante*, at 407, I note that *Armstrong* expressly reserved the question whether comparator evidence alone can provide sufficiently clear

improvement over the majority's approach, would nevertheless take a doctrine applying (1) equal protection principles (2) in a criminal proceeding to (3) charging decisions by prosecutors, see *id.*, at 458–459, 464–465, and ask it also to govern the application of (1) First Amendment principles (2) in a suit for civil damages challenging (3) arrests by police officers. JUSTICE GORSUCH commendably reserves judgment on a proposal not yet subjected to adversarial testing, so I too refrain from speaking too definitively. But I do note that we rejected a very similar rule in *Crawford-El*. See 523 U. S., at 594 (rejecting a "clear and convincing" standard for "constitutional claims that require proof of improper intent"). And whatever the merits of the *Armstrong* rule as currently applied in other contexts, there are good reasons—unexplored by the parties here—to hesitate before extending it.[10]

III

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For the foregoing reasons, I agree with JUSTICE GINSBURG that the tried-and-true *Mt. Healthy* approach remains the correct one. And because petitioners have not asked us

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evidence of discrimination or whether "'direct admissions . . . of discriminatory purpose'" might also suffice. 517 U. S., at 469, n. 3. The Court should have followed that example here.

[10] For example, JUSTICE GORSUCH suggests that a potential *Armstrong*-like rule might be supported by a concern for "separation of powers and federalism." *Ante*, at 417. While those values are undoubtedly important, they have no apparent interpretive role to play here. Section 1983 exercises Congress' Fourteenth Amendment power to enforce the Constitution against those who wield state authority, "whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961). It is an emphatic "extension of federal power" into state affairs, *id.*, at 182, one that by its plain terms covers all traditional state prerogatives—including the power to arrest—when wielded to violate federal constitutional rights. Abuses of the arrest power thus are unquestionably among the unconstitutional acts "under color of" state law against which § 1983 operates. See *id.*, at 184; see also *id.*, at 174, and n. 10.

to revisit the Court of Appeals' application of the governing standard, I would affirm.

* * *

The power to constrain a person's liberty is delegated to law enforcement officers by the public in a sacred trust. The First Amendment stands as a bulwark of that trust, erected by people who knew from personal experience the dangers of abuse that follow from investing anyone with such awesome power. Cf. *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring). Because the majority shortchanges that hard-earned wisdom in the name of marginal convenience, I respectfully dissent.

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Syllabus

HOME DEPOT U. S. A., INC. *v.* JACKSON

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

No. 17–1471. Argued January 15, 2019—Decided May 28, 2019

Citibank, N. A., filed a debt-collection action in state court, alleging that respondent Jackson was liable for charges incurred on a Home Depot credit card. As relevant here, Jackson responded by filing third-party class-action claims against petitioner Home Depot U. S. A., Inc., and Carolina Water Systems, Inc., alleging that they had engaged in unlawful referral sales and deceptive and unfair trade practices under state law. Home Depot filed a notice to remove the case from state to federal court, but Jackson moved to remand, arguing that controlling precedent barred removal by a third-party counterclaim defendant. The District Court granted Jackson's motion, and the Fourth Circuit affirmed, holding that neither the general removal provision, 28 U. S. C. § 1441(a), nor the removal provision in the Class Action Fairness Act of 2005, § 1453(b), allowed Home Depot to remove the class-action claims filed against it.

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Held:

1. Section 1441(a) does not permit removal by a third-party counterclaim defendant. Home Depot emphasizes that it is a "defendant" to a "claim," but § 1441(a) refers to "civil action[s]," not "claims." And because the action as defined by the plaintiff's complaint is the "civil action . . . of which the district cour[t]" must have "original jurisdiction," "the defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. This conclusion is bolstered by the use of the term "defendant" in related contexts. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. See, *e. g.*, Rules 14, 12(a)(1)(A)–(B). And in other removal provisions, Congress has clearly extended removal authority to parties other than the original defendant, see, *e. g.*, §§ 1452(a), 1454(a), (b), but has not done so here. Finally, if, as this Court has held, a counterclaim defendant who was the original plaintiff is not one of "the defendants," see *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 106–109, there is no textual reason to reach a different conclusion for a counterclaim defendant who was not part of the initial lawsuit. This reading, Home Depot asserts, runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it to

Syllabus

federal court. But the limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove, see, *e. g.*, § 1441(b)(2), and Home Depot's interpretation makes little sense in the context of other removal provisions, see, *e. g.*, § 1446(b)(2)(A). Pp. 440–444.

2. Section 1453(b) does not permit removal by a third-party counterclaim defendant. Home Depot contends that even if § 1441(a) does not permit removal here, § 1453(b) does because it permits removal by "*any* defendant" to a "class action." But the two clauses in § 1453(b) that employ the term "any defendant" simply clarify that certain limitations on removal that might otherwise apply do not limit removal under that provision. And neither clause—nor anything else in the statute—alters § 1441(a)'s limitation on *who* can remove, suggesting that Congress intended to leave that limit in place. In addition, §§ 1453(b) and 1441(a) both rely on the procedures for removal in § 1446, which also employs the term "defendant." Interpreting that term to have different meanings in different sections would render the removal provisions incoherent. Pp. 444–446.

880 F. 3d 165, affirmed.

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THOMAS, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and GORSUCH and KAVANAUGH, JJ., joined, *post*, p. 446.

William P. Barnette argued the cause for petitioner. On the briefs were *Sarah E. Harrington*, *Thomas C. Goldstein*, *Erica Oleszczuk Evans*, and *Kacy D. Goebel.*

F. Paul Bland argued the cause for respondent. With him on the brief were *Karla Gilbride*, *Leah M. Nicholls*, *Jennifer Bennett*, *Brian Warwick*, *Janet Varnell*, *David Lietz*, and *Daniel K. Bryson.**

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*Briefs of *amici curiae* urging reversal were filed for DRI–The Voice of the Defense Bar by *Lawrence S. Ebner*; for the Retail Litigation Center, Inc., et al. by *Laura K. McNally, Nina Ruvinsky, Deborah White*, and *Daryl Joseffer*; and for the Washington Legal Foundation et al. by *Richard A. Samp* and *Cory L. Andrews.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Gerson H. Smoger*, *Elise Sanguinetti*, and *Jeffrey White*; and for the National Consumer Law Center by *Jason L. Lichtman.*

JUSTICE THOMAS delivered the opinion of the Court.

The general removal statute, 28 U. S. C. § 1441(a), provides that "any civil action" over which a federal court would have original jurisdiction may be removed to federal court by "the defendant or the defendants." The Class Action Fairness Act of 2005 (CAFA) provides that "[a] class action" may be removed to federal court by "any defendant without the consent of all defendants." 28 U. S. C. § 1453(b). In this case, we address whether either provision allows a third-party counterclaim defendant—that is, a party brought into a lawsuit through a counterclaim filed by the original defendant—to remove the counterclaim filed against it. Because in the context of these removal provisions the term "defendant" refers only to the party sued by the original plaintiff, we conclude that neither provision allows such a third party to remove.

I

A

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We have often explained that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994). Article III, § 2, of the Constitution delineates "[t]he character of the controversies over which federal judicial authority may extend." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 701 (1982). And lower federal-court jurisdiction "is further limited to those subjects encompassed within a statutory grant of jurisdiction." *Ibid.* Accordingly, "the district courts may not exercise jurisdiction absent a statutory basis." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 552 (2005).

In 28 U. S. C. §§ 1331 and 1332(a), Congress granted federal courts jurisdiction over two general types of cases: cases that "aris[e] under" federal law, § 1331, and cases in which the amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties, § 1332(a). These jurisdictional grants are known as "federal-question jurisdic-

tion" and "diversity jurisdiction," respectively. Each serves a distinct purpose: Federal-question jurisdiction affords parties a federal forum in which "to vindicate federal rights," whereas diversity jurisdiction provides "a neutral forum" for parties from different States. *Exxon Mobil Corp.*, *supra*, at 552.

Congress has modified these general grants of jurisdiction to provide federal courts with jurisdiction in certain other types of cases. As relevant here, CAFA provides district courts with jurisdiction over "class action[s]" in which the matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a State different from the defendant. § 1332(d)(2)(A). A "class action" is "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure." § 1332(d)(1)(B).

In addition to granting federal courts jurisdiction over certain types of cases, Congress has enacted provisions that permit parties to remove cases originally filed in state court to federal court. Section 1441(a), the general removal statute, permits "the defendant or the defendants" in a state-court action over which the federal courts would have original jurisdiction to remove that action to federal court. To remove under this provision, a party must meet the requirements for removal detailed in other provisions. For one, a defendant cannot remove unilaterally. Instead, "all defendants who have been properly joined and served must join in or consent to the removal of the action." § 1446(b)(2)(A). Moreover, when federal jurisdiction is based on diversity jurisdiction, the case generally must be removed within "1 year after commencement of the action," § 1446(c)(1), and the case may not be removed if any defendant is "a citizen of the State in which such action is brought," § 1441(b)(2).

CAFA also includes a removal provision specific to class actions. That provision permits the removal of a "class action" from state court to federal court "by any defendant

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without the consent of all defendants" and "without regard to whether any defendant is a citizen of the State in which the action is brought." § 1453(b).

At issue here is whether the term "defendant" in either § 1441(a) or § 1453(b) encompasses a party brought into a lawsuit to defend against a counterclaim filed by the original defendant or whether the provisions limit removal authority to the original defendant.

B

In June 2016, Citibank, N. A., filed a debt-collection action against respondent George Jackson in North Carolina state court. Citibank alleged that Jackson was liable for charges he incurred on a Home Depot credit card. In August 2016, Jackson answered and filed his own claims: an individual counterclaim against Citibank and third-party class-action claims against Home Depot U. S. A., Inc., and Carolina Water Systems, Inc.

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Jackson's claims arose out of an alleged scheme between Home Depot and Carolina Water Systems to induce homeowners to buy water treatment systems at inflated prices. The crux of the claims was that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices in violation of North Carolina law, Gen. Stat. Ann. §§ 25A–37, 75–1.1 (2013). Jackson also asserted that Citibank was jointly and severally liable for the conduct of Home Depot and Carolina Water Systems and that his obligations under the sale were null and void.

In September 2016, Citibank dismissed its claims against Jackson. One month later, Home Depot filed a notice of removal, citing 28 U. S. C. §§ 1332, 1441, 1446, and 1453. Jackson moved to remand, arguing that precedent barred removal by a "third-party/additional counter defendant like Home Depot." App. 51–52. Shortly thereafter, Jackson amended his third-party class-action claims to remove any reference to Citibank.

The District Court granted Jackson's motion to remand, and the Court of Appeals for the Fourth Circuit granted Home Depot permission to appeal and affirmed. 880 F. 3d 165, 167 (2018); see 28 U. S. C. § 1453(c)(1). Relying on Circuit precedent, it held that neither the general removal provision, § 1441(a), nor CAFA's removal provision, § 1453(b), allowed Home Depot to remove the class-action claims filed against it. 880 F. 3d, at 167–171.

We granted Home Depot's petition for a writ of certiorari to determine whether a third party named in a class-action counterclaim brought by the original defendant can remove if the claim otherwise satisfies the jurisdictional requirements of CAFA. 585 U. S. 1058 (2018). We also directed the parties to address whether the holding in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—should extend to third-party counterclaim defendants.[1] 585 U. S. 1058.

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II

A

We first consider whether 28 U. S. C. § 1441(a) permits a third-party counterclaim defendant to remove a claim filed against it.[2] Home Depot contends that because a third-party counterclaim defendant is a "defendant" to the claim against it, it may remove pursuant to § 1441(a). The dissent agrees, emphasizing that "a 'defendant' is a 'person sued in a civil proceeding.'" *Post*, at 454 (opinion of ALITO, J.). This reading of the statute is plausible, but we do not think it is

[1] In this opinion, we use the term "third-party counterclaim defendant" to refer to a party first brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff.

[2] Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

the best one. Of course the term "defendant," standing alone, is broad. But the phrase "the defendant or the defendants" "cannot be construed in a vacuum." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Ibid.*; see also A. Scalia & B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"); accord, *Bailey* v. *United States*, 516 U. S. 137, 145–146 (1995). Considering the phrase "the defendant or the defendants" in light of the structure of the statute and our precedent, we conclude that § 1441(a) does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by the counterclaim.[3]

Home Depot emphasizes that it is a "defendant" to a "claim," but the statute refers to "civil action[s]," not "claims." This Court has long held that a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court. See *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201, 208 (1895); *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461 (1894). This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction. *E. g.*, *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 10 (1983); cf. *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, 831 (2002) ("[A] counterclaim . . . cannot serve as the basis for 'arising under' jurisdiction");

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[3] Even the dissent declines to rely on the dictionary definition of "defendant" alone, as following that approach to its logical conclusion would require overruling *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941). See *post*, at 455, n. 2.

§ 1446(c)(2) (deeming the "sum demanded in good faith in the initial pleading . . . the amount in controversy"). Section 1441(a) thus does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "original jurisdiction" is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context, not "the policy goals behind the [well-pleaded complaint] rule," *post*, at 468, that underlies our interpretation of the phrase "the defendant or the defendants."

The use of the term "defendant" in related contexts bolsters our determination that Congress did not intend for the phrase "the defendant or the defendants" in § 1441(a) to include third-party counterclaim defendants. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. Rule 14, which governs "Third-Party Practice," distinguishes between "the plaintiff," a "defendant" who becomes the "third-party plaintiff," and "the third-party defendant" sued by the original defendant. Rule 12 likewise distinguishes between defendants and counterclaim defendants by separately specifying when "[a] defendant must serve an answer" and when "[a] party must serve an answer to a counterclaim." Fed. Rules Civ. Proc. 12(a)(1)(A)–(B).

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Moreover, in other removal provisions, Congress has clearly extended the reach of the statute to include parties other than the original defendant. For instance, § 1452(a) permits "[a] party" in a civil action to "remove any claim or cause of action" over which a federal court would have bankruptcy jurisdiction. And §§ 1454(a) and (b) allow "any party" to remove "[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." Section

1441(a), by contrast, limits removal to "the defendant or the defendants" in a "civil action" over which the district courts have original jurisdiction.

Finally, our decision in *Shamrock Oil* suggests that third-party counterclaim defendants are not "the defendant or the defendants" who can remove under § 1441(a). *Shamrock Oil* held that a counterclaim defendant who was also the original plaintiff could not remove under § 1441(a)'s predecessor statute. 313 U. S., at 106–109. We agree with Home Depot that *Shamrock Oil* does not specifically address whether a party who was not the original plaintiff can remove a counterclaim filed against it. And we acknowledge, as Home Depot points out, that a third-party counterclaim defendant, unlike the original plaintiff, has no role in selecting the forum for the suit. But the text of § 1441(a) simply refers to "the defendant or the defendants" in the civil action. If a counterclaim defendant who was the original plaintiff is not one of "the defendants," we see no textual reason to reach a different conclusion for a counterclaim defendant who was not originally part of the lawsuit. In that regard, *Shamrock Oil* did not view the counterclaim as a separate action with a new plaintiff and a new defendant. Instead, the Court highlighted that the original plaintiff was still "the plaintiff." *Id.*, at 108 ("We can find no basis for saying that Congress, by omitting from the present statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others"). Similarly here, the filing of counterclaims that included class-action allegations against a third party did not create a new "civil action" with a new "plaintiff" and a new "defendant."

Home Depot asserts that reading "the defendant" in § 1441(a) to exclude third-party counterclaim defendants runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it. But the limits Congress has imposed on removal show that it did not intend

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to allow all defendants an unqualified right to remove. *E. g.*, § 1441(b)(2) (preventing removal based on diversity jurisdiction where any defendant is a citizen of the State in which the action is brought). Moreover, Home Depot's interpretation makes little sense in the context of other removal provisions. For instance, when removal is based on § 1441(a), all defendants must consent to removal. See § 1446(b)(2)(A). Under Home Depot's interpretation, "defendants" in § 1446(b)(2)(A) could be read to require consent from the third-party counterclaim defendant, the original plaintiff (as a counterclaim defendant), *and* the original defendant asserting claims against them. Further, Home Depot's interpretation would require courts to determine when the original defendant is also a "plaintiff" under other statutory provisions. *E. g.*, § 1446(c)(1). Instead of venturing down this path, we hold that a third-party counterclaim defendant is not a "defendant" who can remove under § 1441(a).

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B

We next consider whether CAFA's removal provision, § 1453(b), permits a third-party counterclaim defendant to remove.[4] Home Depot contends that even if it could not remove under § 1441(a), it could remove under § 1453(b) because that statute is worded differently. It argues that although § 1441(a) permits removal only by "the defendant or the defendants" in a "civil action," § 1453(b) permits removal by "*any* defendant" to a "class action." (Emphasis added.) Jackson responds that this argument ignores the context of § 1453(b), which he contends makes clear that Congress intended only to alter certain restrictions on removal,

[4] Section 1453(b) provides that "[a] class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."

not expand the class of parties who can remove a class action. Although this is a closer question, we agree with Jackson.

The two clauses in § 1453(b) that employ the term "any defendant" simply clarify that certain limitations on removal that might otherwise apply do not limit removal under § 1453(b). Section 1453(b) first states that "[a] class action may be removed . . . without regard to whether any defendant is a citizen of the State in which the action is brought." There is no indication that this language does anything more than alter the general rule that a civil action may not be removed on the basis of diversity jurisdiction "if any of the . . . defendants is a citizen of the State in which such action is brought." § 1441(b)(2). Section 1453(b) then states that "[a] class action . . . may be removed by any defendant without the consent of all defendants." This language simply amends the rule that "all defendants who have been properly joined and served must join in or consent to the removal of the action." § 1446(b)(2)(A). Rather than indicate that a counterclaim defendant can remove, "here the word 'any' is being employed in connection with the word 'all' later in the sentence—'by *any* . . . without . . . the consent of *all*.'" *Westwood Apex* v. *Contreras*, 644 F. 3d 799, 804 (CA9 2011); see *Palisades Collections LLC* v. *Shorts*, 552 F. 3d 327, 335–336 (CA4 2008). Neither clause—nor anything else in the statute—alters § 1441(a)'s limitation on *who* can remove, which suggests that Congress intended to leave that limit in place. See *supra*, at 441–443.

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Thus, although the term "any" ordinarily carries an "'expansive meaning,'" *post*, at 455, the context here demonstrates that Congress did not expand the types of parties eligible to remove a class action under § 1453(b) beyond § 1441(a)'s limits. If anything, that the language of § 1453(b) mirrors the language in the statutory provisions it is amending suggests that the term "defendant" is being used consistently across all provisions. Cf. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U. S. 161, 169–170 (2014) (interpret-

ing CAFA consistently with Rule 20 where Congress used terms in a like manner in both provisions).

To the extent Home Depot is arguing that the term "defendant" has a different meaning in § 1453(b) than it does in § 1441(a), we reject its interpretation. Because §§ 1453(b) and 1441(a) both rely on the procedures for removal in § 1446, which also employs the term "defendant," interpreting "defendant" to have different meanings in different sections would render the removal provisions incoherent. See *First Bank* v. *DJL Properties, LLC*, 598 F. 3d 915, 917 (CA7 2010) (Easterbrook, C. J.). Interpreting the removal provisions together, we determine that § 1453(b), like § 1441(a), does not permit a third-party counterclaim defendant to remove.

Finally, the dissent argues that our interpretation allows defendants to use the statute as a "tactic" to prevent removal, *post,* at 453, but that result is a consequence of the statute Congress wrote. Of course, if Congress shares the dissent's disapproval of certain litigation "tactics," it certainly has the authority to amend the statute. But we do not.

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* * *

Because neither § 1441(a) nor § 1453(b) permits removal by a third-party counterclaim defendant, Home Depot could not remove the class-action claim filed against it. Accordingly, we affirm the judgment of the Fourth Circuit.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, dissenting.

The rule of law requires neutral forums for resolving disputes. Courts are designed to provide just that. But our legal system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others. Or it might appear that way, which is almost as deleterious. For example, a party bringing suit in its own State's courts

might (seem to) enjoy, so to speak, a home court advantage against outsiders. Thus, from 1789 Congress has opened federal courts to certain disputes between citizens of different States. Plaintiffs, of course, can avail themselves of the federal option in such cases by simply choosing to *file* a case in federal court. But since their defendants cannot, the law has always given defendants the option to *remove* (transfer) cases to federal court. *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 105 (1941). The general removal statute, which authorizes removal by "the defendant or the defendants," thus ensures that defendants get an equal chance to choose a federal forum. 28 U. S. C. § 1441(a).

But defendants cannot remove a case unless it meets certain conditions. Some of those conditions have long made important (and often costly) consumer class actions virtually impossible to remove. Congress, concerned that state courts were biased against defendants to such actions, passed a law facilitating their removal. The Class Action Fairness Act of 2005 (CAFA) allows removal of certain class actions "by any defendant." 28 U. S. C. § 1453(b). Our job is not to judge whether Congress's fears about state-court bias in class actions were warranted or indeed whether CAFA should allay them. We are to determine the scope of the term "defendant" under CAFA as well as the general removal provision, § 1441.

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All agree that if one party sues another, the latter—the original defendant—is a "defendant" under both removal laws. But suppose the original defendant then countersues, bringing claims against both the plaintiff and a new party. Is this new defendant—the "third-party defendant"—also a "defendant" under CAFA and § 1441? There are, of course, some differences between original and third-party defendants. One is brought into a case by the first major filing, the other by the second. The one filing is called a complaint, the other a countercomplaint.

But both kinds of parties are defendants to legal claims. Neither chose to be in state court. Both might face bias there, and with it the potential for crippling unjust losses. Yet today's Court holds that third-party defendants are not "defendants." It holds that Congress left them unprotected under CAFA and § 1441. This reads an irrational distinction into both removal laws and flouts their plain meaning, a meaning that context confirms and today's majority simply ignores.

I

A

To appreciate what Congress sought to achieve with CAFA, consider what Congress failed to accomplish a decade earlier with the Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737 (codified at 15 U. S. C. §§ 77z–1 and 78u–4). The Reform Act was "targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities," including spurious lawsuits, "vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006) (quoting H. R. Conf. Rep. No. 104–369, p. 31 (1995)). As a result of these abuses, Congress found, companies were often forced to enter "extortionate settlements" in frivolous cases, just to avoid the litigation costs—a burden with scant benefits to anyone. 547 U. S., at 81. To curb these inefficiencies, the Reform Act "limit[ed] recoverable damages and attorney's fees, . . . impose[d] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Ibid.*

But "at least some members of the plaintiffs' bar" found a workaround: They avoided the Reform Act's limits on federal litigation by "avoid[ing] the federal forum altogether" and

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heading to state court. *Id.*, at 82. Once there, they were able to keep defendants from taking them back to federal court (under the rules then in force) simply by naming an in-state defendant. See §1441(b)(2). And the change in plaintiffs' strategy was marked: While state-court litigation of such class actions had been "rare" before the Reform Act's passage, *id.*, at 82, within a decade state courts were handling most such cases, see S. Rep. No. 109–14, p. 4 (2005).

Some in Congress feared that plaintiffs' lawyers were able to "'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Ibid.* The result, in Congress's judgment, was that "State and local courts" were keeping issues of "national importance" out of federal court, "acting in ways that demonstrate[d] bias against out-of-State defendants" and imposing burdens that hindered "innovation" and drove up "consumer prices." §§2(a)(4), (b)(3), 119 Stat. 5.

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So Congress again took action. But rather than get at the problem by imposing limits on federal litigation that plaintiffs could sidestep by taking defendants to state court, Congress sought to make it easier for defendants to remove to federal court: thus CAFA.

B

To grasp how CAFA changed the procedural landscape for class actions, it helps to review the rules that govern removal in the mine run of cases, and that once limited removal of all class actions as well. Those general rules appear in 28 U. S. C. §§1441 and 1446.

Under §1441(a), "any civil action brought in a State court . . . may be removed by the defendant or the defendants" as long as federal district courts would have "original jurisdiction" over the case. Such jurisdiction comes in two varieties. Federal courts have "federal question jurisdiction" if the case "aris[es] under" federal law—for instance, if the

plaintiff alleges violations of a federal statute. § 1331. But even when the plaintiff brings only state-law claims—alleging a breach of a contract, for example—federal courts have "diversity jurisdiction" if the amount in controversy exceeds $75,000 and there is complete diversity of parties, meaning that no plaintiff is a citizen of the same State as any defendant. § 1332(a); *Lincoln Property Co.* v. *Roche*, 546 U. S. 81, 89 (2005). While § 1441 normally allows removal of either kind of case, it bars removal in diversity cases brought in the home State of any defendant. § 1441(b)(2).

Another subsection of § 1441 addresses removal of a subset of claims (not an entire action) when a case involves some claims that would be removable because they arise under federal law and others that would not (because they involve state-law claims falling outside both the original *and* the supplemental jurisdiction of federal courts[1]). In these hybrid cases, § 1441(c)(2) allows the federal claims to be removed while the state-law claims are severed and sent back to state court.

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The procedural rules for removing an action or claim from state to federal court under § 1441 are set forth in § 1446. Section 1446(b)(2)(A) requires the consent of all the defendants before an entire case may be removed under § 1441(a). (If a defendant instead invokes § 1441(c)(2), to remove a subset of claims, consent is required only from defendants to the claims that are removed.) And if diversity jurisdiction arises later in litigation—which may occur if, for instance, dismissal of an original defendant creates complete diversity—§ 1446(c)(1) allows removal only within one year of the start of the action in state court.

To this general removal regime, CAFA made several changes specific to class actions. Instead of allowing re-

[1] Supplemental jurisdiction covers those claims "so related" to federal claims that they are "part of the same case or controversy under Article III," 28 U. S. C. § 1367(a), in that they "derive from a common nucleus of operative fact." *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966).

moval by "the defendant or the defendants," see § 1441(a), § 5 of CAFA allowed removal by "any defendant" to certain class actions, § 1453(b), even when the other defendants do not consent, the case was filed in a defendant's home forum, or the case has been pending in state court for more than a year. See 119 Stat. 12–13.

Of course, these changes would be of no use to a class-action defendant hoping to remove if there were no federal jurisdiction over its case. So CAFA also lowered the barriers to diversity jurisdiction. While complete diversity of parties is normally required, CAFA eliminates that rule for class actions involving at least 100 members and more than $5 million in controversy. In such cases, CAFA vests district courts with diversity jurisdiction anytime there is minimal diversity—which occurs when at least one plaintiff and defendant reside in different States. See 28 U. S. C. §§ 1332(d)(2), (d)(5)(B).

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We were asked to decide whether these loosened requirements are best read to allow removal by third-party defendants like Home Depot. The answer is clear when one considers Home Depot's situation against CAFA's language and history.

C

This case began as a garden-variety debt-collection action: Citibank sued respondent George Jackson in state court seeking payment on his purchase from petitioner Home Depot of a product made by Carolina Water Systems (CWS). Jackson came back with a counterclaim class action that roped in Home Depot and CWS as codefendants. (Until then, neither Home Depot nor CWS had been a party.) Citibank then dismissed its claim against Jackson, and Jackson amended his complaint to remove any mention of Citibank. So now all that remains in this case is Jackson's class-action counterclaims against Home Depot and CWS.

Invoking CAFA, Home Depot filed a notice of removal; it also moved to realign the parties to make Jackson the plain-

tiff, and CWS, Home Depot, and Citibank the defendants (just before Citibank had dropped out entirely). The District Court denied the motion and remanded the case to state court, holding that Home Depot cannot remove under CAFA because CAFA's "any defendant" excludes defendants to *counterclaim* class actions. The Court of Appeals affirmed, citing Circuit precedent that hung on this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941). We granted certiorari to decide whether the lower court's reading of *Shamrock Oil* is correct and whether CAFA allows third-party defendants like Home Depot to remove an action to federal court.

All agree that the one dispute that now constitutes this lawsuit—Jackson's class action against Home Depot and CWS—would have been removable under CAFA had it been present from the start of a case. Is it ineligible for removal just because it was not contained in the filing that launched this lawsuit?

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Several lower courts think so. In holding as much, they have created what Judge Niemeyer called a "loophole" that only this Court "can now rectify." *Palisades Collections LLC* v. *Shorts*, 552 F. 3d 327, 345 (CA4 2008) (dissenting from denial of rehearing en banc). The potential for that "loophole" was first spotted by a civil procedure scholar writing shortly after CAFA took effect. See Tidmarsh, Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action, 35 W. St. U. L. Rev. 193, 198 (2007). The article outlined a "tactic" for plaintiffs to employ if they wanted to thwart a defendant's attempt to remove a class action to federal court under CAFA: They could raise their class-action claim as a *counterclaim* and "hope that CAFA does not authorize removal." *Ibid.* In a single stroke, the article observed, a defendant's routine attempt to collect a debt from a single consumer could be leveraged into an unremovable attack on the defendant's "credit and lending policies" brought on behalf of a whole

class of plaintiffs—all in the very state courts that CAFA was designed to help class-action defendants avoid. *Id.*, at 199.

The article is right to call this approach a tactic; it subverts CAFA's evident aims. I cannot imagine why a Congress eager to remedy alleged state-court abuses in class actions would have chosen to discriminate between two kinds of defendants, neither of whom had ever chosen the allegedly abusive state forum, all based on whether the claim against them had initiated the lawsuit or arisen just one filing later (in the countercomplaint). Of course, what finally matters is the text, and in reading texts we must remember that "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*); Congress must often strike a balance between competing purposes. But a good interpreter also reads a text charitably, not lightly ascribing irrationality to its author; and I can think of no rational purpose for this limit on which defendants may remove. Even respondent does not try to defend its rationality, suggesting instead that it simply reflects a legislative compromise. Yet there is no evidence that anyone thought of this potential loophole before CAFA was enacted, and it is hard to believe that any of CAFA's would-be opponents agreed to vote for it in exchange for this way of keeping some cases in state court. The question is whether the uncharitable reading here is inescapable—whether, unwittingly or despite itself, Congress adopted text that compels this bizarre result.

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II

There are different schools of thought about statutory interpretation, but I would have thought this much was common ground: If it is hard to imagine any purpose served by a proposed interpretation of CAFA, if that reading appears nowhere in the statutory or legislative history or our cases on CAFA, if it makes no sense as a policy matter, it had

better purport to reflect the best reading of the text, or any decision embracing it is groundless. Indeed, far from relegating the text to an afterthought, our shared approach to statutory interpretation, "as we always say, *begins* with the text." *Ross* v. *Blake*, 578 U. S. 632, 638 (2016) (emphasis added). After all, as we have unanimously declared, a "plain and unambiguous" text "must" be enforced "according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010). And yet, though the text and key term here is "any defendant," 28 U. S. C. §1453(b), the majority has not one jot or tittle of analysis on the plain meaning of "defendant."

Any such analysis would have compelled a different result. According to legal as well as standard dictionary definitions available in 2005, a "defendant" is a "person sued in a civil proceeding," Black's Law Dictionary 450 (8th ed. 2004), and the term is "opposed to" (contrasted with) the word "*plaintiff*." Webster's Third New International Dictionary 591 (2002) (Webster). See also 4 Oxford English Dictionary 377 (2d ed. 1989) (OED) ("[a] person sued in a court of law; the party in a suit who defends; opposed to *plaintiff*"). What we have before us is a civil proceeding in which Home Depot is not a plaintiff and is being sued. So Home Depot is a defendant, as that term is ordinarily understood.

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The fact that Home Depot is considered a "*third-party* defendant" changes nothing here. See N. C. Rule Civ. Proc. 14(a) (2018). Adjectives like "third-party" "modify nouns—they pick out a subset of a category that possesses a certain quality." *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 19 (2018). They do not "alter the meaning of the word" that they modify. *Rimini Street, Inc.* v. *Oracle USA, Inc.*, 586 U. S. 334, 341 (2019). And so, just as a "'critical habitat'" is a habitat, *Weyerhaeuser Co.*, *supra*, at 19, and "'full costs'" are costs, *Rimini Street, Inc.*, *supra*, at 341–342, zebra finches are finches and third-party defendants are, well, defendants.

If further confirmation were needed, it could be found in CAFA's use of the word "any" to modify "defendant." Unlike the general removal provision, which allows removal by "the defendant or the defendants," § 1441(a), CAFA's authorization extends to "*any* defendant." § 1453(b) (emphasis added). As we have emphasized repeatedly, "'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)). In case after case, we have given effect to this expansive sense of "any." See *Small* v. *United States*, 544 U. S. 385, 396 (2005) (THOMAS, J., dissenting) (collecting cases). So too here: Contrary to the Court's analysis, Congress's use of "any" covers defendants of "whatever kind," *Ali*, *supra*, at 220, including third-party defendants like petitioner. "In concluding that 'any' means not what it says, but rather 'a subset of any,' the Court distorts the plain meaning of the statute and departs from established principles of statutory construction." *Small*, *supra*, at 395 (THOMAS, J., dissenting).

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For these reasons, unless third-party defendants like Home Depot differ in some way that is relevant to removal (as a matter of text, precedent, or common sense),[2] they fall within CAFA's coverage of "any defendant." § 1453(b).

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[2] That is true only of counterdefendants—original plaintiffs who are countersued by their original defendant. For one thing, it is hard to say that these plaintiffs fall under the plain meaning of "defendant," when the word "defendant" is defined in opposition to the word "*plaintiff*." See Webster 591; 4 OED 377. Moreover, as original plaintiffs, these parties chose the state forum (unlike original or third-party defendants), so it makes less sense to give them a chance to remove the case from that same forum. Finally, our decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941), confirms this reasoning and result. See Part IV–A, *infra*.

III

Respondent and the majority contend that Congress meant to incorporate into CAFA a specialized sense of "defendant," derived from its use in the general removal statute, § 1441. And in § 1441, they assert, "defendant" refers only to an *original* defendant—one named in the plaintiff's complaint. As I will show, they are mistaken about § 1441. See Part IV, *infra*. But even if that general removal law *were* best read to leave out third-party defendants, there would be ample grounds to conclude that such defendants are covered by CAFA. And the majority's and respondent's objections to this reading of CAFA, based on comparisons to other federal laws, are unconvincing.

A

1

The first basis for reading CAFA to extend more broadly than § 1441 is that CAFA's *text* is broader. As discussed, see *supra*, at 455, CAFA sweeps in "*any* defendant," § 1453(b) (emphasis added), in contrast to § 1441's "the defendant or the defendants." So even if we read the latter phrase narrowly, we would have to acknowledge that "Congress did not adopt that ready alternative." *Advocate Health Care Network* v. *Stapleton*, 581 U. S. 468, 477 (2017). "Instead, it added language whose most natural reading is to enable" *any* defendant to remove, and "[t]hat drafting decision indicates that Congress did not in fact want" to replicate in CAFA the (purportedly) narrower reach of § 1441. *Ibid.*

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Respondent scoffs at the idea that the word "any" could make the difference. In his view, "any defendant" in CAFA means "any *one of* the defendants," not "any *kind of* defendant." Thus, he contends, if § 1441 covers only one kind of defendant—the original kind, the kind named in a complaint—CAFA must do the same. On this account, CAFA refers to "any defendant" only because it was meant

to eliminate (for class actions) § 1441's requirement that *all* "the defendants" agree to remove. Respondent is right that the word "any" in CAFA eliminated the defendant-unanimity rule. But the modifier's overall effect on the plain meaning of CAFA's removal provision is what counts in a case interpreting CAFA; and that effect is to guarantee a broad reach for the word "defendant."

Nor is it baffling how "any" could be expansive in the way respondent finds so risible. In ordinary language, replacing "the Xs" with "any X" will often make the term "X" go from covering only paradigm instances of X to covering all cases. Compare:

- "Visitors to the prison may not use the phones except at designated times."
- "Visitors to the prison may not use any phone except at designated times."

On a natural reading, "the phones" refers to telephones provided by the prison, whereas "any phone" includes visitors' cellphones. Likewise, even if the phrase "the defendant" reached only original defendants, the phrase "any defendant" would presumptively encompass all kinds. Again, putting the word "any" into a "phrase . . . suggests a broad meaning." *Ali*, 552 U. S., at 218–219.

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In fact, the text makes it indisputable that CAFA's "any defendant" is broader in some ways. CAFA reaches at least two sets of defendants left out by § 1441: in-state (or "forum") defendants and nondiverse defendants. See §§ 1332(d)(2), 1453(b). So respondent and the majority are reduced to claiming that when CAFA says "any defendant," it is stretching further than § 1441's "the defendant" in some directions but not others—picking up forum defendants and nondiverse defendants while avoiding all contact with third-party defendants. But the shape of "any" is not so contorted. If context shows that "any defendant" covers *some* additional

kinds, common sense tells us it presumptively covers the others.

2

Respondent's answer from precedent backfires. Against our many cases reading the word "any" capaciously (which is to say, naturally), see *Small*, 544 U. S., at 396 (THOMAS, J., dissenting) (collecting cases), he cites two cases that assigned the word a narrower scope. But in both, context compelled that departure from plain meaning. In *United States* v. *Palmer*, 3 Wheat. 610, 631–632 (1818), we read "any person" to refer exclusively to those over whom the United States had jurisdiction, but only because that was the undisputed scope of other instances of the same phrase in the same Act. Here, by contrast, even the majority agrees that petitioner's reading of "any defendant" in CAFA is "plausible." *Ante*, at 440. And in *Small*, *supra*, at 388–389, the Court read "any court" to refer only to domestic courts because of the "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." No presumption helps respondent here.

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Indeed, our presumptions in this area cut *against* the majority and respondent's view. That view insists on reading CAFA's "any defendant" narrowly, to match the allegedly narrower scope of "the defendant" in § 1441. But our case law teaches precisely that CAFA should *not* be read as narrowly as § 1441. While removal under § 1441 is presumed narrow in various ways out of respect for States' " 'rightful independence,' " *Shamrock Oil*, 313 U. S., at 109, we have expressly limited this "antiremoval" presumption to cases interpreting § 1441. As JUSTICE GINSBURG recently wrote for the Court:

> "*[N]o* antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court. See *Standard Fire Ins. Co.*, 568 U. S., at 595 ('CAFA's primary objec-

> tive' is to 'ensur[e] "Federal court consideration of interstate cases of national importance."' (quoting § 2(b)(2), 119 Stat. 5)); S. Rep. No. 109–14, p. 43 (2005) (CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.')." *Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U. S. 81, 89 (2014) (emphasis added).

So the strongest argument for reading § 1441 to exclude third-party defendants is an interpretive canon that we have pointedly *refused* to apply to CAFA. Our precedent on this point is thus a second basis—apart from the plain meaning of "any defendant"—for holding that CAFA covers third-party defendants even if § 1441 does not.

B

Respondent and the majority object that this reading ignores the backdrop against which CAFA was enacted and the significance of CAFA's contrast with the language of other (subject-matter-specific) removal statutes. And to these objections, respondent adds a third and bolder claim: that CAFA does not empower petitioner to remove because it does not create removal authority at all, but only channels removals already authorized by § 1441 (on which petitioner cannot rely in this case). All three objections fail.

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1

In respondent's telling, it has been the uniform view of the lower courts that a third-party defendant is not among "the defendants" empowered to remove under § 1441. Since those courts' decisions studded the legal "backdrop" when Congress enacted CAFA, respondent contends, we should presume CAFA used "defendant" in the same narrow sense. But this story exaggerates both the degree of lower court harmony and the salience of the resulting "backdrop" to Congress's work on CAFA.

First, though respondent repeatedly declares that the lower courts have reached a "consensus," see Brief for Respondent i, 1, 14, 19, 32, 35, they have not. "Several cases . . . have permitted removal on the basis of a third party claim where a separate and independent controversy is stated." *Carl Heck Engineers, Inc.* v. *Lafourche Parish Police Jury*, 622 F. 2d 133, 135–136 (CA5 1980) (collecting cases). Before CAFA, at least a half-dozen District Courts took this view.[3] And though courts of appeals rarely get to opine on this issue (because § 1447(d) blocks most appeals from district court orders sending a removed case back to state court), two Circuits have actually allowed third-party defendants to remove under § 1441. See *Texas ex rel. Bd. of Regents of Univ. of Tex. System* v. *Walker*, 142 F. 3d 813, 816 (CA5 1998); *United Benefit Life Ins. Co.* v. *United States Life Ins. Co.*, 36 F. 3d 1063, 1064, n. 1 (CA11 1994). Even a treatise cited by respondent destroys his "consensus" claim, as it admits that courts take "myriad and diverging views on whether third-party defendants may remove an action." 16 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Moore's Federal Practice § 107.41[6] (3d ed. 2019).

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Second, even if the lower courts all agreed, the "legal backdrop" created by their decisions would matter only insofar as it told us what we can "safely assume" about what Congress "intend[ed]." *McFarland* v. *Scott*, 512 U. S. 849, 856 (1994). So the less salient that backdrop would have been to Congress, the less relevant it is to interpreting Congress's actions. And I doubt the backdrop here would have been very salient. For one thing, it consisted mostly of trial court decisions; and the lower the courts, the less visible the backdrop. Indeed, I can find no case where we have read a

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[3] See *Carl Heck Engineers, Inc.* v. *Lafourche Parish Police Jury*, 622 F. 2d 133, 135 (CA5 1980) (collecting four); *Charter Medical Corp.* v. *Friese*, 732 F. Supp. 1160 (ND Ga. 1989); *Patient Care, Inc.* v. *Freeman*, 755 F. Supp. 644 (NJ 1991).

special meaning into a federal statutory term based mainly on trial court interpretations.

But even if several higher courts had spoken—and spoken with one voice—there would be a problem: We have no evidence Congress was listening. In preparing and passing CAFA, Congress never adverted to third-party defendants' status. By respondent's admission, Congress was "silen[t]" on them in the seven years of hearings, drafts, and debates leading up to CAFA's adoption. Brief for Respondent 45. Yet if Congress was not thinking about a question, neither was it thinking about lower courts' answer to the question. So we cannot presume it adopted that answer.

2

Respondent also thinks we should read CAFA to exclude third-party defendants in light of the contrast between CAFA's "any defendant" and the language of two other removal laws that more clearly encompass third-party defendants. The America Invents Act (AIA), for example, allows "any party" to remove a lawsuit involving patent or copyright claims. 28 U. S. C. §§ 1454(a), (b)(1). The Bankruptcy Code likewise allows "[a] party" to remove in cases related to bankruptcy. § 1452(a). Thus, respondent says, when Congress *wanted* to include more than original defendants, it knew how. It used terms like "any party" and "a party"—as CAFA did not.

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Note, however, that the cited terms would have covered even original plaintiffs, whom *no one* thinks CAFA meant to reach (and for good reason, see Part II, *supra*). So CAFA's terms had to be narrower than (say) the AIA's "any party," *regardless* of whether CAFA was going to cover third-party defendants. Its failure to use the AIA's and Bankruptcy Code's broader terms, then, tells us nothing about third-party defendants' status under CAFA. Only the meaning of CAFA's "any defendant" does that. And it favors petitioner. See Parts II, III–A, *supra*.

Respondent's final and most radical argument against petitioner's CAFA claim is that CAFA's removal language does not independently authorize removal at all. On this view, all that § 1453(b) does is "make a few surgical changes [in certain class-action cases] to the *procedures* that ordinarily govern removal," while the actual power to remove comes from the general removal provision, § 1441(a). Brief for Respondent 49 (emphasis added). And so, the argument goes, removals under CAFA are still subject to § 1441(a)'s restriction to "civil action[s]" over which federal courts have "original jurisdiction." Since this limitation is often read to mean that federal jurisdiction must have existed from the start of the civil action, see Part IV–C, *infra*, and that was not the case here, no removal is possible.

The premise of this objection is as weak as it is audacious. If CAFA does not authorize removal, then neither does § 1441. After all, they use the same operative language, with the one providing that a class action "may be removed," § 1453(b), and the other providing that a civil action "may be removed," § 1441(a). So § 1453(b) must, after all, be its own font of removal power and not a conduit for removals sourced by § 1441(a).

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Respondent argues that this reading of CAFA's § 1453(b) would render it unconstitutional. The argument is as follows: Section 1453(b) provides that a "class action" may be removed, but it does not specify that the class action must fall within federal courts' jurisdiction. So if § 1453(b) were a separate source of removal authority, it would authorize removals of class actions over which federal courts lacked jurisdiction, contrary to Article III of the Constitution. By contrast, § 1441(a) limits itself to authorizing removal of cases over which federal courts have "original jurisdiction." Thus, only if § 1441(a)—including its jurisdictional limit—governs the removals described in CAFA will CAFA's removal language be constitutional.

This argument fails. Section 1453 implicitly limits removal to class actions where there is minimal diversity, thus satisfying Article III. After all, § 1453(a) incorporates the definition of "class action" found in the first paragraph of § 1332(d). See § 1332(d)(1). But the very next paragraph, § 1332(d)(2), codifies the part of CAFA that created federal jurisdiction over class actions involving minimal diversity. This proves that the class actions addressed by CAFA's removal language, in § 1453(b), are those involving minimal diversity, as described in § 1332(d). In fact, respondent effectively *concedes* that § 1453(b) applies only to actions described in § 1332(d), since the latter is also what codifies those CAFA-removal rules that respondent does acknowledge, see Brief for Respondent 52—the requirements of more than $5 million in controversy but only minimal diversity, see § 1332(d)(2). Because CAFA's removal language in § 1453(b) applies only to class actions described in § 1332(d), it raises no constitutional trouble to read § 1453(b) as its own source of removal authority and not a funnel for § 1441(a).

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IV

So far I have accepted, *arguendo*, the majority and respondent's view that third-party defendants are *not* covered by the general removal provision, § 1441. But I agree with petitioner that this is incorrect. On a proper reading of § 1441, too, third-party defendants are "defendants" entitled to remove. Though a majority of District Courts would disagree, their exclusion of third-party defendants has rested (in virtually every instance) on a misunderstanding of a previous case of ours, and the mere fact that this misreading has spread is no reason for us to go along with it. Nor, contrary to the majority, does a refusal to recognize third-party defendants under § 1441 find support in our precedent embracing the so-called "well-pleaded complaint" rule, which is all about how a plaintiff can make its case unremovable,

not about which defendants may seek removal in those cases that *can* be removed.

A

Look at lower court cases excluding third-party defendants from § 1441. Trace their lines of authority—the cases and sources they cite, and those *they* cite—and the lines will invariably converge on one point: our decision in *Shamrock Oil*. But nothing in that case justifies the common reading of § 1441 among the lower courts, a reading that treats some defendants who never chose the state forum differently from others.

As a preliminary matter, *Shamrock Oil* is too sensible to produce such an arbitrary result. That case involved a close ancestor of today's general removal provision, one that allowed removal of certain state-court actions at the motion of "'the defendant or defendants therein.'" 313 U. S., at 104, n. 1. And our holding was simple: If *A* sues *B* in state court, and *B* brings a counterclaim against *A*, this does not then allow *A* to remove the case to federal court. As the original plaintiff who chose the forum, *A* does not get to change its mind now. That is all that *Shamrock Oil* held. The issue of third-party defendants never arose. And none of the Court's three rationales would support a bar on removal by parties *other than* original plaintiffs.

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Shamrock Oil looked to statutory history, text, and purpose. As to history, it noted that removal laws had evolved to give the power to remove first to "defendants," then to "'either party, or any one or more of the plaintiffs or defendants,'" and finally to "defendants" again. The last revision must have been designed to withdraw removal power from someone, we inferred, and the only candidate was the plaintiff. *Id.*, at 105–108. Second, we said there was no basis in the text for distinguishing mere plaintiffs from plaintiffs who had been countersued, so we would treat them the same; neither could remove. *Id.*, at 108. Third, we offered a policy rationale: "[T]he plaintiff, having submitted himself to the

jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Id.*, at 106. In this vein, we quoted a House Report calling it "'just and proper to require the plaintiff to abide his selection of a forum.'" *Ibid.*, n. 2 (quoting H. R. Rep. No. 1078, 49th Cong., 1st Sess., 1 (1886)). So history, language, and logic demanded that original plaintiffs remain unable to remove even if countersued.

None of these considerations applies to third-party defendants. If anything, all three point the other way. First, the statutory history cited by the Court shows that Congress (and the *Shamrock Oil* Court itself) took "the plaintiffs or defendants" to be jointly exhaustive categories. By that logic, since third-party defendants are certainly not plaintiffs—in any sense—they must be "defendants" under § 1441. Cf. Webster 591 (defining "defendant" as "opposed to *plaintiff*"); 4 OED 377 (same). Second, and relatedly, the text of the general removal statute, then and now, does not distinguish original from third-party defendants when it comes to granting removal power—any more than it had distinguished plaintiffs who were and were not countersued when it came to *withdrawing* the right to remove, as *Shamrock Oil* emphasized. And finally, *Shamrock Oil*'s focus on fairness—reflected in its point that plaintiffs may fairly be stuck with the forum they chose—urges the opposite treatment for third-party defendants. Like original defendants, they never chose to submit themselves to the state-court forum.

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Thus, all three grounds for excluding original plaintiffs in *Shamrock Oil* actually support *allowing* third-party defendants to remove under § 1441.

B

Respondent leans on his claim that District Courts to address the issue have reached a "consensus" that *Shamrock*

Oil bars third-party defendants from removing. But as we saw above, rumors of a "consensus" have been greatly exaggerated. See Part III–B–1, *supra*. And in any case, no interpretive principle requires leaving intact the lower courts' misreading of a case of ours.

Certainly there is no reason to presume that Congress embraces the lower courts' majority view. For one thing, the cases distorting § 1441 postdate the last revision of the relevant statutory language, so they could not have informed Congress's view of what it was signing onto. And it would be naive to assume that Congress now agrees with those lower court cases just because it has not reacted to them. Congress does not accept the common reading of every law it leaves alone. Because life is short, the U. S. Code is long, and court cases are legion, it normally takes more than a court's misreading of a law to rouse Congress to issue a correction. That is why "'Congressional inaction lacks persuasive significance' in most circumstances." *Star Athletica, L. L. C.* v. *Varsity Brands, Inc.*, 580 U. S. 405, 424 (2017) (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990); quotation altered). In particular, "it is inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines, because doing so allows the Court to create law and then 'effectively codif[y]' it 'based only on Congress' failure to address it.'" *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 299 (2014) (THOMAS, J., concurring in judgment). Because the decisions misreading *Shamrock Oil* are not a reliable indicator of Congress's intent regarding § 1441, we owe them no deference.

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C

Finally, according to the majority, reading § 1441 to include third-party defendants would run afoul of our precedent establishing the "well-pleaded complaint" rule (WPC rule). Assuming that I have been able to reconstruct the majority's

argument from this rule accurately, I think it rests on a non sequitur. The WPC rule is all about a plaintiff's ability to choose the forum in which its case is heard, by controlling whether there is federal jurisdiction; the rule has nothing to do with the division of labor or authority among defendants.

Under the WPC rule, we consider only the plaintiff's claims to see if there is federal-question jurisdiction. Whether the defendant raises federal counterclaims (or even federal defenses) is irrelevant. See, *e. g.*, *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, 831 (2002). Likewise, in a case involving standard diversity jurisdiction (based on complete diversity under § 1332(a) rather than minimal diversity under CAFA), it is "the sum demanded . . . in the initial pleading" that determines whether the amount in controversy is large enough. § 1446(c)(2). In both kinds of cases, a federal court trying to figure out if it has "original jurisdiction," as required for removal of cases under § 1441(a), must shut its eyes to the defendant's filings. Only the plaintiff's complaint counts. So says the WPC rule.

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But that is all about *jurisdiction*. The majority and respondent would take things a step further. Even after assuring itself of jurisdiction, they urge, a court should consult only the plaintiff's complaint to see if a party *is a "defendant"* empowered to remove under § 1441. Since third-party defendants (by definition) are not named until the counter-complaint, they are not § 1441 "defendants."

I cannot fathom why this rule about who is a "defendant" should follow from the WPC rule about when there is federal jurisdiction. And the majority makes no effort to fill the logical gap; it betrays almost no awareness of the gap, drawing the relevant inference in two conclusory sentences. See *ante*, at 441–442. But since this Court's reasons for the WPC rule have sounded in policy, the argument could only be that the same policy goals would support today's restriction on who

is a § 1441 "defendant."[4] What *are* the policy goals behind the WPC rule? We have described them as threefold. See *Holmes Group, Inc.*, 535 U. S., at 831–832.

First,

> "since the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, . . . to have the cause heard in state court.' *Caterpillar Inc.*, [482 U. S.,] at 398–399. [Allowing a defendant's counterclaims or defenses to create federal-question jurisdiction], in contrast, would leave acceptance or rejection of a state forum to the master of the counterclaim. It would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim." *Ibid.*

But this concern is not implicated here; adopting petitioner's reading of "defendant" would in no way reduce the extent of a plaintiff's control over the forum. Plaintiffs would be able to keep state-law cases in state court no matter what we held about § 1441, and any cases removable by third-party defendants would have been removable by original defendants anyway. In other words, the issue here is *who* can remove under that provision, not *which cases* can be removed. However we resolved that "who" question, removability under § 1441(a) would still require cases to fall within federal courts' "original jurisdiction," § 1441(a), and *that* would still turn just on the plaintiff's choices—on whether the plaintiff had raised federal claims (or sued diverse parties for enough money). So a case that a plaintiff had brought "in state

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[4] The Court insists that its position is based on "statutory context," not the logic behind the well-pleaded complaint rule. *Ante*, at 442. But the only context to which the Court points is our precedent establishing the well-pleaded complaint rule. *Ante*, at 441–442. It is that rule—the rule that federal jurisdiction over an action turns entirely on the plaintiff's complaint—that leads the Court to think furthermore that "'the defendant' to [an] action is the defendant to that complaint." *Ibid.*

court under state law," *id.*, at 832, would remain beyond federal jurisdiction, and thus unremovable under § 1441(a), even if we held that third-party defendants are "defendants" under that provision.

By the same token, such a holding would not undermine the *second* policy justification that *Holmes* gave for the WPC rule: namely, to avoid "radically expand[ing] the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments.' " *Id.*, at 832. As noted, our decision on the scope of § 1441's "defendants" would not expand the class of removable cases *at all*, because it would have no impact on whether a case fell within federal courts' jurisdiction. It would only expand the set of people ("the defendants") who would have to consent to such removal: Now third-party *and* original defendants would have to agree.

The majority declares that treating third-party defendants as among "the defendants" under § 1441 "makes little sense." *Ante*, at 444. Perhaps its concern is that such a ruling would make no meaningful difference since third-party defendants would still be powerless to remove unless they secured the consent of the original defendants, who are their adversaries in litigation. But for one thing, there may be cases in which original defendants do consent. Though original and third-party defendants are rivals as to claims brought by the one against the other, they may well agree that a federal forum would be preferable. After all, neither will have chosen the state forum in which both find themselves prior to removal.[5]

More to the point, even if third-party defendants could not secure the agreement needed to remove an entire civil action

[5] Or perhaps the majority fears that petitioner's position would make it harder for *original* defendants under § 1441(a), by requiring them to get the consent of the third-party defendants against whom they have just brought suit. But this is an illusory problem. Original defendants hoping to remove under § 1441(a) without having to get their adversaries to agree could simply remove the case *before* roping in any third-party defendants.

under § 1441(a), counting them as "defendants" under § 1441 would make a difference by allowing them to invoke § 1441(c)(2), which would permit them to remove certain claims (not whole actions) *without* original defendants' consent. See Part I–B, *supra*. Being able to remove claims under § 1441(c)(2) has, in fact, been the main benefit to third-party defendants in those jurisdictions that have ruled that they are "defendants" under § 1441. See *Carl Heck*, 622 F. 2d, at 136. But *this* effect of such a ruling is immune to the objection that it would "radically expand the class of removable cases" since § 1441(c)(2) does not address the removal of a whole case (a "civil action") at all, but only of some claims within a case—and only those that could have been brought in federal court from the start, "in a separate suit from that filed by the original plaintiff." *Id.*, at 136. Notably, then, any claims that were raised by the original plaintiff would get to remain in state court. Here too, the WPC rule's concern to avoid "radically expand[ing] the class of removable cases" is just not implicated.

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This leaves *Holmes*'s final rationale for the WPC rule: that it promotes "clarity and ease of administration" in the resolution of procedural disputes. 535 U. S., at 832. But petitioner's and respondent's views on who is a "defendant" are equally workable, so this last factor does not cut one way or the other.

In sum, the actual WPC rule, which limits the filings courts may consult in determining if they have jurisdiction, is based on policy concerns that do not arise here. There is, therefore, no justification for inventing an ersatz WPC rule to limit which filings may be consulted by courts deciding who is a "defendant" under § 1441.

* * *

All the resources of statutory interpretation confirm that under CAFA and § 1441, third-party defendants are defendants. I respectfully dissent.

Syllabus

SMITH *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY

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

No. 17–1606. Argued March 18, 2019—Decided May 28, 2019

The Social Security Act permits judicial review of "any final decision . . . after a hearing" by the Social Security Administration (SSA). 42 U. S. C. § 405(g). Claimants for, as relevant here, supplemental security income disability benefits under Title XVI of the Act must generally proceed through a four-step administrative process in order to obtain federal-court review: (1) seek an initial determination of eligibility; (2) seek reconsideration of that determination; (3) request a hearing before an administrative law judge (ALJ); and (4) seek review of the ALJ's decision by the SSA's Appeals Council. See 20 CFR § 416.1400. A request for Appeals Council review generally must be made within 60 days of receiving the ALJ's ruling, § 416.1468; if the claimant misses the deadline and cannot show good cause for doing so, the Appeals Council dismisses the request, § 416.1471.

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Petitioner Ricky Lee Smith's claim for disability benefits under Title XVI was denied at the initial-determination stage, upon reconsideration, and on the merits after a hearing before an ALJ. The Appeals Council later dismissed Smith's request for review as untimely. Smith sought judicial review of the dismissal in a Federal District Court, which held that it lacked jurisdiction to hear the suit. The Sixth Circuit affirmed, maintaining that the Appeals Council's dismissal of an untimely petition is not a "final decision" subject to federal-court review.

Held: An Appeals Council dismissal on timeliness grounds after a claimant has had an ALJ hearing on the merits qualifies as a "final decision . . . made after a hearing" for purposes of allowing judicial review under § 405(g). Pp. 478–489.

(a) The statute's text supports this reading. In the first clause ("any final decision"), the phrase "final decision" clearly denotes some kind of terminal event, and Congress' use of "any" suggests an intent to use that term "expansive[ly]," *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 218–219. The Appeals Council's dismissal of Smith's claim fits that language: The SSA's regulations make it the final stage of review. See 20 CFR § 416.1472. As for the second clause ("made after a hearing"), Smith obtained the kind of hearing that § 405(g) most naturally suggests: an ALJ hearing on the merits. This case differs from *Califano*

v. *Sanders*, 430 U. S. 99, where the Court found that the SSA's denial of a claimant's petition to reopen a prior denial of his claim for benefits—a second look that the agency had made available to claimants as a matter of grace—was not a final decision under § 405(g). Here, by contrast, the SSA's "final decision" is much more closely tethered to the relevant "hearing." A primary application for benefits may not be denied without an ALJ hearing (if requested), § 405(b)(1), and a claimant's access to this first bite at the apple is a matter of legislative right rather than agency grace. There is also no danger here of thwarting Congress' own deadline, where the only potential untimeliness concerns Smith's request for Appeals Council review, not his request for judicial review following the agency's ultimate determination. Pp. 479–481.

(b) The statutory context also weighs in Smith's favor. Appeals from SSA determinations are, by their nature, appeals from the action of a federal agency. In the separate administrative-law context of Administrative Procedure Act review, an action is "final" if it both (1) "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett* v. *Spear*, 520 U. S. 154, 177–178. Both conditions are satisfied when a Social Security claimant has reached the final step of the SSA's four-step process and has had his request for review dismissed as untimely. While the administrative-exhaustion requirement "should be applied with regard for the particular administrative scheme at issue," *Weinberger* v. *Salfi*, 422 U. S. 749, 765, the differences between the two Acts here suggest that Congress wanted more oversight by the courts rather than less under § 405(g) and that "Congress designed [the statute as a whole] to be 'unusually protective' of claimants," *Bowen* v. *City of New York*, 476 U. S. 467, 480. The SSA is also a massive enterprise and mistakes will occur; Congress did not suggest that it intended for this claimant-protective statute to leave a claimant with no recourse to the courts if a mistake does happen. Pp. 481–483.

(c) Smith's entitlement to judicial review is confirmed by "the strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670. The heavy burden for rebutting this presumption is not met here. Congress left it to the SSA to define the procedures that claimants like Smith must first pass through, but it has not suggested that it intended for the SSA to be the unreviewable arbiter of whether claimants have complied with those procedures. P. 483.

(d) The arguments of *amicus* in support of the judgment do not alter this conclusion. *Amicus* first argues that the phrase "final decision . . . made after a hearing" refers to a conclusive disposition, after exhaustion, of a benefits claim on the merits. However, this Court's prece-

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dents do not support that reading; the Appeals Council's dismissal is not merely collateral but an end to a proceeding in which a substantial factual record has already been developed and on which considerable resources have already been expended; and Smith's case is distinct from *Sanders*. *Amicus* also claims that permitting greater judicial review could risk a flood of litigation, given the large volume of claims handled by the SSA, but that result is unlikely, because the number of Appeals Council untimeliness dismissals is comparatively small, and because data from the Eleventh Circuit, which follows the interpretation adopted here, do not bear out *amicus*' warning. Third, *amicus* flags related contexts that could be informed by this ruling, but those issues are not before the Court. Finally, *amicus* argues that § 405(g) is ambiguous and that the SSA's longstanding interpretation of its meaning—prior to a change of position in this case—is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, but this is not the kind of question on which courts defer to agencies. Pp. 484–487.

(e) A reviewing court that disagrees with the procedural ground for the Appeals Council dismissal should in the ordinary case remand the case to allow the agency to address substantive issues in the first place. While there would be jurisdiction for a court to reach the merits, this general rule comports with fundamental administrative-law principles and is confirmed by the Court's cases discussing exhaustion in the Social Security context, see *City of New York*, 476 U. S., at 485. Pp. 487–488.

880 F. 3d 813, reversed and remanded.

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

Michael B. Kimberly argued the cause petitioner. With him on the briefs were *Andrew J. Pincus*, *Paul W. Hughes*, *Charles A. Rothfeld*, *Eugene R. Fidell*, and *Wolodymyr Cybriwsky.*

Michael R. Hutson argued the cause for respondent. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, *Charles W. Scarborough*, and *Sarah Carroll.*

Deepak Gupta, by invitation of the Court, 586 U. S. 986, argued the cause as *amicus curiae* urging affirmance. With him on the brief was *Joshua Matz*.*

**Cody T. Marvin*, *Carolyn A. Kubitschek*, and *Paul B. Eaglin* filed a brief for the National Organization of Social Security Claimants' Representatives as *amicus curiae* urging reversal.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Social Security Act allows for judicial review of "any final decision . . . made after a hearing" by the Social Security Administration (SSA). 42 U. S. C. § 405(g). Petitioner Ricky Lee Smith was denied Social Security benefits after a hearing by an administrative law judge (ALJ) and later had his appeal from that denial dismissed as untimely by the SSA's Appeals Council—the agency's final decisionmaker. This case asks whether the Appeals Council's dismissal of Smith's claim is a "final decision . . . made after a hearing" so as to allow judicial review under § 405(g). We hold that it is.

I

A

Congress enacted the Social Security Act in 1935, responding to the crisis of the Great Depression. 49 Stat. 620; F. Bloch, Social Security Law and Practice 13 (2012). In its early days, the program was administered by a body called the Social Security Board; that role has since passed on to the Board's successor, the SSA.[1]

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In 1939, Congress amended the Act, adding various provisions that—subject to changes not at issue here—continue to govern cases like this one. See Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. First, Congress gave the agency "full power and authority to make rules and regulations and to establish procedures . . . necessary or appropriate to carry out" the Act. 42 U. S. C. § 405(a). Second, Congress directed the agency "to make findings of fac[t] and decisions as to the rights of any individual applying for a payment" and to provide all eligible claimants—that is, people seeking benefits—with an "opportunity for a hearing with respect to such decision[s]." § 405(b)(1). Third, and most centrally,

[1] See Koch & Koplow, The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council, 17 Fla. St. U. L. Rev. 199, 234–235 (1990) (Koch & Koplow).

Congress provided for judicial review of "any final decision of the [agency] made after a hearing." § 405(g). At the same time, Congress made clear that review would be available only "as herein provided"—that is, only under the terms of § 405(g). § 405(h); see *Heckler* v. *Ringer*, 466 U. S. 602, 614–615 (1984).

In 1940, the Social Security Board created the Appeals Council, giving it responsibility for overseeing and reviewing the decisions of the agency's hearing officers (who, today, are ALJs).[2] Though the Appeals Council originally had just three members, its ranks have since swelled to include over 100 individuals serving as either judges or officers.[3] The Appeals Council remains a creature of regulatory rather than statutory creation.

Today, the Social Security Act provides disability benefits under two programs, known by their statutory headings as Title II and Title XVI. See § 401 *et seq.* (Title II); § 1381 *et seq.* (Title XVI). Title II "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U. S. 74, 75 (1988). Title XVI provides supplemental security income benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Ibid.* The regulations that govern the two programs are, for today's purposes, equivalent. See *Sims* v. *Apfel*, 530 U. S. 103, 107, n. 2 (2000).[4] Likewise, § 405(g) sets the terms of judicial review for each. See § 1383(c)(3).

Modern-day claimants must generally proceed through a four-step process before they can obtain review from a fed-

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[2] See *id.*, at 235.

[3] SSA, Brief History and Current Information About the Appeals Council, https://www.ssa.gov/appeals/about_ac.html (all Internet materials as last visited May 22, 2019).

[4] Because Smith seeks benefits under Title XVI, we cite to the regulations that govern Title XVI, which are located at 20 CFR pt. 416 (2018). The regulations that govern Title II are located at 20 CFR pt. 404.

eral court. First, the claimant must seek an initial determination as to his eligibility. Second, the claimant must seek reconsideration of the initial determination. Third, the claimant must request a hearing, which is conducted by an ALJ. Fourth, the claimant must seek review of the ALJ's decision by the Appeals Council. See 20 CFR §416.1400. If a claimant has proceeded through all four steps on the merits, all agree, §405(g) entitles him to judicial review in federal district court.[5]

The tension in this case stems from the deadlines that SSA regulations impose for seeking each successive stage of review. A party who seeks Appeals Council review, as relevant here, must file his request within 60 days of receiving the ALJ's ruling, unless he can show "good cause for missing the deadline." §416.1468.

The Appeals Council's review is discretionary: It may deny even a timely request without issuing a decision. See §416.1481. If a claimant misses the deadline and cannot show good cause, however, the Appeals Council does not deny the request but rather dismisses it. §416.1471. Dismissals are "binding and not subject to further review" by the SSA. §416.1472. The question here is whether a dismissal for untimeliness, after the claimant has had an ALJ hearing, is a "final decision . . . made after a hearing" for purposes of allowing judicial review under §405(g).

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B

Petitioner Ricky Lee Smith applied for disability benefits under Title XVI in 2012. Smith's claim was denied at the initial-determination stage and upon reconsideration. Smith then requested an ALJ hearing, which the ALJ held in February 2014 before issuing a decision denying Smith's claim on the merits in March 2014.

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[5] Of course, if the result at any of the four preceding stages is fully favorable, there is generally no need to proceed further.

The parties dispute what happened next. Smith's attorney says that he sent a letter requesting Appeals Council review in April 2014, well within the 60-day deadline. The SSA says that it has no record of receiving any such letter. In late September 2014, Smith's attorney sent a copy of the letter that he assertedly had mailed in April. The SSA, noting that it had no record of prior receipt, counted the date of the request as the day that it received the copy. The Appeals Council accordingly determined that Smith's submission was untimely, concluded that Smith lacked good cause for missing the deadline, and dismissed Smith's request for review.

Smith sought judicial review of that dismissal in the U. S. District Court for the Eastern District of Kentucky. The District Court held that it lacked jurisdiction to hear his suit. The U. S. Court of Appeals for the Sixth Circuit affirmed, maintaining that "an Appeals Council decision to refrain from considering an untimely petition for review is not a 'final decision' subject to judicial review in federal court." *Smith* v. *Commissioner of Social Security*, 880 F. 3d 813, 814 (2018).

Cases Proof Petitioned Publication

Smith petitioned this Court for certiorari. Responding to Smith's petition, the Government stated that while the Sixth Circuit's decision accorded with the SSA's longstanding position, the Government had "reexamined the question and concluded that its prior position was incorrect." Brief for Respondent on Pet. for Cert. 15.

We granted certiorari to resolve a conflict among the Courts of Appeals. 586 U. S. 985 (2018).[6] Because the Gov-

[6] Seven Courts of Appeals have held that there is no judicial review under these circumstances, while two have held that there is. Compare *Brandtner* v. *Department of Health and Human Servs.*, 150 F. 3d 1306, 1307 (CA10 1998); *Bacon* v. *Sullivan*, 969 F. 2d 1517, 1520 (CA3 1992); *Matlock* v. *Sullivan*, 908 F. 2d 492, 494 (CA9 1990); *Harper* v. *Bowen*, 813 F. 2d 737, 743 (CA5 1987); *Adams* v. *Heckler*, 799 F. 2d 131, 133 (CA4 1986); *Smith* v. *Heckler*, 761 F. 2d 516, 518 (CA8 1985); *Dietsch* v. *Schweiker*, 700 F. 2d

ernment agrees with Smith that the Appeals Council's dismissal meets § 405(g)'s terms, we appointed Deepak Gupta as *amicus curiae* to defend the judgment below. 586 U. S. 986 (2018). He has ably discharged his duties.

II

Section 405(g), as noted above, provides for judicial review of "any final decision . . . made after a hearing." This provision, the Court has explained, contains two separate elements: first, a "jurisdictional" requirement that claims be presented to the agency, and second, a "waivable . . . requirement that the administrative remedies prescribed by the Secretary be exhausted." *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976). This case involves the latter, nonjurisdictional element of administrative exhaustion. While § 405(g) delegates to the SSA the authority to dictate which steps are generally required, see *Sims*, 530 U. S., at 106, exhaustion of those steps may not only be waived by the agency, see *Weinberger* v. *Salfi*, 422 U. S. 749, 767 (1975), but also excused by the courts, see *Bowen* v. *City of New York*, 476 U. S. 467, 484 (1986); *Eldridge*, 424 U. S., at 330.[7]

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The question here is whether a dismissal by the Appeals Council on timeliness grounds after a claimant has received an ALJ hearing on the merits qualifies as a "final decision . . . made after a hearing" for purposes of allowing judicial

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865, 867 (CA2 1983), with *Casey* v. *Berryhill*, 853 F. 3d 322, 326 (CA7 2017); *Bloodsworth* v. *Heckler*, 703 F. 2d 1233, 1239 (CA11 1983).

[7] While *Califano* v. *Sanders*, 430 U. S. 99 (1977), can be read to cabin *Eldridge* and *Salfi* to only constitutional claims, the Court's subsequent decision in *City of New York* demonstrates that this understanding of § 405(g) can extend to cases lacking *Eldridge*'s and *Salfi*'s constitutional character. See *City of New York*, 476 U. S., at 474–475, and n. 5, 482–484; see also *New York* v. *Heckler*, 578 F. Supp. 1109, 1124–1125 (EDNY 1984) (ruling that the agency's actions violated the Social Security Act and its own regulations and thus declining to reach the plaintiffs' constitutional argument).

review under § 405(g). In light of the text, the context, and the presumption in favor of the reviewability of agency action, we conclude that it does.

A

We begin with the text. Taking the first clause ("any final decision") first, we note that the phrase "final decision" clearly denotes some kind of terminal event,[8] and Congress' use of the word "any" suggests an intent to use that term "'expansive[ly],'" see *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 218–219 (2008). The Appeals Council's dismissal of Smith's claim fits that language: Under the SSA's own regulations, it was the final stage of review. See 20 CFR § 416.1472.

Turning to the second clause ("made after a hearing"), we note that this phrase has been the subject of some confusion over the years. On the one hand, the statute elsewhere repeatedly uses the word "hearing" to signify an ALJ hearing,[9] which suggests that, in the ordinary case, the phrase here too denotes an ALJ hearing. See, *e. g.*, *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005) (noting "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"). On the other hand, the Court's precedents make

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[8] See 5 Oxford English Dictionary 920 (2d ed. 1989) (Final: "[m]arking the last stage of a process; leaving nothing to be looked for or expected; ultimate"); 4 Oxford English Dictionary 222 (1933) (same); see also Webster's New World College Dictionary 542 (5th ed. 2016) (Final: "leaving no further chance for action, discussion, or change; deciding; conclusive"); Merriam-Webster's Collegiate Dictionary 469 (11th ed. 2011) (Final: "coming at the end: being the last in a series, process, or progress").

[9] See 42 U. S. C. § 405(b)(1) (entitling claimants to a hearing on the merits); § 405(b)(2) (discussing "reconsideration" of certain findings "before any hearing under paragraph (1) on the issue of such entitlement"); § 405(g) (discussing factual findings and evidence resulting from such a "hearing"); § 405(h) (discussing binding effect of decision "after a hearing"); see also §§ 1383(c)(1)(A), (3) (similar).

clear that an ALJ hearing is not an ironclad prerequisite for judicial review. See, *e. g.*, *City of New York*, 476 U. S., at 484 (emphasizing the Court's " 'intensely practical' " approach to the applicability of the exhaustion requirement and disapproving "mechanical application" of a set of factors).

There is no need today to give § 405(g) a definition for all seasons, because, in any event, this is a mine-run case and Smith obtained the kind of hearing that § 405(g) most naturally suggests: an ALJ hearing on the merits.[10] In other words, even giving § 405(g) a relatively strict reading, Smith appears to satisfy its terms.[11]

Smith cannot, however, satisfy § 405(g)'s "after a hearing" requirement as a matter of mere chronology.[12] In *Califano* v. *Sanders*, 430 U. S. 99 (1977), the Court considered whether the SSA's denial of a claimant's petition to reopen a prior denial of his claim for benefits qualified as a final decision under § 405(g). *Id.*, at 102–103, 107–109. The Court con-

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[10] We note as well that the "hearing" referred to in § 405(g) cannot be a hearing before the Appeals Council. Congress provided for a hearing in § 405(b) and for judicial review "after a hearing" in § 405(g) before the Appeals Council even existed. See *supra*, at 475. Moreover, the Appeals Council makes many decisions without a hearing—*e. g.*, denying a petition for review without giving reasons—that are nevertheless plainly reviewable. See 20 CFR §§ 416.1400(a)(5), 416.1467, 416.1481. Accordingly, the fact that there was no Appeals Council hearing—much like the fact that there was no reasoned Appeals Council decision on the merits—does not bar review.

[11] We return below to the possibility, suggested by *amicus*, that "final decision . . . made after a hearing" could signify a final decision "on a matter on which the Act requires a hearing." Brief for Court-Appointed *Amicus Curiae* 13; see *infra*, at 484. Here, we note only that while Congress certainly could have written something like "final decision on the merits . . . made after a hearing," it did not.

[12] The alternative risks untenable breadth. The Battle of Yorktown predates our ruling today, but no one would describe today's opinion as a "decision made after the Battle of Yorktown." As we explain, however, the dismissal of Smith's claim is tethered to Smith's hearing in a way that more distant events are not.

cluded that it did not, reasoning that a petition to reopen was a matter of agency grace that could be denied without a hearing altogether and that allowing judicial review would thwart Congress' own deadline for seeking such review. See *id.*, at 108–109. That the SSA's denial of the petition to reopen (1) was conclusive and (2) postdated an ALJ hearing did not, alone, bring it within the meaning of § 405(g).

Here, by contrast, the SSA's "final decision" is much more closely tethered to the relevant "hearing." Unlike a petition to reopen, a primary application for benefits may not be denied without an ALJ hearing (assuming the claimant timely requests one, as Smith did). § 405(b)(1). Moreover, the claimant's access to this first bite at the apple is indeed a matter of legislative right rather than agency grace. See *id.*, at 108. And, again unlike the situation in *Sanders*, there is no danger here of thwarting Congress' own deadline, given that the only potential untimeliness here concerns Smith's request for Appeals Council review—not his request for judicial review following the agency's ultimate determination.

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B

The statutory context weighs in Smith's favor as well. Appeals from SSA determinations are, by their nature, appeals from the action of a federal agency, and in the separate administrative-law context of the Administrative Procedure Act (APA), an action is "final" if it both (1) "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett* v. *Spear*, 520 U. S. 154, 177–178 (1997). Both conditions are satisfied when a Social Security claimant has reached the fourth and final step of the SSA's four-step process and has had his request for review dismissed as untimely. It is consistent to treat the Appeals Council's dismissal of Smith's claim as a final decision as well.

To be clear, "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue," *Salfi*, 422 U. S., at 765, and we leave this axiom undisturbed today. The Social Security Act and the APA are different statutes, and courts must remain sensitive to their differences. See, *e. g.*, *Sullivan* v. *Hudson*, 490 U. S. 877, 885 (1989) (observing that "[a]s provisions for judicial review of agency action go, § 405(g) is somewhat unusual" in that its "detailed provisions . . . suggest a degree of direct interaction between a federal court and an administrative agency alien to" APA review). But at least some of these differences suggest that Congress wanted more oversight by the courts in this context rather than less, see *ibid.*,[13] and the statute as a whole is one that "Congress designed to be 'unusually protective' of claimants," *City of New York*, 476 U. S., at 480.

We note further that the SSA is a massive enterprise,[14] and mistakes will occur. See Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* 13 (collecting examples).[15] The four steps preceding judicial review, meanwhile, can drag on for years.[16]

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[13] The noteworthy counterpoint is § 405(h), which withdraws federal-court jurisdiction under 28 U. S. C. §§ 1331, 1346. While that provision clearly serves "to route review through" § 405(g), see *Sanders*, 430 U. S., at 103, n. 3; see also *Heckler* v. *Ringer*, 466 U. S. 602, 614–615 (1984), that routing choice does not simultaneously constrict the route that Congress did provide.

[14] For example, the agency receives roughly 2.5 million new disability claims per year. See SSA, Annual Performance Report Fiscal Years 2017–2019, p. 32 (Feb. 12, 2018), https://www.ssa.gov/budget/FY19Files/2019APR.pdf.

[15] See also Koch & Koplow 257 (noting that each Appeals Council member "typically spends only ten to fifteen minutes reviewing an average case" given "the pressures of the caseload").

[16] See SSA, FY 2020 Congressional Justification 9 (Mar. 2019) (estimating 2019 average processing time for the first three steps at 113 days, 105 days, and 515 days, respectively), https://www.ssa.gov/budget/FY20Files/

While mistakes by the agency may be admirably rare, we do not presume that Congress intended for this claimant-protective statute, see *City of New York*, 476 U. S., at 480, to leave a claimant without recourse to the courts when such a mistake does occur—least of all when the claimant may have already expended a significant amount of likely limited resources in a lengthy proceeding.

C

Smith's entitlement to judicial review is confirmed by "the strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986). "That presumption," of course, "is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015). But the burden for rebutting it is "'heavy,'" *ibid.*, and that burden is not met here. While Congress left it to the SSA to define the procedures that claimants like Smith must first pass through, see *Sims*, 530 U. S., at 106, Congress has not suggested that it intended for the SSA to be the unreviewable arbiter of whether claimants have complied with those procedures. Where, as here, a claimant has received a claim-ending timeliness determination from the agency's last-in-line decisionmaker after bringing his claim past the key procedural post (a hearing) mentioned in § 405(g), there has been a "final decision . . . made after a hearing" under § 405(g).[17]

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FY20-JEAC.pdf; Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* 11.

[17] A different question would be presented by a claimant who assertedly faltered at an earlier step—*e. g.*, whose request for an ALJ hearing was dismissed as untimely and who then appealed that determination to the Appeals Council before seeking judicial review. While such a claimant would not have received a "hearing" at all, the Court's precedents also

III

Amicus' arguments to the contrary have aided our consideration of this case, but they have not dissuaded us from concluding that the Appeals Council's dismissal of Smith's claim satisfied § 405(g).

Amicus first argues that the phrase "final decision . . . made after a hearing" refers to a conclusive disposition, after exhaustion, of a benefits claim on the merits—that is, on a basis for which the Social Security Act entitles a claimant to a hearing. This reading follows, *amicus* argues, from the Court's observations that § 405(g) generally requires exhaustion, and moreover from *Sanders*' suggestion, see 430 U. S., at 108, that review is not called for where a claimant loses on an agency-determined procedural ground that is divorced from the substantive matters for which a hearing is required. Even if Smith did receive a hearing on the merits, *amicus* argues, the conclusive determination was not on that basis, and "[i]t would be unnatural to read the statute as throwing open the gates to judicial review of any final decision, no matter how collateral," just because such a hearing occurred. Brief for Court-Appointed *Amicus Curiae* 34.

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We disagree. First, as noted above, the Court's precedents do not make exhaustion a pure necessity, indicating instead that while the SSA is empowered to define the steps claimants must generally take, the SSA is not also the unreviewable arbiter of whether a claimant has sufficiently complied with those steps. See *supra*, at 478, and n. 7. Second, the Appeals Council's dismissal is not merely collateral; such a dismissal calls an end to a proceeding in which a substantial factual record has already been developed and on which considerable resources have already been expended. See *supra*, at 482–483, and n. 16. Accepting *amicus*' argument would mean that a claimant could make it to the end of the

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make clear that a hearing is not always required. See *supra*, at 479–480. Because such a situation is not before us, we do not address it.

SSA's process and then have judicial review precluded simply because the Appeals Council stamped "untimely" on the request, even if that designation were patently inaccurate. While there may be contexts in which the law is so unforgiving, this is not one. See *supra*, at 481–483.

Smith's case, as noted above, is also distinct from *Sanders*. See *supra*, at 480–481. *Sanders*, after all, involved the SSA's denial of a petition for reopening—a second look that the agency had made available to claimants as a matter of grace. See 430 U. S., at 101–102, 107–108. But Smith is not seeking a second look at an already-final denial; he argues that he was wrongly prevented from continuing to pursue his primary claim for benefits. That primary claim, meanwhile, is indeed a matter of statutory entitlement. See § 405(b).

Amicus also emphasizes that the SSA handles a large volume of claims, such that a decision providing for greater judicial review could risk a flood of litigation. That result seems unlikely for a few reasons. First, the number of Appeals Council untimeliness dismissals is comparatively small—something on the order of 2,500 dismissals out of 160,000 dispositions per year.[18] Second, the interpretation that Smith and the Government urge has been the law since 1983 in the Eleventh Circuit, and the data there do not bear out *amicus*' warning. See Reply Brief for Respondent 14–15 (collecting statistics). Third, while *amicus* flags related contexts that could be informed by today's ruling, see Brief for Court-Appointed *Amicus Curiae* 36–40, those issues are not before us. We therefore do not address them other than to reinforce that such questions must be considered in the light of "the particular administrative scheme at issue." See *Salfi*, 422 U. S., at 765. Today's decision, therefore, hardly knocks loose a line of dominoes.

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[18] See Brief for Respondent 43, n. 17 (number of timeliness dismissals); SSA, Annual Statistical Supplement 2018 (Table 2.F11) (number of dispositions), https://www.ssa.gov/policy/docs/statcomps/supplement/2018/2f8-2f11.pdf.

Finally, *amicus* argues that the meaning of § 405(g) is ambiguous and that the SSA's longstanding interpretation of § 405(g)—prior to its changed position during the pendency of this case—is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The Government and Smith maintain that the statute unambiguously supports the Government's new position, and Smith further asserts that deference is inappropriate where the Government itself has rejected the interpretation in question in its filings.

We need not decide whether the statute is unambiguous or what to do with the curious situation of an *amicus curiae* seeking deference for an interpretation that the Government's briefing rejects. *Chevron* deference " 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.' " *King* v. *Burwell*, 576 U. S. 473, 485 (2015). The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.

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Indeed, roughly six years after *Chevron* was decided, the Court declined to give *Chevron* deference to the Secretary of Labor's interpretation of a federal statute that would have foreclosed private rights of action under certain circumstances. See *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649–650 (1990). As the Court explained, Congress' having created "a role for the Department of Labor in administering the statute" did "not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id.*, at 650. Rather, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' " *Ibid.* Here, too, while Congress has empowered the SSA to create a scheme of administrative exhaustion, see *Sims*, 530 U. S., at 106,

Congress did not delegate to the SSA the power to determine "the scope of the judicial power vested by" § 405(g) or to determine conclusively when its dictates are satisfied. *Adams Fruit Co.*, 494 U. S., at 650. Consequently, having concluded that Smith and the Government have the better reading of § 405(g), we need go no further.

IV

Although they agree that § 405(g) permits judicial review of the Appeals Council's dismissal in this case, Smith and the Government disagree somewhat about the scope of review on remand.[19] Smith argues that if a reviewing court disagrees with the procedural ground for dismissal, it can then proceed directly to the merits, while the Government argues that the proper step in such a case would be to remand. We largely agree with the Government.

To be sure, there would be jurisdiction for a federal court to proceed to the merits in the way that Smith avers. For one, as noted above, exhaustion itself is not a jurisdictional prerequisite. See *supra*, at 478. Moreover, § 405(g) states that a reviewing "court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing"—a broad grant of authority that reflects the high "degree of direct interaction between a federal court and an administrative agency" envisioned by § 405(g). *Hudson*, 490 U. S., at 885. In short, there is no jurisdictional bar to a court's reaching the merits.

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[19] The parties agree, as do we, on the standard of review: abuse of discretion as to the overall conclusion, and "substantial evidence" "as to any fact." See § 405(g); see also Brief for Respondent 43–44; Tr. of Oral Arg. 5; cf. *Bowen* v. *City of New York*, 476 U. S. 467, 483 (1986) ("Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement").

Fundamental principles of administrative law, however, teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question. See, *e. g.*, *INS* v. *Orlando Ventura*, 537 U. S. 12, 16, 18 (2002) (*per curiam*); *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 283 (1987); cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943) ("For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency"). The Court's cases discussing exhaustion in the Social Security context confirm the prudence of applying this general principle here, where the agency's final decisionmaker has not had a chance to address the merits at all.[20] See *City of New York*, 476 U. S., at 485 ("Because of the agency's expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review application of those regulations to a particular factual context"); *Salfi*, 422 U. S., at 765 (explaining that exhaustion serves to "preven[t] premature interference with agency processes" and to give the agency "an opportunity to correct its own errors," "to afford the parties and the courts the benefit of its experience and expertise," and to produce "a record which is adequate for judicial review"). Accordingly, in an ordinary case, a court should restrict its review to the procedural ground that was the basis for the Appeals Council dismissal and (if necessary) allow the agency to address any residual substantive questions in the first instance.[21]

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[20] We make no statement, by contrast, regarding the applicability of this line of cases to situations in which the Appeals Council has had a chance to address the merits. Cf. *Sims* v. *Apfel*, 530 U. S. 103, 110–112 (2000) (plurality opinion) (discussing why the inquisitorial nature of SSA proceedings counsels against imposing an issue-exhaustion requirement).

[21] By the same token, remand may be forgone in rarer cases, such as where the Government joins the claimant in asking the court to reach the merits or where remand would serve no meaningful purpose.

V

We hold that where the SSA's Appeals Council has dismissed a request for review as untimely after a claimant has obtained a hearing from an ALJ on the merits, that dismissal qualifies as a "final decision . . . made after a hearing" within the meaning of § 405(g). The judgment of the United States Court of Appeals for the Sixth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Per Curiam

BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL. *v.* PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.

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

No. 18–483. Decided May 28, 2019

The Court of Appeals for the Seventh Circuit invalidated a provision of Indiana law relating to the disposition of fetal remains by abortion providers. The Indiana provision at issue excluded fetal remains from the definition of infectious and pathological waste, Ind. Code §§ 16–41–16–4(d), 16–41–16–5, thereby preventing incineration of fetal remains along with surgical byproducts, and also authorized simultaneous cremation of fetal remains, § 16–34–3–4(a). The law did not affect a woman's right under existing law "to determine the final disposition of the aborted fetus." § 16–34–3–2(a). The Seventh Circuit, applying a deferential rational basis review, first held that Indiana's stated interest in "the 'humane and dignified disposal of human remains' " was "not . . . legitimate." The Seventh Circuit held that even if Indiana's stated interest were legitimate, Indiana could not identify a rational relationship between that interest and "the law as written," because the law preserves a woman's right to dispose of fetal remains however she wishes and allows for simultaneous cremation.

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Held: The Seventh Circuit clearly erred in failing to recognize Indiana's "legitimate interest in proper disposal of fetal remains," *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452, n. 45, as a permissible basis for Indiana's disposition law. Further, Indiana's law is rationally related to the State's interest in proper disposal of fetal remains, even if it is not perfectly tailored to that end. See *Armour* v. *Indianapolis*, 566 U. S. 673, 685. As litigated, this case does not address whether Indiana's law imposes an undue burden on a woman's right to obtain an abortion and therefore does not implicate the Court's cases applying the undue burden test to abortion regulations.

Certiorari granted in part; 888 F. 3d 300, reversed.

PER CURIAM.

Indiana's petition for certiorari argues that the Court of Appeals for the Seventh Circuit incorrectly invalidated two new provisions of Indiana law: the first relating to the dispo-

sition of fetal remains by abortion providers; and the second barring the knowing provision of sex-, race-, or disability-selective abortions by abortion providers. See Ind. Code §§16–34–2–1.1(a)(1)(K), 16–34–3–4(a), 16–34–4–4, 16–34–4–5, 16–34–4–6, 16–34–4–7, 16–34–4–8, 16–41–16–4(d), 16–41–16–5 (2019). We reverse the judgment of the Seventh Circuit with respect to the first question presented, and we deny the petition with respect to the second question presented.

I

The first challenged provision altered the manner in which abortion providers may dispose of fetal remains. Among other changes, it excluded fetal remains from the definition of infectious and pathological waste, §§16–41–16–4(d), 16–41–16–5, thereby preventing incineration of fetal remains along with surgical byproducts. It also authorized simultaneous cremation of fetal remains, §16–34–3–4(a), which Indiana does not generally allow for human remains, §23–14–31–39(a). The law did not affect a woman's right under existing law "to determine the final disposition of the aborted fetus." §16–34–3–2(a).

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Respondents have never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 874 (1992) (plurality opinion). Respondents have instead litigated this case on the assumption that the law does not implicate a fundamental right and is therefore subject only to ordinary rational-basis review. See *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 888 F. 3d 300, 307 (2018). To survive under that standard, a state law need only be "rationally related to legitimate government interests." *Washington* v. *Glucksberg*, 521 U. S. 702, 728 (1997).

The Seventh Circuit found Indiana's disposition law invalid even under this deferential test. It first held that Indiana's stated interest in "the 'humane and dignified disposal of

human remains'" was "not . . . legitimate." 888 F. 3d, at 309. It went on to hold that even if Indiana's stated interest were legitimate, "it [could not] identify a rational relationship" between that interest and "the law as written," because the law preserves a woman's right to dispose of fetal remains however she wishes and allows for simultaneous cremation. *Ibid.*

We now reverse that determination. This Court has already acknowledged that a State has a "legitimate interest in proper disposal of fetal remains." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 452, n. 45 (1983). The Seventh Circuit clearly erred in failing to recognize that interest as a permissible basis for Indiana's disposition law. See *Armour* v. *Indianapolis*, 566 U. S. 673, 685 (2012) (on rational-basis review, "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it'"). The only remaining question, then, is whether Indiana's law is rationally related to the State's interest in proper disposal of fetal remains. We conclude that it is, even if it is not perfectly tailored to that end. See *ibid.* (the State need not have drawn "the perfect line," as long as "the line actually drawn [is] a rational" one). We therefore uphold Indiana's law under rational basis review.

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We reiterate that, in challenging this provision, respondents have never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion. This case, as litigated, therefore does not implicate our cases applying the undue burden test to abortion regulations. Other courts have analyzed challenges to similar disposition laws under the undue burden standard. See *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 917 F. 3d 532, 535 (CA7 2018) (Wood, C. J., concurring in denial of rehearing en banc). Our opinion expresses no view on the merits of those challenges.

II

Our opinion likewise expresses no view on the merits of the second question presented, *i. e.*, whether Indiana may prohibit the knowing provision of sex-, race-, and disability-selective abortions by abortion providers. Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals. See this Court's Rule 10.

* * *

In sum, we grant certiorari with respect to the first question presented in the petition and reverse the judgment of the Court of Appeals with respect to that question. We deny certiorari with respect to the second question presented.

It is so ordered.

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JUSTICE SOTOMAYOR would deny the petition for a writ of certiorari as to both questions presented.

JUSTICE THOMAS, concurring.

Indiana law prohibits abortion providers from treating the bodies of aborted children as "infectious waste" and incinerating them alongside used needles, laboratory-animal carcasses, and surgical byproducts. Ind. Code § 16–41–16–4(d) (2019); see §§ 16–41–16–2, 16–41–16–4, 16–41–16–5; Ind. Admin. Code, tit. 410, §§ 35–1–3, 35–2–1(a)(2) (2019). A panel of the Seventh Circuit held that this fetal-remains law was irrational, and thus unconstitutional, under the doctrine of "substantive due process." That decision was manifestly inconsistent with our precedent, as the Court holds.[1] I

[1] JUSTICE GINSBURG's dissent from this holding makes little sense. It is not a "'waste'" of our resources to summarily reverse an incorrect decision that created a Circuit split. *Post*, at 513. And JUSTICE GINSBURG does not even attempt to argue that the decision below was correct. In-

would have thought it could go without saying that nothing in the Constitution or any decision of this Court prevents a State from requiring abortion facilities to provide for the respectful treatment of human remains.

I write separately to address the other aspect of Indiana law at issue here—the "Sex Selective and Disability Abortion Ban." Ind. Code § 16–34–4–1 *et seq.* This statute makes it illegal for an abortion provider to perform an abortion in Indiana when the provider knows that the mother is seeking the abortion solely because of the child's race, sex, diagnosis of Down syndrome, disability, or related characteristics. §§ 16–34–4–1 to 16–34–4–8; see § 16–34–4–1(b) (excluding "lethal fetal anomal[ies]" from the definition of disability). The law requires that the mother be advised of this restriction and given information about financial assistance and adoption alternatives, but it imposes liability only on the provider. See §§ 16–34–2–1.1(a)(1)(K), (2)(A)–(C), 16–34–4–9. Each of the immutable characteristics protected by this law can be known relatively early in a pregnancy, and the law prevents them from becoming the sole criterion for deciding whether the child will live or die. Put differently, this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics.[2]

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stead, she adopts Chief Judge Wood's alternative suggestion that regulating the disposition of an aborted child's body might impose an "undue burden" on the mother's right to abort that (already aborted) child. See *post*, at 512. This argument is difficult to understand, to say the least—which may explain why even respondent Planned Parenthood did not make it. The argument also lacks evidentiary support. See *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 917 F. 3d 532, 538 (CA7 2018) (en banc) (Easterbrook, J., dissenting).

[2] See, *e.g.*, Ariz. Rev. Stat. Ann. § 13–3603.02 (2018) (sex and race); Ark. Code § 20–16–1904 (2018) (sex); Kan. Stat. Ann. § 65–6726 (2017 Cum. Supp.) (sex); La. Rev. Stat. Ann. § 40:1061.1.2 (2019 Cum. Supp.) (genetic abnormality); N.C.

The use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause. She emphasized and embraced the notion that birth control "opens the way to the eugenist." Sanger, Birth Control and Racial Betterment, Birth Control Rev., Feb. 1919, p. 12 (Racial Betterment). As a means of reducing the "ever increasing, unceasingly spawning class of human beings who never should have been born at all," Sanger argued that "Birth Control . . . is really the greatest and most truly eugenic method" of "human generation." M. Sanger, Pivot of Civilization 187, 189 (1922) (Pivot of Civilization). In her view, birth control had been "accepted by the most clear thinking and far seeing of the Eugenists themselves as the most constructive and necessary of the means to racial health." *Id.*, at 189.

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It is true that Sanger was not referring to abortion when she made these statements, at least not directly. She recognized a moral difference between "contraceptives" and other, more "extreme" ways for "women to limit their families," such as "the horrors of abortion and infanticide." M. Sanger, Woman and the New Race 25, 5 (1920) (Woman and the New Race). But Sanger's arguments about the eugenic value of birth control in securing "the elimination of the unfit," Racial Betterment 11, apply with even greater

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Gen. Stat. Ann. §90–21.121 (2017) (sex); N. D. Cent. Code Ann. §14–02.1–04.1 (2017) (sex and genetic abnormality); Ohio Rev. Code Ann. §2919.10 (Lexis Supp. 2018) (Down syndrome); Okla. Stat., Tit. 63, §1–731.2(B) (2016) (sex); 18 Pa. Cons. Stat. §3204(c) (2015) (sex); S. D. Codified Laws §34–23A–64 (2018) (sex). My focus on a State's compelling interest in prohibiting eugenics in abortion does not suggest that States lack other compelling interests in adopting these or other abortion-related laws.

force to abortion, making it significantly more effective as a tool of eugenics. Whereas Sanger believed that birth control could prevent "unfit" people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.

Given the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's. But because further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.

I

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The term "eugenics" was coined in 1883 by Francis Galton, a British statistician and half-cousin of Charles Darwin. See S. Caron, Who Chooses?: American Reproductive History Since 1830, p. 49 (2008); A. Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 46 (2016) (Imbeciles). Galton described eugenics as "the science of improving stock" through "all influences that tend in however remote a degree to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have." F. Galton, Inquiries Into Human Faculty and Its Development 25, n. 1 (1883). Eugenics thus rests on the assumption that "man's natural abilities are derived by inheritance, under exactly the same limitations as are the form and physical features of the whole organic world." F. Galton, Hereditary Genius: An Inquiry Into Its Laws and Consequences 1 (1869) (Hereditary Genius); see Imbeciles 46–47. As a social theory, eugenics is rooted in social

Darwinism—*i. e.*, the application of the "survival of the fittest" principle to human society. Caron, *supra*, at 49; Imbeciles 45. Galton argued that by promoting reproduction between people with desirable qualities and inhibiting reproduction of the unfit, man could improve society by "do[ing] providently, quickly, and kindly" "[w]hat Nature does blindly, slowly, and ruthlessly." F. Galton, Eugenics: Its Definition, Scope and Aims, in Essays in Eugenics 42 (1909).

By the 1920s, eugenics had become a "full-fledged intellectual craze" in the United States, particularly among progressives, professionals, and intellectual elites. Imbeciles 2; see *id.*, at 2–4, 55–57; Cohen, Harvard's Eugenics Era, Harvard Magazine, pp. 48–52 (Mar.–Apr. 2016) (Harvard's Eugenics Era). Leaders in the eugenics movement held prominent positions at Harvard, Stanford, and Yale, among other schools, and eugenics was taught at 376 universities and colleges. Imbeciles 4; see also Harvard's Eugenics Era 48. Although eugenics was widely embraced, Harvard was "more central to American eugenics than any other university," with administrators, faculty members, and alumni "founding eugenics organizations, writing academic and popular eugenics articles, and lobbying government to enact eugenics laws." *Ibid.*; see *id.*, at 49–52. One Harvard faculty member even published a leading textbook on the subject through the Harvard University Press, Genetics and Eugenics. *Id.*, at 49.

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Many eugenicists believed that the distinction between the fit and the unfit could be drawn along racial lines, a distinction they justified by pointing to anecdotal and statistical evidence of disparities between the races. Galton, for example, purported to show as a scientific matter that "the average intellectual standard of the negro race is some two grades below" that of the Anglo-Saxon, and that "the number among the negroes of those whom we should call half-witted men, is very large." Hereditary Genius 338–339. Other eugenicists similarly concluded that "the Negro . . . is

in the large eugenically *inferior* to the white" based on "the relative achievements of the race" and statistical disparities in educational outcomes and life expectancy in North America, among other factors. P. Popenoe & R. Johnson, Applied Eugenics 285 (1920) (Applied Eugenics); see *id.*, at 280–297 (elaborating on this view); see also, *e. g.*, R. Gates, Heredity and Eugenics 234 (1923) (citing disparities between white and black people and concluding that "the negro's mental status is thus undoubtedly more primitive than that of the white man"); Hunt, Hand, Pettis, & Russell, Abstract, Family Stock Values in White-Negro Crosses: A Note on Miscegenation, 8 Eugenical News 67 (1923) ("Experiments, as well as general experience, indicate that the average inborn intelligence of the white man is considerably higher than that of the negro").

Building on similar assumptions, eugenicist Lothrop Stoddard argued that the "prodigious birth-rate" of the nonwhite races was bringing the world to a racial tipping point. L. Stoddard, The Rising Tide of Color Against White World-Supremacy 8–9 (1920). Stoddard feared that without "artificial barriers," the races "will increasingly mingle, and the inevitable result will be the supplanting or absorption of the higher by the lower types." *Id.*, at 302. Allowing the white race to be overtaken by inferior races, according to Stoddard, would be a tragedy of historic proportions:

> "[T]hat would mean that the race obviously endowed with the greatest creative ability, the race which had achieved most in the past and which gave the richer promise for the future, had passed away, carrying with it to the grave those potencies upon which the realization of man's highest hopes depends. A million years of human evolution might go uncrowned, and earth's supreme life-product, man, might never fulfil his potential destiny. This is why we today face 'The Crisis of the Ages.'" *Id.*, at 304.

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Eugenic arguments like these helped precipitate the Immigration Act of 1924, which significantly reduced immigration from outside of Western and Northern Europe. §§ 11(a)–(b), 43 Stat. 159; Imbeciles 126–135; see also *id.*, at 135 (discussing the difficulties the Act created for many Jews seeking to flee Nazism). The perceived superiority of the white race also led to calls for race consciousness in marital and reproductive decisions, including through antimiscegenation laws. Applied Eugenics 296 ("We hold that it is to the interests of the United States . . . to prevent further Negro-white amalgamation").

Although race was relevant, eugenicists did not define a person's "fitness" exclusively by race. A typical list of dysgenic individuals would also include some combination of the "feeble-minded," "insane," "criminalistic," "deformed," "crippled," "epileptic," "inebriate," "diseased," "blind," "deaf," and "dependent (including orphans and paupers)." Imbeciles 139; see Applied Eugenics 176–183; cf. G. Chesterton, Eugenics and Other Evils 61 (1922) ("[F]eeble-mindedness is a new phrase under which you might segregate anybody" because "this phrase conveys nothing fixed and outside opinion"). Immigration policy was insufficient to address these "danger[s] from within," Imbeciles 4, so eugenicists turned to other solutions. Many States adopted laws prohibiting marriages between certain feebleminded, epileptic, or other "unfit" individuals, but forced sterilization emerged as the preferred solution for many classes of dysgenic individuals. *Id.*, at 63, 66. Indiana enacted the first eugenic sterilization law in 1907, and a number of other States followed suit. *Id.*, at 70.

This Court threw its prestige behind the eugenics movement in its 1927 decision upholding the constitutionality of Virginia's forced-sterilization law, *Buck* v. *Bell*, 274 U. S. 200. The plaintiff, Carrie Buck, had been found to be "a feeble minded white woman" who was "the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble

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minded child." *Id.*, at 205.[3] In an opinion written by Justice Oliver Wendell Holmes, Jr., and joined by seven other Justices, the Court offered a full-throated defense of forced sterilization:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough." *Id.*, at 207 (citation omitted).

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The Court's decision gave the eugenics movement added legitimacy and considerable momentum; by 1931, 28 of the Nation's 48 States had adopted eugenic sterilization laws. Imbeciles 299–300. Buck was one of more than 60,000 people who were involuntarily sterilized between 1907 and 1983. *Id.*, at 319.

Support for eugenics waned considerably by the 1940s as Americans became familiar with the eugenics of the Nazis and scientific literature undermined the assumptions on which the eugenics movement was built. But even today, the Court continues to attribute legal significance to the same types of racial-disparity evidence that were used to justify race-based eugenics. See T. Sowell, Discrimination

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[3] The finding that Buck was "feeble minded" was apparently wrong. See P. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell* 277 (2008) (arguing that "the case was a sham"); see Imbeciles 15–35 (arguing that Buck had perfectly normal intelligence and no medical records of any disability).

and Disparities 5–6 (rev. ed. 2019) (Sowell).[4] And support for the goal of reducing undesirable populations through selective reproduction has by no means vanished.

II

This case highlights the fact that abortion is an act rife with the potential for eugenic manipulation. From the beginning, birth control and abortion were promoted as means of effectuating eugenics. Planned Parenthood founder Margaret Sanger was particularly open about the fact that birth control could be used for eugenic purposes. These arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics. Even after World War II, future Planned Parenthood President Alan Guttmacher and other abortion advocates endorsed abortion for eugenic reasons and promoted it as a means of controlling the population and improving its quality. As explained below, a growing body of evidence sug-

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[4] Both eugenics and disparate-impact liability rely on the simplistic and often faulty assumption that "some one particular factor is the key or dominant factor behind differences in outcomes" and that one should expect "an even or random distribution of outcomes . . . in the absence of such complicating causes as genes or discrimination." Sowell 25, 87. Among other pitfalls, these assumptions tend to collapse the distinction between correlation and causation and shift the analytical focus away from "flesh-and-blood human being[s]" to impersonal statistical groups frozen in time. *Id.*, at 83; see *id.*, at 87–149 (explaining how statistics and linguistics can be used to obscure realities). Just as we should not assume, based on bare statistical disparities, "that the Negro lacks in his germ-plasm excellence of some qualities which the white races possess," P. Popenoe & R. Johnson, Applied Eugenics 285 (1920), "[w]e should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent," *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. 519, 554 (2015) (THOMAS, J., dissenting). Both views "ignore the complexities of human existence." *Id.*, at 555.

gests that eugenic goals are already being realized through abortion.

A

Like many elites of her day, Sanger accepted that eugenics was "the most adequate and thorough avenue to the solution of racial, political and social problems." Sanger, The Eugenic Value of Birth Control Propaganda, Birth Control Rev., Oct. 1921, p. 5 (Propaganda). She agreed with eugenicists that "the unbalance between the birth rate of the 'unfit' and the 'fit' " was "the greatest present menace to civilization." *Ibid.* Particularly "in a democracy like that of the United States," where "[e]quality of political power has . . . been bestowed upon the lowest elements of our population," Sanger worried that "reckless spawning carries with it the seeds of destruction." Pivot of Civilization 177–178.

Although Sanger believed that society was "indebted" to "the Eugenists" for diagnosing these problems, she did not believe that they had "show[n] much power in suggesting practical and feasible remedies." *Id.*, at 178. "As an advocate of Birth Control," Sanger attempted to fill the gap by showing that birth control had "eugenic and civilizational value." Propaganda 5. In her view, birth-control advocates and eugenicists were "seeking a single end"—"to assist the race toward the elimination of the unfit." Racial Betterment 11. But Sanger believed that the focus should be "upon stopping not only the reproduction of the unfit but upon stopping *all* reproduction when there is not economic means of providing proper care for those who are born in health." *Ibid.* (emphasis added). Thus, for Sanger, forced sterilization did "not go to the bottom of the matter" because it did not "touc[h] the great problem of unlimited reproduction" of "those great masses, who through economic pressure populate the slums and there produce in their helplessness other helpless, diseased and incompetent masses, who overwhelm all that eugenics can do among those whose economic

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condition is better." *Id.*, at 12. In Sanger's view, frequent reproduction among "the majority of wage workers" would lead to "the contributing of morons, feeble-minded, insane and various criminal types to the already tremendous social burden constituted by these unfit." *Ibid.*

Sanger believed that birth control was an important part of the solution to these societal ills. She explained, "Birth Control . . . is really the greatest and most truly eugenic method" of "human generation," "and its adoption as part of the program of Eugenics would immediately give a concrete and realistic power to that science." Pivot of Civilization 189. Sanger even argued that "eugenists and others who are laboring for racial betterment" could not "succeed" unless they "first clear[ed] the way for Birth Control." Racial Betterment 11. If "the masses" were given "practical education in Birth Control"—for which there was "almost universal demand"—then the "Eugenic educator" could use "Birth Control propaganda" to "direct a thorough education in Eugenics" and influence the reproductive decisions of the unfit. Propaganda 5. In this way, "the campaign for Birth Control [was] not merely of eugenic value, but [was] practically identical in ideal with the final aims of Eugenics." *Ibid.*

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Sanger herself campaigned for birth control in black communities. In 1930, she opened a birth-control clinic in Harlem. See Birth Control or Race Control? Sanger and the Negro Project, Margaret Sanger Papers Project Newsletter #28 (2001), http://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php (all Internet materials as last visited May 24, 2019). Then, in 1939, Sanger initiated the "Negro Project," an effort to promote birth control in poor, Southern black communities. *Ibid.* Noting that blacks were "'notoriously underprivileged and handicapped to a large measure by a "caste" system,'" she argued in a fundraising letter that "'birth control knowledge brought to this

group, is the most direct, constructive aid that can be given them to improve their immediate situation.'" *Ibid.* In a report titled "Birth Control and the Negro," Sanger and her coauthors identified blacks as "'the great problem of the South'"—"the group with 'the greatest economic, health, and social problems'"—and developed a birth-control program geared toward this population. *Ibid.* She later emphasized that black ministers should be involved in the program, noting, "'We do not want word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members.'" *Ibid.*

Defenders of Sanger point out that W. E. B. DuBois and other black leaders supported the Negro Project and argue that her writings should not be read to imply a racial bias. *Ibid.*; see Planned Parenthood, Opposition Claims About Margaret Sanger (2016), https://www.plannedparenthood.org/uploads/filer_public/37/fd/37fdc7b6-de5f-4d22-8c05-9568268e92d8/sanger_opposition_claims_fact_sheet_2016.pdf. But Sanger's motives are immaterial to the point relevant here: that "Birth Control" has long been understood to "ope[n] the way to the eugenist." Racial Betterment 12.

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B

To be sure, Sanger distinguished between birth control and abortion. Woman and the New Race 128–129; see, *e. g.*, Sanger, Birth Control or Abortion? Birth Control Rev., Dec. 1918, pp. 3–4. For Sanger, "[t]he one means health and happiness—a stronger, better race," while "[t]he other means disease, suffering, [and] death." Woman and the New Race 129. Sanger argued that "nothing short of contraceptives can put an end to the horrors of abortion and infanticide," *id.*, at 25, and she questioned whether "we want the precious, tender qualities of womanhood, so much needed for our racial development, to perish in [the] sordid, abnormal experiences" of abortions, *id.*, at 29. In short, unlike contracep-

tives, Sanger regarded "the hundreds of thousands of abortions performed in America each year [as] a disgrace to civilization." *Id.*, at 126.

Although Sanger was undoubtedly correct in recognizing a moral difference between birth control and abortion, the eugenic arguments that she made in support of birth control apply with even greater force to abortion. Others were well aware that abortion could be used as a "metho[d] of eugenics," 6 H. Ellis, Studies in the Psychology of Sex 617 (1910), and they were enthusiastic about that possibility. Indeed, some eugenicists believed that abortion should be legal for the very *purpose* of promoting eugenics. See Harris, Abortion in Soviet Russia: Has the Time Come To Legalize It Elsewhere? 25 Eugenics Rev. 22 (1933) ("[W]e are being increasingly compelled to consider legalized abortion as well as birth control and sterilization as possible means of influencing the fitness and happiness and quality of the race"); Aims and Objects of the Eugenics Society, 26 Eugenics Rev. 135 (1934) ("The *Society* advocates the provision of legalized facilities for voluntarily terminating pregnancy in cases of persons for whom sterilization is regarded as appropriate"). Support for abortion can therefore be found throughout the literature on eugenics. *E. g.*, Population Control: Dr. Binnie Dunlop's Address to the Eugenics Society, 25 Eugenics Rev. 251 (1934) (lamenting "the relatively high birth-rate of the poorest third of the population" and "the serious rate of racial deterioration which it implied," and arguing that "this birth-rate . . . would fall rapidly if artificial abortion were made legal"); Williams, The Legalization of Medical Abortion, 56 Eugenics Rev. 24–25 (1964) ("I need hardly stress the eugenic argument for extending family planning"—including "voluntary sterilization" and "abortion"—to "all groups, not merely to those who are the most intelligent and socially responsible").

Abortion advocates were sometimes candid about abortion's eugenic possibilities. In 1959, for example, Gutt-

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macher explicitly endorsed eugenic reasons for abortion. A. Guttmacher, Babies by Choice or by Chance 186–188. He explained that "the quality of the parents must be taken into account," including "[f]eeble-mindedness," and believed that "it should be permissible to abort any pregnancy . . . in which there is a strong probability of an abnormal or malformed infant." *Id.*, at 198. He added that the question whether to allow abortion must be "separated from emotional, moral and religious concepts" and "must have as its focus normal, healthy infants born into homes peopled with parents who have healthy bodies and minds." *Id.*, at 221. Similarly, legal scholar Glanville Williams wrote that he was open to the possibility of eugenic infanticide, at least in some situations, explaining that "an eugenic killing by a mother, exactly paralleled by the bitch that kills her mis-shapen puppies, cannot confidently be pronounced immoral." G. Williams, Sanctity of Life and the Criminal Law 20 (1957). The Court cited Williams' book for a different proposition in *Roe* v. *Wade*, 410 U. S. 113, 130, n. 9 (1973).

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But public aversion to eugenics after World War II also led many to avoid explicit references to that term. The American Eugenics Society, for example, changed the name of its scholarly publication from "Eugenics Quarterly" to "Social Biology." See D. Paul, Controlling Human Heredity: 1865 to the Present, p. 125 (1995). In explaining the name change, the journal's editor stated that it had become evident that eugenic goals could be achieved "for reasons other than eugenics." *Ibid.* For example, "[b]irth control and abortion are turning out to be great eugenic advances of our time. If they had been advanced for eugenic reasons it would have retarded or stopped their acceptance." *Ibid.* But whether they used the term "eugenics" or not, abortion advocates echoed the arguments of early 20th-century eugenicists by describing abortion as a way to achieve "population control" and to improve the "quality" of the population. One journal declared that "abortion is the one mode of population limita-

tion which has demonstrated the speedy impact which it can make upon a national problem." Notes of the Quarter: The Personal and the Universal, 53 Eugenics Rev. 186 (1962). Planned Parenthood's leaders echoed these themes. When exulting over "'fantastic . . . progress'" in expanding abortion, for example, Guttmacher stated that "'the realization of the population problem has been responsible' for the change in attitudes. 'We're now concerned more with the quality of population than the quantity.'" Abortion Reforms Termed "Fantastic," Hartford Courant, Mar. 21, 1970, p. 16.

Avoiding the word "eugenics" did not assuage everyone's fears. Some black groups saw "'family planning' as a euphemism for race genocide" and believed that "black people [were] taking the brunt of the 'planning'" under Planned Parenthood's "ghetto approach" to distributing its services. Dempsey, Dr. Guttmacher Is the Evangelist of Birth Control, N. Y. Times Magazine, Feb. 9, 1969, p. 82. "The Pittsburgh branch of the National Association for the Advancement of Colored People," for example, "criticized family planners as bent on trying to keep the Negro birth rate as low as possible." Kaplan, Abortion and Sterilization Win Support of Planned Parenthood, N. Y. Times, Nov. 14, 1968, p. L50, col. 1.

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C

Today, notwithstanding Sanger's views on abortion, respondent Planned Parenthood promotes both birth control and abortion as "reproductive health services" that can be used for family planning. Brief in Opposition 1. And with today's prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics. Indeed, the individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child. As petitioners and several *amicus curiae* briefs point out, moreover, abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that

undergird eugenics. *E. g.*, Pet. for Cert. 22–26; Brief for State of Wisconsin et al. as *Amici Curiae* 19–25; Brief for Ethics and Religious Liberty Commission of the Southern Baptist Convention et al. as *Amici Curiae* 9–10.

In Iceland, the abortion rate for children diagnosed with Down syndrome in utero approaches 100%. See Will, The Down Syndrome Genocide, Washington Post, Mar. 15, 2018, p. A23, col. 1. Other European countries have similarly high rates, and the rate in the United States is approximately two-thirds. See *ibid.* (98% in Denmark, 90% in the United Kingdom, 77% in France, and 67% in the United States); see also Natoli, Ackerman, McDermott, & Edwards, Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011), 32 Prenatal Diagnosis 142 (2012) (reviewing U. S. studies).

In Asia, widespread sex-selective abortions have led to as many as 160 million "missing" women—more than the entire female population of the United States. See M. Hvistendahl, Unnatural Selection: Choosing Boys Over Girls, and the Consequences of a World Full of Men 5–6 (2011); see also Kalantry, How To Fix India's Sex-Selection Problem, N. Y. Times, Int'l ed., July 28, 2017, p. 9 ("Over the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted in India each year. Today there are about 50 million more men than women in the country"). And recent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States as well. See Almond & Sun, Son-Biased Sex Ratios in 2010 U. S. Census and 2011–2013 U. S. Natality Data, 176 Soc. Sci. & Med. 21 (2017) (concluding that Chinese and Asian-Indian families in the United States "show a tendency to sex-select boys"); Almond & Edlund, Son-Biased Sex Ratios in the 2000 United States Census, 105 Proc. Nat. Acad. of Sci. 5681 (2008) (similar).

Eight decades after Sanger's "Negro Project," abortion in the United States is also marked by a considerable racial

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disparity. The reported nationwide abortion ratio—the number of abortions per 1,000 live births—among black women is nearly 3.5 times the ratio for white women. Dept. of Health and Human Servs., Centers for Disease Control and Prevention, T. Jatlaoui et al., Abortion Surveillance—United States, 2015, 67 Morbidity and Mortality Weekly Report, Surveillance Summaries, No. SS–13, p. 35 (Nov. 23, 2018) (Table 13); see also Brief for Restoration Project et al. as *Amici Curiae* 5–6. And there are areas of New York City in which black children are more likely to be aborted than they are to be born alive—and are up to eight times more likely to be aborted than white children in the same area. See N. Y. Dept. of Health, Table 23: Induced Abortion and Abortion Ratios by Race/Ethnicity and Resident County New York State–2016, https://www.health.ny.gov/statistics/vital_statistics/2016/table23.htm. Whatever the reasons for these disparities, they suggest that, insofar as abortion is viewed as a method of "family planning," black people do indeed "tak[e] the brunt of the 'planning.'" Dempsey, *supra*, at 82.

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Some believe that the United States is already experiencing the eugenic effects of abortion. According to one economist, "*Roe v. Wade* help[ed] trigger, a generation later, the greatest crime drop in recorded history." S. Levitt & S. Dubner, Freakonomics 6 (2005); see *id.*, at 136–144 (elaborating on this theory). On this view, "it turns out that not all children are born equal" in terms of criminal propensity. *Id.*, at 6. And legalized abortion meant that the children of "poor, unmarried, and teenage mothers" who were "much more likely than average to become criminals" "weren't being born." *Ibid.* (emphasis deleted). Whether accurate or not, these observations echo the views articulated by the eugenicists and by Sanger decades earlier: "Birth Control of itself . . . will make a better race" and tend "toward the elimination of the unfit." Racial Betterment 11–12.

III

It was against this background that Indiana's Legislature, on the 100th anniversary of its 1907 sterilization law, adopted a concurrent resolution formally "express[ing] its regret over Indiana's role in the eugenics movement in this country and the injustices done under eugenic laws." Ind. S. Res. 91, 115th Gen. Assembly 1st Sess., § 1 (2007); see Brief for Pro-Life Legal Defense Fund et al. as *Amici Curiae* 6–8. Recognizing that laws implementing eugenic goals "targeted the most vulnerable among us, including the poor and racial minorities, . . . for the claimed purpose of public health and the good of the people," Ind. S. Res. 91, at 2, the General Assembly "urge[d] the citizens of Indiana to become familiar with the history of the eugenics movement" and "repudiate the many laws passed in the name of eugenics and reject any such laws in the future," *id.*, § 2.

In March 2016, the Indiana Legislature passed by wide margins the Sex-Selective and Disability Abortion Ban at issue here. Respondent Planned Parenthood promptly filed a lawsuit to block the law from going into effect, arguing that the Constitution categorically protects a woman's right to abort her child based solely on the child's race, sex, or disability. The District Court agreed, granting a preliminary injunction on the eve of the law's effective date, followed by a permanent injunction. A panel of the Seventh Circuit affirmed. Pointing to *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), both the District Court and the Seventh Circuit held that this Court had already decided the matter: "*Casey*'s holding that a woman has the right to terminate her pregnancy prior to viability is categorical." *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 888 F. 3d 300, 305 (CA7 2018); see *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner, Ind. State Dept. of Health*, 265 F. Supp. 3d 859, 866 (SD Ind. 2017). In an opinion dissenting from the denial of rehearing

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en banc, Judge Easterbrook expressed skepticism as to this holding, explaining that "*Casey* did not consider the validity of an anti-eugenics law" and that judicial opinions, unlike statutes, "resolve only the situations presented for decision." *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 917 F. 3d 532, 536 (CA7 2018).

Judge Easterbrook was correct. Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions. It addressed the constitutionality of only "five provisions of the Pennsylvania Abortion Control Act of 1982" that were said to burden the supposed constitutional right to an abortion. *Casey*, *supra*, at 844. None of those provisions prohibited abortions based solely on race, sex, or disability. In fact, the very first paragraph of the respondents' brief in *Casey* made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was "not [being] challenged," Brief for Respondents in *Planned Parenthood of Southeastern Pa.* v. *Casey*, O. T. 1991, No. 91–744 etc., p. 4. In light of the Court's denial of certiorari today, the constitutionality of other laws like Indiana's thus remains an open question.

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The Court's decision to allow further percolation should not be interpreted as agreement with the decisions below. Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as Planned Parenthood advocates, would constitutionalize the views of the 20th-century eugenics movement. In other contexts, the Court has been zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination. Cf. *Pena-Rodriguez* v. *Colorado*, 580 U. S. 206, 223 (2017) (condemning "discrimination on the basis of race" as "'odious in all aspects'"); *United States* v. *Virginia*, 518 U. S. 515, 532 (1996) (denouncing any "law or official policy [that] denies to women, simply because they are women, . . . equal opportunity to aspire, achieve, participate

in and contribute to society based on their individual talents and capacities"); *Tennessee* v. *Lane*, 541 U. S. 509, 522 (2004) (condemning "irrational disability discrimination").

Although the Court declines to wade into these issues today, we cannot avoid them forever. Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the District Court and the Seventh Circuit looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion.

With these observations, I join the opinion of the Court.

JUSTICE GINSBURG, concurring in part and dissenting in part.

I agree with the Court's disposition of the second question presented. As to the first question, I would not summarily reverse a judgment when application of the proper standard would likely yield restoration of the judgment. In the District Court and on appeal to the Seventh Circuit, Planned Parenthood of Indiana and Kentucky urged that Indiana's law on the disposition of fetal remains should not pass even rational-basis review.[1] But as Chief Judge Wood observed, "rational basis" is not the proper review standard. *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 917 F. 3d 532, 534 (CA7 2018) (opinion concurring in denial of rehearing en banc).

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[1] One may "wonder how, if respect for the humanity of fetal remains after a miscarriage or abortion is the [S]tate's goal, [Indiana's] statute rationally achieves that goal when it simultaneously allows any form of disposal whatsoever if the [woman] elects to handle the remains herself," *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 917 F. 3d 532, 534 (CA7 2018) (Wood, C. J., concurring in denial of rehearing en banc), "and continues to allow for mass cremation of fetuses," *Planned Parenthood of Ind. and Ky., Inc.* v. *Commissioner of Ind. State Dept. of Health*, 888 F. 3d 300, 309 (CA7 2018) (case below).

This case implicates "the right of [a] woman to choose to have an abortion before viability and to obtain it without undue interference from the State," *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 846 (1992), so heightened review is in order, *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 607 (2016).

It is "a waste of th[e] [C]ourt's resources" to take up a case simply to say we are bound by a party's "strategic litigation choice" to invoke rational-basis review alone, but "everything might be different" under the close review instructed by the Court's precedent. 917 F. 3d, at 534, 535 (opinion of Wood, C. J.). I would therefore deny Indiana's petition in its entirety.[2]

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[2] JUSTICE THOMAS' footnote, *ante*, at 493, n. 1, displays more heat than light. The note overlooks many things: "This Court reviews *judgments*, not statements in opinions," *California* v. *Rooney*, 483 U. S. 307, 311 (1987) (*per curiam*) (quoting *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956); emphasis added); a woman who exercises her constitutionally protected right to terminate a pregnancy is not a "mother"; the cost of, and trauma potentially induced by, a post-procedure requirement may well constitute an undue burden, 917 F. 3d, at 534–535 (opinion of Wood, C. J.); under the rational-basis standard applied below, Planned Parenthood of Indiana and Kentucky had no need to marshal evidence that Indiana's law posed an undue burden, *id.*, at 535.

Syllabus

MONT *v.* UNITED STATES

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

No. 17–8995. Argued February 26, 2019—Decided June 3, 2019

Petitioner Mont was released from federal prison in 2012 and began a 5-year term of supervised release that was scheduled to end on March 6, 2017. On June 1, 2016, he was arrested on state drug-trafficking charges and has been in state custody since that time. In October 2016, Mont pleaded guilty to state charges. He then admitted in a filing in Federal District Court that he violated his supervised-release conditions by virtue of the new state convictions, and he requested a hearing. The District Court scheduled a hearing for November, but later rescheduled it several times to allow the state court to first sentence Mont. On March 21, 2017, Mont was sentenced to six years' imprisonment, and his roughly 10 months of pretrial custody were credited as time served. On March 30, the District Court issued a warrant for Mont and set a supervised-release hearing. Mont then challenged the District Court's jurisdiction on the ground that his supervised release had been set to expire on March 6. The District Court ruled that it had jurisdiction under 18 U. S. C. § 3583(i) based on a summons it had issued in November 2016. It then revoked Mont's supervised release and ordered him to serve an additional 42 months' imprisonment to run consecutive to his state sentence. The Sixth Circuit affirmed on alternative grounds, holding that Mont's supervised-release period was tolled under § 3624(e), which provides that a "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a . . . crime unless the imprisonment is for a period of less than 30 consecutive days." Because the roughly 10 months of pretrial custody was "in connection with [Mont's] conviction" and therefore tolled the period of supervised release, the court concluded that there was ample time left on Mont's term of supervised release when the March warrant issued.

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Held: Pretrial detention later credited as time served for a new conviction is "imprison[ment] in connection with a conviction" and thus tolls the supervised-release term under § 3624(e), even if the court must make the tolling calculation after learning whether the time will be credited. Pp. 521–528.

(a) The text of § 3624(e) compels this reading. First, dictionary definitions of the term "imprison," both now and at the time Congress

created supervised release, may very well encompass pretrial detention, and Mont has not pressed any serious argument to the contrary. Second, the phrase "in connection with a conviction" encompasses a period of pretrial detention for which a defendant receives credit against the sentence ultimately imposed. "In connection with" can bear a "broad interpretation," *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 85, but the outer bounds need not be determined here, as pretrial incarceration is directly tied to the conviction when it is credited toward the new sentence. This reading is buttressed by the fact that Congress, like most States, instructs courts calculating a term of imprisonment to credit pretrial detention as time served on a subsequent conviction. See § 3585(b)(1). Third, the text undeniably requires courts to retrospectively calculate whether a period of pretrial detention should toll a period of supervised release by including the 30-day minimum. The statute does not require courts to make a tolling determination as soon as a defendant is arrested on new charges or to continually reassess the tolling calculation throughout the pretrial-detention period. Its 30-day minimum-incarceration threshold contemplates the opposite. Pp. 521–523.

(b) The statutory context also supports this reading. First, § 3624(e) provides that supervised release "runs concurrently" with "probation or supervised release or parole for another offense," but excludes periods of "imprison[ment]" served "in connection with a conviction." This juxtaposition reinforces the fact that prison time is "not interchangeable" with supervised release, *United States* v. *Johnson*, 529 U. S. 53, 59, and furthers the statutory design of "successful[ly] transition[ing]" a defendant from "prison to liberty," *Johnson* v. *United States*, 529 U. S. 694, 708–709. Second, it would be an exceedingly odd construction of the statute to give a defendant the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention. Supervised release is a form of punishment prescribed along with a term of imprisonment as part of the same sentence. And Congress denies defendants credit for time served if the detention time has already "been credited against another sentence." § 3585(b). Pp. 523–525.

(c) Mont's argument that the statute's present tense forbids any backward looking tolling analysis confuses the rule with a court's analysis of whether that rule was satisfied. The present-tense phrasing does not address whether a judge must be able to make a supervised-release determination at any given time. Moreover, any uncertainty about whether supervised release is tolled matters little from either the court's or the defendant's perspective. As for the court, the defendant need not be supervised when he is held in custody; as for the defendant,

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there is nothing unfair about not knowing during pretrial detention whether he is also under supervised release. Pp. 525–527.

723 Fed. Appx. 325, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, ALITO, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, KAGAN, and GORSUCH, JJ., joined, *post*, p. 528.

Vanessa F. Malone argued the cause for petitioner. With her on the briefs was *Stephen Newman*.

Jenny C. Ellickson argued the cause for the United States. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *Joshua K. Handell.*

JUSTICE THOMAS delivered the opinion of the Court.

This case requires the Court to decide whether a convicted criminal's period of supervised release is tolled—in effect, paused—during his pretrial detention for a new criminal offense. Specifically, the question is whether that pretrial detention qualifies as "imprison[ment] in connection with a conviction for a Federal, State, or local crime." 18 U. S. C. § 3624(e). Given the text and statutory context of § 3624(e), we conclude that if the court's later imposed sentence credits the period of pretrial detention as time served for the new offense, then the pretrial detention also tolls the supervised-release period.

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I

A

In 2004, petitioner Jason Mont began distributing cocaine and crack cocaine in northern Ohio. After substantial drug sales to a confidential informant and a search of his home that uncovered handguns and $2,700 in cash, a federal grand jury indicted Mont for multiple drug and firearm offenses. He later pleaded guilty to conspiring to possess with intent to distribute cocaine and to possessing a firearm and ammu-

nition after having been convicted of a felony. See 18 U. S. C. § 922(g)(1) (2000 ed.); 21 U. S. C. §§ 841(a)(1), 846 (2000 ed.).

The District Court sentenced Mont to 120 months' imprisonment, later reduced to 84 months, to be followed by 5 years of supervised release. Mont was released from federal prison on March 6, 2012, and his supervised release was "slated to end on March 6, 2017." 723 Fed. Appx. 325, 326 (CA6 2018); see 18 U. S. C. § 3624(e) (a "term of supervised release commences on the day the person is released from imprisonment"). Among other standard conditions, Mont's supervised release required that he "not commit another federal, state, or local crime," "not illegally possess a controlled substance," and "refrain from any unlawful use of a controlled substance." Judgment in No. 4:05–cr–00229 (ND Ohio), Doc. 37, p. 111.

Mont did not succeed on supervised release. In March 2015, an Ohio grand jury charged him with two counts of marijuana trafficking in a sealed indictment. Mont was arrested and released on bond while awaiting trial for those charges. Things only got worse from there. In October 2015, Mont tested positive for cocaine and oxycodone during a routine drug test conducted as part of his supervised release. But Mont's probation officer did not immediately report these violations to the District Court; instead, the officer referred him for additional substance-abuse counseling. Mont proceeded to test positive in five more random drug tests over the next few months. He also used an "'unknown' liquid to try to pass two subsequent drug tests." 723 Fed. Appx., at 326. In January 2016, Mont's probation officer finally reported the supervised-release violations, including Mont's use of drugs and attempts to adulterate his urine samples. The violation report also informed the District Court about the pending state charges and the anticipated trial date of March 2016 in state court. The District Court declined to issue an arrest warrant at that time, but it

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asked to "'be notified of the resolution of the state charges.'" *Ibid.*; see 18 U. S. C. §3606 (explaining that the District Court "may issue a warrant for the arrest" of the releasee for "violation of a condition of release").

On June 1, 2016, approximately four years and three months into his 5-year term of supervised release, Mont was arrested again on new state charges of trafficking in cocaine, and his bond was revoked on the earlier marijuana-trafficking charges. He was incarcerated in the Mahoning County Jail and has remained in state custody since that date. Mont's probation officer filed a report with the District Court stating that he had violated the terms of his release based on these new state offenses. The officer later advised the court that because Mont's incarceration rendered him unavailable for supervision, the Probation Office was "toll[ing]" his federal supervision. App. 21. The officer promised to keep the court apprised of the pending state charges and stated that, if Mont were convicted, the officer would ask the court to take action at that time.

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In October 2016, Mont entered into plea agreements with state prosecutors in exchange for a predetermined 6-year sentence. The state trial court accepted Mont's guilty pleas on October 6, 2016, and set the cases for sentencing in December 2016.

Three weeks later, Mont filed a written admission in the District Court "acknowledg[ing]" that he had violated his conditions of supervised release "by virtue of his conviction following guilty pleas to certain felony offenses" in state court. Record in No. 4:05–cr–00229 (ND Ohio), Doc. 92, p. 419. Even though he had yet to be sentenced for the state offenses, Mont sought a hearing on the supervised-release violations at the court's "earliest convenience." *Ibid.* The court initially scheduled a hearing for November 9, 2016, but then, over Mont's objection, rescheduled the hearing several times to allow for "the conclusion of the State sentencing." App. 8; 723 Fed. Appx., at 327.

On March 21, 2017, Mont was sentenced in state court to six years' imprisonment. The judge "credited the roughly ten months that Mont had already been incarcerated pending a disposition as time served." *Id.*, at 327. The District Court issued a warrant on March 30, 2017, and ultimately set a supervised-release hearing for June 28, 2017.

B

Two days before that hearing, Mont challenged the jurisdiction of the District Court based on the fact that his supervised release had initially been set to expire on March 6, 2017. The court concluded that it had authority to supervise Mont, revoked his supervised release, and ordered him to serve an additional 42 months' imprisonment to run consecutive to his state sentence. The court held that it retained jurisdiction to revoke the release under 18 U. S. C. § 3583(i), which preserves, for a "reasonably necessary" period of time, the court's power to adjudicate violations and revoke a term of supervised release after the term has expired "if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." The court further held that it retained authority to revoke Mont's term of supervised release because it gave "notice by way of a summons" on November 1, 2016, when it originally scheduled the hearing. App. 22. The court also concluded that the delay between the guilty pleas in October 2016 and the hearing date in June 2017 was "reasonably necessary." *Id.*, at 24.

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The Sixth Circuit affirmed on alternative grounds. The court could find no evidence in the record that a summons had issued within the meaning of § 3583(i). 723 Fed. Appx., at 329, n. 5. But because Circuit precedent provided an alternative basis for affirmance, the court did not further consider the Government's argument that the District Court retained jurisdiction under § 3583(i). Instead, the court held that Mont's supervised-release period was tolled while he was held in pretrial detention in state custody under § 3624(e), which provides:

> "Supervision After Release.— . . . The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person *is imprisoned in connection with a conviction* for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." (Emphasis added.)

Relying on Circuit precedent, the Sixth Circuit explained that when a defendant is convicted of the offense for which he was held in pretrial detention for longer than 30 days and "'his pretrial detention is credited as time served toward his sentence, then the pretrial detention is "in connection with" a conviction and tolls the period of supervised release under §3624.'" *Id.*, at 328 (quoting *United States* v. *Goins*, 516 F. 3d 416, 417 (2008)). Because Mont's term of supervised release had been tolled between June 2016 and March 2017, there was ample time left on his supervised-release term when the warrant issued on March 30, 2017.

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The Courts of Appeals disagree on whether §3624(e) tolls supervised release for periods of pretrial detention lasting longer than 30 days when that incarceration is later credited as time served on a conviction. Compare *United States* v. *Ide*, 624 F. 3d 666, 667 (CA4 2010) (supervised-release period tolls); *United States* v. *Molina-Gazca*, 571 F. 3d 470, 474 (CA5 2009) (same); *United States* v. *Johnson*, 581 F. 3d 1310, 1312–1313 (CA11 2009) (same); *Goins*, *supra*, at 417 (same), with *United States* v. *Marsh*, 829 F. 3d 705, 709 (CADC 2016) (supervised-release period does not toll); *United States* v. *Morales-Alejo*, 193 F. 3d 1102, 1106 (CA9 1999) (same). We granted certiorari to resolve this split of authority. 586 U. S. 985 (2018).

II

We hold that pretrial detention later credited as time served for a new conviction is "imprison[ment] in connection with a conviction" and thus tolls the supervised-release term under § 3624(e). This is so even if the court must make the tolling calculation after learning whether the time will be credited. In our view, this reading is compelled by the text and statutory context of § 3624(e).

A

Section 3624(e) provides for tolling when a person "is imprisoned in connection with a conviction." This phrase, sensibly read, includes pretrial detention credited toward another sentence for a new conviction.

First, the definition of "is imprisoned" may well include pretrial detention. Both now and at the time Congress created supervised release, see § 212(a)(2), 98 Stat. 1999–2000, the term "imprison" has meant "[t]o put in a prison," "to incarcerate," "[t]o confine a person, or restrain his liberty, in any way." Black's Law Dictionary 681 (5th ed. 1979); 5 Oxford English Dictionary 113 (1933); accord, Black's Law Dictionary 875 (10th ed. 2014). These definitions encompass pretrial detention, and, despite the dissent's reliance on a narrower definition, *post*, at 531–534 (opinion of SOTOMAYOR, J.), even Mont has not pressed any serious argument to the contrary. As the Sixth Circuit previously recognized, if imprisonment referred only to "confinement that is the result of a penalty or sentence, then the phrase 'in connection with a conviction' [would] becom[e] entirely superfluous." *Goins*, *supra*, at 421.

Second, the phrase "in connection with a conviction" encompasses a period of pretrial detention for which a defendant receives credit against the sentence ultimately imposed. The Court has often recognized that "in connection with" can bear a "broad interpretation." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 85 (2006)

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(interpreting "in connection with the purchase or sale" broadly in the context of § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b)); see, *e. g.*, *United States* v. *American Union Transport, Inc.*, 327 U. S. 437, 443 (1946) (describing the phrase "in connection with" in the Shipping Act, 1916, 39 Stat. 728, as "broad and general"). The Court has also recognized that "'in connection with' is essentially indeterminate because connections, like relations, stop nowhere." *Maracich* v. *Spears*, 570 U. S. 48, 59 (2013) (quotation altered). Here, however, we need not consider the outer bounds of the term "in connection with," as pretrial incarceration is *directly* tied to the conviction when it is credited toward the new sentence. The judgment of the state court stated as much, crediting the pretrial detention that Mont served while awaiting trial and sentencing for his crimes against his ultimate sentence for those same crimes.

This reading of "imprison[ment] in connection with a conviction" is buttressed by the fact that Congress, like most States, instructs courts calculating a term of imprisonment to credit pretrial detention as time served on a subsequent conviction. See 18 U. S. C. § 3585(b)(1); Tr. of Oral Arg. 54 (statement of the Assistant Solicitor General representing that the same rule applies in 45 States and the District of Columbia). Thus, it makes sense that the phrase "imprison-[ment] in connection with a conviction" would include pretrial detention later credited as time served, especially since both provisions were passed as part of the Sentencing Reform Act of 1984. See § 212(a)(2), 98 Stat. 2008–2009. If Congress intended a narrower interpretation, it could have easily used narrower language, such as "*after* a conviction" or "*following* a conviction." See, *e. g.*, Bail Reform Act of 1984, § 209(d)(4), 98 Stat. 1987 (adding Federal Rule of Criminal Procedure 46(h), allowing courts to direct forfeiture of property "*after* conviction of the offense charged" (emphasis added)). We cannot override Congress' choice to employ the more capacious phrase "in connection with."

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Third, the text undeniably requires courts to retrospectively calculate whether a period of pretrial detention should toll a period of supervised release. Whereas § 3624(e) instructs courts precisely when the supervised-release clock begins—"on the day the person is released"—the statute does not require courts to make a tolling determination as soon as a defendant is arrested on new charges or to continually reassess the tolling calculation throughout the period of his pretrial detention. Congress contemplated the opposite by including a minimum-incarceration threshold: tolling occurs "unless the imprisonment is for a period of less than 30 consecutive days." § 3624(e). This calculation must be made after either release from custody or entry of judgment; there is no way for a court to know on day 5 of a defendant's pretrial detention whether the period of custody will extend beyond 30 days. Thus, at least some uncertainty as to whether supervised release is tolled is built into § 3624(e) by legislative design. This fact confirms that courts should make the tolling calculation upon the defendant's release from custody or upon entry of judgment.

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B

The statutory context also supports our reading. Supervised release is "a form of postconfinement monitoring" that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison. *Johnson* v. *United States*, 529 U. S. 694, 697 (2000). Recognizing that Congress provided for supervised release to facilitate a "transition to community life," we have declined to offset a term of supervised release by the amount of excess time a defendant spent in prison after two of his convictions were declared invalid. *United States* v. *Johnson*, 529 U. S. 53, 59–60 (2000). As we explained: "The objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release" because "[s]upervised release has no statutory function

until confinement ends." *Id.*, at 59. This understanding of supervised release informs our reading of the tolling provision.

Consider § 3624(e) itself. The sentence preceding the one at issue here specifies that supervised release "runs concurrently" with "probation or supervised release or parole for *another* offense." § 3624(e) (emphasis added). But the next sentence (the one at issue here) excludes periods of "imprison[ment]" served "in connection with a conviction." The juxtaposition of these two sentences reinforces the fact that prison time is "not interchangeable" with supervised release. *Id.*, at 59. Permitting a period of probation or parole to count toward supervised release but excluding a period of incarceration furthers the statutory design of "successful[ly] transition[ing]" a defendant from "prison to liberty." *Johnson*, *supra*, at 708–709. Allowing pretrial detention credited toward another sentence to toll the period of supervised release is consistent with that design. Cf. A. Scalia & B. Garner, Reading Law 167 (2012) (explaining that "the whole-text canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts").

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Second, it would be an exceedingly odd construction of the statute to give a defendant the windfall of satisfying a new sentence of imprisonment and an old sentence of supervised release with the same period of pretrial detention. Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence. See generally § 3583. And Congress denies defendants credit for time served if the detention time has already "been credited against another sentence." § 3585(b). Yet Mont's reading of § 3624(e) would deprive the Government of its lawfully imposed sentence of supervised release while the defendant is serving a separate sentence of incarceration—one often imposed by a different sovereign. Under our view, in contrast, time in pretrial detention consti-

tutes supervised release only if the charges against the defendant are dismissed or the defendant is acquitted. This ensures that the defendant is not faulted for conduct he might not have committed, while otherwise giving full effect to the lawful judgment previously imposed on the defendant.[1]

C

In response to these points, Mont follows the D. C. Circuit in arguing that the present tense of the statute ("'*is* imprisoned'") forbids any backward looking tolling analysis. See *Marsh*, 829 F. 3d, at 709. Mont contends that, when a defendant is held in pretrial detention, a court cannot say *at that moment* that he "is imprisoned in connection with a conviction." He relies on the Dictionary Act, which provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words used in the present tense include the future as well as the present." 1 U. S. C. § 1.

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Mont's argument confuses the rule ("any period in which the person is imprisoned in connection with a conviction") with a court's analysis of whether that rule was satisfied. Of course, the determination whether supervised release has been tolled cannot be made at the exact moment when the defendant is held in pretrial detention. Rather, the court must await the outcome of those separate proceedings before it will know whether "imprison[ment]" is tied to a conviction. But the statute does not require the court to make a contemporaneous assessment. Quite the opposite: As discussed, the statute undeniably contemplates that there will be uncer-

[1] Our reading leaves intact a district court's ability to preserve its authority by issuing an arrest warrant or summons under § 3583(i) based on the conduct at issue in the new charges, irrespective of whether the defendant is later convicted or acquitted of those offenses. But preserving jurisdiction through § 3583(i) is not a prerequisite to a court maintaining authority under § 3624(e), nor does it impact the tolling calculation under § 3624(e).

tainty about the status of supervised release when a defendant has been held for a short period of time and it is unclear whether the imprisonment will exceed 30 days. There is no reason the statute would preclude postponing calculation just because the custody period extends beyond 30 days. Once the court makes the calculation, it will determine whether the relevant period ultimately qualified as a period "in which the person is imprisoned in connection with a conviction" for 30 or more days. In short, the present-tense phrasing of the statute does not address whether a judge must be able to make a supervised-release determination at any given time.

Moreover, any uncertainty about whether supervised release is tolled matters little from either the court's or the defendant's perspective. As for the court, the defendant need not be supervised when he is held in custody, so it does not strike us as "odd" to make a delayed determination concerning tolling. *Marsh*, *supra*, at 710. The court need not monitor the defendant's progress in transitioning back into the community because the defendant is not *in* the community. And if the court is concerned about losing authority over the defendant because of an impending conclusion to supervised release, it can simply issue a summons or warrant under § 3583(i) for alleged violations.

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As for the defendant, there is nothing unfair about not knowing during pretrial detention whether he is also subject to court supervision. The answer to that question cannot meaningfully influence his behavior. A defendant in custody will be unable to comply with many ordinary conditions of supervised release intended to reacclimate him to society—for example, making restitution payments, attending substance-abuse counseling, meeting curfews, or participating in job training. The rules he can "comply" with are generally mandated by virtue of being in prison—for example, no new offenses or use of drugs. See §§ 3563(a)–(b) (listing mandatory and discretionary condi-

tions). In this case, Mont's supervised-release conditions required that he "work regularly at a lawful occupation" and "support his . . . dependants and meet other family responsibilities." Judgment in No. 4:05–cr–00229 (ND Ohio), Doc. 37, at 111. Mont could not fulfill these conditions while sitting in an Ohio jail, and his probation officer correctly deemed him "unavailable for supervision."[2] App. 21.

III

Applying § 3624(e) to Mont, the pretrial-detention period tolled his supervised release beginning in June 2016. Mont therefore had about nine months remaining on his term of supervised release when the District Court revoked his supervised release and sentenced him to an additional 42 months' imprisonment. And because § 3624(e) independently tolled the supervised-release period, it is immaterial whether the District Court could have issued a summons or warrant under § 3583(i) to preserve its authority.

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* * *

In light of the statutory text and context of § 3624(e), pretrial detention qualifies as "imprison[ment] in connection with a conviction" if a later imposed sentence credits that detention as time served for the new offense. Such pretrial detention tolls the supervised-release period, even though the District Court may need to make the tolling determina-

[2] Although a defendant in pretrial detention is unable to be supervised, it does not necessarily follow that the defendant will be punished by his inability to comply with the terms of his supervised release if the detention period is *not* later credited as time served for a conviction. In that circumstance, the district court may always modify the terms of his supervision. See 18 U. S. C. § 3583(e)(2). And, as the Government explained at oral argument, modification of supervised release may not be necessary to the extent that "the defendant can't be deemed to have been required to" comply with the terms of supervised release while in custody. Tr. of Oral Arg. 45.

tion after the conviction. Accordingly, we affirm the judgment of the Sixth Circuit.

It is so ordered.

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

A term of supervised release is tolled when an offender "is imprisoned in connection with a conviction." 18 U. S. C. § 3624(e). The question before the Court is whether pretrial detention later credited as time served for a new offense has this tolling effect. The Court concludes that it does, but it reaches that result by adopting a backward-looking approach at odds with the statute's language and by reading the terms "imprisoned" and "in connection with" in unnatural isolation. Because I cannot agree that a person "is imprisoned in connection with a conviction" before any conviction has occurred, I respectfully dissent.

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I

A

The Sentencing Reform Act of 1984 empowers a court to impose a term of supervised release following imprisonment. See 18 U. S. C. §§ 3583(a), (b).

The clock starts running on a supervised release term when the offender exits the jailhouse doors. § 3624(e). During the term, offenders are bound to follow court-imposed conditions. Some apply to all supervised release terms, such as a requirement to refrain from committing other crimes. § 3583(d). Others apply only at a sentencing court's discretion, such as a condition that the offender allow visits from a probation officer. See § 3563(b)(16); § 3583(d). The probation officer, in turn, is tasked with monitoring and seeking to improve the offender's "conduct and condition" and reporting to the sentencing court, among other duties. § 3603. During the supervised release term, the court has the power to change its conditions and to extend the term if

less than the maximum term was previously imposed. § 3583(e)(2). If an offender violates any of the conditions of release, the court can revoke supervised release and require the person to serve all or part of the supervised release term in prison, without giving credit for time previously served on postrelease supervision. § 3583(e)(3).

In the normal course, a supervised release term ends after the term specified by the district court. But, crucially, the term "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." § 3624(e). In other words, certain periods of "imprisonment" postpone the expiration of the supervised release term.

A district court's revocation power generally lasts only as long as the supervised release term. If the court issues a warrant or summons for an alleged violation before the term expires, however, the court's revocation power can extend for a "reasonably necessary" period beyond the term's expiration. § 3583(i).

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B

Though the mechanics of supervised release tolling may seem arcane, these calculations can have weighty consequences. For petitioner Jason Mont, tolling enabled a court to order an additional 3½ years of federal imprisonment after he serves his current state sentence.

Mont was convicted in 2005 for federal drug and gun crimes. The District Court sentenced him to prison time and to five years of supervised release. In 2012, Mont was released from prison and his supervised release term began. Left to run its course, the term would have ended on March 6, 2017.[1]

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[1] I accept the dates as given in the Sixth Circuit's opinion, although that opinion notes some immaterial discrepancies in the record. See 723 Fed. Appx. 325, 326, nn. 1–2 (2018).

Mont's time on supervised release did not go well. In January 2016, his probation officer informed the District Court that Mont had failed two drug tests and tried to pass two further drug tests by using an "'unknown'" liquid. 723 Fed. Appx. 325, 326 (CA6 2018). The officer noted that Mont also had been charged with state marijuana-trafficking offenses. Upon learning of these alleged violations of the supervised release conditions, the District Court could have issued a warrant for Mont's arrest, but it did not do so at that time.

On June 1, 2016, Mont was arrested on a new state indictment for trafficking cocaine, and the State took him into custody. The probation officer reported the arrest to the District Court, but the record does not reflect any action by the court in response. After several months in custody, Mont pleaded guilty to certain of the state charges. He also admitted to the District Court that he had violated the terms of his supervised release, and he requested a hearing. The District Court set a November hearing to consider his alleged supervised release violation, but continuances delayed that hearing. Months more passed as Mont, still detained, awaited sentencing. In the meantime, the original end date of his federal supervised release term—March 6, 2017—came and went. On March 21, 2017, the state court sentenced Mont to six years in prison and retroactively credited the approximately 10 months he had spent in pretrial detention toward his sentence.

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At that point, Mont's probation officer reported Mont's state convictions and sentences to the Federal District Court, which—after its many earlier opportunities—finally issued a warrant for Mont's arrest on March 30, 2017. Mont objected, claiming that the court had no power to issue the warrant because his supervised release term had expired on March 6. The District Court rejected that contention and

sentenced Mont to 42 months in prison, to run consecutively to his state sentence.[2]

The United States Court of Appeals for the Sixth Circuit affirmed. In its view, the District Court had jurisdiction to revoke Mont's supervised release because his pretrial detention triggered the tolling provision in § 3624(e) and thus shifted back the end date of his supervised release term. The Sixth Circuit construed the tolling provision to apply to Mont's detention because his state-court indictment ultimately led to a conviction and Mont subsequently received credit for the period of detention as time served for that conviction.

II

The majority errs by affirming the Sixth Circuit's construction of the tolling statute. Most naturally read, a person "is imprisoned in connection with a conviction" only while he or she serves a prison term after a conviction. The statute does not allow for tolling when an offender is in pretrial detention and a conviction is no more than a possibility.

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The first clue to the meaning of § 3624(e) is its present-tense construction. In normal usage, no one would say that a person "is imprisoned in connection with a conviction" before any conviction has occurred, because the phrase would convey something that is not yet—and, indeed, may never be—true: that the detention has the requisite connection to a conviction. After all, many detained individuals are never convicted because they ultimately are acquitted or have their

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[2] The District Court held that it had jurisdiction because of a summons it issued on November 1, 2016, which would have given the court power to sanction a supervised release violation even after the term expired. See 18 U. S. C. § 3583(i). The Sixth Circuit did not affirm on this ground, however, because it "failed to detect any . . . evidence in the record" of a November 2016 summons. 723 Fed. Appx., at 329, n. 5.

cases dismissed.[3] Until a conviction happens, it is impossible to tell whether any given pretrial detention is "connect[ed] with" a conviction or not.

Reading the phrase "is imprisoned" to require a real-time assessment of the character of a conviction does not just match the colloquial sense of the phrase; it also gives meaning to the tense of the words Congress chose. The Court generally "look[s] to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 560 U. S. 438, 448 (2010). Doing so abides by the Dictionary Act, which provides that "words used in the present tense include the future as well as the present" absent contextual clues to the contrary, 1 U. S. C. § 1, and thus "the present tense generally does not include the past," *Carr*, 560 U. S., at 448. Applying this presumption here leads to the straightforward result that the phrase "is imprisoned" does not mean "was imprisoned." Adhering to the present-tense framework of the statute, then, pretrial detention does not meet the statutory definition, no matter what later happens.

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The other language in § 3624(e)—"imprisoned in connection with a conviction"—confirms this result. Had Congress wanted to toll supervised release during pretrial confinement, it could have chosen an alternative to the word "imprisoned" that more readily conveys that intent, such as "confined" or "detained." See Black's Law Dictionary 362 (10th ed. 2014) (defining "confinement" as "the quality, state, or condition of being imprisoned or restrained"); *id.*, at 543 (defining "detention" as "[t]he act or an instance of holding a person in custody; confinement or compulsory delay"). Instead, Congress selected a word—"imprisoned"—that is

[3] See Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, T. Cohen & B. Reaves, Pretrial Release of Felony Defendants in State Courts; State Court Processing Statistics, 1990–2004, p. 7 (Nov. 2007) (roughly one in five defendants held in pretrial detention for state felony charges conclude their cases without a conviction), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf (as last visited May 30, 2019).

most naturally understood in context to mean postconviction incarceration.

Congress regularly uses the word "imprisoned" (or "imprisonment") to refer to a prison term following a conviction. The United States Code is littered with statutes providing that an individual shall be "imprisoned" following a conviction for a specific offense. See, *e. g.*, 18 U. S. C. §§ 1832, 2199, 2344. Congress also classifies crimes as felonies, misdemeanors, or infractions based on "the maximum term of imprisonment authorized." § 3559(a). And even in the Sentencing Reform Act itself, which added the tolling provision at issue, Congress used the word "imprisonment" to refer to incarceration after a conviction. See § 3582(a) (describing the factors courts consider when imposing "a term of imprisonment"); § 3582(b) (referring to "a sentence to imprisonment"); § 3582(c)(1)(B) (discussing when courts may "modify an imposed term of imprisonment").

This Court also has previously equated the word "imprisonment" with a "prison term" or a "sentence"—phrases that imply post-trial detention. See *Tapia* v. *United States*, 564 U. S. 319, 327 (2011) (referring in passing to "imprisonment" as a "prison term"); *Barber* v. *Thomas*, 560 U. S. 474, 484 (2010) ("'[T]erm of imprisonment'" can refer "to the sentence that the judge imposes" or "the time that the prisoner actually serves" of such a sentence); see also *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972) ("[N]o person may be imprisoned for any offense . . . unless he was represented by counsel at his trial").

To be sure, dictionary definitions of the word "imprison" sweep more broadly than just post-trial incarceration. See *ante*, at 521. But the word "imprisoned" does not appear in this statute in isolation; Congress referred to imprisonment "in connection with a conviction." As part of that phrase and given its usual meaning, the word "imprisoned" is best read as referring to the state of an individual serving time following a conviction.

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The present tense of the statute and the phrase "imprisoned in connection with a conviction" thus lead to the same conclusion: Pretrial detention does not toll supervised release.[4]

III

The majority justifies a contrary interpretation of the tolling provision only by jettisoning the present-tense view of the statute and affording snippets of text broader meaning than they merit in context.

The majority's first error is its conclusion that courts can take a wait-and-see approach to tolling. If a conviction ultimately materializes and a court credits the offender's pretrial custody toward the resulting sentence, the majority reasons, then the pretrial detention retroactively will toll supervised release. If not, then there will be no tolling. See *ante*, at 521–523. The offender's supervised release status thus will be uncertain until the court calculates tolling either "upon the defendant's release from custody or upon entry of judgment." *Ante*, at 523.

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The majority's retrospective approach cannot be squared with the language of § 3624(e). Because Congress phrased the provision in the present tense, the statute calls for a contemporaneous assessment of whether a person "is imprisoned" with the requisite connection to a conviction. The majority erroneously shifts the statute's frame of reference

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[4] I note that rejecting the Sixth Circuit's contrary interpretation of the statute would not necessarily resolve this case in Mont's favor. The Government views Mont's guilty plea as a "conviction" and thus argues that his supervised release should, at the least, have been tolled during the five months he was detained between his plea and sentencing. See Brief for United States 39–44. Because the Sixth Circuit did not directly address whether a guilty plea constitutes a "conviction," the appropriate course would be to remand to the Sixth Circuit to consider this argument in the first instance. See, *e. g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

from that present-tense assessment (what is) to a backward-looking review (what was or what has been).[5]

The majority's textual argument hinges on what the majority perceives to be an advantage of the retrospective approach: It accounts for the fact that the statute provides for tolling only if a period of imprisonment lasts longer than 30 days. § 3624(e). According to the majority, the 30-day provision shows Congress' expectation that courts look backward when evaluating whether tolling is appropriate. If Congress anticipated such an analysis as to the length of the detention, the majority implies, surely it provided more generally for backward-looking review of the relationship between the detention and any ensuing conviction. See *ante*, at 523.

This argument, however, assumes a problem of the majority's own making. The 30-day minimum creates no anomalies if the statute is read to toll supervised release only during detention following a conviction. Under that more natural reading, courts in most cases will not be left in the dark about the length of a period of detention or its relationship to a conviction; the conviction and sentence of imprisonment at the time imposed will answer both questions.[6]

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[5] Although Congress did not use a phrase like "was imprisoned" or "has been imprisoned" in this provision, it did employ such formulations in several other tolling provisions. See 38 U. S. C. § 3103(b)(3) (eligibility period "shall not run" during any period in which a veteran "was . . . prevented" from accessing a rehabilitation program); § 3031(b) (time period "shall not run" during a period in which an individual "had not met" a discharge requirement); 29 U. S. C. § 1854(f) (statute of limitations for a federal claim "shall be tolled" for the period in which a related state-law claim "was pending").

[6] The Government gestures to some uncertainties inherent in predicting the length of imprisonment even following a conviction, such as the presence of indeterminate sentencing schemes and the possibility that a determinate sentence can be shortened or interrupted temporarily. See Brief for United States 34–35 (citing 18 U. S. C. §§ 3621(e)(2)(B), 3622). However, these provisions in no way suggest that a court regularly would find itself unsure whether a prisoner's sentence will extend past 30 days.

Under the majority's approach, however, this language creates a dilemma. Unlike a term of imprisonment following a conviction, the duration of pretrial confinement is uncertain at its outset. Thus if (as the majority contends) Congress meant to toll such periods of detention, the 30-day limitation means that every single time a person on supervised release enters detention, it will be unclear for up to a month whether the supervised release term is being tolled or not. See *ante*, at 523 (conceding that there will be "no way for a court to know on day 5 of a defendant's pretrial detention whether the period of custody will extend beyond 30 days"). If pretrial detention lasts longer than 30 days, the uncertainty will continue until a judgment of conviction is entered and credit for pretrial detention is computed.

But the difficulties inherent in predicting how long pretrial detention will last (and whether that detention eventually will turn out to have any connection to a conviction, see *supra*, at 531–532, and n. 3) most naturally compel the conclusion that Congress never intended to force district courts to grapple with them in the first place. These uncertainties generally would not arise—and courts thus would not need to rely on hindsight—if the Court were to adopt Mont's reading. Yet the majority instead takes as a given that the statute tolls supervised release during pretrial detention, and then uses the uncertainties inherent in that process to justify a backward-looking analysis.

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The majority's error is compounded by the centerpiece of its textual analysis, which relies on artificially isolating the terms "imprisoned" and "in connection with." The majority says that imprisonment is a term so capacious as to encompass pretrial detention, *ante*, at 521–522, and that the phrase "in connection with" sweeps broadly enough to include pretrial detention that is ultimately credited to a new sentence, *ante*, at 522.

Whether or not these phrases independently have the far-reaching meaning that the majority ascribes to them—a

conclusion that is by no means inevitable—the terms are still limited by their relationship to each other and by the present-tense framework of the statute. Individual phrases must not be taken "'in a vacuum,'" because doing so overrides the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Home Depot U. S. A., Inc.* v. *Jackson*, *ante*, at 441 (quoting *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)). As discussed, in the context of a phrase referring to conviction, the term "imprisoned" most naturally means imprisonment following a conviction. *Supra*, at 532–533. And seen from the point at which a person is detained and awaiting a verdict, his confinement is not "in connection with" a conviction that has not happened and may never occur.

IV

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The majority's approach has the further flaw of treating tolling as the only meaningful avenue to preserve a district court's revocation power when an offender is detained pretrial. But the statute already provides a way for a court to extend its revocation power: If a court issues a warrant or summons while the supervised release term is running, that action triggers an extension of the court's revocation authority "beyond" the supervised release term "for any period reasonably necessary for the adjudication" of the matters that led to the warrant or summons. See § 3583(i).

In this very case, the District Court had at least three opportunities to issue a warrant prior to the expiration of Mont's original supervised release term. Mont's probation officer notified the District Court of Mont's potential supervised release violations in January 2016, more than a year before Mont's supervised release was set to expire. 723 Fed. Appx., at 326. In June 2016, the probation

officer alerted the District Court to Mont's arrest. *Ibid.* And in October 2016, Mont filed a written admission with the District Court that he had violated supervised release. *Id.*, at 326–327. The District Court was empowered at each step of this process to issue a warrant. Indeed, the court apparently intended to do just that after Mont's written admission, though the Sixth Circuit later found that there was no evidence of such a warrant in the record. See *id.*, at 329, n. 5.

In sum, the delayed revocation process provides a straightforward, and statutorily prescribed, path for district courts to decide which charges are significant enough to justify a warrant and thus to extend the court's revocation power. The majority's overly broad reading of the tolling provision is thus unnecessary as well as a distortion of the clear statutory text.

V

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Lacking a strong textual basis for its backward-looking analysis, the majority is left to rely on intuitions about how best to fulfill the statute's purpose.

To begin with, the majority emphasizes that supervised release and incarceration have different aims. See *ante*, at 523–525. True enough. The Court has explained that supervised release is intended "to assist individuals in their transition to community life," and as a result is not "interchangeable" with periods of incarceration. *United States* v. *Johnson*, 529 U. S. 53, 58–60 (2000). But the goals of supervised release can be fulfilled to some degree even when an offender is detained. Cf. *Burns* v. *United States*, 287 U. S. 216, 223 (1932) (noting that a probationer is still "subject to the conditions of" probation "even in jail"). Offenders on supervised release may well be able to comply with several mandatory conditions of supervised release while detained, such as submitting to a DNA sample or taking drug tests. See § 3583(d). And probation officers have experience coordinating with correctional facilities in the prere-

lease context. See § 3624(c)(3) (providing that the probation system "shall, to the extent practicable, offer assistance to a prisoner during prerelease custody").

Even if an offender's detention does make it meaningfully harder to fulfill the goals of supervised release, moreover, the majority's reading permits the same incongruities. Under the majority's interpretation, supervised release continues to run for offenders who are confined pretrial for less than 30 days and for those who are detained pretrial but are later acquitted or released after charges are dropped. See Tr. of Oral Arg. 34.[7] At best, the majority offers a half-a-loaf policy rationale that cannot justify departing from the best reading of the statute's text.

The majority also invokes the general principle against double-counting sentences, see, *e. g.*, § 3585(b), and objects that Mont's reading of the statute would give defendants a "windfall." *Ante*, at 524. This argument, however, fails to recognize the distinct character of pretrial detention. Its purpose is to ensure that an alleged offender attends trial and is incapacitated if he or she is a danger to the community, not to punish the offender for a conviction. See *United States* v. *Morales-Alejo*, 193 F. 3d 1102, 1105 (CA9 1999) (citing § 3142(c); *United States* v. *Salerno*, 481 U. S. 739, 748 (1987)). A State or the Federal Government may later choose to credit an equivalent period of time toward a new

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[7] Imagine two offenders on supervised release and detained pending trial on similar charges who receive precisely the same supervision during their detention. One ultimately is convicted and the other's charges are dismissed on statute of limitations grounds. Today's decision means that the detention time for the convicted person will not count toward his or her supervised release term, even though the detention of the other person—who was detained for similar conduct and received the same monitoring and supervision—will count down the supervised release clock. The better practice is to read the statute on its plain terms and rely on a district court's power to clarify any ambiguity in its authority by issuing a warrant when an alleged supervised release violation is sufficiently serious. See § 3583(i).

sentence, but that credit does not retroactively transform the character of the detention itself into "imprison[ment] in connection with a conviction," § 3624(e)—particularly in the context of this present-tense statute.

In any event, the majority's approach creates a serious risk of unfairness. Offenders in pretrial detention will have no notice of whether they are bound by the terms of supervised release. This effectively compels all offenders to comply with the terms of their release, even though only some will ultimately get credit for that compliance, because otherwise they risk being charged with a violation if their supervised release term is not tolled.[8] Although the majority indicates that offenders generally will comply with the terms of their release simply by following prison rules, the range of supervised release conditions is too broad to guarantee complete overlap with prison directives. See, *e. g.*, Doherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, 88 N. Y. U. L. Rev. 958, 1012–1013 (2013) (describing mandatory condition of cooperating in DNA collection and special conditions of taking prescribed medications and undergoing periodic polygraph testing). Altogether, I am not nearly as sanguine as the majority that the uncertainty created by the majority's expansive tolling rule "matters little from either the court's or the defendant's perspective." *Ante*, at 526.

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The Court errs by treating Mont's pretrial detention as tolling his supervised release term. Because its approach misconstrues the operative text and fosters needless uncertainty and unfairness, I respectfully dissent.

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[8] The majority suggests that offenders will not necessarily face punishment for a failure to comply with supervision conditions while in detention. *Ante*, at 527, n. 2. Given the consequences of revocation, however, offenders may well be unwilling to take that chance. See *supra*, at 529; § 3583(e)(3).

Syllabus

FORT BEND COUNTY, TEXAS *v.* DAVIS

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

No. 18–525. Argued April 22, 2019—Decided June 3, 2019

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U. S. C. § 2000e–2(a)(1). The Act instructs a complainant, before commencing a Title VII action in court, to file a charge with the Equal Employment Opportunity Commission (EEOC or Commission). § 2000e–5(e)(1), (f)(1). On receipt of a charge, the EEOC is to notify the employer and investigate the allegations. § 2000e–5(b). The Commission may "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of . . . conciliation." *Ibid.* The EEOC also has first option to "bring a civil action" against the employer in court. § 2000e–5(f)(1). But the Commission has no authority itself to adjudicate discrimination complaints. If the EEOC chooses not to sue, and whether or not the EEOC otherwise acts on the charge, a complainant is entitled to a "right-to-sue" notice 180 days after the charge is filed. *Ibid.*; 29 CFR § 1601.28. On receipt of the right-to-sue notice, the complainant may commence a civil action against her employer. § 2000e–5(f)(1).

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Respondent Lois M. Davis filed a charge against her employer, petitioner Fort Bend County. Davis alleged sexual harassment and retaliation for reporting the harassment. While her EEOC charge was pending, Fort Bend fired Davis because she failed to show up for work on a Sunday and went to a church event instead. Davis attempted to supplement her EEOC charge by handwriting "religion" on a form called an "intake questionnaire," but she did not amend the formal charge document. Upon receiving a right-to-sue letter, Davis commenced suit in Federal District Court, alleging discrimination on account of religion and retaliation for reporting sexual harassment.

After years of litigation, only the religion-based discrimination claim remained in the case. Fort Bend then asserted for the first time that the District Court lacked jurisdiction to adjudicate Davis' case because her EEOC charge did not state a religion-based discrimination claim. The District Court agreed and granted Fort Bend's motion to dismiss Davis' suit. On appeal from the dismissal, the Court of Appeals for the Fifth Circuit reversed. Title VII's charge-filing requirement, the Court

of Appeals held, is not jurisdictional; instead, the requirement is a prudential prerequisite to suit, forfeited in Davis' case because Fort Bend had waited too long to raise the objection.

Held: Title VII's charge-filing requirement is not jurisdictional. Pp. 547–553.

(a) The word "jurisdictional" is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction). *Kontrick* v. *Ryan*, 540 U. S. 443, 455. A claim-processing rule requiring parties to take certain procedural steps in, or prior to, litigation, may be mandatory in the sense that a court must enforce the rule if timely raised. *Eberhart* v. *United States*, 546 U. S. 12, 19. But a mandatory rule of that sort, unlike a prescription limiting the kinds of cases a court may adjudicate, is ordinarily forfeited if not timely asserted. *Id.*, at 15. Pp. 547–550.

(b) Title VII's charge-filing requirement is a nonjurisdictional claim-processing rule. The requirement is stated in provisions of Title VII discrete from the statutory provisions empowering federal courts to exercise jurisdiction over Title VII actions. The charge-filing instruction is kin to prescriptions the Court has ranked as nonjurisdictional—for example, directions to raise objections in an agency rulemaking before asserting them in court, *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 511–512, or to follow procedures governing copyright registration before suing for infringement, *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 157. Pp. 550–553.

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893 F. 3d 300, affirmed.

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

Colleen E. Roh Sinzdak argued the cause for petitioner. With her on the briefs were *Neal Kumar Katyal*, *Mitchell P. Reich*, and *Randall W. Morse*.

Raffi Melkonian argued the cause for respondent. With him on the brief were *Thomas C. Wright*, *R. Russell Hollenbeck*, *Brian H. Fletcher*, and *Pamela S. Karlan*.

Jonathan C. Bond argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Dreiband*, *Deputy Solicitor General Wall*, *Bonnie I.*

Robin-Vergeer, *James L. Lee*, *Jennifer S. Goldstein*, *Elizabeth E. Theran*, and *Gail S. Coleman*.*

JUSTICE GINSBURG delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin. 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). The Act also prohibits retaliation against persons who assert rights under the statute. §2000e–3(a). As a precondition to the commencement of a Title VII action in court, a complainant must first file a charge with the Equal Employment Opportunity Commission (EEOC or Commission). §2000e–5(e)(1), (f)(1). The question this case presents: Is Title VII's charge-filing precondition to suit a "jurisdictional" requirement that can be raised at any stage of a proceeding; or is it a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted? We hold that Title VII's charge-filing instruction is not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction). *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004). Prerequisites to suit like Title VII's charge-filing instruction are not of that character; they are

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*Briefs of *amici curiae* urging reversal were filed for the Center for Workplace Compliance et al. by *Rae T. Vann*, *Karen R. Harned*, *Elizabeth Milito*, and *Daryl Joseffer*; and for the National Conference of State Legislatures et al. by *Collin O'Connor Udell* and *Lisa Soronen*.

Briefs of *amicus curiae* urging affirmance were filed for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Ashwin P. Phatak*; for the NAACP Legal Defense & Educational Fund, Inc., by *Sherrilyn A. Ifill*, *Janai S. Nelson*, and *Samuel Spital*; and for the National Employment Lawyers Association et al. by *Michael L. Foreman*.

Scott Dodson filed a brief of *amicus curiae*, *pro se*.

properly ranked among the array of claim-processing rules that must be timely raised to come into play.

I

Title VII directs that a "charge . . . shall be filed" with the EEOC "by or on behalf of a person claiming to be aggrieved" within 180 days "after the alleged unlawful employment practice occur[s]." 42 U. S. C. § 2000e–5(b), (e)(1). For complaints concerning a practice occurring in a State or political subdivision that has a fair employment agency of its own empowered "to grant or seek relief," Title VII instructs the complainant to file her charge first with the state or local agency. § 2000e–5(c). The complainant then has 300 days following the challenged practice, or 30 days after receiving notice that state or local proceedings have ended, "whichever is earlier," to file a charge with the EEOC. § 2000e–5(e)(1). If the state or local agency has a "worksharing" agreement with the EEOC, a complainant ordinarily need not file separately with federal and state agencies. She may file her charge with one agency, and that agency will then relay the charge to the other. See 29 CFR § 1601.13 (2018); Brief for United States as *Amicus Curiae* 3.

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When the EEOC receives a charge, in contrast to agencies like the National Labor Relations Board, 29 U. S. C. § 160, and the Merit Systems Protection Board, 5 U. S. C. § 1204, it does not "adjudicate [the] clai[m]," *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). Instead, Title VII calls for the following course. Upon receiving a charge, the EEOC notifies the employer and investigates the allegations. 42 U. S. C. § 2000e–5(b). If the Commission finds "reasonable cause" to believe the charge is true, the Act instructs the Commission to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* When informal methods do not resolve the charge, the EEOC has first option to "bring a civil action" against the employer in court.

§ 2000e–5(f)(1). Where the discrimination charge is lodged against state or local government employers, the Attorney General is the federal authority empowered to commence suit. *Ibid.*[1]

In the event that the EEOC determines there is "n[o] reasonable cause to believe that the charge is true," the Commission is to dismiss the charge and notify the complainant of his or her right to sue in court. 42 U. S. C. § 2000e–5(b), (f)(1); 29 CFR § 1601.28. Whether or not the EEOC acts on the charge, a complainant is entitled to a "right-to-sue" notice 180 days after the charge is filed. § 2000e–5(f)(1); 29 CFR § 1601.28. And within 90 days following such notice, the complainant may commence a civil action against the allegedly offending employer. § 2000e–5(f)(1).

II

Respondent Lois M. Davis worked in information technology for petitioner Fort Bend County. In 2010, she informed Fort Bend's human resources department that the director of information technology, Charles Cook, was sexually harassing her. Following an investigation by Fort Bend, Cook resigned. Davis' supervisor at Fort Bend, Kenneth Ford, was well acquainted with Cook. After Cook resigned, Davis alleges, Ford began retaliating against her for reporting Cook's sexual harassment. Ford did so, according to Davis, by, *inter alia*, curtailing her work responsibilities.

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Seeking redress for the asserted harassment and retaliation, Davis submitted an "intake questionnaire" in February 2011, followed by a charge in March 2011.[2] While her

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[1] A different provision of Title VII, 42 U. S. C. § 2000e–16, prohibits employment discrimination by the Federal Government and sets out procedures applicable to claims by federal employees.

[2] Davis submitted these documents to the Texas Workforce Commission. Complaints lodged with that commission are relayed to the EEOC, under a "worksharing" agreement between the two agencies. See How To Submit an Employment Discrimination Complaint, Texas Workforce Commission,

EEOC charge was pending, Davis was told to report to work on an upcoming Sunday. Davis informed her supervisor Ford that she had a commitment at church that Sunday, and she offered to arrange for another employee to replace her at work. Ford responded that if Davis did not show up for the Sunday work, she would be subject to termination. Davis went to church, not work, that Sunday. Fort Bend thereupon fired her.

Attempting to supplement the allegations in her charge, Davis handwrote "religion" on the "Employment Harms or Actions" part of her intake questionnaire, and she checked boxes for "discharge" and "reasonable accommodation" on that form. She made no change, however, in the formal charge document. A few months later, the Department of Justice notified Davis of her right to sue.

In January 2012, Davis commenced a civil action in the United States District Court for the Southern District of Texas, alleging discrimination on account of religion and retaliation for reporting sexual harassment.[3] The District Court granted Fort Bend's motion for summary judgment. *Davis* v. *Fort Bend County*, 2013 WL 5157191 (SD Tex., Sept. 11, 2013). On appeal, the Court of Appeals for the Fifth Circuit affirmed as to Davis' retaliation claim, but reversed as to her religion-based discrimination claim. *Davis* v. *Fort Bend County*, 765 F. 3d 480 (2014). Fort Bend filed a petition for certiorari, which this Court denied. 576 U. S. 1004 (2015).

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When the case returned to the District Court on Davis' claim of discrimination on account of religion, Fort Bend moved to dismiss the complaint. Years into the litigation, Fort Bend asserted for the first time that the District Court

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https://twc.texas.gov/jobseekers/how-submit-employment-discrimination-complaint (as last visited May 30, 2019).

[3] Davis also alleged intentional infliction of emotional distress, but she did not appeal the District Court's grant of summary judgment to Fort Bend on that claim.

lacked jurisdiction to adjudicate Davis' religion-based discrimination claim because she had not stated such a claim in her EEOC charge. Granting the motion, the District Court held that Davis had not satisfied the charge-filing requirement with respect to her claim of religion-based discrimination, and that the requirement qualified as "jurisdictional," which made it nonforfeitable. 2016 WL 4479527 (SD Tex., Aug. 24, 2016).

The Fifth Circuit reversed. 893 F. 3d 300 (2018). Title VII's charge-filing requirement, the Court of Appeals held, is not jurisdictional; instead, the requirement is a prudential prerequisite to suit, forfeited in Davis' case because Fort Bend did not raise it until after "an entire round of appeals all the way to the Supreme Court." *Id.*, at 307–308.

We granted Fort Bend's petition for certiorari, 586 U. S. 1113 (2019), to resolve a conflict among the Courts of Appeals over whether Title VII's charge-filing requirement is jurisdictional. Compare, *e. g.*, 893 F. 3d, at 306 (case below) (charge-filing requirement is nonjurisdictional), with, *e. g.*, *Jones* v. *Calvert Group, Ltd.*, 551 F. 3d 297, 300 (CA4 2009) (federal courts lack subject-matter jurisdiction when the charge-filing requirement is not satisfied).

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III

"Jurisdiction," the Court has observed, "is a word of many, too many, meanings." *Kontrick*, 540 U. S., at 454 (quoting *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998)).[4] In recent years, the Court has undertaken "[t]o

[4] "Courts, including this Court, . . . have more than occasionally [mis]-used the term 'jurisdictional' " to refer to nonjurisdictional prescriptions. *Scarborough* v. *Principi*, 541 U. S. 401, 413 (2004) (quoting *Kontrick* v. *Ryan*, 540 U. S. 443, 454 (2004) (alterations in original)). Passing references to Title VII's charge-filing requirement as "jurisdictional" in prior Court opinions, see, *e. g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973), display the terminology employed when the Court's use of "jurisdictional" was "less than meticulous," *Kontrick*, 540 U. S., at 454.

ward off profligate use of the term." *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013). As earlier noted, see *supra*, at 543, the word "jurisdictional" is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction). *Kontrick*, 540 U. S., at 455.

Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision, as Congress has done with the amount-in-controversy requirement for federal-court diversity jurisdiction. See 28 U. S. C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different States . . . ."). In addition, the Court has stated it would treat a requirement as "jurisdictional" when "a long line of [Supreme] Cour[t] decisions left undisturbed by Congress" attached a jurisdictional label to the prescription. *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 82 (2009) (citing *Bowles* v. *Russell*, 551 U. S. 205, 209–211 (2007)). See also *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 132 (2008).

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Characterizing a rule as a limit on subject-matter jurisdiction "renders it unique in our adversarial system." *Auburn*, 568 U. S., at 153. Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant "at any point in the litigation," and courts must consider them *sua sponte*. *Gonzalez* v. *Thaler*, 565 U. S. 134, 141 (2012). "[H]arsh consequences" attend the jurisdictional brand. *United States* v. *Kwai Fun Wong*, 575 U. S. 402, 409 (2015). "Tardy jurisdictional objections" occasion wasted court resources and "disturbingly disarm litigants." *Auburn*, 568 U. S., at 153.

The Court has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules, which "seek to promote the orderly prog-

ress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 562 U. S. 428, 435 (2011). A claim-processing rule may be "mandatory" in the sense that a court must enforce the rule if a party "properly raise[s]" it. *Eberhart* v. *United States*, 546 U. S. 12, 19 (2005) (*per curiam*). But an objection based on a mandatory claim-processing rule may be forfeited "if the party asserting the rule waits too long to raise the point." *Id.*, at 15 (quoting *Kontrick*, 540 U. S., at 456).[5]

The Court has characterized as nonjurisdictional an array of mandatory claim-processing rules and other preconditions to relief. These include: the Copyright Act's requirement that parties register their copyrights (or receive a denial of registration from the Copyright Register) before commencing an infringement action, *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 157, 163–164 (2010); the Railway Labor Act's direction that, before arbitrating, parties to certain railroad labor disputes "attempt settlement 'in conference,'" *Union Pacific*, 558 U. S., at 82 (quoting 45 U. S. C. § 152); the Clean Air Act's instruction that, to maintain an objection in court on certain issues, one must first raise the objection "with reasonable specificity" during agency rulemaking, *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 511–512 (2014) (quoting 42 U. S. C. § 7607(d)(7)(B)); the Antiterrorism and Effective Death Penalty Act's requirement that a certificate of appealability "indicate [the] specific issue" warranting issuance of the certificate, *Gonzalez*, 565 U. S., at 137 (quoting 28 U. S. C. § 2253(c)(3)); Title VII's limitation of covered "employer[s]" to those with 15 or more employees, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 503–504 (2006) (quoting 42 U. S. C. § 2000e(b)); Title VII's time limit for filing a charge with the EEOC, *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982); and several other time prescriptions

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[5] The Court has "reserved whether mandatory claim-processing rules may [ever] be subject to equitable exceptions." *Hamer* v. *Neighborhood Housing Servs. of Chicago*, 583 U. S. 17, 20, n. 3 (2017).

for procedural steps in judicial or agency forums. See, *e. g.*, *Hamer* v. *Neighborhood Housing Servs. of Chicago*, 583 U. S. 17, 27 (2017); *Musacchio* v. *United States*, 577 U. S. 237, 246 (2016); *Kwai Fun Wong*, 575 U. S., at 412; *Auburn*, 568 U. S., at 149; *Henderson*, 562 U. S., at 431; *Eberhart*, 546 U. S., at 13; *Scarborough* v. *Principi*, 541 U. S. 401, 414 (2004); *Kontrick*, 540 U. S., at 447.[6]

While not demanding that Congress "incant magic words" to render a prescription jurisdictional, *Auburn*, 568 U. S., at 153, the Court has clarified that it would "leave the ball in Congress' court": "If the Legislature clearly states that a [prescription] count[s] as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue[;] [b]ut when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U. S., at 515–516 (footnote and citation omitted).

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IV

Title VII's charge-filing requirement is not of jurisdictional cast. Federal courts exercise jurisdiction over Title VII actions pursuant to 28 U. S. C. § 1331's grant of general federal-question jurisdiction, and Title VII's own jurisdictional provision, 42 U. S. C. § 2000e–5(f)(3) (giving federal courts "jurisdiction [over] actions brought under this subchapter").[7] Separate provisions of Title VII, § 2000e–5(e)(1)

[6] "If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation [will rank as] jurisdictional; otherwise, the time specification fits within the claim-processing category." *Hamer*, 583 U. S., at 25 (citation omitted).

[7] When Title VII was passed in 1964, 28 U. S. C. § 1331's grant of general federal-question jurisdiction included an amount-in-controversy requirement. See § 1331(a) (1964 ed.). To ensure that this "limitation would not impede an employment-discrimination complainant's access to a federal forum," *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 505 (2006), Congress enacted Title VII's jurisdiction-conferring provision, 42 U. S. C. § 2000e–

and (f)(1), contain the Act's charge-filing requirement. Those provisions "d[o] not speak to a court's authority," *EME Homer*, 572 U. S., at 512, or "refer in any way to the jurisdiction of the district courts," *Arbaugh*, 546 U. S., at 515 (quoting *Zipes*, 455 U. S., at 394).

Instead, Title VII's charge-filing provisions "speak to . . . a party's procedural obligations." *EME Homer*, 572 U. S., at 512. They require complainants to submit information to the EEOC and to wait a specified period before commencing a civil action. Like kindred provisions directing parties to raise objections in agency rulemaking, *id.*, at 511–512; follow procedures governing copyright registration, *Reed Elsevier*, 559 U. S., at 157; or attempt settlement, *Union Pacific*, 558 U. S., at 82, Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts.[8]

5(f)(3). See *Arbaugh*, 546 U. S., at 505–506. In 1980, Congress eliminated § 1331's amount-in-controversy requirement. See Federal Question Jurisdictional Amendments Act of 1980, § 2, 94 Stat. 2369. Since then, "Title VII's own jurisdictional provision, 42 U. S. C. § 2000e–5(f)(3), has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims." *Arbaugh*, 546 U. S., at 506. Title VII also contains a separate jurisdictional provision, § 2000e–6(b), giving federal courts jurisdiction over actions by the Federal Government to enjoin "pattern or practice" discrimination.

[8] Fort Bend argues that Title VII's charge-filing requirement is jurisdictional because it is "textually linked" to Title VII's jurisdictional provision. Brief for Petitioner 50. Title VII states in 42 U. S. C. § 2000e–5(f)(1) that "a civil action may be brought" after the charge-filing procedures are followed. Section 2000e–5(f)(3) gives federal courts jurisdiction over "actions brought under this subchapter," a subchapter that includes § 2000e–5(f)(1). Therefore, Fort Bend insists, federal jurisdiction lies under § 2000e–5(f)(3) only when a proper EEOC charge is filed. But as just observed, see *supra*, at 550–551, the charge-filing requirement is stated in provisions discrete from Title VII's conferral of jurisdiction on federal courts. See *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 155 (2013) (a requirement "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions"); *Gon-*

Resisting this conclusion, Fort Bend points to statutory schemes that channel certain claims to administrative agency adjudication first, followed by judicial review in a federal court. In *Elgin* v. *Department of Treasury*, 567 U. S. 1 (2012), for example, the Court held that claims earmarked for initial adjudication by the Merit Systems Protection Board, then review in the Court of Appeals for the Federal Circuit, may not proceed instead in federal district court. *Id.*, at 5–6, 8. See also *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 202–204 (1994) (no district court jurisdiction over claims assigned in the first instance to a mine safety commission, whose decisions are reviewable in a court of appeals). Nowhere do these cases, or others cited by Fort Bend, address the issue here presented: whether a precondition to suit is a mandatory claim-processing rule subject to forfeiture, or a jurisdictional prescription.

Fort Bend further maintains that "[t]he congressional purposes embodied in the Title VII scheme," notably, encouraging conciliation and affording the EEOC first option to bring suit, support jurisdictional characterization of the charge-filing requirement. Brief for Petitioner 27. But a prescription does not become jurisdictional whenever it "promotes important congressional objectives." *Reed Elsevier*, 559 U. S., at 169, n. 9. And recognizing that the charge-filing requirement is nonjurisdictional gives plaintiffs scant incentive to skirt the instruction. Defendants, after all, have good reason promptly to raise an objection that may rid them of the lawsuit filed against them. A Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive defense.

In sum, a rule may be mandatory without being jurisdictional, and Title VII's charge-filing requirement fits that bill.

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zalez v. *Thaler*, 565 U. S. 134, 145 (2012) (a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision).

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For the reasons stated, the judgment of the Court of Appeals for the Fifth Circuit is

Affirmed.

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Syllabus

TAGGART *v.* LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

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

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company's operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney's fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney's fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel's decision. Applying a subjective standard, the Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d 438, 444.

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Held: A court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. Pp. 559–565.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. 59, 73. Here, the bankruptcy statutes specifying that a discharge order "operates as an injunction," 11 U. S. C. § 524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, § 105(a), bring with them the "old soil" that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California*

Syllabus

Artificial Stone Paving Co. v. *Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party's good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. Pp. 560–562.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 562–565.

888 F. 3d 438, vacated and remanded.

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

Daniel L. Geyser argued the cause for petitioner. With him on the briefs was *John M. Berman*.

Sopan Joshi argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark B. Stern*, *Sarah Carroll*, *Thomas J. Clark*, and *Paul A. Allulis*.

Nicole A. Saharsky argued the cause for respondents. With her on the brief were *Andrew E. Tauber*, *Michael B. Kimberly*, *Matthew A. Waring*, *Janet M. Schroer*, and *Hollis K. McMilan*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Consumer Bankruptcy Rights Center et al. by *Tara Twomey* and *Mat-*

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. § 524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to "strict liability" based on the standard's expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d

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thew J. Mason; and for Judge Eugene Wedoff (Ret.) et al. by *David R. Kuney*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Xavier Becerra*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Janill L. Richards*, Principal Deputy Solicitor General, *Diane S. Shaw*, Senior Assistant Attorney General, and *Molly K. Mosley*, *Robert E. Asperger*, *Craig D. Rust*, and *Karli Eisenberg*, Deputy Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Kevin G. Clarkson* of Alaska, *Phil Weiser* of Colorado, *William Tong* of Connecticut, *Karl A. Racine* of the District of Columbia, *Ashley Moody* of Florida, *Clare E. Connors* of Hawaii, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Doug Peterson* of Nebraska, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Jason Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; and for the National Creditors Bar Association by *Nicole M. Strickler*.

1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." *Ibid.*

We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.

I

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Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the business center's operating agreement. (We use the name "Sherwood" to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§ 704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart's discharge order, like many such orders, goes no further than the statute: It simply says that the debtor "shall be granted a discharge under § 727." App. 60; see United States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http://

www.uscourts.gov/sites/default/files/form_b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor "from all debts that arose before the date of the order for relief," "[e]xcept as provided in section 523." § 727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§ 523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order "operates as an injunction" that bars creditors from collecting any debt that has been discharged. § 524(a)(2).

After the issuance of Taggart's federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney's fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit's decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney's fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor "'returned to the fray'" after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had "returned to the fray" postpetition and therefore was liable for the postpetition attorney's fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly $45,000 of Sherwood's postpetition attorney's fees.

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At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court "fray" under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney's fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "'aware of the discharge'" order and "'intended the actions which violate[d]'" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress, and $2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

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Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our

efforts to find an answer. The first, § 524, says that a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset" a discharged debt. 11 U. S. C. § 524(a)(2). The second, § 105, authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." § 105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is "'obviously transplanted from another legal source,'" it "'brings the old soil with it.'" *Hall* v. *Hall*, 584 U. S. 59, 73 (2018) (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)); see *Field* v. *Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order "operates as an injunction," § 524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, § 105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

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That "old soil" includes the "potent weapon" of civil contempt. *Longshoremen* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction.

United States v. *Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, Law of Remedies § 2.8, p. 132 (3d ed. 2018); J. High, Law of Injunctions § 1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the "old soil" they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt* v. *Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen*, *supra*, at 76 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable").

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This standard is generally an *objective* one. We have explained before that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. As we said in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187 (1949), "[t]he absence of wilfulness does not relieve from civil contempt." *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil

contempt sanctions may be warranted when a party acts in bad faith. See *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party's "record of continuing and persistent violations" and "persistent contumacy" justified placing "the burden of any uncertainty in the decree . . . on [the] shoulders" of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) ("[O]nly the least possible power adequate to the end proposed should be used in contempt cases" (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 557–558. Congress, however, has carefully delineated which debts are exempt from discharge. See §§ 523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

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B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a "creditor's good faith belief" that the discharge order "does not apply to the credi-

tor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor's subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the "fresh start" that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrtcy. Proc. 4007(a).

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We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy

court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. § 523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. § 1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

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Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual'" resolution of bankruptcy cases "'within a limited period.'" *Katchen* v. *Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover ac-

tual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U. S. C. § 362(k)(1). This language, however, differs from the more general language in § 105(a). *Supra*, at 560. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but "'whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan* v. *United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

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III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order. In our view, that standard strikes the "careful balance between the interests of creditors and debtors" that the Bankruptcy Code often seeks to achieve. *Clark* v. *Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

AZAR, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ALLINA HEALTH SERVICES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17–1484. Argued January 15, 2019—Decided June 3, 2019

The Medicare program offers additional payments to institutions that serve a "disproportionate number" of low-income patients. 42 U. S. C. § 1395ww(d)(5)(F)(i)(I). These payments are calculated in part using what is called a hospital's "Medicare fraction." The fraction's denominator is the time the hospital spent caring for patients who were "entitled to benefits under" Medicare Part A, while the numerator is the time the hospital spent caring for Part-A-entitled patients who were also entitled to income support payments under the Social Security Act. § 1395ww(d)(5)(F)(vi)(I). Congress created Medicare Part C in 1997, leading to the question whether Part C enrollees should be counted as "entitled to benefits under" Part A when calculating a hospital's Medicare fraction. Respondents claim that, because Part C enrollees tend to be wealthier than Part A enrollees, counting them makes the fraction smaller and reduces hospitals' payments considerably. In 2004, the agency overseeing Medicare issued a final rule declaring that it would count Part C patients, but that rule was later vacated after hospitals filed legal challenges. In 2013, it issued a new rule prospectively readopting the policy of counting Part C patients. In 2014, unable to rely on either the vacated 2004 rule or the prospective 2013 rule, the agency posted on its website the Medicare fractions for fiscal year 2012, noting that they included Part C patients. A group of hospitals, respondents here, sued. They claimed, among other things, that the government had violated the Medicare Act's requirement to provide public notice and a 60-day comment period for any "rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing . . . the payment for services," § 1395hh(a)(2). The court of appeals ultimately sided with the hospitals.

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Held: Because the government has not identified a lawful excuse for neglecting its statutory notice-and-comment obligations, its policy must be vacated. Pp. 572–584.

(a) This case turns on whether the government's 2014 announcement established or changed a "substantive legal standard." The government suggests the statute means to distinguish a substantive from an *interpretive* legal standard and thus tracks the Administrative Proce-

dure Act (APA), under which "substantive rules" have the "force and effect of law," while "interpretive rules" merely "advise the public of the agency's construction of the statutes and rules which it administers," *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96–97. Because the policy of counting Part C patients in the Medicare fractions would be treated as interpretive rather than substantive under the APA, the government submits, it had no statutory obligation to provide notice and comment before adopting the policy.

The government's interpretation is incorrect because the Medicare Act and the APA do not use the word "substantive" in the same way. First, the Medicare Act contemplates that "statements of policy" *can* establish or change a "substantive legal standard," § 1395hh(a)(2), while APA statements of policy are *not* substantive by definition but are grouped with and treated as interpretive rules, 5 U. S. C. § 553(b)(A). Second, § 1395hh(e)(1)—which gives the government limited authority to make retroactive "substantive change[s]" in, among other things, "interpretative rules" and "statements of policy"—would make no sense if the Medicare Act used the term "substantive" as the APA does, because interpretive rules and statements of policy—and any changes to them—are *not* substantive under the APA by definition. Third, had Congress wanted to follow the APA in the Medicare Act and exempt interpretive rules and policy statements from notice and comment, it could have simply cross-referenced the exemption in § 553(b)(A) of the APA. And the fact that Congress did cross-reference the APA's neighboring good cause exemption found in § 553(b)(B), see § 1395hh(b)(2)(C), strongly suggests that it "act[ed] intentionally and purposefully in the disparate" decisions, *Russello* v. *United States*, 464 U. S. 16, 23. Pp. 572–579.

(b) The Medicare Act's text and structure foreclose the government's position in this case, and the legislative history presented by the government is ambiguous at best. The government also advances a policy argument: Requiring notice and comment for Medicare interpretive rules would be excessively burdensome. But courts are not free to rewrite clear statutes under the banner of their own policy concerns, and the government's argument carries little force even on its own terms. Pp. 579–583.

(c) Because this Court affirms the court of appeals' judgment under § 1395hh(a)(2), there is no need to address that court's alternative holding that § 1395hh(a)(4) independently required notice and comment. Nor does this Court consider the argument, not pursued by the government here, that the policy did not "establis[h] or chang[e]" a substantive legal standard—and so did not require notice and comment under § 1395hh(a)(2)—because the statute itself required the government to count Part C patients in the Medicare fraction. Pp. 583–584.

863 F. 3d 937, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, *post*, p. 584. KAVANAUGH, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Anthony A. Yang*, *Sopan Joshi*, *Mark B. Stern*, and *Stephanie R. Marcus*.

Pratik A. Shah argued the cause for respondents. With him on the brief were *Stephanie A. Webster*, *Christopher L. Keough*, *Martine Cicconi*, and *Hyland Hunt*.*

JUSTICE GORSUCH delivered the opinion of the Court.

One way or another, Medicare touches the lives of nearly all Americans. Recognizing this reality, Congress has told the government that, when it wishes to establish or change a "substantive legal standard" affecting Medicare benefits, it must first afford the public notice and a chance to comment. 42 U. S. C. § 1395hh(a)(2). In 2014, the government revealed a new policy on its website that dramatically—and retroactively—reduced payments to hospitals serving low-income patients. Because affected members of the public received no advance warning and no chance to comment first, and because the government has not identified a lawful excuse for neglecting its statutory notice-and-comment obligations, we agree with the court of appeals that the new policy cannot stand.

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*Briefs of *amici curiae* urging affirmance were filed for the American Hospital Association et al. by *Sheree R. Kanner*, *Sean Marotta*, *Heather A. Briggs*, and *Frank Trinity*; for the American Medical Association et al. by *Tacy F. Flint* and *Jack R. Bierig*; for Catholic Health et al. by *John J. Bursch*; for Fourteen State and Regional Hospital Associations by *Chad Golder*; and for 77 Hospitals et al. by *Paul D. Clement* and *Erin E. Murphy*.

I

Today, Medicare stands as the largest federal program after Social Security. It spends about $700 billion annually to provide health insurance for nearly 60 million aged or disabled Americans, nearly one-fifth of the Nation's population. Needless to say, even seemingly modest modifications to the program can affect the lives of millions.

As Medicare has grown, so has Congress's interest in ensuring that the public has a chance to be heard before changes are made to its administration. As originally enacted in 1965, the Medicare Act didn't address the possibility of public input. Nor did the notice-and-comment procedures of the Administrative Procedure Act apply. While the APA requires many other agencies to offer public notice and a comment period before adopting new regulations, it does not apply to public benefit programs like Medicare. 5 U. S. C. § 553(a)(2). Soon enough, though, the government volunteered to follow the informal notice-and-comment rulemaking procedures found in the APA when proceeding under the Medicare Act. See *Clarian Health West, LLC* v. *Hargan*, 878 F. 3d 346, 356–357 (CADC 2017).

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This solution came under stress in the 1980s. By then, Medicare had grown exponentially and the burdens and benefits of public comment had come under new scrutiny. The government now took the view that following the APA's procedures had become too troublesome and proposed to relax its commitment to them. See 47 Fed. Reg. 26860–26861 (1982). But Congress formed a different judgment. It decided that, with the growing scope of Medicare, notice and comment should become a matter not merely of administrative grace, but of statutory duty. See § 9321(e)(1), 100 Stat. 2017; § 4035(b), 101 Stat. 1330–78.

Notably, Congress didn't just adopt the APA's notice-and-comment regime for the Medicare program. That, of course, it could have easily accomplished in just a few words. Instead, Congress chose to write a new, Medicare-specific stat-

ute. The new statute required the government to provide public notice and a 60-day comment period (twice the APA minimum of 30 days) for any "rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare]." 42 U. S. C. § 1395hh(a)(2).

Our case involves a dispute over this language. Since Medicare's creation and under what's called "Medicare Part A," the federal government has paid hospitals directly for providing covered patient care. To ensure hospitals have the resources and incentive to serve low-income patients, the government has also long offered additional payments to institutions that serve a "disproportionate number" of such persons. § 1395ww(d)(5)(F)(i)(I). These payments are calculated in part using a hospital's so-called "Medicare fraction," which asks how much of the care the hospital provided to Medicare patients in a given year was provided to *low-income* Medicare patients. The fraction's denominator is the time the hospital spent caring for patients who were "entitled to benefits under" Medicare Part A. The numerator is the time the hospital spent caring for Part-A-entitled patients who were *also* entitled to income support payments under the Social Security Act. § 1395ww(d)(5)(F)(vi)(I). The bigger the fraction, the bigger the payment.

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Calculating Medicare fractions got more complicated in 1997. That year, Congress created "Medicare Part C," sometimes referred to as Medicare Advantage. Under Part C, beneficiaries may choose to have the government pay their private insurance premiums rather than pay for their hospital care directly. This development led to the question whether Part C patients should be counted as "entitled to benefits under" Part A when calculating a hospital's Medicare fraction. The question is important as a practical mat-

ter because Part C enrollees, we're told, tend to be wealthier than patients who opt for traditional Part A coverage. *Allina Health Services* v. *Price*, 863 F. 3d 937, 939 (CADC 2017). So counting them makes the fraction smaller and reduces hospitals' payments considerably—by between $3 and $4 billion over a 9-year period, according to the government. Pet. for Cert. 23.

The agency overseeing Medicare has gone back and forth on whether to count Part C participants in the Medicare fraction. At first, it did not include them. See *Northeast Hospital Corp.* v. *Sebelius*, 657 F. 3d 1, 15–16 (CADC 2011). In 2003, the agency even proposed codifying that practice in a formal rule. 68 Fed. Reg. 27208. But after the public comment period, the agency reversed field and issued a final rule in 2004 declaring that it would begin counting Part C patients. 69 Fed. Reg. 49099. This abrupt change prompted various legal challenges from hospitals. In one case, a court held that the agency couldn't apply the 2004 rule retroactively. *Northeast Hospital*, 657 F. 3d, at 14. In another case, a court vacated the 2004 rule because the agency had "'pull[ed] a surprise switcheroo'" by doing the opposite of what it had proposed. *Allina Health Services* v. *Sebelius*, 746 F. 3d 1102, 1108 (CADC 2014). Eventually, and in response to these developments, the agency in 2013 issued a new rule that prospectively "readopt[ed] the policy" of counting Part C patients. 78 Fed. Reg. 50620. Challenges to the 2013 rule are pending.

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The case before us arose in 2014. That's when the agency got around to calculating hospitals' Medicare fractions for fiscal year 2012. When it did so, the agency still wanted to count Part C patients. But it couldn't rely on the 2004 rule, which had been vacated. And it couldn't rely on the 2013 rule, which bore only prospective effect. The agency's solution? It posted on a website a spreadsheet announcing the 2012 Medicare fractions for 3,500 hospitals nationwide and noting that the fractions included Part C patients.

That Internet posting led to this lawsuit. A group of hospitals who provided care to low-income Medicare patients in 2012 argued (among other things) that the government had violated the Medicare Act by skipping its statutory notice-and-comment obligations. In reply, the government admitted that it hadn't provided notice and comment but argued it wasn't required to do so in these circumstances. Ultimately, the court of appeals sided with the hospitals. 863 F. 3d, at 938. But in doing so the court created a conflict with other circuits that had suggested, if only in passing, that notice and comment wasn't needed in cases like this. See, *e. g.*, *Via Christi Regional Medical Center, Inc.* v. *Leavitt*, 509 F. 3d 1259, 1271, n. 11 (CA10 2007); *Baptist Health* v. *Thompson*, 458 F. 3d 768, 776, n. 8 (CA8 2006). We granted the government's petition for certiorari to resolve the conflict. 585 U. S. 1058 (2018).

II

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This case hinges on the meaning of a single phrase in the notice-and-comment statute Congress drafted specially for Medicare in 1987. Recall that the law requires the government to provide the public with advance notice and a chance to comment on any "rule, requirement, or other statement of policy" that "establishes or changes a substantive legal standard governing . . . the payment for services." § 1395hh(a)(2). Before us, everyone agrees that the government's 2014 announcement of the 2012 Medicare fractions governed "payment for services." It's clear, too, that the government's announcement was at least a "statement of policy" because it "le[t] the public know [the agency's] current . . . adjudicatory approach" to a critical question involved in calculating payments for thousands of hospitals nationwide. *Syncor Int'l Corp.* v. *Shalala*, 127 F. 3d 90, 94 (CADC 1997). So whether the government had an obligation to provide notice and comment winds up turning on whether its 2014 announcement established or changed a "substantive legal standard." That phrase doesn't seem to appear anywhere

else in the entire United States Code, and the parties offer at least two ways to read it.

The hospitals suggest the statute means to distinguish a substantive from a *procedural* legal standard. On this account, a substantive standard is one that "creates duties, rights and obligations," while a procedural standard specifies how those duties, rights, and obligations should be enforced. Black's Law Dictionary 1281 (5th ed. 1979) (defining "substantive law"). And everyone agrees that a policy of counting Part C patients in the Medicare fraction is substantive in this sense, because it affects a hospital's right to payment. From this it follows that the public had a right to notice and comment before the government could adopt the policy at hand. 863 F. 3d, at 943.

Very differently, the government suggests the statute means to distinguish a substantive from an *interpretive* legal standard. Under the APA, "substantive rules" are those that have the "force and effect of law," while "interpretive rules" are those that merely "'advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96–97 (2015). On the government's view, the 1987 Medicare notice-and-comment statute meant to track the APA's usage in this respect. And the government submits that, because the policy of counting Part C patients in the Medicare fractions would be treated as interpretive rather than substantive under the APA, it had no statutory obligation to provide notice and comment before adopting its new policy.

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Who has the better reading? Several statutory clues persuade us of at least one thing: The government's interpretation can't be right. Pretty clearly, the Medicare Act doesn't use the word "substantive" in the same way the APA does—to identify only those legal standards that have the "force and effect of law."

First, the Medicare Act contemplates that "statements of policy" like the one at issue here *can* establish or change a

"*substantive* legal standard." 42 U. S. C. § 1395hh(a)(2) (emphasis added). Yet, by definition under the APA, statements of policy are *not* substantive; instead they are grouped with and treated as interpretive rules. 5 U. S. C. § 553(b)(A). This strongly suggests the Medicare Act just isn't using the word "substantive" in the same way as the APA. Even the government acknowledges that its contrary reading leaves the Medicare Act's treatment of policy statements "incoherent." Tr. of Oral Arg. 19.

To be sure, the government suggests that the statutory incoherence produced by its reading turns out to serve a rational purpose: It clarifies that the agency overseeing Medicare can't evade its notice-and-comment obligations for new rules that bear the "force and effect" of law by the simple expedient of "call[ing]" them mere "statements of policy." *Id.*, at 19–20. The dissent echoes this argument, suggesting that Congress included "statements of policy" in § 1395hh(a)(2) in order to capture "substantive rules in disguise." *Post*, at 588 (opinion of BREYER, J.).

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But the statute doesn't refer to things that are *labeled* or *disguised* as statements of policy; it just refers to "statements of policy." Everyone agrees that when Congress used that phrase in the APA and in other provisions of § 1395hh, it referred to things that *really are* statements of policy. See, *e. g.*, *Pacific Gas & Elec. Co.* v. *Federal Power Comm'n*, 506 F. 2d 33, 38 (CADC 1974); *post*, at 587 (discussing § 1395hh(e)(1)). Yet, to accept the government's view, we'd have to hold that when Congress used the very same phrase in § 1395hh(a)(2), it sought to refer to things an agency *calls* statements of policy but that *in fact* are nothing of the sort. The dissent admits this "may seem odd at first blush," *post*, at 588, but further blushes don't bring much improvement. This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes. See *Law* v. *Siegel*, 571 U. S. 415, 422 (2014).

Besides, even if the statute's reference to "statements of policy" could bear such an odd construction, the government and the dissent fail to explain why Congress would have thought it necessary or appropriate. Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply. See, *e. g.*, *General Motors Corp.* v. *Ruckelshaus*, 742 F. 2d 1561, 1565 (CADC 1984) (en banc) ("[T]he agency's own label, while relevant, is not dispositive"); *Guardian Fed. Sav. & Loan Assn.* v. *Federal Sav. & Loan Ins. Corporation*, 589 F. 2d 658, 666–667 (CADC 1978) (if "a so-called policy statement is in purpose or likely effect . . . a binding rule of substantive law," it "will be taken for what it is"). Nor is there any evidence before us suggesting that Congress thought it important to underscore this prosaic point in the Medicare Act (and yet not in the APA)—let alone any reason to think Congress would have sought to make the point in such an admittedly incoherent way.

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Second, the government's reading would introduce another incoherence into the Medicare statute. Subsection (e)(1) of § 1395hh gives the government limited authority to make retroactive "substantive change[s]" in, among other things, "interpretative rules" and "statements of policy." But this statutory authority would make no sense if the Medicare Act used the term "substantive" as the APA does. It wouldn't because, again, interpretive rules and statements of policy—and any changes to them—are *not* substantive under the APA by definition.

Here, too, the government offers no satisfactory reply. It concedes, as it must, that the term "substantive" in subsection (e)(1) can't carry the meaning it wishes to ascribe to the same word in subsection (a)(2). Tr. of Oral Arg. 16–18. So that leaves the government to suggest (again) that the same

word should mean two different things in the same statute. In (e)(1), the government says, it may bear the meaning the hospitals propose, but in (a)(2) it means the same thing it does in the APA. But, once more, the government fails to offer any good reason or evidence to unseat our normal presumption that, when Congress uses a term in multiple places within a single statute, the term bears a consistent meaning throughout. See *Law*, 571 U. S., at 422.

Third, the government suggests Congress used the phrase "substantive legal standard" in the Medicare Act as a way to exempt interpretive rules and policy statements from notice and comment. But Congress had before it—and rejected—a much more direct path to that destination. In a single sentence the APA sets forth two exemptions from the government's usual notice-and-comment obligations:

> "Except when notice or hearing is required by statute, this subsection [requiring notice and comment] does not apply—
>
> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> "(B) when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U. S. C. § 553(b).

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In the Medicare Act, Congress expressly borrowed *one* of the APA's exemptions, the good cause exemption, by cross-referencing it in § 1395hh(b)(2)(C). If, as the government supposes, Congress had also wanted to borrow the *other* APA exemption, for interpretive rules and policy statements, it could have easily cross-referenced that exemption in exactly the same way. Congress had recently done just that, cross-referencing both of the APA's exceptions in the Clean Air Act. See § 305(a), 91 Stat. 772, 42 U. S. C. § 7607(d)(1). Yet it didn't do the same thing in the Medicare

Act, and Congress's choice to include a cross-reference to one but not the other of the APA's neighboring exemptions strongly suggests it acted "'intentionally and purposely in the disparate'" decisions. *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

The government's response asks us to favor a most unlikely reading over this obvious one. The government submits that Congress simply preferred to mimic the APA's interpretive-rule exemption in the Medicare Act by using the novel and enigmatic phrase "substantive legal standard" instead of a simple cross-reference. But the government supplies no persuasive account why Congress would have thought it necessary or wise to proceed in this convoluted way. The dissent suggests that a cross-reference could not have taken the place of *other* language in § 1395hh(a)(2) limiting the notice-and-comment requirement to rules governing benefits, payment, or eligibility, *post*, at 599; but we can't see why this would have made a cross-reference less desirable than the phrase "substantive legal standard" as a means of incorporating the APA's interpretive-rule exemption. So we're left with nothing but the doubtful proposition that Congress sought to accomplish in a "surpassingly strange manner" what it could have accomplished in a much more straightforward way. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 647 (2012); see *Advocate Health Care Network* v. *Stapleton*, 581 U. S. 468, 477 (2017) ("When legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative").

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The dissent would have us disregard all of the textual clues we've found significant because the word "substantive" carried "a special meaning in the context of administrative law" in the 1980s, making it "almost a certainty" that Congress had that meaning in mind when it used the word "substantive" in § 1395hh(a)(2). *Post*, at 586, 591. But it was the phrase "substantive *rule*" that was a term of

art in administrative law, and Congress chose *not* to use that term in the Medicare Act. Instead, it introduced a seemingly new phrase to the statute books when it spoke of "substantive *legal standards*." And, for all the reasons we have already explored, the term "substantive legal standard" in the Medicare Act appears to carry a more expansive scope than that borne by the term "substantive rule" under the APA.

In reply, the dissent stresses that § 1395hh refers to agency actions requiring notice and comment as "regulations." This is significant, the dissent says, because "courts had sometimes treated [the term 'regulations'] as interchangeable with the term 'substantive rules' " around the time of the 1987 Medicare Act amendments. *Post*, at 587. So if only "regulations" must proceed through notice and comment, the dissent reasons, that necessarily encompasses only things that qualify as substantive rules under the APA. In fact, however, by 1987 courts had commonly referred to *both* substantive and interpretive rules as "regulations," so the dissent's logical syllogism fails on its own terms. To see this, one need look no further than *Chrysler Corp.* v. *Brown*, 441 U. S. 281 (1979), which described the substantive-interpretive divide as "[t]he central distinction *among agency regulations* found in the APA." *Id.*, at 301 (emphasis added); see also, *e. g.*, *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977) (distinguishing between "[l]egislative, or substantive, regulations" and "interpretative regulation[s]"); *United Technologies Corp.* v. *EPA*, 821 F. 2d 714, 719 (CADC 1987) ("most of the regulations at issue are . . . interpretative").[1]

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[1] Nor does § 1395hh(e)(1) imply that the statute is using "regulations" and "interpretative rules" to mean different things. *Post*, at 587. True, that provision refers to "regulations, manual instructions, interpretative rules, statements of policy, or guidelines of general applicability." But contrary to the dissent's suggestion that each item in the list "refers to something different," *ibid.*, the items appear to have substantial overlap. For example, many manual instructions surely qualify as guidelines

In the end, all of the available evidence persuades us that the phrase "substantive legal standard," which appears in § 1395hh(a)(2) and apparently nowhere else in the U. S. Code, cannot bear the same construction as the term "substantive rule" in the APA. We need not, however, go so far as to say that the hospitals' interpretation, adopted by the court of appeals, is correct in every particular. To affirm the judgment before us, it is enough to say the government's arguments for reversal fail to withstand scrutiny. Other questions about the statute's meaning can await other cases. The dissent would like us to provide more guidance, *post*, at 595–596, but the briefing before us focused on the issue whether the Medicare Act borrows the APA's interpretive-rule exception, and we limit our holding accordingly. In doing so, we follow the well-worn path of declining "to issue a sweeping ruling when a narrow one will do." *McWilliams* v. *Dunn*, 582 U. S. 183, 198 (2017).[2]

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III

Unable to muster support for its position in the statutory text or structure, the government encourages us to look elsewhere. It begins by inviting us to follow it into the legislative history lurking behind the Medicare Act. "But legislative history is not the law." *Epic Systems Corp.* v. *Lewis*, 584 U. S. 497, 523 (2018). And even those of us who believe that clear legislative history can "illuminate ambiguous text" won't allow "ambiguous legislative history to muddy clear statutory language." *Milner* v. *Department of Navy*, 562

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of general applicability; and, as explained above, the statute explicitly requires some statements of policy to be issued as regulations.

[2] Nor is it obvious that the dissent's approach would provide significantly clearer guidance. Lower courts have often observed "that it is quite difficult to distinguish between substantive and interpretative rules," *Syncor Int'l Corp.* v. *Shalala*, 127 F. 3d 90, 93 (CADC 1997), and precisely where to draw the boundary has been a subject "of much scholarly and judicial debate," *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96 (2015).

U. S. 562, 572 (2011). Yet the text before us clearly forecloses the government's position in this case, and the legislative history presented to us is ambiguous at best.

The government points us first to a conference report on the 1986 bill that adopted § 1395hh(b). The 1986 report opined that the bill adopted at that time wouldn't require notice and comment for interpretive rules. See H. R. Conf. Rep. No. 99–1012, p. 311 (1986). But the 1986 bill didn't include the statutory language at issue here. Congress added *that* language only the following year, when it enacted § 1395hh(a)(2). Nor does the government try to explain how a report on a 1986 bill sheds light on the meaning of statutory terms first introduced in 1987. If anything, the fact that Congress revisited the statute in 1987 may suggest it wasn't satisfied with the 1986 notice-and-comment requirements and wished to enhance them. Some legislative history even says as much. See H. R. Rep. No. 100–391, pt. 1, p. 430 (1987) (expressing concern that, despite the 1986 legislation, the agency was still announcing "important policies" without notice and comment).

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The conference report on the 1987 bill that *did* adopt the statutory language before us today doesn't offer much help to the government either. The House version of the bill would have required notice and comment for rules with a "significant effect" on payments, a condition no doubt present here. H. R. 3545, 100th Cong., 1st Sess., reprinted in 133 Cong. Rec. 30019. Later, the conference committee replaced the House's language with the current language of subsection (a)(2), which the report said "reflect[ed] recent court rulings." H. R. Conf. Rep. No. 100–495, p. 566 (1987). The government contends that this was an oblique reference to a then-recent decision discussing the APA's interpretive-rule exception and an implicit suggestion that interpretive rules shouldn't be subject to notice and comment. See *American Hospital Assn.* v. *Bowen*, 834 F. 2d 1037, 1045–1046 (CADC 1987). But, as the hospitals point out, *Bowen*

was mostly about the APA's treatment of *procedural* rules. See *id.*, at 1047–1057. So it seems at least equally plausible that the conference committee revised the House's language because it feared that language would have subjected procedural rules to notice-and-comment obligations.

The hospitals call our attention to other indications, too, that Members of Congress didn't understand the conference's language to track the APA. For example, the relevant provision in the final bill was titled "Publication as Regulations of *Significant Policies*." § 4035(b), 101 Stat. 1330–78 (emphasis added). And, as we've seen, "significant policies" don't always amount to substantive rules under the APA. The House Ways and Means Committee likewise described the final bill as requiring notice and comment for "[s]ignificant policy changes," not just substantive rules. Summary of Conference Agreement on Reconciliation Provisions Within the Jurisdiction of the Committee on Ways and Means, 100th Cong., 1st Sess., 12–13 (Comm. Print 1987). So in the end and at most, we are left with exactly the kind of murky legislative history that we all agree can't overcome a statute's clear text and structure.

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That leads us to the government's final redoubt: a policy argument. But as the government knows well, courts aren't free to rewrite clear statutes under the banner of our own policy concerns. If the government doesn't like Congress's notice-and-comment policy choices, it must take its complaints there. See, *e. g.*, *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 89–90 (2017); *Sebelius* v. *Cloer*, 569 U. S. 369, 381 (2013). Besides, the government's policy arguments don't carry much force even on their own terms. The government warns that providing the public with notice and a chance to comment on all Medicare interpretive rules, like those in its roughly 6,000-page "Provider Reimbursement Manual," would take "'many years'" to complete. Brief for Petitioner 18, 42. But the dissent points to only *eight* manual provisions that courts have deemed interpre-

tive over the last four decades, see *post*, at 593–594, and the government hasn't suggested that providing notice and comment for these or any other specific manual provisions would prove excessively burdensome. Nor has the government identified any court decision invalidating a manual provision under § 1395hh(a)(2) in the nearly two years since the court of appeals issued its opinion in this case. For their part, the hospitals claim that only a few dozen pages of the Provider Reimbursement Manual might even arguably require notice and comment. Tr. of Oral Arg. 49–51. And they tell us that the agency regularly and without much difficulty undertakes notice-and-comment rulemaking for many other decisions affecting the Medicare program. See Brief for Respondents 58; App. to Brief in Opposition 1a–3a. The government hasn't rebutted any of these points.

Not only has the government failed to document any draconian costs associated with notice and comment, it also has neglected to acknowledge the potential countervailing benefits. Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision. See 1 K. Hickman & R. Pierce, Administrative Law § 4.8 (6th ed. 2019). Surely a rational Congress could have thought those benefits especially valuable when it comes to a program where even minor changes to the agency's approach can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate. None of this is to say Congress *had* to proceed as it did. It is only to say that Congress reasonably could have believed that the policy decision reflected in the statute would yield benefits sufficient to outweigh the speculative burdens the government has suggested. And if notice and comment really does threaten to "become a major roadblock to the implementation of" Medicare, *post*, at 593, the agency can seek relief from Congress, which—unlike the courts—is both qualified and constitution-

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ally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment.

IV

There are two more lines of argument that deserve brief acknowledgment. One concerns § 1395hh(a)(4), which provides that a Medicare regulation struck down for not being a logical outgrowth of the government's proposal can't "take effect" until the agency provides a "further opportunity for public comment." The hospitals claim, and the court of appeals held, that subsection (a)(4) also and independently required notice and comment here. But given our holding affirming the court of appeals' judgment under § 1395hh(a)(2), we have no need to reach this question.

Separately, we can imagine that the government might have sought to argue that the policy at issue here didn't "establis[h] or chang[e]" a substantive legal standard—and so didn't require notice and comment under § 1395hh(a)(2)—because the *statute* itself required it to count Part C patients in the Medicare fraction. But we need not consider this argument either, this time because the government hasn't pursued it and we normally have no obligation to entertain grounds for reversal that a party hasn't presented. Far from suggesting that the Medicare Act supplies the controlling legal standard for determining whether to count Part C patients, the government has insisted that the statute "does not speak directly to the issue," Brief for Appellant in *Northeast Hospital Corp.* v. *Sebelius*, No. 10–5163 (CADC), p. 22, and thus leaves a "'gap'" for the agency to fill, Brief for Appellee in *Allina* v. *Price*, No. 16–5255 (CADC), p. 50 (quoting *Northeast Hospital Corp.*, 657 F. 3d, at 13). The courts below accepted the government's submission, and the government hasn't sought to take a different position in this Court. So we express no opinion on whether the statute in fact contains such a "gap." We hold simply that, when the government establishes or changes an avowedly "gap"-filling

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policy, it can't evade its notice-and-comment obligations under § 1395hh(a)(2) on the strength of the arguments it has advanced in this case.

*

The judgment of the court of appeals is

Affirmed.

JUSTICE KAVANAUGH took no part in the consideration or decision of this case.

JUSTICE BREYER, dissenting.

The statute before us, a subsection of the Medicare Act, refers to a "rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard." 42 U. S. C. § 1395hh(a)(2). This phrase is nested within a set of provisions that, taken together, require the Secretary of Health and Human Services to use notice-and-comment rulemaking before promulgating "regulations."

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The Government argues that the language at issue, like the notice-and-comment provisions of the Administrative Procedure Act (APA), applies only to "substantive" or "legislative" rules. In its view, the language does not cover "interpretive" rules (which it believes the agency promulgated here). After considering the relevant language, the statutory context, the statutory history, and the related consequences, I believe the Government is right. I would remand this case to the Court of Appeals to consider whether the agency determination at issue in this case is a substantive rule (which requires notice and comment) or an interpretive rule (which does not).

I

The arguments in support of my interpretation are simple. By using words with meanings that are well settled in the APA context, Congress made clear that the notice-and-comment requirement in the Medicare Act applies only to substantive, not interpretive, rules. The statutory language, at minimum, permits this interpretation, and the stat-

ute's history and the practical consequences provide further evidence that Congress had only substantive rules in mind. Importantly, this interpretation of the statute, unlike the Court's, provides a familiar and readily administrable way for the agency to distinguish the actions that require notice and comment from the actions that do not.

A

I begin with the specific language of the statute. There are, in my view, three relevant subsections that must be read together. The first, a general provision, has been part of the Medicare Act since Congress created the program in 1965. It says that the Secretary "shall prescribe such *regulations* as may be necessary to carry out the administration of the insurance programs." 42 U. S. C. § 1395hh(a)(1) (emphasis added).

The other two relevant provisions were added in the 1980s. The provision contained in the very next paragraph is the one directly at issue here. It says:

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> "No rule, requirement, or other statement of policy . . . that establishes or changes a *substantive* legal standard governing the scope of benefits, the payment for services, or the eligibility . . . to furnish or receive services or benefits . . . shall take effect unless it is promulgated by the Secretary by *regulation* under paragraph (1)." § 1395hh(a)(2) (emphasis added).

And the third relevant provision, eight paragraphs away, contains the notice-and-comment requirement:

> "[B]efore issuing in final form *any regulation* under subsection (a) . . . , the Secretary shall provide for notice of the proposed *regulation* in the Federal Register and a period of not less than 60 days for public comment thereon." § 1395hh(b)(1) (emphasis added).

Taken together, these provisions say that the Secretary must use notice-and-comment procedures before promulgat-

ing any "regulation," and that a "rule, requirement, or other statement of policy" counts as a "regulation" whenever it "establishes or changes a substantive legal standard."

The question at hand is whether an interpretive rule qualifies as the type of "regulation" that Congress intended to subject to the notice-and-comment requirement when it added the second and third provisions in the 1980s. In my view, the answer is no.

In the 1980s, the words "regulation" and "substantive" (which I have repeatedly italicized above) carried a special meaning in the context of administrative law. This Court had recognized the "central distinction" drawn by the APA between "'substantive rules' on the one hand and 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice' on the other." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301 (1979). A "substantive rule," often promulgated pursuant to specific statutory authority, is a rule that "'bind[s]'" the public or has "'the force and effect of law.'" *Id.*, at 301–302. Substantive rules had also come to be known as "legislative rules." *Id.*, at 302. And some courts referred to substantive rules as "regulations" as well, see, *e. g.*, *American Hospital Assn.* v. *Bowen*, 834 F. 2d 1037, 1045 (CADC 1987) ("'"regulations," "substantive rules," or "legislative rules" are those which create law'"); *Cabais* v. *Egger*, 690 F. 2d 234, 238 (CADC 1982) (same), although this practice was both less common and less consistent.

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By way of contrast, courts had held that "interpretive rules" do not have the "force and effect of law"; they simply set forth the agency's interpretation of the statutes or regulations that it administers. *Chrysler Corp.*, 441 U. S., at 302, and n. 31; see also *American Hospital Assn.*, 834 F. 2d, at 1045 (interpretive rules "merely clarify or explain existing law or regulations"). Then, as today, whether a rule was substantive or interpretive determined whether it had to be promulgated using the APA's notice-and-comment rule-

making procedures. 5 U. S. C. § 553(b)(3)(A) (exempting "interpretative rules," among other things, from the notice-and-comment requirement); see also *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) ("Interpretive rules do not require notice and comment").

At this point, we can begin to see support in the statutory language for the Government's interpretation of the notice-and-comment provisions—one that excludes interpretive rules from their scope. By applying the statute only to agency actions that "*establis[h] or chang[e] a substantive legal standard*," 42 U. S. C. § 1395hh(a)(2) (emphasis added), Congress used words that courts had long used to describe substantive rules under the APA. See, *e. g.*, *American Hospital Assn.*, 834 F. 2d, at 1045, 1046 ("'substantive rules'" are rules that "'create law'" or "'establis[h] a standard of conduct which has the force of law'"); *Linoz* v. *Heckler*, 800 F. 2d 871, 877 (CA9 1986) (substantive rules "'effect a change in existing law or policy'"). Moreover, by limiting the notice-and-comment requirement to "*regulation*[*s*]," § 1395hh(b)(1) (emphasis added), Congress used a word that courts had sometimes treated as interchangeable with the term "substantive rules."

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Another subsection of the statute, § 1395hh(e)(1), similarly implies that Congress had only substantive rules in mind when it used the term "regulations." That subsection bars the agency from retroactively applying certain policy changes articulated in "regulations, manual instructions, interpretative rules, statements of policy, or guidelines of general applicability." *Ibid.* By using the word "or" to connect "regulations" and the other words in the list, Congress suggested that each linked phrase refers to something different. This textual distinction between "regulations" and "interpretive rules" further suggests that the "regulations" that must go through notice and comment do not include interpretive rules.

There is, however, an important counterargument. As the Court emphasizes, *ante*, at 573–575, the provision before us

includes the words "statement[s] of policy." § 1395hh(a)(2). Even if we can easily read the words "rule[s]" and "requirement[s]" as referring to substantive or legislative rules, "statement[s] of policy" are a different matter. *Ibid.* Indeed, the APA explicitly excludes "statements of policy" from its notice-and-comment requirements. 5 U. S. C. § 553(d)(2). So how can we say that our provision—which explicitly *includes* statements of policy—encompasses only those legislative rules that the APA subjects to notice-and-comment rulemaking?

The answer to this question linguistically is that our provision does not include *all* "statements of policy," but rather only those that are, in effect, substantive rules. That is because the statute does not "just refe[r] to 'statements of policy,'" *ante,* at 574; it refers to "statement[s] of policy . . . *that establis[h] or chang[e] a substantive legal standard*," 42 U. S. C. § 1395hh(a)(2) (emphasis added). Those words, read together, are simply another way of referring to substantive rules in disguise. This reading may seem odd at first blush, but the statutory history and the consequences of the alternative interpretation persuade me that this is precisely what Congress intended.

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B

I turn next to the history of the statute, which provides significant support for believing that the Medicare rulemaking provision does not extend to interpretive rules. As enacted in 1965, the Medicare Act authorized the agency to promulgate "regulations" as necessary, but did not require the agency to follow any particular rulemaking procedures. See § 102(a), 79 Stat. 331. The APA's notice-and-comment requirements did not apply to Medicare regulations, for the APA specifically exempts "matter[s] relating to . . . benefits" from its scope. 5 U. S. C. § 553(a)(2).

In 1971, the agency nonetheless adopted a policy of voluntarily promulgating most regulations through notice-and-

comment rulemaking. See Public Participation in Rule Making, 36 Fed. Reg. 2532. But the agency did not use notice and comment for *all* policy decisions during this time. It also provided extensive guidance to participants in the Medicare system through less formal means like manuals (a practice it still follows today). See, *e. g.*, *Daughters of Miriam Ctr. for the Aged* v. *Mathews*, 590 F. 2d 1250, 1254 (CA3 1978) (describing the agency's Provider Reimbursement Manual, which "interprets and elaborates upon" Medicare regulations).

In the early 1980s, the agency proposed to change its notice-and-comment policy: It no longer intended to use notice and comment when the disadvantages of doing so "outweigh[ed] the benefits of receiving public comment." Administrative Practice and Procedures, 47 Fed. Reg. 26860 (1982). This announcement provoked widespread opposition. Citizens' groups and others asked Congress to "make it clear, *by statute*, that Medicare regulations . . . should be subject to" the APA. Medicare Appeals Provisions: Hearing on S. 1158 before the Subcommittee on Health of the Senate Committee on Finance, 99th Cong., 1st Sess., 62 (1985). In 1986, Congress responded to these requests by enacting a provision that required public notice and a 60-day comment period for "any regulation," with a few exceptions. See 42 U. S. C. § 1395hh (1982 ed., Supp. IV); § 9321(e)(1), 100 Stat. 2017.

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Congress meant the term "regulation" to include only substantive or legislative rules. As I have said, *supra*, at 586, at the time Congress wrote the notice-and-comment provision in the 1980s, courts sometimes used all three terms interchangeably. See, *e. g.*, *Cabais*, 690 F. 2d, at 238. And the legislative history confirms that Congress expected the APA principles to apply. The House-Senate Conference Report stated that the 1986 notice-and-comment provision would *not* require rulemaking for "items (such as interpretive rules,

general statements of policy, or rules of agency organization, procedure or practice) that are not currently subject to that requirement." H. R. Conf. Rep. No. 99–1012, p. 311.

As of 1986, then, it was clear that the Medicare Act required notice-and-comment rulemaking only for substantive rules, not for interpretive rules. That was true even though the Medicare Act did not expressly cross-reference the APA's exception for interpretive rules. Instead, Congress simply understood that the statutory term "regulation" excluded interpretive rules, statements of policy, and the like.

Now I shall turn to the subsection before us, a provision enacted one year later. Did that provision, enacted in 1987, significantly change the scope of the Medicare Act's notice-and-comment requirement? The House of Representatives passed a version of the provision that seemed to say yes. The House Report on that bill said that the provision arose from a "concer[n] that *important policies* [were] being developed without benefit of the public notice and comment period and, with growing frequency, [were] being transmitted, if at all, through manual instructions and other informal means." H. R. Rep. No. 100–391, pt. 1, p. 430 (emphasis added). Thus, the House bill required notice and comment for *any* "rule, requirement, or other statement of policy . . . that *has (or may have) a significant effect* on the scope of benefits, the payment for services, or the eligibility" for benefits or services. H. R. 3545, 100th Cong., 1st Sess., §4073(a)(2) (1987), 133 Cong. Rec. 30019.

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The Senate, however, thought the scope of this language was too broad. And the House-Senate Conference Committee agreed with the Senate, not the House. It revised the House version by taking out the words "*has (or may have) a significant effect* on the scope of" benefits, payment, or eligibility, and by substituting for those words the current language—namely, "*establishes or changes a substantive legal standard* governing the scope of" benefits, payment, or eligibility. §1395hh(a)(2) (emphasis added); see §4035(b),

101 Stat. 1330–78; H. R. Conf. Rep. No. 100–495, p. 566 (1987). The revised language thus focused on the *legal effect* of the agency decision, not its practical importance.

The Conference Report explains that the Committee substituted its language for that of the House in order to "reflec[t] recent court rulings." *Ibid.* What were those "court rulings"? I have described many of them above. See *supra*, at 586–587. Among others, they included rulings describing "substantive rules" as rules that " 'establis[h] a standard of conduct which has the force of law' " or that change "substantive standards." *American Hospital Assn.*, 834 F. 2d, at 1046, 1056. Given this case law, it is almost a certainty that the Conference Committee had in mind the meaning that courts had already given to the term "substantive"; indeed, neither the Court nor the hospitals point to any other recent rulings to which the Report could have referred. And if that is correct, Congress would not have intended to include interpretive rules within the scope of the revised provision.

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Then-recent court rulings also explain why Congress added the words "statement of policy," given its desire to mimic the scope of the APA's rulemaking provision. At the time Congress added this language in 1987, the D. C. Circuit had recently described it as "well established that a court, in determining whether notice and comment procedures apply to an agency action, will consider the agency's own characterization of the particular action." *Telecommunications Research and Action Ctr.* v. *FCC*, 800 F. 2d 1181, 1186 (1986); see also *United Technologies Corp.* v. *EPA*, 821 F. 2d 714, 718 (CADC 1987) ("[T]he agency's characterization of a rule is 'relevant' "). And in practice, courts appeared to give the agency's characterization at least some weight. See *Telecommunications*, 800 F. 2d, at 1186 (finding "no reason to question the Commission's characterization" of the challenged action as a "policy statement"); *General Motors Corp.* v. *Ruckelshaus*, 742 F. 2d 1561, 1565 (CADC 1984) (en banc) (finding a rule exempt from notice and comment in part be-

cause "the agency regarded its rule as interpretative"). These cases thus reinforce the likelihood that Congress inserted the words "statement of policy" to make clear that the agency could not evade the notice-and-comment obligation simply by calling a substantive rule a "statement of policy." In deciding whether a particular agency action is (or is not) a substantive rule, it is the *substantive legal effect* that will matter, not the label.

In short, the statute's history provides considerable evidence that Congress intended to replicate the APA framework. Nowhere in this history is there any indication that Congress intended to require notice and comment for a *broader* category than substantive rules.

C

The third—and perhaps strongest—reason for believing that Congress intended this interpretation is a practical reason. Medicare is a massive federal program, "embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 13 (2000). To help participants navigate the statutory and regulatory scheme, the agency has issued tens of thousands of pages of manual instructions, interpretive rules, and other guidance documents. And it has followed this practice since well before Congress enacted the notice-and-comment provisions at issue here. See *supra*, at 588–589.

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This combination of regulations and informal guidance is, we have said, "a sensible structure for the complex Medicare reimbursement process." *Guernsey Memorial Hospital*, 514 U. S., at 101. Notice-and-comment procedures are elaborate and take time to complete. The Government cites a study showing that notice-and-comment rulemakings take an average of four years to complete. Pet. for Cert. 20 (citing GAO, D. Fantone, Federal Rulemaking 5, 19 (GAO–09–205, 2009)).

To imagine that Congress wanted the agency to use those procedures in respect to a large percentage of its Medicare guidance manuals is to believe that Congress intended to enact what could become a major roadblock to the implementation of the Medicare program. As the Government warns us, the Court of Appeals' interpretation may "substantially undermine" and even "cripple" the administration of the Medicare scheme. See Brief for Petitioner 21, 42. To illustrate this point, consider the following provisions of the Medicare Provider Reimbursement Manual, which the agency has published for decades. All of these provisions were held by courts to be "interpretive rules," and hence not subject—before today—to the statute's notice-and-comment requirements:

- Provisions governing when provider contributions to employee deferred compensation plans are necessary and proper and therefore reimbursable. *Visiting Nurse Assn. Gregoria Auffant, Inc.* v. *Thompson*, 447 F. 3d 68, 76–77 (CA1 2006).
- Provisions governing exceptions to the per diem cost limits that the Secretary can authorize in respect to routine extended care service costs. *St. Francis Health Care Centre* v. *Shalala*, 205 F. 3d 937, 940–943, 947 (CA6 2000).
- A provision governing whether certain hospital costs should be classified as "routine" or "ancillary." *National Medical Enterprises, Inc.* v. *Shalala*, 43 F. 3d 691, 694 (CADC 1995).
- A provision governing whether borrowing is considered "necessary" when the provider has funds in its funded depreciation account that are not committed by contract to a capital purpose. *Sentara-Hampton Gen. Hospital* v. *Sullivan*, 980 F. 2d 749, 751, 756–760 (CADC 1992).
- A provision restricting the type of financial arrangements for which hospitals can recover reimbursement

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for on-call emergency room physicians. *Samaritan Health Serv.* v. *Bowen*, 811 F. 2d 1524, 1525, 1529 (CADC 1987).

- A provision regarding the recapture of excess reimbursements resulting from a provider depreciating its assets using an accelerated method. *Daughters of Miriam Ctr.*, 590 F. 2d, at 1254–1255.
- A provision governing whether providers are entitled to reimbursement for bad debts when States are obligated to pay those debts under Medicaid. *GCI Health Care Ctrs., Inc.* v. *Thompson*, 209 F. Supp. 2d 63, 68–69 (DC 2002).
- A provision disallowing reimbursement of stock maintenance costs. *American Medical Int'l, Inc.* v. *Secretary of Health, Education and Welfare*, 466 F. Supp. 605, 615–616 (DC 1979).

These examples all involve provisions of the Provider Reimbursement Manual, but the agency also publishes more than a dozen other manuals, with tens of thousands of additional pages of instructions governing "the scope of benefits, the payment for services, [and] the eligibility" for benefits or services. § 1395hh(a)(2). These include the Medicare General Information, Eligibility and Entitlement Manual; the Medicare Claims Processing Manual; the Medicare Benefit Policy Manual; the Medicare Secondary Payer Manual; the Medicare Program Integrity Manual; the Medicare Prescription Drug Benefit Manual; and many others. Many provisions of these manuals have been deemed interpretive rules as well. See, *e. g.*, *Erringer* v. *Thompson*, 371 F. 3d 625, 632 (CA9 2004) (provisions of Program Integrity Manual governing contractors' creation of local coverage determinations); *Linoz*, 800 F. 2d, at 876–878 (provision of Carrier's Manual carving out an exception to the rule governing reimbursement for ambulance service).

Is it reasonable to believe that Congress intended to impose notice-and-comment requirements upon all, or most, or

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even many of these rules, requirements, or statements of policy? See *ante*, at 582–583. In my view, the answer is clearly no. Yet the Court's opinion might impose this unnecessary and potentially severe burden on the administration of the Medicare scheme.

D

Finally, interpreting the statute as replicating the APA has the added virtues of clarity and stability. We know that Congress could not have meant to require notice-and-comment rulemaking for *all* agency actions that could conceivably affect substantive Medicare policy. So there must be a way to distinguish the "substantive" rules that are covered from the "substantive" rules that are not. And the APA's notion of a "substantive rule" provides a natural, legally understandable, and customary way for judges, agencies, and lawyers to perform that task. In that sense, the APA offers us a familiar port in an interpretive storm.

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The Court not only leaves the APA behind; it fails to substitute any reasonably clear alternative standard. How is the agency to determine whether a rule "establishes or changes a substantive legal standard"? At one point, the Court refers to the hospitals' view that the statute applies to agency actions "that 'creat[e] duties, rights and obligations,'" as distinct from agency actions that "specif[y] how those duties, rights, and obligations should be enforced." *Ante*, at 573. But it later declines to "go so far as" to fully endorse that view. *Ante*, at 579.

At another point, the Court refers to the notice-and-comment requirement as applying to "avowedly 'gap'-filling polic[ies]," suggesting the case might be different if the Government had argued that "the *statute* itself" "supplie[d] the controlling legal standard." *Ante*, at 583–584. But these statements sound as if the Court is embracing the very interpretive-rule exception that its holding denies. See, *e. g.*, *Hemp Industries Assn.* v. *DEA*, 333 F. 3d 1082, 1087 (CA9 2003) (interpretive rules "merely explain, but do not

add to, the substantive law that already exists in the form of a statute"); *American Hospital Assn.*, 834 F. 2d, at 1046 (agency action is interpretive where it "merely reminds parties of existing duties" under a statute); cf. *Clarian Health West, LLC* v. *Hargan*, 878 F. 3d 346, 355–356 (CADC 2017) (concluding, after the decision below, that manual instructions governing reconciliation of outlier payments did not require notice and comment because they did not "bind" the agency and because existing statutory and regulatory provisions "establish[ed the] substantive legal standards"). If the Court is going to effectively exempt interpretive rules from the notice-and-comment requirement, why not simply say so?

Nor does the Court's resolution of this particular case offer clarity as to the scope of the statute. The Court holds that the agency must provide notice and comment before including Medicare Part C patients in the Medicare fraction. But it does not *explain* why that agency decision "establishes or changes a substantive legal standard." Is it because the decision "affects a hospital's right to payment"? *Ante*, at 573. Is it because the decision's financial impact is "considerabl[e]"? *Ante*, at 571. Is it because the agency had previously sought to adopt the same policy through notice and comment? *Ibid.* The Court does not say.

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This lack of explanation aggravates the potential burden that the Court's opinion already imposes upon the Medicare program. It may also lead to legal challenges to the validity of interpretive rules (or even procedural rules) previously thought to have been settled. And it will thereby increase the confusion that is inevitable once the Court rejects the settled and readily available principles that courts have learned to use to identify substantive rules under the APA. These potential adverse consequences are, in my view, persuasive evidence that Congress did not intend the statute to be construed in this way.

To consider these consequences in no way invades Congress' constitutional authority to "weigh the costs and bene-

fits of different approaches and make the necessary policy judgment." *Ante*, at 583. Congress exercised that authority when it passed the Medicare Act's notice-and-comment provisions. But it used language that even the Court describes as "enigmatic," *ante*, at 577, and our role as judges is to decipher that enigma. Examining the potential consequences of each competing interpretation helps us perform that task, as we can presume that Congress did not intend to produce irrational or undesirable practical consequences. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 538, 544–545 (2013) (concluding that Congress did not intend an interpretation of the copyright statute that would produce serious and extensive "practical problems"); cf. *Home Depot U. S. A., Inc.* v. *Jackson*, 587 U. S. 435, 453 (2019) (ALITO, J., dissenting) ("[A] good interpreter also reads a text charitably, not lightly ascribing irrationality to its author").

II

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The reasons set forth above provide sufficient grounds to believe that Congress only intended to require notice and comment for substantive rules. The Court nonetheless concludes that three "textual clues" foreclose this interpretation. *Ante*, at 577. I have already mentioned one of them: Congress' use of the words "statement of policy" in the provision before us. As I have explained, the most plausible explanation for this language is that Congress sought to make clear that the agency must use notice and comment for any agency pronouncement that amounts to a substantive rule—irrespective of the label that the agency applies. See *supra*, at 591–592.

The remaining two arguments that the Court offers to defend its interpretation are, in my view, similarly inadequate. The Court points, for example, to § 1395hh(e)(1), which Congress added in 2003. See § 903(a)(1), 117 Stat. 2376. That subsection limits the agency's authority to make retroactive any "substantive change" in "regulations, manual instruc-

tions, interpretative rules, statements of policy, or guidelines of general applicability." The Court points out that the word "substantive" in this subsection does not mean a "substantive rule" under the APA. *Ante*, at 575–576. And I agree with that observation. But I cannot see how that fact sheds light on the meaning of the phrase "establishes or changes a *substantive legal standard*," where the adjective "substantive" modifies an entirely different noun.

We of course normally *presume* that the same word carries a single meaning throughout a given statute. Here, however, that presumption is overcome. The word "substantive" in § 1395hh(e)(1) modifies the word "change," and the phrase "substantive change" has a known meaning in the law. It refers to a change to the *substance* of a rule, rather than a technical change to its form. See, *e. g.*, *Northwest, Inc.* v. *Ginsberg*, 572 U. S. 273, 282 (2014) (noting that statutory recodification "did not effect any 'substantive change' " to the law); see also Black's Law Dictionary 1469 (8th ed. 2004) (defining "substance" as, *inter alia*, "the essential quality of something, *as opposed to its mere form*" (emphasis added)). Thus, § 1395hh(e)(1) simply says that the agency cannot retroactively apply nontechnical changes made to policies articulated in "regulations, manual instructions, interpretative rules, statements of policy, or guidelines of general applicability." The provision before us deals with an entirely different subject, namely, the use of notice-and-comment procedures. And the word "substantive" in this context has a different and significantly narrower scope.

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The Court also points to the fact that the Medicare Act cross-references the APA's good-cause exception. Had Congress wanted to pick up the APA's exclusion of interpretive rules, the Court says, it could simply have cross-referenced the APA's interpretive-rule exception as well. *Ante,* at 576–577. As a practical matter, the legislative history suggests that the absence of a cross-reference is a particularly unreliable guide to congressional intent in this case. The initial

version of the bill passed by the House of Representatives unambiguously sought to *broaden* the scope of the APA. See *supra*, at 590. Rather than starting anew, the Conference Committee retained some of the language from the House's version but revised it to reflect the APA's notion of a substantive rule. See *supra*, at 590–591.

Even putting the drafting history aside, there are many reasons why Congress might have chosen to spell out the governing standard rather than rest upon an explicit cross-reference to a portion of the APA. Section 1395hh(a)(2), for example, reflects Congress' judgment that rulemaking is necessary only for a certain subset of substantive rules—namely, those governing "the scope of benefits, the payment for services, or the eligibility" for benefits or services. A simple cross-reference to the APA's interpretive-rule exception would not have adequately captured this judgment. The APA's exception would have exempted interpretive rules, but Congress also wanted to exempt those substantive rules that do not govern benefits, payment, or eligibility. True, Congress could have produced the same result by first amending the statute to require notice and comment for any regulation governing benefits, payment, or eligibility and *then* cross-referencing the interpretive-rule exception. But the language of § 1395hh(a)(2) accomplishes both of those tasks at once.

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And even were that not so, there is no rule requiring Congress to use cross-references. As I have explained, the Medicare Act's notice-and-comment provisions already operate by way of three cross-linked subsections. See *supra*, at 585–586. Given the complexity of this scheme, I would not second-guess Congress' decision not to add yet another cross-reference here.

* * *

Given the statute's context, its language, its history, and related practical consequences, I believe that Congress in-

tended the provision before us to apply to all substantive rules, irrespective of the labels that the agency affixed. Congress did not, however, intend the provision to require notice and comment for interpretive rules that, by definition, lack the force and effect of law. I fear that the Court, in rejecting this interpretation, has improperly (and needlessly) "ignore[d] persuasive evidence of Congress' actual purpose." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 115 (1991) (Stevens, J., dissenting); cf. *Johnson* v. *United States*, 163 F. 30, 32 (CA1 1908) (Holmes, J.) ("[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before").

If I am right, and if the Court's opinion will cause serious confusion or delay, Congress can, through legislation, fix the Court's mistake. "But legislative action takes time; Congress has much to do; and other matters . . . may warrant higher legislative priority." *Milner* v. *Department of Navy*, 562 U. S. 562, 592 (2011) (BREYER, J., dissenting). Rather than requiring Congress to "revisit the matter" and "restate its purpose in more precise English," *Casey*, 499 U. S., at 115 (Stevens, J., dissenting), I would hold that the Medicare Act only requires notice and comment for what this Court has traditionally considered to be substantive rules. I would remand for the Court of Appeals to decide in the first instance whether the agency's decision in this case qualifies as a substantive or an interpretive rule.

For these reasons, I respectfully dissent.

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Syllabus

PARKER DRILLING MANAGEMENT SERVICES, LTD. *v.* NEWTON

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

No. 18–389. Argued April 16, 2019—Decided June 10, 2019

Respondent Brian Newton worked for petitioner Parker Drilling Management Services on drilling platforms off the California coast. Newton was paid for his time on duty but not for his time on standby, during which he could not leave the platform. Newton filed a class action in state court, alleging, as relevant here, that California's minimum-wage and overtime laws required Parker to compensate him for his standby time. Parker removed the action to Federal District Court. The parties agreed that Parker's platforms were subject to the Outer Continental Shelf Lands Act (OCSLA), which provides that all law on the Outer Continental Shelf (OCS) is federal law, administered by federal officials; denies States any interest in or jurisdiction over the OCS; and deems the adjacent State's laws to be federal law only "[t]o the extent that they are applicable and not inconsistent with" other federal law, 43 U. S. C. § 1333(a)(2)(A). The District Court concluded that the state laws relevant here should not be applied as federal law on the OCS because the Fair Labor Standards Act of 1938 (FLSA), a comprehensive federal wage-and-hour scheme, left no significant gap in federal law for state law to fill. It thus granted Parker judgment on the pleadings. The Ninth Circuit vacated and remanded. It held that state law is "applicable" under the OCSLA if it pertains to the subject matter at issue, a standard satisfied by California wage-and-hour laws. It also held that those state laws were not "inconsistent" with federal law because they were not incompatible with the federal scheme.

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Held:

1. Where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS. Pp. 606–616.

(a) After this Court held that the Federal Government has exclusive jurisdiction over the entire continental shelf, see, *e. g.*, *United States* v. *Louisiana*, 339 U. S. 699, 705, Congress enacted the Submerged Lands Act, which ceded certain offshore lands to the coastal States, and passed the OCSLA, which affirmed the Federal Government's exclusive control over the OCS. Pp. 606–607.

(b) Newton argues that state law is "applicable" on the OCS whenever it pertains to the subject matter at issue and that it is "inconsist-

ent" only if it would be pre-empted under ordinary pre-emption principles. Parker counters that state law is not "applicable" absent a gap in federal law that needs to be filled and that state law can be "inconsistent" with federal law even if it is possible to satisfy both sets of laws. Parker's approach is more persuasive. This Court reads the statute's words "'in their context and with a view to their place in the overall statutory scheme.'" *Roberts* v. *Sea-Land Services, Inc.*, 566 U. S. 93, 101. The Court's pre-OCSLA decisions made clear that federal law controlled the OCS in every respect, and the OCSLA reaffirmed that role. Taken together, the OCSLA's provisions convincingly show that state laws can be "applicable and not inconsistent" with federal law under § 1333(a)(2)(A) only if federal law does not address the relevant issue. The OCSLA makes apparent "that federal law is 'exclusive' . . . and that state law is adopted only as surrogate federal law." *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, 357. It borrows only certain state laws, which are then declared to be federal law and administered by federal officials. It would thus make little sense to treat the OCS as a mere extension of the adjacent State, where state law applies unless it conflicts with federal law. That type of pre-emption analysis applies only where overlapping, dual state and federal jurisdiction makes it necessary to decide which law takes precedence. But federal law is the only law on the OCS and there is no overlapping state and federal jurisdiction, so the reference to "not inconsistent" state laws presents only the question whether federal law has already addressed the relevant issue. If so, state law on the issue is inapplicable. Pp. 607–610.

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(c) This interpretation is supported by several other considerations. Pp. 610–617.

(1) Newton's interpretation—that the choice-of-law question on the OCS is the same as it would be in an adjacent State—would deprive much of the OCSLA of any import, violating the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin* v. *United States*, 573 U. S. 351, 358. Pp. 610–611.

(2) This Court's interpretation is consistent with the federal-enclave model and the historical development of the statute. The OCSLA treats the OCS as "an upland federal enclave." *Rodrigue*, *supra*, at 366. Generally, when an area in a State becomes a federal enclave, "only the [state] law in effect at the time of the transfer of jurisdiction continues in force" as surrogate federal law, *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 100, provided that the state law does not conflict with "federal policy," *Paul* v. *United States*, 371 U. S. 245, 269. Going forward, state law presumptively does not apply to

the enclave. See *Sadrakula*, *supra*, at 100. As originally enacted, the OCSLA both treated the OCS as a federal enclave and adopted only the "applicable and not inconsistent" laws of the adjacent State in effect as of the Act's effective date. This suggests that, like the general enclave rule, the OCSLA sought to make all OCS law federal yet also "provide a sufficiently detailed legal framework to govern life" on the OCS. *Shell Oil Co.* v. *Iowa Dept. of Revenue*, 488 U. S. 19, 27. Providing a sufficient legal structure to accomplish that purpose eliminated the need to adopt new state laws. The OCSLA's text and context thus suggest that state law is not adopted to govern the OCS where federal law is on point. The later amendment of the OCSLA to adopt state law on an ongoing basis confirms the connection between the OCSLA and the federal-enclave model. Pp. 611–614.

(3) This Court's interpretation accords with precedent construing the OCSLA. In *Rodrigue*, *supra*, at 352–353; *Chevron Oil Co.* v. *Huson*, 404 U. S. 97; and *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, the Court viewed the OCSLA as adopting state law to fill in federal-law gaps. Pp. 614–616.

2. Under the proper standard, some of Newton's present claims can be resolved, though others have not been analyzed by the Ninth Circuit. Some claims are premised on the adoption of California law requiring payment for all standby time. Because federal law already addresses this issue, California law does not provide the rule of decision on the OCS. To the extent Newton's OCS-based claims rely on that law, they necessarily fail. Likewise, to the extent his OCS-based claims rely on the adoption of California's minimum wage, the FLSA already provides for a minimum wage, so the state minimum wage is not adopted as federal law and does not apply on the OCS. Pp. 616–617.

881 F. 3d 1078 and 888 F. 3d 1085, vacated and remanded.

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

Paul D. Clement argued the cause for petitioner. With him on the briefs were *George W. Hicks, Jr.*, *Michael D. Lieberman*, *Ronald J. Holland*, and *Ellen M. Bronchetti*.

Christopher G. Michel argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, and *Mark B. Stern*.

David C. Frederick argued the cause for respondent. With him on the brief were *Michael A. Strauss*, *Aris E. Kar-*

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akalos, *Erin Glenn Busby*, *Lisa R. Eskow*, and *Michael F. Sturley.**

JUSTICE THOMAS delivered the opinion of the Court.

The Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, 43 U. S. C. § 1331 *et seq.*, extends federal law to the subsoil and seabed of the Outer Continental Shelf and all attachments thereon (OCS). Under the OCSLA, all law on the OCS is federal law, administered by federal officials. The OCSLA denies States any interest in or jurisdiction over the OCS, and it deems the adjacent State's laws to be federal law "[t]o the extent that they are applicable and not inconsistent with" other federal law. § 1333(a)(2)(A). The question before us is how to determine which state laws meet this requirement and therefore should be adopted as federal law. Applying familiar tools of statutory interpretation, we hold that where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS.

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I

Respondent Brian Newton worked for petitioner Parker Drilling Management Services on drilling platforms off the coast of California. Newton's 14-day shifts involved 12 hours per day on duty and 12 hours per day on standby, during which he could not leave the platform. He was paid well above the California and federal minimum wages for his time on duty, but he was not paid for his standby time.

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Hyland Hunt* and *Ruthanne M. Deutsch*; for Freeport-McMoRan Oil & Gas LLC et al. by *John P. Elwood*, *Kevin A. Gaynor*, *Jeremy C. Marwell*, *Baldwin J. Lee*, *Kevin W. Brooks*, *George W. Abele*, *Stacy R. Linden*, *Benjamin G. Shatz*, and *Peter C. Tolsdorf*; and for the Washington Legal Foundation by *Richard A. Samp*.

John J. Korzen and *William A. Herreras* filed a brief for the California Applicants' Attorneys Association as *amicus curiae* urging affirmance.

Newton filed a class action in California state court alleging violations of several California wage-and-hour laws and related state-law claims. Among other things, Newton claimed that California's minimum-wage and overtime laws required Parker to compensate him for the time he spent on standby. Parker removed the action to Federal District Court. The parties agreed that Parker's platforms were subject to the OCSLA. Their disagreement centered on whether the relevant California laws were "applicable and not inconsistent" with existing federal law and thus deemed to be the applicable federal law under the OCSLA. § 1333(a)(2)(A).

The District Court applied Fifth Circuit precedent providing that under the OCSLA, "state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." App. to Pet. for Cert. 51a (quoting *Continental Oil Co.* v. *London Steam-Ship Owners' Mut. Ins. Assn.*, 417 F. 2d 1030, 1036 (1969)). It determined that the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, constitutes a comprehensive federal wage-and-hour scheme and thus left no significant gap for state law to fill. Because all of Newton's claims relied on state law, the court granted Parker judgment on the pleadings.

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The Ninth Circuit vacated and remanded. It first held that state law is "'applicable'" under the OCSLA whenever it "pertain[s] to the subject matter at hand." 881 F. 3d 1078, 1090, amended and reh'g en banc denied, 888 F. 3d 1085 (2018). The court found that California wage-and-hour laws satisfied this standard and turned to "the determinative question in Newton's case": "whether California wage and hour laws are 'inconsistent with' existing federal law." 881 F. 3d, at 1093. According to the Ninth Circuit, state laws are "inconsistent" with federal law under the OCSLA only "if they are mutually incompatible, incongruous, [or] inharmonious." *Ibid.* (internal quotation marks omitted). Applying that standard, the court determined that no incon-

sistency exists between the FLSA and California wage-and-hour law because the FLSA saving clause "explicitly permits more protective state wage and hour laws." *Id.*, at 1097 (citing 29 U. S. C. § 218(a)). Given the disagreement between the Fifth and Ninth Circuits, we granted certiorari. 586 U. S. 1112 (2019).

II

Before the OCSLA, coastal States and the Federal Government disputed who had the right to lease submerged lands on the continental shelf. Some coastal States even asserted jurisdiction all the way to the outer edge of the shelf. See *Shell Oil Co.* v. *Iowa Dept. of Revenue*, 488 U. S. 19, 26 (1988). The disputes eventually reached this Court, which held in a series of decisions that the Federal Government has exclusive jurisdiction over the entire continental shelf. See *United States* v. *California*, 332 U. S. 19, 38–39 (1947); *United States* v. *Louisiana*, 339 U. S. 699, 705 (1950); *United States* v. *Texas*, 339 U. S. 707, 717–718 (1950).

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After these decisions, Congress divided jurisdiction over the shelf. In 1953, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, which ceded to the coastal States offshore lands within a specified distance of their coasts. A few months later, Congress passed the OCSLA, which affirmed that the Federal Government exercised exclusive control over the OCS, defined as "all submerged lands" beyond the lands reserved to the States up to the edge of the United States' jurisdiction and control. § 1331(a). Specifically, the OCSLA declares that "the subsoil and seabed of the [OCS] appertain to the United States and are subject to its jurisdiction, control, and power of disposition." § 1332(1). The OCSLA then sets forth "detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed." *United States* v. *Maine*, 420 U. S. 515, 527 (1975); see §§ 1334–1354.

Of primary relevance here, the OCSLA defines the body of law that governs the OCS. First, in § 1333(a)(1), the OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States" to the OCS. Section 1333(a)(1) provides that federal law applies "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." Then, § 1333(a)(2)(A) provides:

> "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ."

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Section 1333(a)(2)(A) also states that "[a]ll of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." Finally, § 1333(a)(3) emphasizes that "[t]he provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over" the OCS.

III

A

The question in this case is how to interpret the OCSLA's command that state laws be adopted as federal law on the OCS "[t]o the extent that they are applicable and not inconsistent" with other federal law. § 1333(a)(2)(A). Echoing the Ninth Circuit, Newton argues that state law is "applica-

ble" on the OCS whenever it pertains to the subject matter at issue. Newton further argues that state law is only "inconsistent" with federal law if it is incompatible with the federal scheme. In essence, Newton's argument is that state law is "inconsistent" only if it would be pre-empted under our ordinary pre-emption principles.

Parker, on the other hand, argues that state law is not "applicable" on the OCS in the absence of a gap in federal law that needs to be filled. Moreover, Parker argues that state law can be "inconsistent" with federal law even if it is possible for a party to satisfy both sets of laws. Specifically, Parker contends that, although the FLSA normally accommodates more protective state wage-and-hour laws, such laws are inconsistent with the FLSA when adopting state law as surrogate federal law because federal law would then contain two different standards.

B

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Although this is a close question of statutory interpretation, on the whole we find Parker's approach more persuasive because "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Roberts* v. *Sea-Land Services, Inc.*, 566 U. S. 93, 101 (2012). That rule is particularly relevant here, as the terms "applicable" and "not inconsistent" are susceptible of interpretations that would deprive one term or the other of meaning. If Newton is right that "applicable" merely means relevant to the subject matter, then the word adds nothing to the statute, for an irrelevant law would never be "applicable" in that sense. Cf. *Ransom* v. *FIA Card Services, N. A.*, 562 U. S. 61, 70 (2011) (declining to interpret the word "applicable" in such a way that Congress "could have omitted the term . . . altogether"). And if Parker is right that "applicable" means "necessary to fill a gap in federal law," it is hard to imagine circumstances in which "not inconsistent" would add anything to the statute, for a state law would rarely be

inconsistent with a federal law that leaves a gap that needs to be filled. Moreover, when the OCSLA was enacted, the term "inconsistent" could mean either "incompatible," as Newton contends, or merely "inharmonious," as Parker argues. Webster's New International Dictionary 1259 (2d ed. 1953); see also Funk & Wagnalls New Standard Dictionary 1245 (1957) ("logically discrepant" or "disagreeing" and "discordant"); The New Century Dictionary 811 (1953) ("self-contradictory" or "at variance"); 5 Oxford English Dictionary 173 (1933) ("incongruous" or "not agreeing in substance, spirit, or form"). In short, the two terms standing alone do not resolve the question before us. Particularly given their indeterminacy in isolation, the terms should be read together and interpreted in light of the entire statute. See *Star Athletica, L. L. C.* v. *Varsity Brands, Inc.*, 580 U. S. 405, 414 (2017) ("'[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning'").

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Our pre-OCSLA decisions made clear that the Federal Government controlled the OCS in every respect, and the OCSLA reaffirmed the central role of federal law on the OCS. See *supra*, at 606–607. As discussed, the OCSLA gives the Federal Government complete "jurisdiction, control, and power of disposition" over the OCS, while giving the States no "interest in or jurisdiction" over it. §§ 1332(1), 1333(a)(3). The statute applies federal law to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." § 1333(a)(1). Accordingly, the only law on the OCS is federal law, and state laws are adopted as federal law only "[t]o the extent that they are applicable and not inconsistent with" federal law. § 1333(a)(2)(A).

Taken together, these provisions convince us that state laws can be "applicable and not inconsistent" with federal law under § 1333(a)(2)(A) only if federal law does not address the relevant issue. As we have said before, the OCSLA

makes apparent "that federal law is 'exclusive' in its regulation of [the OCS], and that state law is adopted only as surrogate federal law." *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, 357 (1969). The OCSLA extends all federal law to the OCS, and instead of also extending state law writ large, it borrows only certain state laws. These laws, in turn, are declared to be federal law and are administered by federal officials. Given the primacy of federal law on the OCS and the limited role of state law, it would make little sense to treat the OCS as a mere extension of the adjacent State, where state law applies unless it conflicts with federal law. See *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 617–618 (2011). That type of pre-emption analysis is applicable only where the overlapping, dual jurisdiction of the Federal and State Governments makes it necessary to decide which law takes precedence. But the OCS is not, and never was, part of a State, so state law has never applied of its own force. Because federal law is the only law on the OCS, and there has never been overlapping state and federal jurisdiction there, the statute's reference to "not inconsistent" state laws does not present the ordinary question in pre-emption cases—*i. e.*, whether a conflict exists between federal and state law. Instead, the question is whether federal law has already addressed the relevant issue; if so, state law addressing the same issue would necessarily be inconsistent with existing federal law and cannot be adopted as surrogate federal law. Put another way, to the extent federal law applies to a particular issue, state law is inapplicable.

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C

Apart from § 1333(a)(2)'s place in the overall statutory scheme, several other considerations support our interpretation, which accords with the standard long applied by the Fifth Circuit, see *Continental Oil*, 417 F. 2d, at 1036–1037. First, if Newton were correct that the choice-of-law question on the OCS is the same as it would be in an adjacent State,

much of the OCSLA would be unnecessary. Second, our interpretation is consistent with the federal-enclave model—a model that the OCSLA expressly invokes—and the historical development of the statute. And third, the Court's precedents have treated the OCSLA in accord with our interpretation.

1

Under Newton's interpretation, state law would apply unless pre-empted by federal law, meaning that the OCS would be treated essentially the same as the adjacent State. See Tr. of Oral Arg. 49. But that interpretation would render much of the OCSLA unnecessary. For example, the statute would not have needed to adopt state law as federal law or say that federal law applies on the OCS as if it "were an area of exclusive Federal jurisdiction located within a State." §§1333(a)(1)–(2). It could have simply defined which State's law applied on the OCS and given federal officials and courts the authority to enforce the law. And the statute would not have needed to limit state laws on the OCS to those "applicable and not inconsistent" with federal law (as Newton understands those words), for irrelevant laws never apply and federal law is always "supreme," U. S. Const., Art. VI, cl. 2. Newton's interpretation deprives much of the statute of any import, violating the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin* v. *United States*, 573 U. S. 351, 358 (2014).

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2

Further support for our interpretation comes from the statute's treatment of the OCS as "an area of exclusive Federal jurisdiction located within a State"—*i. e.*, as "an upland federal enclave." §1333(a)(1); *Rodrigue*, *supra*, at 366. It is a commonplace of statutory interpretation that "Congress legislates against the backdrop of existing law." *McQuiggin* v. *Perkins*, 569 U. S. 383, 398, n. 3 (2013). Generally,

when an area in a State becomes a federal enclave, "only the [state] law in effect at the time of the transfer of jurisdiction continues in force" as surrogate federal law. *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 100 (1940). Existing state law typically does not continue in force, however, to the extent it conflicts with "federal policy." *Paul* v. *United States*, 371 U. S. 245, 269 (1963); see *Chicago, R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 542, 547 (1885). And going forward, state law presumptively does not apply to the enclave. See *Sadrakula*, *supra*, at 100; see also *Paul*, *supra*, at 268; *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of Cal.*, 318 U. S. 285, 294 (1943). This approach ensures "that no area however small will be left without a developed legal system for private rights," while simultaneously retaining the primacy of federal law and requiring future statutory changes to be made by Congress. *Sadrakula*, *supra*, at 100; *United States* v. *Tax Comm'n of Miss.*, 412 U. S. 363, 370, n. 12 (1973).[1]

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The original version of the OCSLA both treated the OCS as a federal enclave and adopted only the "applicable and not inconsistent" laws of the adjacent State that were in effect as of the effective date of the Act. 43 U. S. C. § 1333(a)(2) (1970 ed.); see § 1333(a)(1) (1970 ed.) (deeming the OCS "an area of exclusive Federal jurisdiction located within a State"). This textual connection between the OCSLA and the federal-enclave model suggests that, like the generally applicable enclave rule, the OCSLA sought to make all OCS law federal yet also "provide a sufficiently detailed legal framework to govern life" on the OCS. *Shell Oil*, 488 U. S., at 27. Once that framework was established, federal law (including previously adopted state law) provided a sufficient

[1] These general rules "may be qualified in accordance with agreements reached by the respective governments." *Sadrakula*, 309 U. S., at 99; see also *Paul*, 371 U. S., at 268 ("[A] State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States").

legal structure to accomplish that purpose, eliminating the need to adopt new state laws. The federal-state balance in a typical federal enclave is quite different than in a State, and that difference is all the more striking on the OCS, which was never under state control. The text and context of the OCSLA therefore suggest that state law is not adopted to govern the OCS where federal law is on point.

Although Congress later amended the OCSLA to adopt state law on an ongoing basis, this amendment only confirms the connection between the OCSLA and the federal-enclave model. Beginning in 1825, when "federal statutory law punished only a few crimes committed on federal enclaves," Congress enacted several Assimilative Crimes Acts (ACAs) that "borrow[ed] state law to fill gaps in the federal criminal law" on enclaves. *Lewis* v. *United States*, 523 U. S. 155, 160 (1998); see 18 U. S. C. § 13(a) (criminalizing "any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the" relevant State or territory). Mirroring the general enclave rule discussed above, the first ACA was limited to state laws in existence when the Act was passed. *United States* v. *Sharpnack*, 355 U. S. 286, 291 (1958). Because of this limitation, the initial ACA "gradually lost much of its effectiveness in maintaining current conformity with state criminal laws," and Congress eventually provided for the adoption of the state laws in effect at the time of the crime. *Id.*, at 291–292. After this Court upheld this ongoing adoption of state criminal law against a nondelegation challenge, see *id.*, at 294, Congress amended the OCSLA to borrow state laws "'in effect or hereafter adopted, amended, or repealed.'" § 19(f), 88 Stat. 2146. At the same time, Congress left unchanged the features of the OCSLA that we have emphasized above—*i. e.*, that the only law on the OCS is federal, and that state law is adopted only when it is "applicable and not inconsistent" with existing federal law. Thus, we do not understand the statutory amend-

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ment to alter our conclusion. If anything, this history reinforces that the OCS should be treated as an exclusive federal enclave, not an extension of a State, and that the OCSLA, like the ACAs, does not adopt state law "where there is no gap to fill." *Lewis*, 523 U. S., at 163.

3

Finally, our interpretation accords with the Court's precedents construing the OCSLA. We first interpreted the OCSLA's choice-of-law provision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, where we considered whether suits brought by the families of men killed on OCS drilling rigs could proceed under only the federal Death on the High Seas Act or also under state law. 395 U. S., at 352–353. We emphasized that under the OCSLA, the body of law applicable to the OCS "was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law." *Id.*, at 355–356. We explained that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems," and that the OCSLA "supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.'" *Id.*, at 357 (quoting § 1333(a)(3)). We reiterated that the statutory language makes it "evident" "that federal law is 'exclusive'" on the OCS and that "state law could be used to fill federal voids." *Id.*, at 357–358. After concluding that the Death on the High Seas Act did not apply to accidents on the OCS and thus left a gap related to wrongful deaths, we held that state law provided the rule of decision. We explained that "the inapplicability of the [federal Act] removes any obstacle to the application of state law by incorporation as federal law through" the OCSLA. *Id.*, at 366.

Two years later, in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), the Court again viewed the OCSLA as adopting state

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law to fill in federal-law gaps. In *Huson*, the question was whether federal admiralty law or a state statute governed a tort action arising from an injury that occurred on the OCS. *Id.*, at 98–99. Describing *Rodrigue*'s analysis, we explained that where "there exists a substantial 'gap' in federal law," "state law remedies are not 'inconsistent' with applicable federal law." 404 U. S., at 101. We highlighted that "state law was needed" as surrogate federal law because federal law alone did not provide "'a complete body of law,'" which is why "Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law." *Id.*, at 103–104. In other words, the OCSLA "made clear provision for filling in the 'gaps' in federal law." *Id.*, at 104. And because Congress had decided not to apply federal admiralty law on the OCS, leaving a gap on the relevant issue, we held that it was appropriate to "absor[b]" the state law as federal law. *Id.*, at 104, 109.

In *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981), we once again emphasized that "[a]ll law applicable to the [OCS] is federal law" and that the "OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States" "to fill the substantial 'gaps' in the coverage of federal law." *Id.*, at 480. We noted that under the OCSLA, the Federal Government "retain[ed] exclusive . . . control of the administration of the [OCS]," and that state law is incorporated "to fill gaps in federal law." *Id.*, at 480, n. 7.

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These precedents confirm our understanding of the OCSLA. Although none decided the precise question before us, much of our prior discussion of the OCSLA would make little sense if the statute essentially treated the OCS as an extension of the adjacent State. In *Rodrigue*, for example, there was no question that the state law at issue pertained to the subject matter or that the relevant federal law expressly preserved state laws regulating the same subject. See 395 U. S., at 355; 46 U. S. C. § 767 (1964 ed.). Under Newton's interpretation, that should have ended the case. Yet the

Court instead analyzed at length whether the federal law extended to the OCS. See 395 U. S., at 359–366. It would be odd for our decisions to focus so closely on the gap-filling role of state law under the OCSLA if, as Newton argues, the existence of a federal-law gap is irrelevant. Our consistent understanding of the OCSLA remains: All law on the OCS is federal, and state law serves a supporting role, to be adopted only where there is a gap in federal law's coverage.

In sum, the standard we adopt today is supported by the statute's text, structure, and history, as well as our precedents. Under that standard, if a federal law addresses the issue at hand, then state law is not adopted as federal law on the OCS.[2]

IV

Applying this standard, some of Newton's present claims are readily resolvable. For instance, some of his claims are premised on the adoption of California law requiring payment for all time that Newton spent on standby. See *Mendiola* v. *CPS Security Solutions, Inc.*, 60 Cal. 4th 833, 842, 340 P. 3d 355, 361 (2015); Cal. Lab. Code Ann. § 510(a) (West 2011). But federal law already addresses this issue. See 29 CFR § 785.23 (2018) ("An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises"); see also 29 U. S. C. § 207(a). Therefore, this California law does not provide the rule of decision on the OCS, and to the extent Newton's OCS-based claims rely on that law, they necessarily fail.

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Likewise, to the extent Newton's OCS-based claims rely on the adoption of the California minimum wage (currently

[2] Of course, it is conceivable that state law might be "inconsistent" with federal law for purposes of § 1333(a)(2) even absent an on-point federal law. For example, federal law might contain a deliberate gap, making state law inconsistent with the federal scheme. Or, state law might be inconsistent with a federal law addressing a different issue. We do not foreclose these or other possible inconsistencies.

$12), Cal. Lab. Code Ann. § 1182.12(b) (West Supp. 2019), the FLSA already provides for a minimum wage, 29 U. S. C. § 206(a)(1), so the California minimum wage does not apply. Newton points out that the FLSA sets a minimum wage of "*not less than* . . . $7.25 an hour," *ibid.* (emphasis added), and does not "excuse noncompliance with any Federal or State law . . . establishing a [higher] minimum wage," § 218(a). But whatever the import of these provisions in an ordinary pre-emption case, they do not help Newton here, for the question under the OCSLA is whether federal law addresses the minimum wage on the OCS. It does. Therefore, the California minimum wage is not adopted as federal law and does not apply on the OCS.

Newton's other claims were not analyzed by the Court of Appeals, and the parties have provided little briefing on those claims. Moreover, the Court of Appeals held that Newton should be given leave to amend his complaint. Because we cannot finally resolve whether Parker was entitled to judgment on the pleadings, we vacate the judgment of the Court of Appeals, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Syllabus

RETURN MAIL, INC. *v.* UNITED STATES POSTAL SERVICE ET AL.

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

No. 17–1594. Argued February 19, 2019—Decided June 10, 2019

The Leahy-Smith America Invents Act (AIA) of 2011 created the Patent Trial and Appeal Board, 35 U. S. C. § 6(c), and established three types of administrative review proceedings before the Board that enable a "person" other than the patent owner to challenge the validity of a patent post-issuance: (1) "inter partes review," § 311; (2) "post-grant review," § 321; and (3) "covered-business-method review" (CBM review), note following § 321. After an adjudicatory proceeding, the Board either confirms the patent claims or cancels some or all of them, §§ 318(b), 328(b). Any "dissatisfied" party may then seek judicial review in the Federal Circuit, §§ 319, 329. In addition to AIA review proceedings, a patent can be reexamined either in federal court during a defense to an infringement suit, § 282(b), or in an ex parte reexamination by the Patent Office, §§ 301(a), 302(a).

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Return Mail, Inc., owns a patent that claims a method for processing undeliverable mail. The Postal Service subsequently introduced an enhanced address-change service to process undeliverable mail, which Return Mail asserted infringed its patent. The Postal Service petitioned for ex parte reexamination of the patent, but the Patent Office confirmed the patent's validity. Return Mail then sued the Postal Service in the Court of Federal Claims, seeking compensation for the unauthorized use of its invention. While that suit was pending, the Postal Service petitioned for CBM review. The Patent Board concluded that the subject matter of Return Mail's claims was ineligible to be patented and thus canceled the claims underlying its patent. The Federal Circuit affirmed, concluding, as relevant here, that the Government is a "person" eligible to petition for CBM review.

Held: The Government is not a "person" capable of instituting the three AIA review proceedings. Pp. 626–637.

(a) In the absence of an express definition of the term "person" in the patent statutes, the Court applies a "longstanding interpretive presumption that 'person' does not include the sovereign," and thus excludes a federal agency like the Postal Service. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 780–781. This presumption reflects "common usage," *United States* v. *Mine*

Workers, 330 U. S. 258, 275, as well as an express directive from Congress in the Dictionary Act, 1 U. S. C. § 1. The Dictionary Act does not include the Federal Government among the persons listed in the definition of "person" that courts use "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise," § 1. Contrary to the Postal Service's contention otherwise, this Court has, in several instances, applied the presumption against treating the Government as a statutory person even when, as here, doing so would exclude the Government or one of its agencies from accessing a benefit or favorable procedural device. See, *e. g.*, *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605, 614. Thus, the Court here proceeds from the presumption that the Government is not a "person" authorized to initiate these proceedings absent an affirmative showing to the contrary. Pp. 626–628.

(b) The Postal Service must point to some indication in the AIA's text or context affirmatively showing that Congress intended to include the Government as a "person," but its arguments are unpersuasive. Pp. 628–636.

(1) The Postal Service first argues that the AIA's reference to a "person" in the context of post-issuance review proceedings must include the Government because other references to persons in the patent statutes appear to do so. The consistent-usage principle—*i. e.*, when Congress uses a word to mean one thing in one part of the statute, it will mean the same thing elsewhere in the statute—however, "'readily yields to context,'" especially when a statutory term is used throughout a statute and takes on "distinct characters" in distinct statutory provisions. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320. Here, where there are at least 18 references to "person[s]" in the Patent Act and the AIA, no clear trend is shown: Sometimes "person" plainly includes or excludes the Government, but sometimes, as here, it might be read either way. The mere existence of some Government-inclusive references cannot make the "affirmative showing," *Stevens*, 529 U. S., at 781, required to overcome the presumption that the Government is not a "person" eligible to petition for AIA review proceedings. Pp. 628–632.

(2) The Postal Service next points to the Federal Government's longstanding history with the patent system, arguing that because federal officers have been able to apply for patents in the name of the United States since 1883, Congress must have intended to allow the Government access to AIA review proceedings. But the Government's ability to obtain a patent does not speak to whether Congress meant for the Government to participate as a third-party challenger in AIA proceedings established only eight years ago. Moreover, even assuming that the Government may petition for ex parte reexamination of an issued patent, as a 1981 Patent Office Manual of Patent Examining

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Syllabus

Procedure (MPEP) indicates, an ex parte reexamination process is fundamentally different from an AIA review proceeding. The former process is internal, and the party challenging the patent may not participate. By contrast, adversarial, adjudicatory AIA review proceedings are between the "person" who petitioned for review and the patent owner; they include briefing, a hearing, discovery, and the presentation of evidence; and the losing party has appeal rights. Congress may have had good reason to authorize the Government to initiate a hands-off ex parte reexamination but not to become a party to the AIA's full-blown adversarial proceeding. Nothing suggests that Congress had the 1981 MPEP statement about ex parte reexamination in mind when it created the AIA review proceedings. And because there is no "settled" meaning of the term "person" with respect to the newly established AIA review proceedings, see *Bragdon* v. *Abbott*, 524 U. S. 624, 645, the MPEP does not justify putting aside the presumptive meaning of "person." Pp. 632–634.

(3) Finally, the Postal Service argues that it must be a "person" who may petition for AIA review proceedings because, like other potential infringers, it is subject to civil liability and can assert a defense of patent invalidity. It would thus be anomalous, the Postal Service posits, to deny it a benefit afforded to other infringers—namely, the ability to challenge a patent *de novo* before the Patent Office, rather than only with clear and convincing evidence in defense to an infringement suit. Federal agencies, however, face lower and more calculable risks than nongovernmental actors, so it is reasonable for Congress to have treated them differently. Excluding federal agencies from AIA review proceedings also avoids the awkward situation of having a civilian patent owner defend the patentability of her invention in an adversarial, adjudicatory proceeding initiated by one federal agency and overseen by a different federal agency. Pp. 634–636.

868 F. 3d 1350, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 637.

Beth S. Brinkmann argued the cause for petitioner. With her on the briefs were *Richard L. Rainey*, *Kevin F. King*, *Nicholas L. Evoy*, and *Daniel G. Randolph*.

Deputy Solicitor General Stewart argued the cause for respondents. With him on the brief were *Solicitor General*

Francisco, *Assistant Attorney General Hunt*, *Jonathan Y. Ellis*, *Mark R. Freeman*, and *Megan Barbero*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In the Leahy-Smith America Invents Act of 2011, 35 U. S. C. § 100 *et seq.*, Congress created the Patent Trial and Appeal Board and established three new types of administrative proceedings before the Board that allow a "person" other than the patent owner to challenge the validity of a patent post-issuance. The question presented in this case is whether a federal agency is a "person" able to seek such review under the statute. We conclude that it is not.

I

A

The Constitution empowers Congress "[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 . . . Discoveries." Art. I, § 8, cl. 8. Pursuant to that authority, Congress established the United States Patent and Trademark Office (Patent Office) and tasked it

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*Briefs of *amici curiae* urging reversal were filed for the CATO Institute et al. by *Gregory A. Castanias*, *David B. Cochran*, *Benjamin M. Flowers*, and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Pratik A. Shah*, *James E. Tysse*, *Martine E. Cicconi*, and *Daryl Joseffer*; for Pharmaceutical Research and Manufacturers of America by *Jonathan G. Cedarbaum*, *James C. Stansel*, and *David E. Korn*; and for Seven Law Professors by *Matthew J. Dowd*.

Briefs of *amici curiae* urging affirmance were filed for the R Street Institute by *Charles Duan*; and for Tejas N. Narechania by *Sarah Boyce* and *Mr. Narechania*, *pro se*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Blair A. Silver* and *Sheldon H. Klein*; for the Intellectual Property Owners Association by *Lauren A. Degnan* and *Mark W. Lauroesch*; and for the New York Intellectual Property Law Association by *Robert M. Isackson*, *Charles R. Macedo*, *David P. Goldberg*, *Jung S. Hahm*, and *Robert J. Rando*.

with "the granting and issuing of patents." 35 U. S. C. §§ 1, 2(a)(1).

To obtain a patent, an inventor submits an application describing the proposed patent claims to the Patent Office. See §§ 111(a)(1), 112. A patent examiner then reviews the application and prior art (the information available to the public at the time of the application) to determine whether the claims satisfy the statutory requirements for patentability, including that the claimed invention is useful, novel, nonobvious, and contains eligible subject matter. See §§ 101, 102, 103. If the Patent Office accepts the claim and issues a patent, the patent owner generally obtains exclusive rights to the patented invention throughout the United States for 20 years. §§ 154(a)(1), (2).

After a patent issues, there are several avenues by which its validity can be revisited. The first is through a defense in an infringement action. Generally, one who intrudes upon a patent without authorization "infringes the patent" and becomes subject to civil suit in the federal district courts, where the patent owner may demand a jury trial and seek monetary damages and injunctive relief. §§ 271(a), 281–284. If, however, the Federal Government is the alleged patent infringer, the patent owner must sue the Government in the United States Court of Federal Claims and may recover only "reasonable and entire compensation" for the unauthorized use. 28 U. S. C. § 1498(a).

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Once sued, an accused infringer can attempt to prove by clear and convincing evidence "that the patent never should have issued in the first place." *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 96–97 (2011); see 35 U. S. C. § 282(b). If a defendant succeeds in showing that the claimed invention falls short of one or more patentability requirements, the court may deem the patent invalid and absolve the defendant of liability.

The Patent Office may also reconsider the validity of issued patents. Since 1980, the Patent Act has empowered

the Patent Office "to reexamine—and perhaps cancel—a patent claim that it had previously allowed." *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 267 (2016). This procedure is known as ex parte reexamination. "Any person at any time" may cite to the Patent Office certain prior art that may "bea[r] on the patentability of any claim of a particular patent"; and the person may additionally request that the Patent Office reexamine the claim on that basis. 35 U. S. C. §§301(a), 302. If the Patent Office concludes that the prior art raises "a substantial new question of patentability," the agency may reexamine the patent and, if warranted, cancel the patent or some of its claims. §§303(a), 304–307. The Director of the Patent Office may also, on her "own initiative," initiate such a proceeding. §303(a).

In 1999 and 2002, Congress added an "inter partes reexamination" procedure, which similarly invited "[a]ny person at any time" to seek reexamination of a patent on the basis of prior art and allowed the challenger to participate in the administrative proceedings and any subsequent appeal. See §311(a) (2000 ed.); §§314(a), (b) (2006 ed.); *Cuozzo Speed Technologies*, 579 U. S., at 267.

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B

In 2011, Congress overhauled the patent system by enacting the America Invents Act (AIA), which created the Patent Trial and Appeal Board and phased out inter partes reexamination. See 35 U. S. C. §6; H. R. Rep. No. 112–98, pt. 1, pp. 46–47. In its stead, the AIA tasked the Board with overseeing three new types of post-issuance review proceedings.

First, the "inter partes review" provision permits "a person" other than the patent owner to petition for the review and cancellation of a patent on the grounds that the invention lacks novelty or nonobviousness in light of "patents or printed publications" existing at the time of the patent application. §311.

Second, the "post-grant review" provision permits "a person who is not the owner of a patent" to petition for review and cancellation of a patent on any ground of patentability. § 321; see §§ 282(b)(2), (3). Such proceedings must be brought within nine months of the patent's issuance. § 321.

Third, the "covered-business-method review" (CBM review) provision provides for changes to a patent that claims a method for performing data processing or other operations used in the practice or management of a financial product or service. AIA §§ 18(a)(1), (d)(1), 125 Stat. 329, note following 35 U. S. C. § 321, p. 1442. CBM review tracks the "standards and procedures of" post-grant review with two notable exceptions: CBM review is not limited to the nine months following issuance of a patent, and "[a] person" may file for CBM review only as a defense against a charge or suit for infringement. § 18(a)(1)(B), 125 Stat. 330.[1]

The AIA's three post-issuance review proceedings are adjudicatory in nature. Review is conducted by a three-member panel of the Patent Trial and Appeal Board, 35 U. S. C. § 6(c), and the patent owner and challenger may seek discovery, file affidavits and other written memoranda, and request an oral hearing, see §§ 316, 326; AIA § 18(a)(1), 125 Stat. 329; *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 331 (2018). The petitioner has the burden of proving unpatentability by a preponderance of the evidence. §§ 282, 316(e), 326(e). The Board then either confirms the patent claims or cancels some or all of the claims. §§ 318(b), 328(b). Any party "dissatisfied" with the Board's final decision may seek judicial review in the Court of Appeals for the Federal Circuit, §§ 319, 329; see § 141(c), and the Director of the Patent Office may intervene, § 143.

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In sum, in the post-AIA world, a patent can be reexamined either in federal court during a defense to an infringement

[1] The CBM review program will stop accepting new claims in 2020. See AIA § 18(a)(3)(A), 125 Stat. 330; 77 Fed. Reg. 48687 (2012).

action, in an ex parte reexamination by the Patent Office, or in the suite of three post-issuance review proceedings before the Patent Trial and Appeal Board. The central question in this case is whether the Federal Government can avail itself of the three post-issuance review proceedings, including CBM review.

C

Return Mail, Inc., owns U. S. Patent No. 6,826,548 ('548 patent), which claims a method for processing mail that is undeliverable. Beginning in 2003, the United States Postal Service allegedly began exploring the possibility of licensing Return Mail's invention for use in handling the country's undelivered mail. But the parties never reached an agreement.

In 2006, the Postal Service introduced an enhanced address-change service to process undeliverable mail. Return Mail's representatives asserted that the new service infringed the '548 patent, and the company renewed its offer to license the claimed invention to the Postal Service. In response, the Postal Service petitioned for ex parte reexamination of the '548 patent. The Patent Office canceled the original claims but issued several new ones, confirming the validity of the '548 patent. Return Mail then sued the Postal Service in the Court of Federal Claims, seeking compensation for the Postal Service's unauthorized use of its invention, as reissued by the Patent Office.

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While the lawsuit was pending, the Postal Service again petitioned the Patent Office to review the '548 patent, this time seeking CBM review. The Patent Board instituted review. The Board agreed with the Postal Service that Return Mail's patent claims subject matter that was ineligible to be patented, and it canceled the claims underlying the '548 patent. A divided panel of the Court of Appeals for the Federal Circuit affirmed. See 868 F. 3d 1350 (2017). As relevant here, the Federal Circuit held, over a dissent, that the Government is a "person" eligible to petition for CBM review. *Id.*, at 1366; see AIA § 18(a)(1)(B), 125 Stat. 330

(only a qualifying "person" may petition for CBM review). The court then affirmed the Patent Board's decision on the merits, invalidating Return Mail's patent claims.

We granted certiorari to determine whether a federal agency is a "person" capable of petitioning for post-issuance review under the AIA.[2] 586 U. S. 959 (2018).

II

The AIA provides that only "a person" other than the patent owner may file with the Office a petition to institute a post-grant review or inter partes review of an issued patent. 35 U. S. C. §§ 311(a), 321(a). The statute likewise provides that a "person" eligible to seek CBM review may not do so "unless the person or the person's real party in interest or privy has been sued for infringement." AIA § 18(a)(1)(B), 125 Stat. 330. The question in this case is whether the Government is a "person" capable of instituting the three AIA review proceedings.

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A

The patent statutes do not define the term "person." In the absence of an express statutory definition, the Court applies a "longstanding interpretive presumption that 'person' does not include the sovereign," and thus excludes a federal agency like the Postal Service. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 780–781 (2000); see *United States* v. *Mine Workers*, 330 U. S. 258, 275 (1947); *United States* v. *Cooper Corp.*, 312 U. S. 600, 603–605 (1941); *United States* v. *Fox*, 94 U. S. 315, 321 (1877).

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[2] The Federal Circuit rejected Return Mail's argument that the Postal Service cannot petition for CBM review for the independent reason that a suit against the Government under 28 U. S. C. § 1498 is not a suit for infringement. 868 F. 3d 1350, 1366 (2017). We denied Return Mail's petition for certiorari on this question and therefore have no occasion to resolve it in this case. Accordingly, we assume that a § 1498 suit is one for infringement and refer to it as the same.

This presumption reflects "common usage." *Mine Workers*, 330 U. S., at 275. It is also an express directive from Congress: The Dictionary Act has since 1947 provided the definition of "'person'" that courts use "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U. S. C. § 1; see *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U. S. 194, 199–200 (1993). The Act provides that the word "'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." § 1. Notably absent from the list of "person[s]" is the Federal Government. See *Mine Workers*, 330 U. S., at 275 (reasoning that Congress' express inclusion of partnerships and corporations in § 1 implies that Congress did not intend to include the Government). Thus, although the presumption is not a "hard and fast rule of exclusion," *Cooper*, 312 U. S., at 604–605, "it may be disregarded only upon some affirmative showing of statutory intent to the contrary," *Stevens*, 529 U. S., at 781.

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The Postal Service contends that the presumption is strongest where interpreting the word "person" to include the Government imposes liability on the Government, and is weakest where (as here) interpreting "person" in that way benefits the Government. In support of this argument, the Postal Service points to a different interpretive canon: that Congress must unequivocally express any waiver of sovereign immunity for that waiver to be effective. See *FAA* v. *Cooper*, 566 U. S. 284, 290 (2012). That clear-statement rule inherently applies only when a party seeks to hold the Government liable for its actions; otherwise immunity is generally irrelevant. In the Postal Service's view, the presumption against treating the Government as a statutory person works in tandem with the clear-statement rule regarding immunity, such that both apply only when a statute would subject the Government to liability.

Our precedents teach otherwise. In several instances, this Court has applied the presumption against treating the Government as a statutory person when there was no question of immunity, and doing so would instead exclude the Federal Government or one of its agencies from accessing a benefit or favorable procedural device. In *Cooper*, 312 U. S., at 604–605, 614, for example, the Court held that the Federal Government was not "'[a]ny person'" who could sue for treble damages under § 7 of the Sherman Anti-Trust Act. Accord, *International Primate Protection League* v. *Administrators of Tulane Ed. Fund*, 500 U. S. 72, 82–84 (1991) (concluding that the National Institutes of Health was not authorized to remove an action as a "'person acting under [a federal]' officer" pursuant to 28 U. S. C. § 1442(a)(1)); *Davis* v. *Pringle*, 268 U. S. 315, 317–318 (1925) (reasoning that "normal usages of speech" indicated that the Government was not a "person" entitled to priority under the Bankruptcy Act); *Fox*, 94 U. S., at 321 (holding that the Federal Government was not a "'person capable by law of holding real estate,'" absent "an express definition to that effect").

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Thus, although the presumption against treating the Government as a statutory person is "'particularly applicable where it is claimed that Congress has subjected the [sovereign] to liability to which they had not been subject before,'" *Stevens*, 529 U. S., at 781, it is hardly confined to such cases. Here, too, we proceed from the presumption that the Government is not a "person" authorized to initiate these proceedings absent an affirmative showing to the contrary.

B

Given the presumption that a statutory reference to a "person" does not include the Government, the Postal Service must show that the AIA's context indicates otherwise. Although the Postal Service need not cite to "an express contrary definition," *Rowland*, 506 U. S., at 200, it must point to some indication in the text or context of the statute that

affirmatively shows Congress intended to include the Government. See *Cooper*, 312 U. S., at 605.

The Postal Service makes three arguments for displacing the presumption. First, the Postal Service argues that the statutory text and context offer sufficient evidence that the Government is a "person" with the power to petition for AIA review proceedings. Second, the Postal Service contends that federal agencies' long history of participation in the patent system suggests that Congress intended for the Government to participate in AIA review proceedings as well. Third, the Postal Service maintains that the statute must permit it to petition for AIA review because § 1498 subjects the Government to liability for infringement. None delivers.

1

The Postal Service first argues that the AIA's reference to a "person" in the context of post-issuance review proceedings must include the Government because other references to persons in the patent statutes appear to do so. Indeed, it is often true that when Congress uses a word to mean one thing in one part of the statute, it will mean the same thing elsewhere in the statute. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 86 (2006). This principle, however, "readily yields to context," especially when a statutory term is used throughout a statute and takes on "distinct characters" in distinct statutory provisions. See *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320 (2014) (internal quotation marks omitted). That is the case here. The Patent Act and the AIA refer to "person[s]" in at least 18 different places, and there is no clear trend: Sometimes "person" plainly includes the Government,[3] sometimes

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[3] For example, the statute expressly includes the Government as a "person" in § 296(a), which, as enacted, provided that States "shall not be immune . . . from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent under section 271." 35 U. S. C. § 296(a) (1988 ed., Supp. IV) (ruled unconstitu-

it plainly excludes the Government,[4] and sometimes—as here—it might be read either way.

Looking on the bright side, the Postal Service and the dissent, see *post*, at 638, focus on § 207(a)(1), which authorizes "[e]ach [f]ederal agency" to "apply for, obtain, and maintain patents or other forms of protection . . . on inventions in which the Federal Government owns a right, title, or interest." It follows from § 207(a)(1)'s express inclusion of federal agencies among those eligible to apply for patents that the statute's references to "person[s]" in the subsections governing the patent-application process and questions of patentability (§§ 102(a), 118, and 119) must also include federal agencies.[5] In other words, the right described in § 207(a)(1) provides a sufficient contextual clue that the word "person"—when used in the other provisions governing the application process § 207(a)(1) makes available to federal agencies—includes the Government.

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tional by *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 630 (1999)).

[4] For example, in § 6(a), the Patent Act provides that the administrative patent judges constituting the Board must be "persons of competent legal knowledge and scientific ability." Likewise, § 257(e) requires the Patent Office Director to treat as confidential any referral to the Attorney General of suspected fraud in the patent process unless the United States charges "a person" with a criminal offense in connection with the fraud. See also § 2(b)(11) (authorizing the Patent Office to cover the expenses of "persons" other than federal employees attending programs on intellectual-property protection); § 100(h) (defining a "'joint research agreement'" as a written agreement between "2 or more persons or entities"). Some of these provisions (§§ 2(b)(11), 6(a), and 100(h)) were enacted as part of the AIA, alongside the AIA review proceedings. See 125 Stat. 285, 313, 335.

[5] Section 102(a) provides that "[a] person shall be entitled to a patent" as long as the patent is novel. Section 118 states that "[a] person to whom the inventor has assigned" an invention may file a patent application. Section 119 discusses the effect of a patent application filed in a foreign country "by any person" on the patent-application process in the United States.

But § 207(a)(1) provides no such clue as to the interpretation of the AIA review provisions because it implies nothing about what a federal agency may or may not do following the issuance of someone else's patent. Conversely, reading the review provisions to exclude the Government has no bearing on a federal agency's right to obtain a patent under § 207(a)(1). An agency may still apply for and obtain patents whether or not it may petition for a review proceeding under the AIA seeking cancellation of a patent it does not own. There is thus no reason to think that "person" must mean the same thing in these two different parts of the statute. See *Utility Air*, 573 U. S., at 320.[6]

The Postal Service cites other provisions that may refer to the Government—namely, the "intervening rights" provisions that offer certain protections for "any person" who is lawfully making or using an invention when the Patent Office modifies an existing patent claim in a way that deems the person's (previously lawful) use to be infringement. See §§ 252, 307(b), 318(c), 328(c). The Postal Service argues that the Government must be among those protected by these provisions and from there deduces that it must also be permitted to petition for AIA review proceedings because the review provisions and the intervening-rights provisions were all added to the Patent Act by the AIA at the same time. See *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007) (invoking the consistent-usage canon where the same term was used in related provisions enacted at the same time).

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[6] Likewise, we are not persuaded by the dissent's suggestion that § 207(a)(3)—which authorizes federal agencies "to protect and administer rights" to federally owned inventions—provides a statutory basis for the Postal Service's initiation of AIA review proceedings. See *post*, at 641–642. The statute explains how a federal agency is to "protect" those rights: "either directly or through contract," such as by "acquiring rights for and administering royalties" or "licensing." § 207(a)(3). The AIA review proceedings, which a "person" may initiate regardless of ownership, do not fall clearly within the ambit of § 207(a)(3).

But regardless of whether the intervening-rights provisions apply to the Government (a separate interpretive question that we have no occasion to answer here), the Postal Service's chain of inferences overlooks a confounding link: The consistent-usage canon breaks down where Congress uses the same word in a statute in multiple conflicting ways. As noted, that is the case here. In the face of such inconsistency, the mere existence of some Government-inclusive references cannot make the "affirmative showing," *Stevens*, 529 U. S., at 781, required to overcome the presumption that Congress did not intend to include the Government among those "person[s]" eligible to petition for AIA review proceedings.[7]

2

The Postal Service next points to the Federal Government's longstanding history with the patent system. It reminds us that federal officers have been able to apply for patents in the name of the United States since 1883, see Act of Mar. 3, 1883, 22 Stat. 625—which, in the Postal Service's view, suggests that Congress intended to allow the Government access to AIA review proceedings as well. But, as already explained, the Government's ability to obtain a patent under § 207(a)(1) does not speak to whether Congress meant for the Government to participate as a third-party challenger in AIA review proceedings. As to those proceedings, there is no longstanding practice: The AIA was enacted just eight years ago.[8]

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[7] The dissent responds that we should set aside the statutory references to "person[s]" that naturally exclude the Government and instead count only those references that expressly or impliedly include the Government. See *post*, at 639–640. But the point of the canon the Postal Service invokes is to ascertain the meaning of a statutory term from its consistent usage in other parts of the statute, not to pick sides among differing uses.

[8] Moreover, for those of us who consider legislative history, there is none that suggests Congress considered whether the Federal Government or its agencies would have access to the AIA review proceedings.

More pertinently, the Postal Service and the dissent both note that the Patent Office since 1981 has treated federal agencies as "persons" who may cite prior art to the agency or request an ex parte reexamination of an issued patent. See *post*, at 641. Recall that § 301(a) provides that "[a]ny person at any time may cite to the Office in writing . . . prior art . . . which that person believes to have a bearing on the patentability of any claim of a particular patent." As memorialized in the Patent Office's Manual of Patent Examining Procedure (MPEP), the agency has understood § 301's reference to "any person" to include "governmental entities." Dept. of Commerce, Patent and Trademark Office, MPEP §§ 2203, 2212 (4th rev. ed., July 1981).

We might take account of this "executive interpretation" if we were determining whether Congress meant to include the Government as a "person" for purposes of the ex parte reexamination procedures themselves. See, *e. g.*, *United States* v. *Hermanos y Compañia*, 209 U. S. 337, 339 (1908). Here, however, the Patent Office's statement in the 1981 MPEP has no direct relevance. Even assuming that the Government may petition for ex parte reexamination, ex parte reexamination is a fundamentally different process than an AIA post-issuance review proceeding.[9] Both share the common purpose of allowing non-patent owners to bring questions of patent validity to the Patent Office's attention, but they do so in meaningfully different ways.

In an ex parte reexamination, the third party sends information to the Patent Office that the party believes bears on the patent's validity, and the Patent Office decides whether to reexamine the patent. If it decides to do so, the reexami-

[9] As discussed above, see *supra*, at 622–624, ex parte reexamination is not one of the three new proceedings added by the AIA, and therefore the question whether its reference to a "person" includes the Government is beyond the scope of the question presented. Moreover, neither party contests that a federal agency may cite prior art to the Patent Office and ask for ex parte reexamination.

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nation process is internal; the challenger is not permitted to participate in the Patent Office's process. See 35 U. S. C. §§ 302, 303. By contrast, the AIA post-issuance review proceedings are adversarial, adjudicatory proceedings between the "person" who petitioned for review and the patent owner: There is briefing, a hearing, discovery, and the presentation of evidence, and the losing party has appeal rights. See *supra*, at 624. Thus, there are good reasons Congress might have authorized the Government to initiate a hands-off ex parte reexamination but not to become a party to a full-blown adversarial proceeding before the Patent Office and any subsequent appeal. After all, the Government is already in a unique position among alleged infringers given that 28 U. S. C. § 1498 limits patent owners to bench trials before the Court of Federal Claims and monetary damages, whereas 35 U. S. C. § 271 permits patent owners to demand jury trials in the federal district courts and seek other types of relief.

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Thus, there is nothing to suggest that Congress had the 1981 MPEP statement in mind when it enacted the AIA. It is true that this Court has often said, "[w]hen 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." *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998). But there is no "settled" meaning of the term "person" with respect to the newly established AIA review proceedings. Accordingly, the MPEP does not justify putting aside the presumptive meaning of "person" here.

3

Finally, the Postal Service argues that it must be a "person" who may petition for AIA review proceedings because, like other potential infringers, it is subject to civil liability

and can assert a defense of patent invalidity. See §§282(b)(2)–(3). In the Postal Service's view, it is anomalous to deny it a benefit afforded to other infringers—the ability to challenge a patent *de novo* before the Patent Office, rather than only as an infringement defense that must be proved by clear and convincing evidence. See *ibid.*; *Microsoft Corp.*, 564 U. S., at 95 (holding that §282's presumption of validity in litigation imposes a clear and convincing evidence standard on defendants seeking to prove invalidity).

The Postal Service overstates the asymmetry. Agencies retain the ability under §282 to assert defenses to infringement. Once sued, an agency may, like any other accused infringer, argue that the patent is invalid, and the agency faces the same burden of proof as a defendant in any other infringement suit. The Postal Service lacks only the additional tool of petitioning for the initiation of an administrative proceeding before the Patent Office under the AIA, a process separate from defending an infringement suit.

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We see no oddity, however, in Congress' affording nongovernmental actors an expedient route that the Government does not also enjoy for heading off potential infringement suits. Those other actors face greater and more uncertain risks if they misjudge their right to use technology that is subject to potentially invalid patents. Most notably, 28 U. S. C. §1498 restricts a patent owner who sues the Government to her "reasonable and entire compensation" for the Government's infringing use; she cannot seek an injunction, demand a jury trial, or ask for punitive damages, all of which are available in infringement suits against nongovernmental actors under §271(e)(4). Thus, although federal agencies remain subject to damages for impermissible uses, they do not face the threat of preliminary injunctive relief that could suddenly halt their use of a patented invention, and they enjoy a degree of certainty about the extent of their potential liability that ordinary accused infringers do not. Because federal

agencies face lower risks, it is reasonable for Congress to have treated them differently.[10]

Finally, excluding federal agencies from the AIA review proceedings avoids the awkward situation that might result from forcing a civilian patent owner (such as Return Mail) to defend the patentability of her invention in an adversarial, adjudicatory proceeding initiated by one federal agency (such as the Postal Service) and overseen by a different federal agency (the Patent Office). We are therefore unpersuaded that the Government's exclusion from the AIA review proceedings is sufficiently anomalous to overcome the presumption that the Government is not a "person" under the Act.[11]

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[10] If the Government were a "person" under the AIA, yet another anomaly might arise under the statute's estoppel provisions. Those provisions generally preclude a party from relitigating issues in any subsequent proceedings in federal district court, before the International Trade Commission, and (for inter partes review and post-grant review) before the Patent Office. See 35 U. S. C. §§ 315(e), 325(e); AIA § 18(a)(1)(D), 125 Stat. 330. Because infringement suits against the Government must be brought in the Court of Federal Claims—which is not named in the estoppel provisions—the Government might not be precluded by statute from relitigating claims raised before the Patent Office if it were able to institute post-issuance review under the AIA. See 28 U. S. C. § 1498(a). Although Return Mail cites this asymmetry in support of its interpretation, we need not rely on it, because Return Mail already prevails for the reasons given above. At any rate, the practical effect of the estoppel provisions' potential inapplicability to the Government is uncertain given that this Court has not decided whether common-law estoppel applies in § 1498 suits.

[11] Nor do we find persuasive the dissent's argument that the Postal Service should be allowed to petition for post-issuance review proceedings because its participation would further the purpose of the AIA: to provide a cost-effective and efficient alternative to litigation in the courts. See *post*, at 640–641; H. R. Rep. No. 112–98, pt. 1, pp. 47–48 (2001). Statutes rarely embrace every possible measure that would further their general aims, and, absent other contextual indicators of Congress' intent to include the Government in a statutory provision referring to a "person," the mere furtherance of the statute's broad purpose does not overcome the presumption in this case. See *Cooper*, 312 U. S., at 605 ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made").

III

For the foregoing reasons, we hold that a federal agency is not a "person" who may petition for post-issuance review under the AIA. The judgment of the United States Court of Appeals for the Federal Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

When A sues B for patent infringement, B may defend against the lawsuit by claiming that A's patent is invalid. In court, B must prove the invalidity of A's patent by "clear and convincing evidence." *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 95 (2011). Congress, however, has also established a variety of *administrative* procedures that B may use to challenge the validity of A's patent. Although some of the statutes setting forth these administrative procedures have existed for several decades, we consider here the three administrative procedures that Congress established in the Leahy-Smith America Invents Act of 2011. See *ante*, at 623–625. All three involve hearings before the Patent Trial and Appeal Board, which is part of the Patent and Trademark Office. And all three involve a lower burden of proof: B need only prove by a preponderance of the evidence that A's patent is invalid. 35 U. S. C. §§ 316(e), 326(e); see America Invents Act, § 18(a)(1), 125 Stat. 329.

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The America Invents Act states that all three administrative procedures may be invoked only by a "person." 35 U. S. C. §§ 311(a), 321(a); America Invents Act, § 18(a)(1)(B), 125 Stat. 330. Here we must decide whether the Government falls within the scope of the word "person." Are federal agencies entitled to invoke these administrative procedures on the same terms as private parties? In my view, the answer is "yes." For purposes of these statutes, Gov-

ernment agencies count as "persons" and so may invoke these procedures to challenge the validity of a patent.

The Court reaches the opposite conclusion based on the interpretive presumption that the word "person" excludes the Government. See *ante*, at 627. This presumption, however, is "no hard and fast rule of exclusion." *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605 (1941). We have long said that this presumption may be overcome when "'[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation . . . indicate an intent'" to include the Government. *International Primate Protection League* v. *Administrators of Tulane Ed. Fund*, 500 U. S. 72, 83 (1991) (quoting *Cooper*, *supra*, at 605). And here these factors indicate that very intent.

I

The language of other related patent provisions strongly suggests that, in the administrative review statutes at issue here, the term "person" includes the Government.

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The Patent Act states that "[e]ach Federal agency is authorized" to "apply for, obtain, and maintain patents or other forms of protection . . . on inventions in which the Federal Government owns a right, title, or interest." 35 U. S. C. § 207(a)(1). The Act then provides that a "*person*" shall be "entitled to a patent" if various "[c]onditions for patentability" have been met. § 102(a)(1) (emphasis added). It authorizes a "*person* to whom the inventor has assigned" an invention to apply for a patent in some circumstances. § 118 (emphasis added). And it generally allows "any *person*" who initially files a patent application in a foreign country to obtain in the United States the advantage of that earlier filing date. § 119 (emphasis added). Because the Government is authorized to "obtain" patents, there is no dispute here that the word "person" in these patent-eligibility provisions must include the Government. See *ante*, at 630.

Now consider a few of the statutory provisions that help those *accused of infringing* a patent. Suppose A obtains a patent in Year One, modifies this patent in Year Three, and then accuses B of infringing the patent *as modified* in Year Five. What if B's conduct infringes the modified patent but did not infringe A's patent as it originally stood in Year One? In these circumstances, Congress has provided that A generally cannot win an infringement suit against B. The relevant statutes, known as the "intervening rights" provisions, state that B is entitled to a defense that his conduct did not violate the original, unmodified patent. §§252, 307(b), 318(c), 328(c). These statutes, several of which were enacted alongside the three administrative review procedures in the America Invents Act, provide that a "*person*" may take advantage of this defense. *Ibid.* (emphasis added). Again, as the parties all agree, the word "person" in these provisions includes the Government. See Reply Brief 3; *Lamson* v. *United States*, 117 Fed. Cl. 755, 760 (2014) (noting that the Government may "avail itself of any defense that is available to a private party in an infringement action").

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The majority refers to several patent-related provisions that use the word "person" but that do not include the Government within the scope of that term. See *ante*, at 629–630, and n. 4. These provisions, however, concern details of administration that, almost by definition, could not involve an entity such as the Government. The first provision cited by the majority says that administrative patent judges must be "persons of competent legal knowledge and scientific ability." §6(a). Patent judges are human beings, not governments or corporations or other artificial entities. The second requires the Patent Office to keep confidential a referral to the Attorney General of possible fraud unless the Government charges "a person" with a related criminal offense. §257(e). Although the word "person" here could refer to a corporation, it cannot refer to the Government, for governments do not

charge themselves with crimes. The third concerns payment for the "subsistence expenses and travel-related expenses" of "persons" who attend certain programs relating to intellectual property law. § 2(b)(11). But governments as entities do not travel, attend events, or incur expenses for "subsistence" or "lodging"; only their employees do. *Ibid.* (The majority also refers to a fourth provision, which defines a "joint research agreement" as an agreement between "2 or more persons or entities." § 100(h). If the Government is not a "person" under this provision, it is only because the adjacent term "entities" already covers the Government.)

The fact that the word "person" does not apply to the Government where that application is close to logically impossible proves nothing at all about the word's application here. On the one hand, Congress has used the word "person" to refer to Government agencies when the statute concerns the criteria for obtaining patents, or when the statute concerns the availability of certain infringement defenses. On the other, Congress has *not* used the word "person" to refer to Government agencies when doing so would be close to logically impossible, or where the context otherwise makes plain that the Government is not a "person." The provisions at issue here, which establish administrative procedures for the benefit of parties accused of infringement, are much closer to the former category than the latter. It therefore makes little sense to presume that the word "person" excludes the Government, for the surrounding provisions point to the opposite conclusion.

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II

The statutes' purposes, as illuminated by the legislative history and longstanding executive interpretation, show even more clearly that Congress intended the term "person" to include the Government in this context.

Congress enacted the new administrative review procedures for two basic reasons. *First*, Congress sought to "improve the quality of patents" and "make the patent system

more efficient" by making it easier to challenge "questionable patents." H. R. Rep. No. 112–98, pt. 1, pp. 39, 48 (2011); see *id.*, at 39 (noting the "growing sense that questionable patents are too easily obtained and are too difficult to challenge"); *id.*, at 45 (explaining that pre-existing administrative procedures were "less viable alternativ[es] to litigation . . . than Congress intended"). Congress' goal of providing an easier way for parties to challenge "questionable patents" is implicated to the same extent whether the Government or a private party is the one accused of infringing an invalid patent. That is perhaps why the Executive Branch has long indicated that Government agencies count as "perso[ns]" who are entitled to invoke the administrative review procedures that predate the America Invents Act. See Dept. of Commerce, Patent and Trademark Office, Manual of Patent Examining Procedure §§2203, 2212 (4th rev. ed., Sept. 1982).

Second, the statutes help maintain a robust patent system in another way: They allow B, a patent holder who might be sued for infringing A's (related) patent, to protect B's own patent by more easily proving the invalidity of A's patent. Insofar as this objective underlies the statutes at issue here, it applies to the same extent whether B is a private person or a Government agency. Indeed, the Patent Act explicitly states that the Government may "maintain" patents and "undertake all other suitable and necessary steps to protect and administer rights to federally owned inventions on behalf of the Federal Government." 35 U. S. C. §§207(a)(1), (3). And the use of administrative procedures to "protect" a patented invention from claims of infringement (by clearing away conflicting patents that cover the same or similar ground) would seem to be "suitable and necessary" whether a private person or a Government agency invokes these procedures. Cf. *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93, 109 (2016) (noting that a third-party patent covering part of an invention may be used to exact "licensing fees" from the inventor); *Acorda Therapeutics, Inc.*

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v. *Roxane Laboratories, Inc.*, 903 F. 3d 1310, 1337 (CA Fed. 2018) (explaining that a third-party patent covering part of an invention may be used to deter or curtail the inventor's use of the invention).

The majority responds that allowing a Government agency to invoke these administrative procedures would create an "awkward situation," as one Government agency—namely, the Patent Office—would end up adjudicating the patent rights of another Government agency. *Ante*, at 636. But why is that "awkward"? In the field of patent law, a Government agency facing a possible infringement suit has long been thought legally capable of invoking other forms of administrative review. See Manual of Patent Examining Procedure §§ 2203, 2212. Moreover, the statutes before us presumably would permit a private party to invoke any of the three new procedures to challenge a Government patent. In such cases, one Government agency, the Patent Office, would be asked to adjudicate the patent rights of another. Thus, the situation the majority attempts to avoid is already baked into the cake.

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The majority also says that because federal agencies "do not face the threat of preliminary injunctive relief" when they are sued for patent infringement, Congress could have reasonably concluded that it was not necessary for the Government to be able to use the administrative procedures at issue here. *Ante*, at 635; see 28 U. S. C. § 1498(a) (limiting the patentee to "reasonable and entire compensation" for infringement by the Government). But patent infringement suits against the Government still threaten to impose large damages awards. See, *e. g.*, *Hughes Aircraft Co.* v. *United States*, 31 Fed. Cl. 481, 488 (1994) (indicating that the value of the infringing technologies developed by the Government exceeded $3.5 billion); Pet. for Cert. in *United States* v. *Hughes Aircraft Co.*, O. T. 1998, No. 98–871, p. 8 (noting that damages ultimately exceeded $100 million). That fact can

create a strong need for speedy resolution of a dispute over patent validity.

When, for example, the Department of Homeland Security recently instituted a research initiative to equip cell phones with hazardous-materials sensors in order to mitigate the risk of terrorist attacks, it faced an infringement lawsuit that threatened to interfere with the project. See *Golden* v. *United States*, 129 Fed. Cl. 630 (2016); Brief for Prof. Tejas N. Narechania as *Amicus Curiae* 9. When the Federal Communications Commission tried to ensure that cell phones would be able to provide their current location automatically to 911 operators, the threat of infringement litigation delayed the deployment of technologies designed to comply with that requirement. Narechania, Patent Conflicts, 103 Geo. L. J. 1483, 1498–1501 (2015). And when Congress enacted statutes requiring the examination of electronic passports at airports, the Government faced the threat of an infringement suit because airlines could not "comply with [their] legal obligations" without engaging in activities that would allegedly infringe an existing patent. *IRIS Corp.* v. *Japan Airlines Corp.*, 769 F. 3d 1359, 1362 (CA Fed. 2014); see *id.*, at 1363 (concluding that the Government may be sued based on the infringing activities of airlines).

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I express no view on the merits of these actions. I simply point out that infringement suits against the Government can threaten to injure Government interests even absent the threat of injunctive relief. That fact runs counter to the majority's efforts to find an explanation for *why* Congress would have wanted to deny Government agencies the ability to invoke the speedier administrative procedures established by the America Invents Act.

* * *

That, in my view, is the basic question: Why? Government agencies can apply for and obtain patents; they can

maintain patents; they can sue other parties for infringing their patents; they can be sued for infringing patents held by private parties; they can invoke certain defenses to an infringement lawsuit on the same terms as private parties; they can invoke one of the pre-existing administrative procedures for challenging the validity of a private party's patents; and they can be forced to defend their own patents when a private party invokes one of the three procedures established by the America Invents Act. Why, then, would Congress have declined to give federal agencies the power to invoke these same administrative procedures?

I see no good answer to that question. Here, the statutes' "purpos[es]," the "subject matter," the "context," the "legislative history," and the longstanding "executive interpretation," together with the way in which related patent provisions use the term "person," demonstrate that Congress meant for the word "person" to include Government agencies. *International Primate Protection League*, 500 U. S., at 83 (quoting *Cooper*, 312 U. S., at 605). I would affirm the Federal Circuit's similar conclusion.

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Consequently, with respect, I dissent.

Syllabus

QUARLES *v.* UNITED STATES

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

No. 17–778. Argued April 24, 2019—Decided June 10, 2019

When petitioner Jamar Quarles pled guilty to being a felon in possession of a firearm in violation of 18 U. S. C. § 922(g)(1), he also appeared to qualify for enhanced sentencing under the Armed Career Criminal Act because he had at least three prior "violent felony" convictions, § 924(e). He claimed, however, that a 2002 Michigan conviction for third-degree home invasion did not qualify, even though § 924(e) defines "violent felony" to include "burglary," and the generic statutory term "burglary" means "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime," *Taylor* v. *United States*, 495 U. S. 575, 599 (emphasis added). Quarles argued that Michigan's third-degree home-invasion statute—which applies when a person "breaks and enters a dwelling or enters a dwelling without permission and, *at any time* while he or she is entering, *present in*, or exiting the dwelling, commits a misdemeanor," Mich. Comp. Laws Ann. § 750.110a(4)(a) (emphasis added)—swept too broadly. Specifically, he claimed, it encompassed situations where the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a dwelling, while generic remaining-in burglary occurs only when the defendant has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure. The District Court rejected that argument, and the Sixth Circuit affirmed.

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Held:

1. Generic remaining-in burglary occurs under § 924(e) when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. In ordinary usage, "remaining in" refers to a continuous activity, and this Court has followed that ordinary meaning in analogous legal contexts, see, *e. g.*, *United States* v. *Cores*, 356 U. S. 405, 408. Those contexts thus inform the interpretation of "remaining-in" burglary in § 924(e): The common understanding of "remaining in" as a continuous event means that burglary occurs for purposes of § 924(e) if the defendant forms the intent to commit a crime *at any time* during the continuous event of unlawfully remaining in a building or structure. The intent to commit a crime must be contemporaneous with unlawful entry or remaining, but the defendant's intent *is* con-

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temporaneous with the unlawful remaining so long as the defendant forms the intent at any time while unlawfully remaining. That conclusion is supported by the body of state law as of 1986, when Congress enacted § 924(e). Quarles' narrow interpretation makes little sense in light of Congress' rationale for specifying burglary as a violent felony. Congress "singled out burglary" because of its "inherent potential for harm to persons," *Taylor*, 495 U. S., at 588, and the possibility of a violent confrontation does not depend on the exact moment when the burglar forms the intent to commit a crime while unlawfully present in a building or structure. Quarles' interpretation would also thwart the stated goals of the Armed Career Criminal Act by presumably eliminating many States' burglary statutes as predicate offenses under § 924(e). Pp. 649–654.

2. For the Court's purposes here, the Michigan home-invasion statute substantially corresponds to or is narrower than generic burglary. The conclusion that generic remaining-in burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure resolves this case. When deciding whether a state law is broader than generic burglary, the state law's "exact definition or label" does not control. *Taylor*, 495 U. S., at 599. So long as the state law in question "substantially corresponds" to (or is narrower than) generic burglary, the conviction qualifies. *Ibid.* Pp. 654–655.

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850 F. 3d 836, affirmed.

KAVANAUGH, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 655.

Jeremy C. Marwell argued the cause for petitioner. With him on the briefs were *John P. Elwood*, *Joshua S. Johnson*, *Matthew X. Etchemendy*, *Daniel R. Ortiz*, *Mark T. Stancil*, and *Matthew M. Madden*.

Zachary D. Tripp argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Eric J. Feigin*, and *David M. Lieberman*.*

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*Briefs of *amici curiae* urging reversal were filed for Federal Public Defenders for the Northern, Western, and Southern Districts of Texas by *J. Carl Cecere*; and for the National Association of Criminal Defense Lawyers by *Thomas M. Bondy* and *David Oscar Markus*.

JUSTICE KAVANAUGH delivered the opinion of the Court.

Section 924(e) of Title 18, also known as the Armed Career Criminal Act, mandates a minimum 15-year prison sentence for a felon who unlawfully possesses a firearm and has three prior convictions for a "serious drug offense" or "violent felony." Section 924(e) defines "violent felony" to include "burglary." Under this Court's 1990 decision in *Taylor* v. *United States*, 495 U. S. 575, the generic statutory term "burglary" means "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." *Id.*, at 599 (emphasis added).

The exceedingly narrow question in this case concerns remaining-in burglary. The question is whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure. For purposes of § 924(e), we conclude that remaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure. We affirm the judgment of the U. S. Court of Appeals for the Sixth Circuit.

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I

On August 24, 2013, police officers in Grand Rapids, Michigan, responded to a 911 call. When the officers arrived at the scene, the caller, Chasity Warren, told the officers that she had just escaped from her boyfriend, Jamar Quarles. Warren said that Quarles had threatened her at gunpoint and also hit her. While the police officers were speaking with Warren, Quarles drove by. The officers then arrested Quarles and later searched his house. Inside they found a semiautomatic pistol.

Quarles pled guilty to being a felon in possession of a firearm in violation of 18 U. S. C. § 922(g)(1). Quarles had at

least three prior convictions that appeared to qualify as violent felonies under the Armed Career Criminal Act, 18 U. S. C. § 924(e). Those three convictions were: (1) a 2002 Michigan conviction for third-degree home invasion stemming from an attempt to chase down an ex-girlfriend who had sought refuge in a nearby apartment; (2) a 2004 Michigan conviction for assault with a dangerous weapon based on an incident where Quarles held a gun to the head of another ex-girlfriend and threatened to kill her; and (3) a 2008 Michigan conviction for assault with a dangerous weapon arising from an altercation with another man and that same ex-girlfriend in which Quarles shot at the man.

In the sentencing proceedings for his federal felon-in-possession offense, Quarles argued that his 2002 Michigan conviction for third-degree home invasion did not qualify as a burglary under § 924(e). Under this Court's precedents, the District Court had to decide whether the Michigan statute under which Quarles was convicted in 2002 was broader than the generic definition of burglary set forth in *Taylor* (in which case the conviction would not qualify as a prior conviction under § 924(e)) or, instead, whether the Michigan statute "substantially correspond[ed]" to or was narrower than the generic definition of burglary set forth in *Taylor*. 495 U. S., at 602. To reiterate, *Taylor* interpreted burglary under § 924(e) to mean "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." *Id.*, at 599 (emphasis added).

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Under the Michigan law at issue here, a person commits third-degree home invasion if he or she "breaks and enters a dwelling or enters a dwelling without permission and, *at any time* while he or she is entering, *present in*, or exiting the dwelling, commits a misdemeanor." Mich. Comp. Laws Ann. § 750.110a(4)(a) (West 2004) (emphasis added). Quarles argued to the District Court that the Michigan third-degree home-invasion statute swept too broadly to qualify as burglary under § 924(e) because the Michigan statute encom-

passed situations where the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a dwelling, not *at the exact moment* when the defendant is *first* unlawfully present in a dwelling. The District Court rejected that argument and sentenced Quarles to 17 years in prison. The Sixth Circuit affirmed. 850 F. 3d 836, 840 (2017). We granted certiorari in light of a Circuit split on the question of how to assess state remaining-in burglary statutes for purposes of § 924(e). 586 U. S. 1112 (2019).

II

Section 924(e) lists "burglary" as a qualifying predicate offense for purposes of the Armed Career Criminal Act. But § 924(e) does not define "burglary." The question here is how to define "burglary" under § 924(e). We do not write on a clean slate. See *Taylor*, 495 U. S., at 599.

At common law, burglary was confined to unlawful breaking and entering a dwelling at night with the intent to commit a felony. See, *e. g.*, 4 W. Blackstone, Commentaries on the Laws of England 224 (1769). But by the time Congress passed and President Reagan signed the current version of § 924(e) in 1986, state burglary statutes had long since departed from the common-law formulation. See *Taylor*, 495 U. S., at 593–596. In addition to casting off relics like the requirement that there be a breaking, or that the unlawful entry occur at night, a majority of States by 1986 prohibited unlawfully "remaining in" a building or structure with intent to commit a crime. Those remaining-in statutes closed a loophole in some States' laws by extending burglary to cover situations where a person enters a structure lawfully but stays unlawfully—for example, by remaining in a store after closing time without permission to do so.

In the 1990 *Taylor* decision, this Court interpreted the term "burglary" in § 924(e) in accord with the more expansive understanding of burglary that had become common by 1986: "We believe that Congress meant by 'burglary' the ge-

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neric sense in which the term is now used in the criminal codes of most States." *Id.*, at 598. The Court concluded that generic burglary under § 924(e) means "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." *Id.*, at 599 (emphasis added). A defendant's prior conviction under a state statute qualifies as a predicate burglary under § 924(e) if the state statute—regardless of its "exact definition or label"—"substantially corresponds" to or is narrower than the generic definition of burglary. *Id.*, at 599, 602.

In this case, we must determine the scope of generic remaining-in burglary under *Taylor*—in particular, the timing of the intent requirement. Quarles argues that remaining-in burglary occurs only when the defendant has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure. The Government argues for a broader definition of remaining-in burglary. According to the Government, remaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully present in a building or structure. We agree with the Government.

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As noted, *Taylor* interpreted generic burglary under § 924(e) to include remaining-in burglary. *Id.*, at 599. In ordinary usage, "remaining in" refers to a continuous activity. See *United States* v. *Cores*, 356 U. S. 405, 408 (1958); see also Webster's New International Dictionary 2106 (2d ed. 1949); 8 Oxford English Dictionary 418 (1933). This Court has followed that ordinary meaning in analogous legal contexts. For example, when interpreting a federal criminal statute punishing any " 'alien crewman who willfully remains in the United States in excess of the number of days allowed,' " the Court stated that "the crucial word 'remains' permits no connotation other than continuing presence." *Cores*, 356 U. S., at 408. The law of trespass likewise proscribes remaining on the land of another without permission. In that context, the term "remain" refers to "a continuing

trespass for the entire time during which the actor wrongfully remains." Restatement (Second) of Torts § 158, Comment *m*, p. 280 (1964).

Those interpretations of "remaining in" in analogous areas of the law inform our interpretation of "remaining-in" burglary in § 924(e). In particular, the common understanding of "remaining in" as a continuous event means that burglary occurs for purposes of § 924(e) if the defendant forms the intent to commit a crime *at any time* during the continuous event of unlawfully remaining in a building or structure. To put it in conventional criminal law terms: Because the *actus reus* is a continuous event, the *mens rea* matches the *actus reus* so long as the burglar forms the intent to commit a crime at any time while unlawfully present in the building or structure.

Quarles insists, however, that to constitute a burglary under § 924(e), the intent to commit a crime must be contemporaneous with unlawful entry or remaining. That is true. But the defendant's intent *is* contemporaneous with the unlawful remaining so long as the defendant forms the intent at any time while unlawfully remaining. Put simply, for burglary predicated on unlawful *entry*, the defendant must have the intent to commit a crime at the time of entry. For burglary predicated on unlawful *remaining*, the defendant must have the intent to commit a crime at the time of remaining, which is any time during which the defendant unlawfully remains.

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That conclusion is supported by the States' laws as of 1986 when Congress enacted § 924(e). As of 1986, a majority of States proscribed remaining-in burglary. At that time, there was not much case law addressing the precise timing of the intent requirement for remaining-in burglary. That is presumably because in most remaining-in burglaries, the defendant has the intent to commit a crime when he or she first unlawfully remains in a building or structure. The timing issue arises only in the rarer cases where the defendant

forms the intent to commit a crime only after unlawfully remaining in the building or structure for a while. In any event, for present purposes, the important point is that all of the state appellate courts that had definitively addressed this issue as of 1986 had interpreted remaining-in burglary to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in the building or structure. See *Gratton* v. *State*, 456 So. 2d 865, 872 (Ala. Crim. App. 1984); *State* v. *Embree*, 130 Ariz. 64, 66, 633 P. 2d 1057, 1059 (App. 1981); *Keith* v. *State*, 138 Ga. App. 239, 225 S. E. 2d 719, 720 (1976); *State* v. *Mogenson*, 10 Kan. App. 2d 470, 472–476, 701 P. 2d 1339, 1343–1345 (1985); *State* v. *Papineau*, 53 Ore. App. 33, 38, 630 P. 2d 904, 906–907 (1981).[1]

Especially in light of the body of state law as of 1986, it is not likely that Congress intended generic burglary under § 924(e) to *include* (i) a burglar who intends to commit a crime at the exact moment when he or she first unlawfully

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[1] The consensus position has not changed. Today, of the States that have addressed the question, at least 18 have adopted the "at any time" interpretation of remaining-in burglary, and only 3 appear to have adopted the narrower interpretation.

Of those 18 States, some have adopted the broader "at any time" interpretation by statute. See Colo. Rev. Stat. § 18–4–201(3) (2018); Del. Code Ann., Tit. 11, § 829(e) (2015); Haw. Rev. Stat. Ann. § 708–812.5 (2014); Mich. Comp. Laws Ann. § 750.110a(4)(a) (West 2004); Minn. Stat. §§ 609.581(4), 609.582(3) (2016); Mont. Code Ann. § 45–6–204(1) (2017); Tenn. Code Ann. § 39–14–402(a)(3) (2018); Tex. Penal Code Ann. § 30.02(a)(3) (West 2019). And in addition to the five pre-1986 state-court decisions identified in the text above, at least five post-1986 state-court decisions have adopted the "at any time" interpretation of "remaining in." See *Braddy* v. *State*, 111 So. 3d 810, 844 (Fla. 2012) (*per curiam*); *State* v. *Walker*, 600 N. W. 2d 606, 609 (Iowa 1999); *State* v. *DeNoyer*, 541 N. W. 2d 725, 732 (S. D. 1995); *State* v. *Rudolph*, 970 P. 2d 1221, 1228–1229 (Utah 1998); *State* v. *Allen*, 127 Wash. App. 125, 135, 110 P. 3d 849, 853–855 (2005).

By contrast, three state courts appear to have adopted the narrower interpretation. *Shetters* v. *State*, 751 P. 2d 31, 36, n. 2 (Alaska App. 1988); *People* v. *Gaines*, 74 N. Y. 2d 358, 361–363, 546 N. E. 2d 913, 915–916 (1989); *In re J. N. S.*, 258 Ore. App. 310, 318–319, 308 P. 3d 1112, 1117–1118 (2013).

remains in a building or structure, but to *exclude* (ii) a burglar who forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.

Indeed, excluding that latter category of burglaries from generic burglary under § 924(e) would make little sense in light of Congress' rationale for specifying burglary as a violent felony. As the Court recognized in *Taylor*, Congress "singled out burglary" because of its "inherent potential for harm to persons." 495 U. S., at 588. Burglary is dangerous because it "creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Ibid.*; see also *United States* v. *Stitt*, 586 U. S. 27, 34 (2018).

With respect to remaining-in burglary, the possibility of a violent confrontation does not depend on the exact moment when the burglar forms the intent to commit a crime while unlawfully present in a building or structure. Once an intruder is both unlawfully present inside a building or structure and has the requisite intent to commit a crime, all of the reasons that led Congress to include burglary as a § 924(e) predicate fully apply. The dangers of remaining-in burglary are not tied to the esoteric question of precisely when the defendant forms the intent to commit a crime. That point underscores that Congress, when enacting § 924(e) in 1986, would not have understood the meaning of burglary to hinge on exactly when the defendant forms the intent to commit a crime while unlawfully present in a building or structure.

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Moreover, to interpret remaining-in burglary narrowly, as Quarles advocates, would thwart the stated goals of the Armed Career Criminal Act. After all, most burglaries involve unlawful entry, not unlawful remaining in. Yet if we were to narrowly interpret the remaining-in category of generic burglary so as to require that the defendant have the intent to commit a crime at the exact moment he or she first unlawfully remains, then many States' burglary statutes would be broader than generic burglary. As a result, under

our precedents, many States' burglary statutes would presumably be eliminated as predicate offenses under § 924(e). That result not only would defy common sense, but also would defeat Congress' stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies. We should not lightly conclude that Congress enacted a self-defeating statute. See, *e. g.*, *Stokeling* v. *United States*, 586 U. S. 73, 81–82 (2019); *Taylor*, 495 U. S., at 594.

To sum up: The Armed Career Criminal Act does not define the term "burglary." In *Taylor*, the Court explained that "Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary' for enhancement purposes." *Id.*, at 599. And the Court recognized that the definitions of burglary "vary" among the States. *Id.*, at 598. The *Taylor* Court therefore interpreted the generic term "burglary" in § 924(e) in light of: the ordinary understanding of burglary as of 1986; the States' laws at that time; Congress' recognition of the dangers of burglary; and Congress' stated objective of imposing increased punishment on armed career criminals who had committed prior burglaries. Looking at those sources, the *Taylor* Court interpreted generic burglary under § 924(e) to encompass remaining-in burglary. Looking at those same sources, we interpret remaining-in burglary under § 924(e) to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure.

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III

In light of our conclusion that generic remaining-in burglary occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure, Quarles' case is easily resolved. The question in Quarles' case is whether the Michigan home-invasion statute under which he was convicted in 2002 is broader than generic burglary or, instead, "substantially corresponds" to

or is narrower than generic burglary. *Id.*, at 602. Regarding that inquiry, the *Taylor* Court cautioned courts against seizing on modest state-law deviations from the generic definition of burglary. A state law's "exact definition or label" does not control. *Id.*, at 599. As the Court stated in *Taylor*, so long as the state law in question "substantially corresponds" to (or is narrower than) generic burglary, the conviction qualifies under § 924(e). *Id.*, at 602.

As stated above, generic remaining-in burglary occurs under § 924(e) when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. For the Court's purposes here, the Michigan statute substantially corresponds to or is narrower than generic burglary.[2]

* * *

We affirm the judgment of the U. S. Court of Appeals for the Sixth Circuit.

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It is so ordered.

JUSTICE THOMAS, concurring.

I join the opinion of the Court because it correctly applies our precedent requiring a "categorical approach" to the enumerated-offenses clause of the Armed Career Criminal Act (ACCA). I write separately to question this approach altogether.

This case demonstrates the absurdity of applying the categorical approach to the enumerated-offenses clause. The categorical approach relies on a comparison of the crime of conviction and a judicially created ideal of burglary. But

[2] In his brief, Quarles alternatively suggests that Michigan's home-invasion statute actually does not require that the defendant have *any* intent to commit a crime at *any* time while unlawfully present in a dwelling. Brief for Petitioner 9. Quarles offers no support for his suggestion that there is no *mens rea* requirement. In any event, Quarles did not preserve that argument, and we do not address it.

this ideal is starkly different from the reality of petitioner's actual crime: Petitioner attempted to climb through an apartment window to attack his ex-girlfriend.

More importantly, there are strong reasons to suspect that the categorical approach described in *Taylor* v. *United States*, 495 U. S. 575 (1990), is not compelled by ACCA's text but was rather a misguided attempt to avoid Sixth Amendment problems. See *Sessions* v. *Dimaya*, 584 U. S. 148, 225–226 (2018) (THOMAS, J., dissenting). Under our precedent, any state burglary statute with a broader definition than the one adopted in *Taylor* is categorically excluded simply because other conduct might be swept in at the margins. It is far from obvious that this is the best reading of the statute. A jury could readily determine whether a particular conviction satisfied the federal definition of burglary or instead fell outside that definition. See *Ovalles* v. *United States*, 905 F. 3d 1231, 1258–1260 (CA11 2018) (W. Pryor, J., concurring). Moreover, allowing a jury to do so would end the unconstitutional judicial factfinding that occurs when applying the categorical approach. See, *e. g.*, *Dimaya*, 584 U. S., at 225 (opinion of THOMAS, J.); *Mathis* v. *United States*, 579 U. S. 500, 522 (2016) (THOMAS, J., concurring); *Descamps* v. *United States*, 570 U. S. 254, 280 (2013) (THOMAS, J., concurring in judgment); *James* v. *United States*, 550 U. S. 192, 231–232 (2007) (THOMAS, J., dissenting); *Shepard* v. *United States*, 544 U. S. 13, 26–28 (2005) (THOMAS, J., concurring in part and concurring in judgment).

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Of course, addressing this issue would not help petitioner: He has not preserved a Sixth Amendment challenge. Moreover, any reasonable jury reviewing the record here would have concluded that petitioner was convicted of burglary, so any error was harmless.

* * *

Because the categorical approach employed today is difficult to apply and can yield dramatically different sentences

depending on where a burglary occurred, the Court should consider whether its approach is actually required in the first place for ACCA's enumerated-offenses clause. With these observations, I join the opinion of the Court.

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Syllabus

VIRGINIA HOUSE OF DELEGATES ET AL. *v.* BETHUNE-HILL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 18–281. Argued March 18, 2019—Decided June 17, 2019

After the 2010 census, Virginia redrew legislative districts for the State's Senate and House of Delegates. Voters in 12 impacted House districts sued two state agencies and four election officials (collectively, State Defendants), charging that the redrawn districts were racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. The House of Delegates and its Speaker (collectively, the House) intervened as defendants, participating in the bench trial, on appeal to this Court, and at a second bench trial, where a three-judge District Court held that 11 of the districts were unconstitutionally drawn, enjoined Virginia from conducting elections for those districts before adoption of a new plan, and gave the General Assembly several months to adopt that plan. Virginia's Attorney General announced that the State would not pursue an appeal to this Court. The House, however, did file an appeal.

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Held: The House lacks standing, either to represent the State's interests or in its own right. Pp. 662–671.

(a) To cross the standing threshold, a litigant must show (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision. *Hollingsworth* v. *Perry*, 570 U. S. 693, 704. Standing must be met at every stage of the litigation, including on appeal. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64. And as a jurisdictional requirement, standing cannot be waived or forfeited. To appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing. *Wittman* v. *Personhuballah*, 578 U. S. 539. Pp. 662–663.

(b) The House lacks standing to represent the State's interests. The State itself had standing to press this appeal, see *Diamond* v. *Charles*, 476 U. S. 54, 62, and could have designated agents to do so, *Hollingsworth*, 570 U. S., at 710. However, the State did not designate the House to represent its interests here. Under Virginia law, authority and responsibility for representing the State's interests in civil litigation rest exclusively with the State's Attorney General. Virginia state courts permitted the House to intervene to defend legislation in *Vesilind*

v. *Virginia State Bd. of Elections*, 295 Va. 427, 813 S. E. 2d 739, but the House's participation in *Vesilind* occurred in the same defensive posture as did the House's participation in earlier phases of this case, when the House did not need to establish standing. Moreover, the House pointed to nothing in the *Vesilind* litigation suggesting that the Virginia courts understood the House to be representing the interests of the State itself. *Karcher* v. *May*, 484 U. S. 72, distinguished. Throughout this litigation, the House has purported to represent only its own interests. The House thus lacks authority to displace Virginia's Attorney General as the State's representative. Pp. 663–666.

(c) The House also lacks standing to pursue this appeal in its own right. This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage. Virginia's Constitution allocates redistricting authority to the "General Assembly," of which the House constitutes only a part. That fact distinguishes this case from *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, where Arizona's House and Senate—*acting together*—had standing to challenge the constitutionality of a referendum that gave redistricting authority exclusively to an independent commission. The Arizona referendum was also assailed on the ground that it *permanently* deprived the legislative plaintiffs of their role in the redistricting process, while the order challenged here does not alter the General Assembly's dominant initiating and ongoing redistricting role. *Coleman* v. *Miller*, 307 U. S. 433, also does not aid the House here, where the issue is the constitutionality of a concededly enacted redistricting plan, not the results of a legislative chamber's poll or the validity of any counted or uncounted vote. Redrawing district lines indeed may affect the chamber's membership, but the House as an institution has no cognizable interest in the identity of its members. The House has no prerogative to select its own members. It is a representative body composed of members chosen by the people. Changes in its membership brought about by the voting public thus inflict no cognizable injury on the House. *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187, distinguished. Nor does a court order causing legislators to seek reelection in districts different from those they currently represent affect the House's representational nature. Legislative districts change frequently, and the Virginia Constitution guards against representational confusion by providing that delegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts. In short, the State of Virginia would rather stop than fight on. One House of its bicameral legis-

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lature cannot alone continue the litigation against the will of its partners in the legislative process. Pp. 666–671.

Appeal dismissed. Reported below: 326 F. Supp. 3d 128.

GINSBURG, J., delivered the opinion of the Court, in which THOMAS, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and BREYER and KAVANAUGH, JJ., joined, *post*, p. 671.

Paul D. Clement argued the cause for appellants. With him on the briefs were *Erin E. Murphy*, *Andrew C. Lawrence*, *Efrem M. Braden*, *Katherine L. McKnight*, and *Richard B. Raile*.

Morgan L. Ratner argued the cause for the United States as *amicus curiae*. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Dreiband*, *Principal Deputy Solicitor General Wall*, *Principal Deputy Assistant Attorney General Gore*, and *Tovah R. Calderon*.

Toby J. Heytens, Solicitor General of Virginia, argued the cause for state appellees. With him on the brief were *Mark R. Herring*, Attorney General, *Matthew R. McGuire*, Principal Deputy Solicitor General, *Stephen A. Cobb*, Deputy Attorney General, and *Michelle S. Kallen*, Deputy Solicitor General. *Marc E. Elias* argued the cause for appellees Bethune-Hill et al. With him on the brief were *Bruce V. Spiva*, *Kevin J. Hamilton*, *Abha Khanna*, and *Ryan Spear*.*

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JUSTICE GINSBURG delivered the opinion of the Court.

The Court resolves in this opinion a question of standing to appeal. In 2011, after the 2010 census, Virginia redrew legislative districts for the State's Senate and House of Dele-

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**Michael C. Keats*, *Kristen Clarke*, *Jon M. Greenbaum*, and *Ezra D. Rosenbaum* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Legislative Exchange Council et al. by *Marguerite Mary Leoni* and *James E. Barolo*; the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Kymberlee C. Stapleton*; and for Lee Chatfield et al. by *Jason Torchinsky*.

gates. Voters in 12 of the impacted House districts sued two Virginia state agencies and four election officials (collectively, State Defendants) charging that the redrawn districts were racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. The Virginia House of Delegates and its Speaker (collectively, the House) intervened as defendants and carried the laboring oar in urging the constitutionality of the challenged districts at a bench trial, see *Bethune-Hill* v. *Virginia State Bd. of Elections*, 141 F. Supp. 3d 505 (ED Va. 2015), on appeal to this Court, see *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 986 (2017), and at a second bench trial. In June 2018, after the second bench trial, a three-judge District Court in the Eastern District of Virginia, dividing 2 to 1, held that in 11 of the districts "the [S]tate ha[d] [unconstitutionally] sorted voters . . . based on the color of their skin." *Bethune-Hill* v. *Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (2018). The court therefore enjoined Virginia "from conducting any elections . . . for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted." *Id.*, at 227. Recognizing the General Assembly's "primary jurisdiction" over redistricting, the District Court gave the General Assembly approximately four months to "adop[t] a new redistricting plan that eliminate[d] the constitutional infirmity." *Ibid.*

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A few weeks after the three-judge District Court's ruling, Virginia's Attorney General announced, both publicly and in a filing with the District Court, that the State would not pursue an appeal to this Court. Continuing the litigation, the Attorney General concluded, "would not be in the best interest of the Commonwealth or its citizens." Defendants' Opposition to Intervenor-Defendants' Motion to Stay Injunction Pending Appeal Under 28 U. S. C. § 1253 in No. 3:14–cv–852 (ED Va.), Doc. 246, p. 1. The House, however, filed an appeal to this Court, App. to Juris. Statement 357–358, which the State Defendants moved to dismiss for want of standing.

We postponed probable jurisdiction, 586 U. S. 996 (2018), and now grant the State Defendants' motion. The House, we hold, lacks authority to displace Virginia's Attorney General as representative of the State. We further hold that the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part.[1]

I

To reach the merits of a case, an Article III court must have jurisdiction. "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth* v. *Perry*, 570 U. S. 693, 704 (2013). The three elements of standing, this Court has reiterated, are (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision. *Ibid.* (citing *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). Although rulings on standing often turn on a plaintiff's stake in initially filing suit, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth*, 570 U. S., at 705 (quoting *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91 (2013)). The standing requirement therefore "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997). As a jurisdictional requirement, standing to litigate cannot be

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[1] After the General Assembly failed to enact a new redistricting plan within the four months allowed by the District Court, that court entered a remedial order delineating districts for the 2019 election. The House has noticed an appeal to this Court from that order as well, and the State Defendants have moved to dismiss the follow-on appeal for lack of standing. See *Virginia House of Delegates* v. *Bethune-Hill*, No. 18–1134. In the appeal from the remedial order, the House and the State Defendants largely repeat the arguments on standing earlier advanced in this appeal. The House's claim to standing to pursue an appeal from the remedial order fares no better than its assertion of standing here. See *post*, p. 1060.

waived or forfeited. And when standing is questioned by a court or an opposing party, the litigant invoking the court's jurisdiction must do more than simply allege a nonobvious harm. See *Wittman* v. *Personhuballah*, 578 U. S. 539, 545 (2016). To cross the standing threshold, the litigant must explain how the elements essential to standing are met.

Before the District Court, the House participated in both bench trials as an intervenor in support of the State Defendants. And in the prior appeal to this Court, the House participated as an appellee. Because neither role entailed invoking a court's jurisdiction, it was not previously incumbent on the House to demonstrate its standing. That situation changed when the House alone endeavored to appeal from the District Court's order holding 11 districts unconstitutional, thereby seeking to invoke this Court's jurisdiction. As the Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing. *Wittman*, 578 U. S. 539; *Diamond* v. *Charles*, 476 U. S. 54 (1986). We find unconvincing the House's arguments that it has standing, either to represent the State's interests or in its own right.

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II

A

The House urges first that it has standing to represent the State's interests. Of course, "a State has standing to defend the constitutionality of its statute." *Id.*, at 62. No doubt, then, the State itself could press this appeal. And, as this Court has held, "a State must be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U. S., at 710. So if the State had designated the House to represent its interests, and if the House had in fact carried out that mission, we would agree that the House could stand in for the State. Neither precondition, however, is met here.

To begin with, the House has not identified any legal basis for its claimed authority to litigate on the State's behalf. Authority and responsibility for representing the State's in-

terests in civil litigation, Virginia law prescribes, rest exclusively with the State's Attorney General:

> "All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge . . . shall be rendered and performed by the Attorney General, except as provided in this chapter and except for [certain judicial misconduct proceedings]." Va. Code Ann. § 2.2–507(A) (2017).[2]

Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which "centraliz[es]" the decision whether to seek certiorari by "reserving litigation in this Court to the Attorney General and the Solicitor General." *United States* v. *Providence Journal Co.*, 485 U. S. 693, 706 (1988) (dismissing a writ of certiorari sought by a special prosecutor without authorization from the Solicitor General); see 28 U. S. C. § 518(a); 28 CFR § 0.20(a) (2018). Virginia, had it so chosen, could have authorized the House to litigate on the State's behalf, either generally or in a defined class of cases. *Hollingsworth*, 570 U. S., at 710. Some States have done just that. Indiana, for example, empowers "[t]he House of Representatives and Senate of the Indiana General Assembly . . . to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." Ind. Code § 2–3–8–1 (2011). But the choice belongs to Virginia, and the House's argument that it has authority to represent the State's interests is foreclosed by the State's contrary decision.

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[2] The exceptions referenced in the statute's text are inapposite here. They include circumstances where, "in the opinion of the Attorney General, it is impracticable or uneconomical for [the] legal service to be rendered by him or one of his assistants," or where the Virginia Supreme Court or any of its justices are litigating matters "arising out of [that court's] official duties." § 2.2–507(C).

The House observes that Virginia state courts have permitted it to intervene to defend legislation. But the sole case the House cites on this point—*Vesilind* v. *Virginia State Bd. of Elections*, 295 Va. 427, 813 S. E. 2d 739 (2018)—does not bear the weight the House would place upon it. In *Vesilind*, the House intervened in support of *defendants* in the trial court, and continued to *defend* the trial court's favorable judgment on appeal. *Id.*, at 433–434, 813 S. E. 2d, at 742. The House's participation in *Vesilind* thus occurred in the same defensive posture as did the House's participation in earlier phases of this case, when the House did not need to establish standing. Moreover, the House has pointed to nothing in the Virginia courts' decisions in the *Vesilind* litigation suggesting that the courts understood the House to be representing the interests of the State itself.

Nonetheless, the House insists, this Court's decision in *Karcher* v. *May*, 484 U. S. 72 (1987), dictates that we treat *Vesilind* as establishing conclusively the House's authority to litigate on the State's behalf. True, in *Karcher*, the Court noted a record, similar to that in *Vesilind*, of litigation by state legislative bodies in state court, and concluded without extensive explanation that "the New Jersey Legislature had authority under state law to represent the State's interests . . . ." 484 U. S., at 82. Of crucial significance, however, the Court in *Karcher* noted no New Jersey statutory provision akin to Virginia's law vesting the Attorney General with exclusive authority to speak for the Commonwealth in civil litigation. *Karcher* therefore scarcely impels the conclusion that, despite Virginia's clear enactment making the Attorney General the State's sole representative in civil litigation, Virginia has designated the House as its agent to assert the State's interests in this Court.

Moreover, even if, contrary to the governing statute, we indulged the assumption that Virginia had authorized the House to represent the State's interests, as a factual matter

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the House never indicated in the District Court that it was appearing in that capacity. Throughout this litigation, the House has purported to represent its own interests. Thus, in its motion to intervene, the House observed that it was "the legislative body that actually drew the redistricting plan at issue," and argued that the existing parties—including the State Defendants—could not adequately protect its interests. App. 2965–2967. Nowhere in its motion did the House suggest it was intervening as agent of the State. That silence undermines the House's attempt to proceed before us on behalf of the State. As another portion of the Court's *Karcher* decision clarifies, a party may not wear on appeal a hat different from the one it wore at trial. 484 U. S., at 78 (parties may not appeal in particular capacities "unless the record shows that they participated in those capacities below").[3]

B

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The House also maintains that, even if it lacks standing to pursue this appeal as the State's agent, it has standing in its own right. To support standing, an injury must be "legally and judicially cognizable." *Raines* v. *Byrd*, 521 U. S. 811, 819 (1997). This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage. The Court's precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legisla-

[3] Nor can we give ear to the House's assertion that forfeiture or acquiescence bar the State Defendants from contesting the House's authority to represent the State's interests. See Brief for Appellants 29–30. As earlier observed, standing to sue (or appeal) is a nonwaivable jurisdictional requirement. See *supra*, at 662–663. Moreover, even if forfeiture were not beyond the pale, the State Defendants here could hardly be held to have relinquished an objection to the House's participation in a capacity—on behalf of the State itself—in which the House was not participating in the District Court.

tive process, may appeal on its own behalf a judgment invalidating a state enactment.

Seeking to demonstrate its asserted injury, the House emphasizes its role in enacting redistricting legislation in particular. The House observes that, under Virginia law, "members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly." Va. Const., Art. 2, § 6. The House has standing, it contends, because it is "the legislative body that actually drew the redistricting plan," and because, the House asserts, any remedial order will transfer redistricting authority from it to the District Court. Brief for Appellants 23, 26–28 (internal quotation marks omitted). But the Virginia constitutional provision the House cites allocates redistricting authority to the "General Assembly," of which the House constitutes only a part.

That fact distinguishes this case from *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787 (2015), in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority under the Federal Constitution over congressional redistricting. In contrast to this case, in *Arizona State Legislature* there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. See 576 U. S., at 801. Just as individual members lack standing to assert the institutional interests of a legislature, see *Raines*, 521 U. S., at 829,[4] a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.

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[4] *Raines* held that individual Members of Congress lacked standing to challenge the Line Item Veto Act.

Moreover, in *Arizona State Legislature*, the challenged referendum was assailed on the ground that it *permanently* deprived the legislative plaintiffs of their role in the redistricting process. Here, by contrast, the challenged order does not alter the General Assembly's dominant initiating and ongoing role in redistricting. Compare *Arizona State Legislature*, 576 U. S., at 804 (allegation of nullification of "any vote by the Legislature, now or in the future, purporting to adopt a redistricting plan" (internal quotation marks omitted)), with 326 F. Supp. 3d, at 227 (recognizing the General Assembly's "primary jurisdiction" over redistricting and giving the General Assembly first crack at enacting a revised redistricting plan).[5]

Nor does *Coleman* v. *Miller*, 307 U. S. 433 (1939), aid the House. There, the Court recognized the standing of 20 state legislators who voted against a resolution ratifying the proposed Child Labor Amendment to the Federal Constitution. *Id.*, at 446. The resolution passed, the opposing legislators stated, only because the Lieutenant Governor cast a tie-breaking vote—a procedure the legislators argued was impermissible under Article V of the Federal Constitution. See *Arizona State Legislature*, 576 U. S., at 803–804 (citing *Coleman*, 307 U. S., at 446). As the Court has since observed, *Coleman* stands "at most" "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely

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[5] Misplaced for similar reasons is the House's reliance on this Court's statements in *INS* v. *Chadha*, 462 U. S. 919, 929–931, and nn. 5–6, 939–940 (1983), that the United States House and Senate were "proper parties" or "adverse parties." First, it is far from clear that the Court meant those terms to refer to standing, as opposed to the simple fact that both Houses of Congress had intervened. In any event, the statute at issue in *Chadha* granted *each* Chamber of Congress an *ongoing* power—to veto certain Executive Branch decisions—that each House could exercise independent of any other body.

nullified." *Raines*, 521 U. S., at 823. Nothing of that sort happened here. Unlike *Coleman*, this case does not concern the results of a legislative chamber's poll or the validity of any counted or uncounted vote. At issue here, instead, is the constitutionality of a concededly enacted redistricting plan. As we have already explained, a single House of a bicameral legislature generally lacks standing to appeal in cases of this order.

Aside from its role in enacting the invalidated redistricting plan, the House, echoed by the dissent, see *post*, at 672–675, asserts that the House has standing because altered district boundaries may affect its composition. For support, the House and the dissent rely on *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972) (*per curiam*), in which this Court allowed the Minnesota Senate to challenge a District Court malapportionment litigation order that reduced the Senate's size from 67 to 35 members. The Court said in *Beens*: "[C]ertainly the [Minnesota Senate] is directly affected by the District Court's orders," rendering the Senate "an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind." *Id.*, at 194.

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Beens predated this Court's decisions in *Diamond* v. *Charles* and other cases holding that intervenor status alone is insufficient to establish standing to appeal. Whether *Beens* established law on the question of standing, as distinct from intervention, is thus less than pellucid. But even assuming, *arguendo*, that *Beens* was, and remains, binding precedent on standing, the order there at issue injured the Minnesota Senate in a way the order challenged here does not injure the Virginia House. Cutting the size of a legislative chamber in half would necessarily alter its day-to-day operations. Among other things, leadership selection, committee structures, and voting rules would likely require alteration. By contrast, although redrawing district lines indeed may affect the membership of the chamber, the House

as an institution has no cognizable interest in the identity of its members.[6] Although the House urges that changes to district lines will "profoundly disrupt its day-to-day operations," Reply Brief 3, it is scarcely obvious how or why that is so. As the party invoking this Court's jurisdiction, the House bears the burden of doing more than "simply alleg-[ing] a nonobvious harm." *Wittman*, 578 U. S., at 545.

Analogizing to "group[s] other than a legislative body," the dissent insists that the House has suffered an "obvious" injury. *Post*, at 673. But groups like the string quartet and basketball team posited by the dissent select their own members. Similarly, the political parties involved in the cases the dissent cites, see *post*, at 674, n. 1 (citing *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 202 (2008), and *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 229–230 (1989)), select their own leadership and candidates. In stark contrast, the House does not select its own members. Instead, it is a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House.[7]

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The House additionally asserts injury from the creation of what it calls "divided constituencies," suggesting that a court order causing legislators to seek reelection in districts different from those they currently represent affects the House's representational nature. But legislative districts change

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[6] The dissent urges that changes to district lines will alter the House's future legislative output. See *post*, at 672–675. A legislative chamber as an institution, however, suffers no legally cognizable injury from changes to the *content* of legislation its future members may elect to enact. By contrast, the House has an obvious institutional interest in the *manner* in which it goes about its business.

[7] The dissent further suggests that "we must assume that the districting plan enacted by the legislature embodies the House's judgment" regarding the best way to select its members. *Post*, at 674. For the reasons explained *supra*, at 666–669, however, the House's role in the legislative process does not give it standing to pursue this appeal.

frequently—indeed, after every decennial census—and the Virginia Constitution resolves any confusion over which district is being represented. It provides that delegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts. Va. Const., Art. 2, §6 ("A member in office at the time that a decennial redistricting law is enacted shall complete his term of office and shall continue to represent the district from which he was elected for the duration of such term of office . . . ."). We see little reason why the same would not hold true after districting changes caused by judicial decisions, and we thus foresee no representational confusion. And if harms centered on costlier or more difficult election campaigns are cognizable—a question that, as in *Wittman*, 578 U. S., at 544–546, we need not decide today—those harms would be suffered by individual legislators or candidates, not by the House as a body.

In short, Virginia would rather stop than fight on. One House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process.

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For the reasons stated, we dismiss the House's appeal for lack of jurisdiction.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH join, dissenting.

I would hold that the Virginia House of Delegates has standing to take this appeal. The Court disagrees for two reasons: first, because Virginia law does not authorize the House to defend the invalidated redistricting plan on behalf of the Commonwealth, see *ante*, at 663–666, and, second, because the imposition of the District Court's districting plan would not cause the House the kind of harm required by Article III of the Constitution, see *ante*, at 666–671. I am

convinced that the second holding is wrong and therefore will not address the first.

I

Our decision in *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992), identified the three elements that constitute the "irreducible constitutional minimum of standing" demanded by Article III. A party invoking the jurisdiction of a federal court must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016). The Virginia House of Delegates satisfies all those requirements in this case.

I begin with "injury in fact." It is clear, in my judgment, that the new districting plan ordered by the lower court will harm the House in a very fundamental way. A legislative districting plan powerfully affects a legislative body's output of work. Each legislator represents a particular district, and each district contains a particular set of constituents with particular interests and views. Cf., *e. g.*, App. 165 (noting the "varied factors that can create or contribute to communities of interest" in districts (House Committee on Privileges and Elections resolution)). The interests and views of these constituents generally have an important effect on everything that a legislator does—meeting with the representatives of organizations and groups seeking the legislator's help in one way or another, drafting and sponsoring bills, pushing for and participating in hearings, writing or approving reports, and of course, voting. When the boundaries of a district are changed, the constituents and communities of interest present within the district are altered, and this is likely to change the way in which the district's representative does his or her work. And while every individual voter will end up being represented by a legislator no matter which districting plan is ultimately used, it matters a lot how voters with shared interests and views are concentrated or

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split up. The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.

All of this should really go without saying. After all, it is precisely because of the connections between the way districts are drawn, the composition of a legislature, and the things that a legislature does that so much effort is invested in drawing, contesting, and defending districting plans. Districting matters because it has institutional and legislative consequences. To suggest otherwise, to argue that substituting one plan for another has no effect on the work or output of the legislative body whose districts are changed, would really be quite astounding. If the selection of a districting plan did not alter what the legislative body does, why would there be such pitched battles over redistricting efforts?

What the Court says on this point is striking. According to the Court, "the House as an institution has no cognizable interest in the identity of its members," and thus suffers no injury from the imposition of a districting plan that "may affect the membership of the chamber" or the "content of legislation its future members may elect to enact." *Ante*, at 669–670, and n. 6 (emphasis deleted). Really? It seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong interest in how its members are selected. And what is more important to such a group than the content of its work?

Apply what the Court says to a group other than a legislative body and it is immediately obvious that the Court is wrong. Does a string quartet have an interest in the identity of its cellist? Does a basketball team have an interest in the identity of its point guard? Does a board of directors have an interest in the identity of its chairperson? Does it matter to these groups how their members are selected? Do these groups care if the selection method affects their performance? Of course.

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The Virginia House of Delegates exists for a purpose: to represent and serve the interests of the people of the Commonwealth. The way in which its members are selected has a powerful effect on how it goes about this purpose[1]—a proposition reflected by the Commonwealth's choice to mandate certain districting criteria in its constitution. See Va. Const., Art. II, § 6. As far as the House's standing, we must assume that the districting plan enacted by the legislature embodies the House's judgment regarding the method of selecting members that best enables it to serve the people of the Commonwealth. (Whether this is a permissible judgment is a merits question, not a question of standing. Cf. *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975).) It therefore follows that discarding that plan and substituting another inflicts injury in fact.

Our most pertinent precedent supports the standing of the House on this ground. In *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972) (*per curiam*), we held that the Minnesota Senate had standing to appeal a District Court order reapportioning the Senate's seats. In reaching that conclusion, we noted that "certainly" such an order "directly affected" the Senate. *Id.*, at 194. The same is true here. There can be no doubt that the new districting plan "directly affect[s]" the House whose districts it redefines and whose legislatively drawn districts have been replaced with a court-ordered map. That the *Beens* Court drew its "directly affect[s]" language from a case involving a standard reapportionment challenge, see *Silver* v. *Jordan*, 241 F. Supp. 576, 579 (SD Cal. 1964) (*per curiam*), aff'd, 381 U. S. 415 (1965) (*per curiam*), only serves to confirm that the House's injury is sufficient to demonstrate standing under *Beens*.

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[1] The Court has not hesitated to recognize this link in other contexts. See, *e. g.*, *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 202 (2008); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 229–230 (1989).

In an effort to distinguish *Beens*, it is argued that the District Court decision at issue there, which slashed the number of senators in half, "ha[d] a distinct and more direct effect on the body itself than a mere shift in district lines." Brief for United States as *Amicus Curiae* 17; see Brief for State Appellees 38. But even if the effect of the court order was greater in *Beens* than it is here, it is the existence—not the extent—of an injury that matters for purposes of Article III standing.

The Court suggests that the effects of the court-ordered districting plan in *Beens* were different from the effects of the plan now before us because the former concerned the legislature's internal operations. See *ante*, at 669–670. But even if the imposition of the court-ordered plan in this case would not affect the internal operations of the House (and that is by no means clear), it is very strange to think that changes to such things as "committee structures" and "voting rules," see *ante*, at 669, are more important than changes in legislative output.

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In short, the invalidation of the House's redistricting plan and its replacement with a court-ordered map would cause the House to suffer a "concrete" injury. And as Article III demands, see *Spokeo*, 578 U. S., at 338–339, that injury would also be "particularized" (because it would target the House); "imminent" (because it would certainly occur if this appeal is dismissed); "traceable" to the imposition of the new, court-ordered plan; and "redress[able]" by the relief the House seeks here, *ibid.*

II

Although the opinion of the Court begins by citing the three fundamental Article III standing requirements just discussed, see *ante*, at 662, it is revealing that the Court never asserts that the effect of the court-ordered plan at issue would not cause the House "concrete" harm. Instead, the Court claims only that any harm would not be "'judicially cognizable,'" *ante*, at 666; see also *ante*, at 669–670. The Court lifts

this term from *Raines* v. *Byrd*, 521 U. S. 811, 819 (1997), where the Court held that individual Members of *Congress* lacked standing to challenge the constitutionality of the Line Item Veto Act. But the decision in *Raines* rested heavily on federal separation-of-powers concerns, which are notably absent here. See *id.*, at 819–820, 826–829; *id.*, at 832–835 (Souter, J., concurring in judgment). And although the Court does not say so expressly, what I take from its use of the term "judicially cognizable" injury rather than "concrete" injury is that the decision here is not really based on the *Lujan* factors, which set out the "irreducible" minimum demanded by Article III. 504 U. S., at 560. Instead, the argument seems to be that the House's injury is insufficient for some other, only-hinted-at reason.

Both the United States, appearing as an *amicus*, and the Commonwealth of Virginia are more explicit. The Solicitor General's brief argues as follows:

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> "In the federal system, the Constitution gives Congress only 'legislative Powers,' U. S. Const. Art. 1, § 1, and the 'power to seek judicial relief . . . cannot possibly be regarded as merely in aid of the legislative function.' *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976) (per curiam). As a result, 'once Congress makes its choice in enacting legislation, its participation ends.' *Bowsher* v. *Synar*, 478 U. S. 714, 733 (1986). . . . *The same is true here.* A branch of a state government that makes rather than enforces the law does not itself have a cognizable Article III interest in the defense of its laws." Brief for United States as *Amicus Curiae* 14–15 (emphasis added).

The Virginia Solicitor General makes a similar argument. See Brief for State Appellees 42–44.

These arguments are seriously flawed because the States are under no obligation to follow the Federal Constitution's model when it comes to the separation of powers. See *Whalen* v. *United States*, 445 U. S. 684, 689, n. 4 (1980); cf.

Raines, *supra*, at 824, n. 8; *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 803, n. 12 (2015). If one House of Congress or one or more Members of Congress attempt to invoke the power of a federal court, the court must consider whether this attempt is consistent with the structure created by the Federal Constitution. An interest asserted by a Member of Congress or by one or both Houses of Congress that is inconsistent with that structure may not be judicially cognizable. But I do not see how we can say anything similar about the standing of state legislators or state legislative bodies.[2] Cf. *Karcher* v. *May*, 484 U. S. 72, 81–82 (1987). The separation of powers (or the lack thereof) under a state constitution is purely a matter of state law, and neither the Court nor the Virginia Solicitor General has provided any support for the proposition that Virginia law bars the House from defending, in its own right, the constitutionality of a districting plan.

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For these reasons, I would hold that the House of Delegates has standing, and I therefore respectfully dissent.

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[2] The Court's observation that the Virginia Constitution gives legislative districting authority to the General Assembly as a whole—in other words, to the House of Delegates and the Senate in combination—does not answer the question. To start, a similar argument against standing was pressed and rejected in *Sixty-seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972) (*per curiam*), see Motion of Appellees To Dismiss Appeal in O. T. 1971, No. 71–1024, p. 9, and the Court does not explain why a different outcome is warranted here. Nor am I persuaded by the Court's citation of *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787 (2015). There, the Court held that the Arizona Legislature had standing to bring a suit aimed at protecting its redistricting authority. But from the fact that a whole legislature may have standing to defend its redistricting authority, it does not follow that the House necessarily lacks standing to challenge a redistricting decision based on concrete injuries to its institutional interests. Cf. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 339, n. 7 (2016).

Syllabus

GAMBLE *v.* UNITED STATES

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

No. 17–646. Argued December 6, 2018—Decided June 17, 2019

Petitioner Gamble pleaded guilty to a charge of violating Alabama's felon-in-possession-of-a-firearm statute. Federal prosecutors then indicted him for the same instance of possession under federal law. Gamble moved to dismiss, arguing that the federal indictment was for "the same offence" as the one at issue in his state conviction, thus exposing him to double jeopardy under the Fifth Amendment. The District Court denied this motion, invoking the dual-sovereignty doctrine, according to which two offenses "are *not* the 'same offence'" for double jeopardy purposes if "prosecuted by different sovereigns," *Heath* v. *Alabama*, 474 U. S. 82, 92. Gamble pleaded guilty to the federal offense but appealed on double jeopardy grounds. The Eleventh Circuit affirmed.

Held: This Court declines to overturn the longstanding dual-sovereignty doctrine. Pp. 683–710.

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(a) The dual-sovereignty doctrine is not an exception to the double jeopardy right but follows from the Fifth Amendment's text. The Double Jeopardy Clause protects individuals from being "twice put in jeopardy" "for the same offence." As originally understood, an "offence" is defined by a law, and each law is defined by a sovereign. Thus, where there are two sovereigns, there are two laws and two "offences." Gamble attempts to show from the Clause's drafting history that Congress must have intended to bar successive prosecutions regardless of the sovereign bringing the charge. But even if conjectures about subjective goals were allowed to inform this Court's reading of the text, the Government's contrary arguments on that score would prevail. Pp. 683–685.

(b) This Court's cases reflect the sovereign-specific reading of the phrase "same offence." Three antebellum cases—*Fox* v. *Ohio*, 5 How. 410; *United States* v. *Marigold*, 9 How. 560; and *Moore* v. *Illinois*, 14 How. 13—laid the foundation that a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate. Seventy years later, that foundation was cemented in *United States* v. *Lanza*, 260 U. S. 377, which upheld a federal prosecution that followed one by a State. This Court applied that precedent for decades until 1959, when it refused two requests to reverse course, see *Bartkus* v. *Illinois*, 359 U. S. 121; *Abbate* v. *United States*, 359 U. S. 187, and it has

reinforced that precedent over the following six decades, see, *e. g.*, *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59. Pp. 685–690.

(c) Gamble claims that this Court's precedent contradicts the common-law rights that the Double Jeopardy Clause was originally understood to engraft onto the Constitution, pointing to English and American cases and treatises. A departure from precedent, however, "demands special justification," *Arizona* v. *Rumsey*, 467 U. S. 203, 212, and Gamble's historical evidence is too feeble to break the chain of precedent linking dozens of cases over 170 years. This Court has previously concluded that the probative value of early English decisions on which Gamble relies was "dubious" due to "confused and inadequate reporting." *Bartkus*, 359 U. S., at 128, n. 9. On closer inspection, that assessment has proved accurate; the passing years have not made those early cases any clearer or more valuable. Nor do the treatises cited by Gamble come close to settling the historical question with enough force to meet his particular burden. His position is also not supported by state-court cases, which are equivocal at best. Less useful still are the two federal cases cited by Gamble—*Houston* v. *Moore*, 5 Wheat. 1, which squares with the dual-sovereignty doctrine, and *United States* v. *Furlong*, 5 Wheat. 184, which actually supports it. Pp. 691–707.

(d) Gamble's attempts to blunt the force of *stare decisis* here do not succeed. He contends that the recognition of the Double Jeopardy Clause's incorporation against the States washed away any theoretical foundation for the dual-sovereignty rule. But this rule rests on the fact that only same-sovereign prosecutions can involve the "same offence," and that is just as true after incorporation as before. Gamble also argues that the proliferation of federal criminal laws has raised the risk of successive prosecutions under state and federal law for the same criminal conduct, thus compounding the harm inflicted by precedent. But this objection obviously assumes that precedent was erroneous from the start, so it is only as strong as the historical arguments found wanting. In any case, eliminating the dual-sovereignty rule would do little to trim the reach of federal criminal law or prevent many successive state and federal prosecutions for the same criminal conduct, see *Blockburger* v. *United States*, 284 U. S. 299. Pp. 707–710.

694 Fed. Appx. 750, affirmed.

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ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 710. GINSBURG, J., *post*, p. 726, and GORSUCH, J., *post*, p. 737, filed dissenting opinions.

Counsel

Louis A. Chaiten argued the cause for petitioner. With him on the briefs were *Emmett E. Robinson*, *Amanda K. Rice*, *Robert N. Stander*, and *Barre C. Dumas.*

Eric J. Feigin argued the cause for the United States. With him on the brief were *Acting Solicitor General Wall*, *Assistant Attorney General Benczkowski*, *Jenny C. Ellickson*, and *Ross B. Goldman.*

Kyle D. Hawkins, Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging affirmance. 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 *Eric A. White* and *Ari Cuenin*, Assistant Solicitors General, and by the Attorneys General and other officials for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *Cynthia H. Coffman* of Colorado, *Kevin T. Kane*, Chief State's Attorney of Connecticut, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Barbara D. Underwood* of New York, *Joshua H. Stein* of North Carolina, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Sean Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin.*

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*Briefs of *amici curiae* urging reversal were filed for the Constitutional Accountability Center et al. by *Elizabeth B. Wydra*, *Brianne J. Gorod*, *Ashwin P. Phatak*, *Ilya Shapiro*, *Jay R. Schweikert*, *David Cole*, *Ezekiel*

JUSTICE ALITO delivered the opinion of the Court.

We consider in this case whether to overrule a longstanding interpretation of the Double Jeopardy Clause of the Fifth Amendment. That Clause provides that no person may be "twice put in jeopardy" "for the same offence." Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular "offence" cannot be tried a second time for the same "offence." But what does the Clause mean by an "offence"?

We have long held that a crime under one sovereign's laws is not "the same offence" as a crime under the laws of another sovereign. Under this "dual-sovereignty" doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.

Or the reverse may happen, as it did here. Terance Gamble, convicted by Alabama for possessing a firearm as a felon, now faces prosecution by the United States under its own felon-in-possession law. Attacking this second prosecution on double jeopardy grounds, Gamble asks us to overrule the dual-sovereignty doctrine. He contends that it departs

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R. Edwards, and *Randall Marshall*; for Criminal Defense Experts by *Paul D. Clement* and *George W. Hicks, Jr.*; for Criminal Procedure Professors by *Peder K. Batalden*, *Barry R. Levy*, and *Stephen E. Henderson*, *pro se*; for Law Professors by *Stuart Banner* and *Paul G. Cassell*, both *pro se*; for the National Association of Criminal Defense Lawyers et al. by *Jonathan L. Marcus*, *Paul M. Kerlin*, *David M. Porter*, *Daniel L. Kaplan*, and *Donna F. Coltharp*; for The Rutherford Institute by *John W. Whitehead*; for the U. S. Navy-Marine Corps Appellate Defense Division et al. by *Rebecca S. Snyder*, *Daniel E. Rosinski*, *John C. Reardon*, *Jane E. Boomer*, *Christopher D. Carrier*, and *Elizabeth G. Marotta*; and for Sen. Orrin Hatch by *Adam G. Unikowsky*.

Briefs of *amici curiae* urging affirmance were filed for the National Association of Counties et al. by *Gordon D. Todd*, *Joshua J. Fougere*, and *Lisa Soronen*; and for the National Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*.

Adam Harris Kurland filed a brief for the Howard University School of Law Thurgood Marshall Civil Rights Center as *amicus curiae*.

from the founding-era understanding of the right enshrined by the Double Jeopardy Clause. But the historical evidence assembled by Gamble is feeble; pointing the other way are the Clause's text, other historical evidence, and 170 years of precedent. Today we affirm that precedent, and with it the decision below.

I

In November 2015, a local police officer in Mobile, Alabama, pulled Gamble over for a damaged headlight. Smelling marijuana, the officer searched Gamble's car, where he found a loaded 9-mm handgun. Since Gamble had been convicted of second-degree robbery, his possession of the handgun violated an Alabama law providing that no one convicted of "a crime of violence" "shall own a firearm or have one in his or her possession." Ala. Code § 13A–11–72(a) (2015); see § 13A–11–70(2) (defining "crime of violence" to include robbery). After Gamble pleaded guilty to this state offense, federal prosecutors indicted him for the same instance of possession under a federal law—one forbidding those convicted of "a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." 18 U. S. C. § 922(g)(1).

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Gamble moved to dismiss on one ground: The federal indictment was for "the same offence" as the one at issue in his state conviction and thus exposed him to double jeopardy. But because this Court has long held that two offenses "are *not* the 'same offence'" for double jeopardy purposes if "prosecuted by different sovereigns," *Heath* v. *Alabama*, 474 U. S. 82, 92 (1985), the District Court denied Gamble's motion to dismiss. Gamble then pleaded guilty to the federal offense while preserving his right to challenge the denial of his motion to dismiss on double jeopardy grounds. But on appeal the Eleventh Circuit affirmed, citing the dual-sovereignty doctrine. 694 Fed. Appx. 750 (2017). We

granted certiorari to determine whether to overturn that doctrine.[1] 585 U. S. 1029 (2018).

II

Gamble contends that the Double Jeopardy Clause must forbid successive prosecutions by different sovereigns because that is what the founding-era common law did. But before turning to that historical claim, see Part III, *infra*, we review the Clause's text and some of the cases Gamble asks us to overturn.

A

We start with the text of the Fifth Amendment. Although the dual-sovereignty rule is often dubbed an "exception" to the double jeopardy right, it is not an exception at all. On the contrary, it follows from the text that defines that right in the first place. "[T]he language of the Clause . . . protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*," *Grady* v. *Corbin*, 495 U. S. 508, 529 (1990), as Justice Scalia wrote in a soon-vindicated dissent, see *United States* v. *Dixon*, 509 U. S. 688 (1993) (overruling *Grady*). And the term "'[o]ffence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Grady*, 495 U. S., at 529 (Scalia, J., dissenting) (quoting Dictionarium Britannicum (Bailey ed. 1730)). See also 2 R. Burn & J. Burn, A New Law Dictionary 167 (1792) ("OFFENCE, is an act committed against law, or omitted where the law requires it"). As originally understood, then, an "offence" is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two "offences." See *Grady*, 495 U. S., at 529

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[1] In addressing that question, we follow the parties' lead and assume, without deciding, that the state and federal offenses at issue here satisfy the other criteria for being the "same offence" under our double jeopardy precedent. See *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932).

(Scalia, J., dissenting) ("If the same conduct violates two (or more) laws, then each offense may be separately prosecuted"); *Moore* v. *Illinois*, 14 How. 13, 17 (1852) ("The constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same *offence*, the same *violation of law*, no person's life or limb shall be twice put in jeopardy" (emphasis added)).

Faced with this reading, Gamble falls back on an episode from the Double Jeopardy Clause's drafting history.[2] The first Congress, working on an earlier draft that would have banned "'more than one trial or one punishment for the same offence,'" voted down a proposal to add "'by any law of the United States.'" 1 Annals of Cong. 753 (1789). In rejecting this addition, Gamble surmises, Congress must have intended to bar successive prosecutions regardless of the sovereign bringing the charge.

Even if that inference were justified—something that the Government disputes—it would count for little. The private intent behind a drafter's rejection of one version of a text is shoddy evidence of the public meaning of an altogether different text. Cf. *United States* v. *Craft*, 535 U. S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" (internal quotation marks omitted)).

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Besides, if we allowed conjectures about purpose to inform our reading of the text, the Government's conjecture would prevail. The Government notes that the Declaration of In-

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[2] Gamble also cites founding-era uses of the word "offence" that are *not* tied to violations of a sovereign's laws, but the examples are not very telling. Some, for instance, play on the unremarkable fact that at the founding, "offence" could take on a different sense in nonlegal settings, much as "offense" does today. In this vein, Gamble cites a 19th-century dictionary defining "offense" broadly as "any transgression of law, divine or human; a crime; sin; act of wickedness or omission of duty." 2 N. Webster, An American Dictionary of the English Language (1828). But the question is what "offence" meant in legal contexts. See *Moore* v. *Illinois*, 14 How. 13, 19 (1852) ("An offence, *in its legal signification*, means the transgression of a law" (emphasis added)).

dependence denounced King George III for "protecting [British troops] by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States." ¶17. The Declaration was alluding to "the so-called Murderers' Act, passed by Parliament after the Boston Massacre," Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 687, n. 181 (1996), a law that allowed British officials indicted for murder in America to be "'tried in England, beyond the control of local juries,'" *ibid.* (quoting J. Blum et al., The National Experience 95 (3d ed. 1973)). "During the late colonial period, Americans strongly objected to . . . [t]his circumvention of the judgment of the victimized community." Amar, 84 Geo. L. Rev., at 687, n. 181. Yet on Gamble's reading, the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals. We doubt it.

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We see no reason to abandon the sovereign-specific reading of the phrase "same offence," from which the dual-sovereignty rule immediately follows.

B

Our cases reflect the same reading. A close look at them reveals how fidelity to the Double Jeopardy Clause's text does more than honor the formal difference between two distinct criminal codes. It honors the substantive differences between the interests that two sovereigns can have in punishing the same act.

The question of successive federal and state prosecutions arose in three antebellum cases implying and then spelling out the dual-sovereignty doctrine. The first, *Fox* v. *Ohio*, 5 How. 410 (1847), involved an Ohio prosecution for the passing of counterfeit coins. The defendant argued that since Congress can punish counterfeiting, the States must be barred from doing so, or else a person could face two trials for the same offense, contrary to the Fifth Amendment. We re-

jected the defendant's premise that under the Double Jeopardy Clause "offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Id.*, at 435. Indeed, we observed, the nature of the crime or its effects on "public safety" might well "deman[d]" separate prosecutions. *Ibid.* Generalizing from this point, we declared in a second case that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." *United States* v. *Marigold*, 9 How. 560, 569 (1850).

A third antebellum case, *Moore* v. *Illinois*, 14 How. 13, expanded on this concern for the different interests of separate sovereigns, after tracing it to the text in the manner set forth above. Recalling that the Fifth Amendment prohibits double jeopardy not "for the same ac[t]" but "for the same offence," and that "[a]n offence, in its legal signification, means the transgression of a law," *id.*, at 19, we drew the now-familiar inference: A single act "may be an offence or transgression of the laws of" two sovereigns, and hence punishable by both, *id.*, at 20. Then we gave color to this abstract principle—and to the diverse interests it might vindicate—with an example. An assault on a United States marshal, we said, would offend against the Nation and a State: the first by "hindering" the "execution of legal process," and the second by "breach[ing]" the "peace of the State." *Ibid.* That duality of harm explains how "one act" could constitute "two offences, for each of which [the offender] is justly punishable." *Ibid.*

This principle comes into still sharper relief when we consider a prosecution in this country for crimes committed abroad. If, as Gamble suggests, only one sovereign may

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prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court. Imagine, for example, that a U. S. national has been murdered in another country. That country could rightfully seek to punish the killer for committing an act of violence within its territory. The foreign country's interest lies in protecting the peace in that territory rather than protecting the American specifically. But the United States looks at the same conduct and sees an act of violence against one of its nationals, a person under the particular protection of its laws. The murder of a U. S. national is an offense to the United States as much as it is to the country where the murder occurred and to which the victim is a stranger. That is why the killing of an American abroad is a federal offense that can be prosecuted in our courts, see 18 U. S. C. § 2332(a)(1), and why customary international law allows this exercise of jurisdiction.

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There are other reasons not to offload all prosecutions for crimes involving Americans abroad. We may lack confidence in the competence or honesty of the other country's legal system. Less cynically, we may think that special protection for U. S. nationals serves key national interests related to security, trade, commerce, or scholarship. Such interests might also give us a stake in punishing crimes committed *by* U. S. nationals abroad—especially crimes that might do harm to our national security or foreign relations. See, *e. g.*, § 2332a(b) (bombings). These examples reinforce the foundation laid in our antebellum cases: that a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate.

We cemented that foundation 70 years after the last of those antebellum cases, in a decision upholding a federal prosecution that followed one by a State. See *United States* v. *Lanza*, 260 U. S. 377, 382 (1922) ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished

by each"). And for decades more, we applied our precedent without qualm or quibble. See, *e. g.*, *Screws* v. *United States*, 325 U. S. 91 (1945); *Jerome* v. *United States*, 318 U. S. 101 (1943); *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253 (1937); *Westfall* v. *United States*, 274 U. S. 256 (1927); *Hebert* v. *Louisiana*, 272 U. S. 312 (1926). When petitioners in 1959 asked us twice to reverse course, we twice refused, finding "[n]o consideration or persuasive reason not presented to the Court in the prior cases" for disturbing our "firmly established" doctrine. *Abbate* v. *United States*, 359 U. S. 187, 195; see also *Bartkus* v. *Illinois*, 359 U. S. 121. And then we went on enforcing it, adding another six decades of cases to the doctrine's history. See, *e. g.*, *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59 (2016); *Heath* v. *Alabama*, 474 U. S. 82 (1985); *United States* v. *Wheeler*, 435 U. S. 313 (1978); *Rinaldi* v. *United States*, 434 U. S. 22 (1977) (*per curiam*).

C

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We briefly address two objections to this analysis.

First, the dissents contend that our dual-sovereignty rule errs in treating the Federal and State *Governments* as two separate sovereigns when in fact sovereignty belongs to the people. See *post*, at 728 (opinion of GINSBURG, J.); *post*, at 743 (opinion of GORSUCH, J.). This argument is based on a non sequitur. Yes, our Constitution rests on the principle that the people are sovereign, but that does not mean that they have conferred all the attributes of sovereignty on a single government. Instead, the people, by adopting the Constitution, "'split the atom of sovereignty.'" *Alden* v. *Maine*, 527 U. S. 706, 751 (1999) (brackets omitted). As we explained last Term:

> "When the original States declared their independence, they claimed the powers inherent in sovereignty . . . . 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). 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)." *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 470 (2018).

It is true that the Republic is "'ONE WHOLE,'" *post*, at 728 (opinion of GINSBURG, J.) (quoting The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton)); accord, *post*, at 743 (opinion of GORSUCH, J.). But there is a difference between the whole and a single part, and that difference underlies decisions as foundational to our legal system as *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). There, in terms so directly relevant as to seem presciently tailored to answer this very objection, Chief Justice Marshall distinguished precisely between "the people of a State" and "[t]he people of all the States," *id.*, at 428, 435; between the "sovereignty which the people of a single state possess" and the sovereign powers "conferred by the people of the United States on the government of the Union," *id.*, at 429–430; and thus between "the action of a part" and "the action of the whole," *id.*, at 435–436. In short, *McCulloch*'s famous holding that a State may not tax the national bank rested on a recognition that the States and the Nation have different "interests" and "right[s]." *Id.*, at 431, 436. One strains to imagine a clearer statement of the premises of our dual-sovereignty rule, or a more authoritative source. The United States is a *federal* republic; it is not, contrary to JUSTICE GORSUCH's suggestion, *post*, at 746–747, a unitary state like the United Kingdom.

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Gamble and the dissents lodge a second objection to this line of reasoning. They suggest that because the division of federal and state power was meant to promote liberty, it cannot support a rule that exposes Gamble to a second sentence. See *post*, at 729–730 (opinion of GINSBURG, J.); *post*, at 744–745 (opinion of GORSUCH, J.). This argument fundamentally mis-

understands the governmental structure established by our Constitution. Our federal system advances individual liberty in many ways. Among other things, it limits the powers of the Federal Government and protects certain basic liberties from infringement. But because the powers of the Federal Government and the States often overlap, allowing both to regulate often results in two layers of regulation. Taxation is an example that comes immediately to mind. It is also not at all uncommon for the Federal Government to permit activities that a State chooses to forbid or heavily restrict—for example, gambling and the sale of alcohol. And a State may choose to legalize an activity that federal law prohibits, such as the sale of marijuana. So while our system of federalism is fundamental to the protection of liberty, it does not always maximize individual liberty at the expense of other interests. And it is thus quite extraordinary to say that the venerable dual-sovereignty doctrine represents a "'desecrat[ion]'" of federalism. *Post*, at 745 (opinion of GORSUCH, J.).

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III

Gamble claims that our precedent contradicts the common-law rights that the Double Jeopardy Clause was originally understood to engraft onto the Constitution—rights stemming from the "common-law pleas of *auterfoits acquit* [former acquittal] and *auterfoits convict* [former conviction]." *Grady*, 495 U. S., at 530 (Scalia, J., dissenting). These pleas were treated as "reason[s] why the prisoner ought not to answer [an indictment] at all, nor put himself upon his trial for the crime alleged." 4 W. Blackstone, Commentaries on the Laws of England 335 (1773) (Blackstone). Gamble argues that those who ratified the Fifth Amendment understood these common-law principles (which the Amendment constitutionalized) to bar a domestic prosecution following one by a foreign nation. For support, he appeals to early English and American cases and treatises. We have highlighted one hurdle to Gamble's reading: the sovereign-

specific original meaning of "offence." But the doctrine of *stare decisis* is another obstacle.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Of course, it is also important to be right, especially on constitutional matters, where Congress cannot override our errors by ordinary legislation. But even in constitutional cases, a departure from precedent "demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). This means that something more than "ambiguous historical evidence" is required before we will "flatly overrule a number of major decisions of this Court." *Welch* v. *Texas Dept. of Highways and Public Transp.*, 483 U. S. 468, 479 (1987). And the strength of the case for adhering to such decisions grows in proportion to their "antiquity." *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009). Here, as noted, Gamble's historical arguments must overcome *numerous* "major decisions of this Court" spanning *170 years*. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling.

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And it is not. The English cases are a muddle. Treatises offer spotty support. And early state and federal cases are by turns equivocal and downright harmful to Gamble's position. All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.

A

Gamble's core claim is that early English cases reflect an established common-law rule barring domestic prosecution following a prosecution for the same act under a different sovereign's laws. But from the very dawn of the common

law in medieval England until the adoption of the Fifth Amendment in 1791, there is not one reported decision barring a prosecution based on a prior trial under foreign law. We repeat: Gamble has not cited and we have not found a single pre-Fifth Amendment case in which a foreign acquittal or conviction barred a second trial in a British or American court. Given this void, Gamble faces a considerable challenge in convincing us that the Fifth Amendment was originally understood to establish such a bar.

Attempting to show that such a bar was *available*, Gamble points to five early English decisions for which we have case reports. We will examine these in some detail, but we note at the outset that they play only a secondary role for Gamble.

The foundation of his argument is a decision for which we have no case report: the prosecution in England in 1677 of a man named Hutchinson. (We have a report of a decision denying Hutchinson bail but no report of his trial.) As told by Gamble, Hutchinson, having been tried and acquitted in a foreign court for a murder committed abroad, was accused of the same homicide in an English tribunal, but the English court held that the foreign prosecution barred retrial.

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Everything for Gamble stems from this one unreported decision. To the extent that the cases he cites provide any support for his argument—and for the most part, they do not—those cases purport to take their cue from the Hutchinson episode; the same is true of the treatises on which Gamble relies.

So what evidence do we have about what actually happened to Hutchinson? The most direct evidence is a report of his application for bail before the Court of King's Bench. The report spans all of one sentence:

> "On Habeas Corpus it appeared the Defendant was committed to Newgate on suspicion of Murder in Portugal, which by Mr. Attorny being a Fact out of the Kings Dominions, is not triable by Commission, upon 35 H. 8. Cap. 2. §. I. N. 2. but by a Constable and Marshal, and

> the Court refused to Bail him, & c." *Rex* v. *Hutchinson*, 3 Keb. 785, 84 Eng. Rep. 1011 (1677).

From this report, all that we can tell about the court's thinking is that it found no convincing reason to grant bail, as was typical in murder cases.[3] The rest of the report concerns claims by an attorney. We are told that he contested the jurisdiction of the commission before which Hutchinson was to be tried, apparently a special commission that would have issued pursuant to a statute enacted under Henry VIII.[4] The commission lacked jurisdiction, the attorney seemed to suggest, because the crime had occurred in Portugal and thus "out of the Kings Dominions." The attorney claimed that jurisdiction lay instead with "a Constable and Marshal"—an apparent reference to the High Court of Chivalry, which dealt with treason and murder committed abroad.[5] But what, if anything, did the King's Bench make of the attorney's jurisdictional claims? And more to the point, what happened after bail was denied? The bail report does not say.

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If Hutchinson did ultimately appear before the Court of Chivalry—and if that court accepted a plea of prior acquittal in Portugal—this would be paltry evidence of any common-law principle, which is what Gamble cites *Hutchinson* to establish. After all, the High Court of Chivalry was a civil-law court *prohibited* from proceeding under the common law (unlike every other English court of the time save Admiralty). 8 Ric. 2, ch. 5; see also Squibb 162; *id.*, at xxv–xxvi

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[3] See J. Beattie, Crime and the Courts in England: 1660–1800, pp. 281–282 (1986).

[4] Although this Act reached conduct committed "out of the King Majesties Realme of Englande and other his Graces [Dominions]," Acte concerninge the triall of Treasons 1543–1544, 35 Hen. 8, ch. 2 (1543–1544), it applied only to treasons and misprisions of treason—not to homicide, of which Hutchinson was accused.

[5] See G. Squibb, The High Court of Chivalry 54, 147–148 (1959) (Squibb); 4 Blackstone 267.

("The essential distinction between the Court of Chivalry and other courts is . . . that it administers justice in relation to those military matters which are not governed by the common law"). Nor would it be any surprise that we have no report of the proceeding; in fact, "[t]here is no report of a case in which a judge of the Court [of Chivalry] has set out the reasons for his decision earlier than the [20th] century." *Id.*, at 162.

In the end, we have only two early accounts from *judges* of what finally became of Hutchinson, and both are indirect and shaky. First, they appear in the reports of cases decided in the Court of Chancery more than a half century after *Hutchinson*. Second, both judges cite only one source, and it is of lower authority than their own: namely, an account of *Hutchinson* given by an interested party (a defendant) in a previous, *non*-criminal case—an account on which the court in that case did not rely or even comment.[6] Insofar as our two judges seem to add their own details to the *Hutchinson* saga, we are not told where they obtained this information or whether it reflects mere guesses as to how gaps in the story should be filled in, decades after the fact. Finally, the two judges' accounts are not entirely consistent. Still, they are the only early judicial glosses on *Hutchinson* that we have, so we will work with them.

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The more extensive account appears in the case of *Gage* v. *Bulkeley*, Ridg. T. H. 263, 27 Eng. Rep. 824 (Ch. 1744), and what the court said there—far from supporting Gamble's argument—cuts against it. *Gage* involved a bill in chancery

[6] See *Gage* v. *Bulkeley*, Ridg. T. H. 263, 271, 27 Eng. Rep. 824, 826–827 (Ch. 1744) (citing *Beake* v. *Tyrrell*, 1 Shower, K. B. 6); *Burrows* v. *Jemino*, 2 Str. 733, 93 Eng. Rep. 815 (K. B. 1726) (same). As noted, the report cited by both judges—which also appears at 89 Eng. Rep. 411 (K. B. 1688)—mentions *Hutchinson* only in summarizing a defendant's argument. So does the only other source cited by either judge. See *Gage*, Ridg. T. H., at 271, 27 Eng. Rep., at 826–827 (citing *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K. B. 1688)). Below we discuss in detail the case that figures in these two reports. See *infra*, at 698, and n. 11.

for an account of money deposited with a banker in Paris. The defendants pleaded, as a bar to this lawsuit, "a sentence" "given upon" the same demand in a French court. *Ibid.* In addressing this plea, Lord Chancellor Hardwicke first determined that foreign judgments are not binding in an English court of law. Here his reasoning was very similar to that found in our dual-sovereignty decisions. Because each judgment rests on the authority of a particular sovereign, the Chancellor thought, it cannot bind foreign courts, which operate by the power of a different sovereign. *Id.*, at 263–264, 27 Eng. Rep., at 824.

Turning next to courts of equity, the Lord Chancellor saw no reason that the rule should be any different; there too, he thought, a foreign judgment is not binding. *Id.*, at 273, 27 Eng. Rep., at 827. But he did allow that in equity a foreign judgment could serve as "evidence, which may affect the right of [a plaintiff] when the cause comes to be heard." *Ibid.*

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Elaborating on why foreign judgments did not bind English courts, whether of law or equity, the Lord Chancellor explained why *Hutchinson* was "no proof" to the contrary. In the Chancellor's telling, Hutchinson was not indicted by the Court of King's Bench, which could have tried a murder committed in England,[7] because that court had no jurisdiction over a homicide committed in Portugal. *Gage*, Ridg. T. H., at 271, 27 Eng. Rep., at 826–827. Instead, Hutchinson was (as the bail decision indicates) before that court on a writ of habeas corpus, and his case "was referred to the judges to know whether a commission should issue" under a statute similar to the one mentioned in the bail decision. *Ibid.*, 27 Eng. Rep., at 827; see 33 Hen. 8, ch. 28 (1541–1542).[8]

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[7] 4 Blackstone 262.

[8] This statute authorized commissioners to try certain defendants for acts of treason or murder committed "in whatsoever other Shire or place, within the King's dominions or without." But "[d]espite the words 'or without', contemporary opinion seems not to have regarded the extra-

"And," he explained, "the judges very rightly and *mercifully* thought not, because he had undergone one trial already." *Gage*, Ridg. T. H., at 271–272, 27 Eng. Rep., at 827 (emphasis added). This suggests that Hutchinson was spared retrial as a matter of discretion ("merc[y]")—which must be true if the Chancellor was right that foreign judgments were not binding. Indeed, at least one modern scholar agrees (on other grounds as well) that the result in *Hutchinson* may have been based on "expediency rather than law." M. Friedland, Double Jeopardy 362–363 (1969).

In the end, then, *Gage* is doubly damaging to Gamble. First, it squarely rejects the proposition that a litigant in an English court—even a civil litigant in equity—had a *right* to the benefit of a foreign judgment, a right that the Fifth Amendment might have codified. And second, *Gage* undermines Gamble's chief historical example, *Hutchinson*, by giving a contrary reading of that case—and doing so, no less, in one of the only two judicial accounts of *Hutchinson* that we have from before the Fifth Amendment.

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The other account appears in *Burrows* v. *Jemino*, 2 Str. 733, 93 Eng. Rep. 815 (K. B. 1726).[9] In *Burrows*, a party that was sued in England on a bill of exchange sought an injunction against this suit in the Court of Chancery, contending that the suit was barred by the judgment of a court in Italy. In explaining why he would grant the injunction, Lord Chancellor King cited *Hutchinson*, which he thought had involved an acquittal in *Spanish* court that was "allowed

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territorial operation of this Act as clear." Squibb 149. Indeed, the statute cited in the *Hutchinson* bail report, dated to just two years later, cited lingering "doubtes and questions" about whether English courts could try treason committed abroad (in the course of clarifying that treason and misprisions of treason abroad could indeed be tried in England). 35 Hen. 8, ch. 2, § I.

[9] This case is also reported as *Burrows* v. *Jemineau* in Sel. Ca. t. King 69, 25 Eng. Rep. 228 (Ch. 1726); as *Burroughs* v. *Jamineau* in Mos. 1, 25 Eng. Rep. 235; as *Burrows* v. *Jemineau* in 2 Eq. Ca. Abr. 476, 22 Eng. Rep. 405; and as *Burrows* v. *Jemino* in 2 Eq. Ca. Abr. 524, 22 Eng. Rep. 443.

to be a good bar to any proceedings here." 2 Str., at 733, 93 Eng. Rep., at 815. This remark, showing that at least one English judge before the founding saw *Hutchinson* as Gamble does, provides a modicum of support for Gamble's argument. But that support softens just a few lines down in the report, where the Chancellor discusses the status of foreign judgments in courts of law in particular (as distinct from courts of equity like his own)—*i. e.*, the courts that actually applied the common-law rules later codified by the Fifth Amendment. Here the Chancellor explained that while he personally would have accepted an Italian judgment as barring any suit at law, "other Judges might be of a different opinion." 2 Str., at 733, 93 Eng. Rep., at 815. As a whole, then, the Chancellor's comments in *Burrows* can hardly be cited to prove that the common law had made up its mind on this matter; just the opposite.

Gamble's other cases have even less force. The "most instructive" case, he claims, see Brief for Petitioner 13, is the 1775 case of *King* v. *Roche*, 1 Leach 134,[10] 168 Eng. Rep. 169 (K. B.), but that is a curious choice since the *Roche* court does not so much as mention *Hutchinson* or even tacitly affirm its supposed holding. The defendant in *Roche* entered two pleas: prior acquittal abroad and not guilty of the charged crime. All that the *Roche* court held was that, as a procedural matter, it made no sense to charge the jury with both pleas at once, because a finding for Roche on the first (prior acquittal) would, if *successful*, bar consideration of the second (not guilty). *Roche*, 1 Leach, at 135, 168 Eng. Rep., at 169. But on our key question—whether a plea based on a foreign acquittal could be successful—the *Roche* court said absolutely nothing; it had no occasion to do so. Before the prosecution could reply to Roche's plea of prior acquittal, he withdrew it, opting for a full trial. The name Hutchinson does not appear even in the marginalia of the 1789 edition of

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[10] This case is reported as *Captain Roche's Case* in 1 Leach 138 (1789 ed.) and in 2 Leach 125 (1792 ed.).

Roche, which existed in 1791. See *Captain Roche's Case*, 1 Leach, at 138–139.

Hutchinson is mentioned in connection with *Roche* only after the Fifth Amendment's ratification, and only in a compiler's annotation to the 1800 edition of the *Roche* case report. See 168 Eng. Rep., at 169, n. (a). That annotation in turn cites one case as support for its reading of *Hutchinson*: *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K. B. 1688). But *Beak* did not involve a foreign prosecution; indeed, it did not involve a prosecution at all. It was an admiralty case for trover and conversion of a ship, and—more to the point—*Hutchinson* is discussed only in the defendant's argument in that case, not the court's response. A report relaying the actual decision in *Beak* shows that the court ultimately said nothing about the defendant's Hutchinson argument one way or another. See *Beake* v. *Tyrrell*, 1 Shower, K. B. 6, 89 Eng. Rep. 411 (1688).[11] This same defendant's argument was the only source of information about *Hutchinson* on which the Chancellors in *Gage* and *Burrows* explicitly relied, as we noted above. All later accounts of *Hutchinson* seem to stem from this one shallow root.

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The last of Gamble's five pre-Fifth Amendment cases, *Rex* v. *Thomas*, 1 Lev. 118, 83 Eng. Rep. 326 (K. B. 1664), did not even involve a foreign prosecution. The defendant was indicted for murder in England, and he pleaded a prior acquittal by a Welsh court. But Wales was then part of the "kingdom of England"; its laws were "the laws of England and no other." 1 Blackstone 94–95; see *Thomas*, 1 Lev., at 118, 83 Eng. Rep., at 326–327. So the prior trial in *Thomas* was not under another sovereign's laws, making it totally irrelevant for present purposes.

Summing up the import of the preratification cases on which Gamble's argument rests, we have the following: (1) not a single reported case in which a foreign acquittal or

[11] This decision is also reported as *Beake* v. *Tirrell*, Com. 120, 90 Eng. Rep. 379.

conviction barred a later prosecution for the same act in either Britain or America; (2) not a single reported decision in which a foreign judgment was held to be binding in a civil case in a court of law; (3) fragmentary and not entirely consistent evidence about a 17th-century case in which a defendant named Hutchinson, having been tried and acquitted for murder someplace in the Iberian Peninsula, is said to have been spared a second trial for this crime on some ground, perhaps out of "merc[y]," not as a matter of right; (4) two cases (one criminal, one in admiralty) in which a party invoked a prior foreign judgment, but the court did not endorse or rest anything on the party's reliance on that judgment; and (5) two Court of Chancery cases actually holding that foreign judgments were *not* (or not generally) treated as barring trial at common law. This is the flimsy foundation in case law for Gamble's argument that when the Fifth Amendment was ratified, it was well understood that a foreign criminal judgment would bar retrial for the same act.

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Surveying the pre-Fifth Amendment cases in 1959, we concluded that their probative value was "dubious" due to "confused and inadequate reporting." *Bartkus*, 359 U. S., at 128, n. 9. Our assessment was accurate then, and the passing years have not made those early cases any clearer or more valuable.

B

Not to worry, Gamble responds: Whatever the English courts actually did prior to adoption of the Fifth Amendment, by that time the early English cases were widely *thought* to support his view. This is a curious argument indeed. It would have us hold that the Fifth Amendment codified a common-law right that existed in legend, not case law. In any event, the evidence that this right was thought to be settled is very thin.

Gamble's argument is based on treatises, but they are not nearly as helpful as he claims. Alone they do not come close

to settling the historical question with enough force to meet Gamble's particular burden under *stare decisis*.

Gamble begins with Blackstone, but he reads volumes into a flyspeck. In the body of his Commentaries, all that Blackstone stated was that successive prosecutions could be barred by prior acquittals by "any court having competent jurisdiction of the offence." 4 Blackstone 335. This is simply a statement of the general double-jeopardy rule, without a word on separate sovereigns. So Gamble directs our attention to a footnote that appears after the phrase "any court having competent jurisdiction." The footnote refers to the report of *Beak* v. *Thyrwhit*, which, as noted, merely rehearses the argument of the defendant in that case, who in turn mentioned *Hutchinson*—but not in a criminal prosecution, much less one preceded by a foreign trial. This thread tying Blackstone to *Hutchinson*—a thread woven through footnotes and reports of reports but not a single statement by a court (or even by a party to an actual prosecution)—is tenuous evidence that Blackstone endorsed Gamble's reading of *Hutchinson*.

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When Gamble's attorney was asked at argument which other treatises he found most likely to have informed those who ratified the Fifth Amendment, he offered four. See Tr. of Oral Arg. 30–31. But two of the four treatises did not exist when the Fifth Amendment was ratified. See 1 J. Chitty, Criminal Law 458 (1816); 1 T. Starkie, Criminal Pleading 300–301, n. h (1814). And a third discusses not a single case involving a prior prosecution under foreign law. See 2 W. Hawkins, Pleas of the Crown 372 (1739).

That leaves one treatise cited by Gamble that spoke to this issue before ratification, F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius (5th ed. 1788). That treatise concerned the trial of civil cases, *id.*, at 2, and its discussion of prior judgments appeared under the heading "Of Evidence in general," *id.*, at 221. After considering the evidentiary value of such documents as acts of Parliament,

deeds, and depositions, Buller addressed what we would later call issue preclusion. Lifting language from an earlier publication, H. Bathurst, The Theory of Evidence 39 (1761), Buller wrote that a final judgment was "conclusive Evidence" "against all the World" of the factual determinations underlying the judgment. Buller, Nisi Prius, at 245. And it is on this basis that Buller (again lifting from Bathurst) said that even someone acquitted of a crime in Spain "might," upon indictment in England, "plead the Acquittal in *Spain* in Bar." *Ibid.*

This endorsement of the preclusive effect of a foreign judgment in civil litigation (which even today is not uniformly accepted in this country[12]) provides no direct support for Gamble since his prior judgment was one of conviction, not acquittal. (There is, after all, a major difference between the preclusive effect of a prior acquittal and that of a prior conviction: Only the first would make a subsequent prosecu-

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[12] Compare Restatement (Fourth) of Foreign Relations Law of the United States § 481 (2017) (With a few specified exceptions, "a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States") and Restatement (Second) of Conflict of Laws § 98, Comment *b*, p. 298 (1969) ("In most respects," judgments rendered in a foreign nation satisfying specified criteria "will be accorded the same degree of recognition to which sister State judgments are entitled"), with, *e. g.*, *Derr* v. *Swarek*, 766 F. 3d 430, 437 (CA5 2014) (recognition of foreign judgments is not required but is a matter of comity); *Diorinou* v. *Mezitis*, 237 F. 3d 133, 142–143 (CA2 2001) (same); *id.*, at 139–140 ("It is well-established that United States courts are not *obliged* to recognize judgments rendered by a foreign state, but may *choose* to give res judicata effect to foreign judgments on the basis of comity" (emphasis in original; internal quotation marks omitted)); *MacArthur* v. *San Juan County*, 497 F. 3d 1057, 1067 (CA10 2007) ("Comity is not an inexorable command . . . and a request for recognition of a foreign judgment may be rebuffed on any number of grounds"); *Guinness PLC* v. *Ward*, 955 F. 2d 875, 883 (CA4 1992) ("The effect to be given foreign judgments has therefore historically been determined by more flexible principles of comity").

tion pointless, by requiring later courts to assume a defendant's innocence from the start.) And in any case, the fleeting references in the Buller and Bathurst treatises are hardly sufficient to show that the Members of the First Congress and the state legislators who ratified the Fifth Amendment understood the Double Jeopardy Clause to bar a prosecution in this country after acquittal abroad for the same criminal conduct.

Gamble attempts to augment his support by citing treatises published *after* the Fifth Amendment was adopted.[13] And he notes that the Court in *District of Columbia* v. *Heller*, 554 U. S. 570, 605–610 (2008), took treatises of a similar vintage to shed light on the public understanding in 1791 of the right codified by the Second Amendment. But the *Heller* Court turned to these later treatises only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions. The 19th-century treatises were treated as mere confirmation of what the Court thought had already been established. Here Gamble's evidence as to the understanding in 1791 of the double jeopardy right is not at all comparable.

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C

When we turn from 19th-century treatises to 19th-century state cases, Gamble's argument appears no stronger. The last time we looked, we found these state cases to be "inconclusive." *Bartkus*, 359 U. S., at 131. They seemed to be nevenly split and to "manifest conflict[s] in conscience" rather than confident conclusions about the common law. *Ibid.* Indeed, two of those cases manifested nothing more than a misreading of a then-recent decision of ours. *Id.*, at 130. We see things no differently today.

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[13] See, *e. g.*, F. Wharton, Law of Homicide 283 (1855); F. Wharton, Criminal Law 137 (1846); L. MacNally, The Rules of Evidence on Pleas of the Crown 428 (1802).

The distinction between believing successive prosecutions by separate sovereigns unjust and holding them unlawful appears right on the face of the first state case that Gamble discusses. In *State* v. *Brown*, 2 N. C. 100, 101 (1794), the court opined that it would be "against natural justice" for a man who stole a horse in the Southwest Territory to be punished for theft in North Carolina just for having brought the horse to that State. To avoid this result, the *Brown* court simply construed North Carolina's theft law not to reach the defendant's conduct. But it did so precisely because the defendant otherwise *could* face two prosecutions for the same act of theft—despite the common-law rule against double jeopardy for the same "offence"—since "the offence against the laws of this State, and the offence against the laws of [the Territory] are distinct; and satisfaction made for the offence committed against this State, is no satisfaction for the offence committed against the laws there." *Ibid.* Far from undermining the dual-sovereignty rule, *Brown* expressly affirms it, rejecting outright the idea that a judgment in one sovereign's court could "be pleadable in bar to an indictment" in another's. *Ibid.*

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Other state courts were divided. Massachusetts and Michigan courts thought that at least some trials in either federal or state court could bar prosecution in the other, see *Commonwealth* v. *Fuller*, 49 Mass. 313, 318 (1844); *Harlan* v. *People*, 1 Doug. 207, 212 (Mich. 1843), but those antebellum cases are poor images of the founding-era common law, resting as they do on what we have explained, see *Bartkus*, 359 U. S., at 130, was a misreading of our then-recent decision in *Houston* v. *Moore*, 5 Wheat. 1 (1820), which we discuss below. A Vermont court did take the same view based on its own analysis of the question, *State* v. *Randall*, 2 Aik. 89, 100–101 (1827), but just a few years later a Virginia court declared the opposite, *Hendrick* v. *Commonwealth*, 32 Va. 707, 713 (1834) (punishment for forgery under both federal and Virginia law is not double punishment for the "same of-

fence" since "the law of *Virginia* punishes the forgery, not because it is an offence against the *U. States*, but because it is an offence against this commonwealth"). And South Carolina—a perfect emblem of the time—produced cases cutting both ways. See *State* v. *Antonio*, 2 Tread. 776, 781 (1816); *State* v. *Tutt*, 2 Bail. 44, 47–48 (1830).

This is not the quantum of support for Gamble's claim about early American common law that might withstand his burden under *stare decisis*. And once we look beyond the Nation's earliest years, the body of state-court decisions appears even less helpful to Gamble's position. We aptly summarized those cases in *Bartkus*, 359 U. S., at 134–136, and need not add to that discussion here.[14]

D

Less useful still, for Gamble's purposes, are the two early Supreme Court cases on which he relies. In the first, a member of the Pennsylvania militia was tried by a state court-martial for the *federal offense* of deserting the militia. See *Houston* v. *Moore*, 5 Wheat. 1 (1820). The accused objected that the state court-martial lacked jurisdiction to try

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[14] As we put it in *Bartkus*, 359 U. S., at 134–136:

"Of the twenty-eight States which have considered the validity of successive state and federal prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a common-law evidentiary rule of *autrefois acquit* and *autrefois convict*, twenty-seven have refused to rule that the second prosecution was or would be barred. These States were not bound to follow this Court and its interpretation of the Fifth Amendment. The rules, constitutional, statutory, or common law which bound them, drew upon the same experience as did the Fifth Amendment, but were and are of separate and independent authority.

"Not all of the state cases manifest careful reasoning, for in some of them the language concerning double jeopardy is but offhand dictum. But in an array of state cases there may be found full consideration of the arguments supporting and denying a bar to a second prosecution. These courts interpreted their rules as not proscribing a second prosecution where the first was by a different government and for violation of a different statute." (Footnote omitted.)

this federal offense. Since the offense could be tried in federal court, the defendant argued, allowing the state court-martial to try him for this crime could expose him to successive federal and state prosecutions for the same offense. Justice Washington answered that a ruling in either federal or state court would bar a second trial in the other. See *id.*, at 31. But as we later explained,

> "that language by Mr. Justice Washington reflected his belief that the state statute imposed state sanctions for violation of a federal criminal law. As he viewed the matter, the two trials would not be of similar crimes arising out of the same conduct; they would be of the same crime. Mr. Justice Johnson agreed that if the state courts had become empowered to try the defendant for the federal offense, then such a state trial would bar a federal prosecution. Thus *Houston* v. *Moore* can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Bartkus*, 359 U. S., at 130 (citations omitted).

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In other words, Justice Washington taught only that the law prohibits two sovereigns (in that case, Pennsylvania and the United States) from both trying an offense against one of them (the United States). That is consistent with our doctrine allowing successive prosecutions for offenses against *separate* sovereigns. In light of this reading of *Houston*, the case does not undercut our dual-sovereignty doctrine.

It may seem strange to think of state courts as prosecuting crimes against the United States, but that is just what state courts and commentators writing within a decade of *Houston* thought it involved. See, *e. g.*, *Tutt*, 2 Bail., at 47 ("In [*Houston*], the act punished by the law of the State, was

certainly and *exclusively an offence against the general Government* [whereas h]ere, certainly there is an offence against the State, and a very different one from that committed against the United States" (emphasis added)); 1 J. Kent, Commentaries on American Law 373–374 (1826) ("[M]any . . . acts of [C]ongress . . . permit jurisdiction, over the offences therein described, to be exercised by state magistrates and courts," and what *Houston* bars are successive prosecutions for the same "crime against the United States"). Even the scholar Gamble cites for his cause finds *Houston* not "[o]n point" because it "was discussing the jurisdiction of the state court to try a crime *against the nation* and impose a fine payable to the latter government." Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 UCLA L. Rev. 1, 7, and n. 27 (1956) (citing Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545 (1925)).

Perhaps feeling *Houston* wobble, Gamble says preemptively that if it is "inconclusive," Brief for Petitioner 26, other cases are clear. But the other federal case on which he leans is worse for his argument. In *United States* v. *Furlong*, 5 Wheat. 184, 197 (1820), we said that an acquittal of piracy in the court of any "civilized State" would bar prosecution in any other nation because piracy, as an "offence within the criminal jurisdiction of all nations," is "punished by all."[15] Ending his quotation from *Furlong* at this point,

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[15] Piracy was understood as a violation of the law of nations, which was seen as common to all. That is why any successive prosecution for piracy, being under the same law, would have been for the same offense. See *United States* v. *Smith*, 5 Wheat. 153, 163, n. a (1820) (quoting definitions of piracy by several ancient and more recent authorities). See also 4 Blackstone 71 ("[T]he crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis* [enemies of mankind]. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war

Gamble gives the impression that *Furlong* rejects any dual-sovereignty rule. But that impression is shattered by the next sentence: "Not so with the crime of murder." *Ibid.* As to *that* crime, the *Furlong* Court was "inclined to think that an acquittal" in the United States "would *not* have been a good plea in a Court of Great Britain." *Ibid.* (emphasis added). And that was precisely because murder is "punishable under the laws of *each* State" rather than falling under some "universal jurisdiction." *Ibid.* (emphasis added). When it came to crimes that were understood to offend against more than one sovereign, *Furlong* treated them as separate offenses—just as we have a dozen times since, and just as we do today.

Thus, of the two federal cases that Gamble cites against the dual-sovereignty rule, *Houston* squares with it and *Furlong* supports it. Together with the muddle in the early state cases, this undermines Gamble's claim that the early American bench and bar took the Fifth Amendment to proscribe successive prosecutions by different sovereigns. And without making a splash in the legal practice of the time, a few early treatises by themselves cannot unsettle almost two centuries of precedent.

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IV

Besides appealing to the remote past, Gamble contends that recent changes—one doctrinal, one practical—blunt the force of *stare decisis* here. They do not.

A

If historical claims form the chorus of Gamble's argument, his refrain is "incorporation." In Gamble's telling, the recognition of the Double Jeopardy Clause's incorporation

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against him: so that every community has a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property" (footnote omitted)).

against the States, see *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969), washed away any theoretical foundation for the dual-sovereignty rule, see *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995) (abrogating precedent when "subsequent decisions of this Court" have "eroded" its foundations). But this incorporation-changes-everything argument trades on a false analogy.

The analogy Gamble draws is to the evolution of our doctrine on the Fourth Amendment right against unreasonable searches and seizures.[16] We have long enforced this right by barring courts from relying on evidence gathered in an illegal search. Thus, in *Weeks* v. *United States*, 232 U. S. 383, 391–393 (1914), the Court held that federal prosecutors could not rely on the fruits of an unreasonable search undertaken by federal agents. But what if state or local police conducted a search that would have violated the Fourth Amendment if conducted by federal agents? Before incorporation, the state search would not have violated the Federal Constitution, so federal law would not have barred admission of the resulting evidence in a state prosecution. But by the very same token, under what was termed "the silver-platter doctrine," state authorities could hand such evidence over to *federal* prosecutors for use in a federal case. See *id.*, at 398.

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Once the Fourth Amendment was held to apply to the States as well as the Federal Government, however, the silver-platter doctrine was scuttled. See *Elkins* v. *United States*, 364 U. S. 206 (1960); *Wolf* v. *Colorado*, 338 U. S. 25 (1949). Now the fruits of unreasonable state searches are inadmissible in federal and state courts alike.

Gamble contends that the incorporation of the Double Jeopardy Clause should likewise end the dual-sovereignty

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[16] He draws a similar analogy to the Fifth Amendment right against self-incrimination, but our response to his Fourth Amendment analogy would answer that argument as well.

rule, but his analogy fails. The silver-platter doctrine was based on the fact that the state searches to which it applied did not at that time violate federal law. Once the Fourth Amendment was incorporated against the States, the status of those state searches changed. Now they did violate federal law, so the basis for the silver-platter doctrine was gone. See *Elkins*, 364 U. S., at 213 ("The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared [with incorporation]").

By contrast, the premises of the dual-sovereignty doctrine have survived incorporation intact. Incorporation meant that the States were now required to abide by this Court's interpretation of the Double Jeopardy Clause. But that interpretation has long included the dual-sovereignty doctrine, and there is no logical reason why incorporation should change it. After all, the doctrine rests on the fact that only same-sovereign successive prosecutions are prosecutions for the "same offense," see Part II, *supra*—and that is just as true after incorporation as before.

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B

If incorporation is the doctrinal shift that Gamble invokes to justify a departure from precedent, the practical change he cites is the proliferation of federal criminal law. Gamble says that the resulting overlap of state and federal criminal codes heightens the risk of successive prosecutions under state and federal law for the same criminal conduct. Thus, Gamble contends, our precedent should yield to " 'far-reaching systemic and structural changes' " that make our "earlier error all the more egregious and harmful." *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 184 (2018). But unlike Gamble's appeal to incorporation, this argument obviously assumes that the dual-sovereignty doctrine was legal error from the start. So the argument is only as strong as Gamble's argument

about the original understanding of double jeopardy rights, an argument that we have found wanting.

Insofar as the expansion of the reach of federal criminal law has been questioned on constitutional rather than policy grounds, the argument has focused on whether Congress has overstepped its legislative powers under the Constitution. See, *e. g.*, *Gonzales* v. *Raich*, 545 U. S. 1, 57–74 (2005) (THOMAS, J., dissenting). Eliminating the dual-sovereignty rule would do little to trim the reach of federal criminal law, and it would not even prevent many successive state and federal prosecutions for the same criminal conduct unless we also overruled the long-settled rule that an "offence" for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct. See *Blockburger* v. *United States*, 284 U. S. 299 (1932). Perhaps believing that two revolutionary assaults in the same case would be too much, Gamble has not asked us to overrule *Blockburger* along with the dual-sovereignty rule.

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* * *

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

It is so ordered.

JUSTICE THOMAS, concurring.

I agree that the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine. See *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 78–79 (2016) (GINSBURG, J., joined by THOMAS, J., concurring). The founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and the Federal Government.[1] The Founders therefore had no reason to address

[1] As the Court suggests, Congress is responsible for the proliferation of duplicative prosecutions for the same offenses by the States and the Federal Government. *Ante*, at 710. By legislating beyond its limited powers, Congress has taken from the People authority that they never gave. U. S.

the double jeopardy question that the Court resolves today. Given their understanding of Congress' limited criminal jurisdiction and the absence of an analogous dual-sovereign system in England, it is difficult to conclude that the People who ratified the Fifth Amendment understood it to prohibit prosecution by a State and the Federal Government for the same offense. And, of course, we are not entitled to interpret the Constitution to align it with our personal sensibilities about " 'unjust' " prosecutions. *Post*, at 731 (GINSBURG, J., dissenting); see *Currier* v. *Virginia*, 585 U. S. 493, 510 (2018) (plurality opinion) ("While the growing number of criminal offenses in our statute books may be cause for concern, no one should expect (or want) judges to revise the Constitution to address every social problem they happen to perceive" (citation omitted)).

I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. It is always "tempting for judges to confuse our own preferences with the requirements of the law," *Obergefell* v. *Hodges*, 576 U. S. 644, 687 (2015) (ROBERTS, C. J., dissenting), and the Court's *stare decisis* doctrine exacerbates that temptation by giving the veneer of respectability to our continued application of demonstrably incorrect precedents. By applying de-

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Const., Art. I, § 8; The Federalist No. 22, p. 152 (C. Rossiter ed. 1961) ("all legitimate authority" derives from "the consent of the people" (capitalization omitted)). And the Court has been complicit by blessing this questionable expansion of the Commerce Clause. See, *e. g.*, *Gonzales* v. *Raich*, 545 U. S. 1, 57–74 (2005) (THOMAS, J., dissenting). Indeed, it seems possible that much of Title 18, among other parts of the U. S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty.

monstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting new individual rights—the Court exercises "force" and "will," two attributes the People did not give it. The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (capitalization omitted).

We should restore our *stare decisis* jurisprudence to ensure that we exercise "mer[e] judgment," *ibid.*, which can be achieved through adherence to the correct, original meaning of the laws we are charged with applying. In my view, anything less invites arbitrariness into judging.[2]

I

The Court currently views *stare decisis* as a "'principle of policy'" that balances several factors to decide whether the scales tip in favor of overruling precedent. *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363 (2010) (quoting *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940)). Among these factors are the "workability" of the standard, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 556 U. S. 778, 792–793 (2009). The influence of this last factor tends to ebb and flow with the Court's desire to achieve a particular end, and the Court may cite additional, ad hoc factors to reinforce the result it chooses. But the shared theme is the need for a "special reason over and above the belief that a prior case was wrongly decided" to overrule a precedent. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 864 (1992). The Court has advanced this view of *stare decisis* on the ground that "it promotes the evenhanded, predictable, and consistent development of legal principles" and "contributes to the actual

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[2] My focus in this opinion is on this Court's adherence to its own precedents. I make no claim about any obligation of "inferior" federal courts, U. S. Const., Art. III, § 1, or state courts to follow Supreme Court precedent.

and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991).

This approach to *stare decisis* might have made sense in a common-law legal system in which courts systematically developed the law through judicial decisions apart from written law. But our federal system is different. The Constitution tasks the political branches—not the Judiciary—with systematically developing the laws that govern our society. The Court's role, by contrast, is to exercise the "judicial Power," faithfully interpreting the Constitution and the laws enacted by those branches. Art. III, § 1.

A

A proper understanding of *stare decisis* in our constitutional structure requires a proper understanding of the nature of the "judicial Power" vested in the federal courts. That "Power" is—as Chief Justice Marshall put it—the power "to say what the law is" in the context of a particular "case" or "controversy" before the court. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803); Art. III, § 2. Phrased differently, the "'judicial Power'" "is fundamentally the power to decide cases in accordance with law." Lawson, The Constitutional Case Against Precedent, 17 Harv. J. L. & Pub. Pol'y 23, 26 (1994) (Lawson). It refers to the duty to exercise "judicial discretion" as distinct from "arbitrary discretion." The Federalist No. 78, at 468, 471.

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That means two things, the first prohibitory and the second obligatory. First, the Judiciary lacks "force" (the power to execute the law) and "will" (the power to legislate). *Id.*, at 465 (capitalization omitted). Those powers are vested in the President and Congress, respectively. "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824) (Marshall, C. J.). The Judiciary thus may not "substi-

tute [its] own pleasure to the constitutional intentions of the legislature." The Federalist No. 78, at 468–469.

Second, "judicial discretion" requires the "liquidat[ion]" or "ascertain[ment]" of the meaning of the law. *Id.*, at 467–468; see *id.*, No. 37. At the time of the founding, "to liquidate" meant "to make clear or plain"; "to render unambiguous; to settle (differences, disputes)." Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 13, and n. 35 (2001) (Nelson) (quoting 8 Oxford English Dictionary 1012 (2d ed. 1991); internal quotation marks omitted). Therefore, judicial discretion is not the power to "alter" the law; it is the duty to correctly "expound" it. Letter from J. Madison to N. Trist (Dec. 1831), in 9 The Writings of James Madison 477 (G. Hunt ed. 1910) (Writings of Madison).

B

This understanding of the judicial power had long been accepted at the time of the founding. But the federalist structure of the constitutional plan had significant implications for the exercise of that power by the newly created Federal Judiciary. Whereas the common-law courts of England discerned and defined many legal principles in the first instance, the Constitution charged federal courts primarily with applying a limited body of written laws articulating those legal principles. This shift profoundly affects the application of *stare decisis* today.

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Stare decisis has its pedigree in the unwritten common law of England. As Blackstone explained, the common law included "[e]stablished customs" and "[e]stablished rules and maxims" that were discerned and articulated by judges. 1 W. Blackstone, Commentaries on the Laws of England 68–69 (1765) (Blackstone). In the common-law system, *stare decisis* played an important role because "judicial decisions [were] the principal and most authoritative evidence, that [could] be given, of the existence of such a custom as shall form a part of the common law." *Id.*, at 69. Accordingly,

"precedents and rules must be followed, unless flatly absurd or unjust," because a judge must issue judgments "according to the known laws and customs of the land" and not "according to his private sentiments" or "own private judgment." *Id.*, at 69–70. In other words, judges were expected to adhere to precedents because they embodied the very law the judges were bound to apply.

"[C]ommon law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made." 3–4 G. White, The Marshall Court and Cultural Change, 1815–35, History of the Supreme Court of the United States 129 (1988).[3] "It was the application of the dictates of natural justice, and of cultivated reason, to particular cases." 1 J. Kent, Commentaries on American Law 439 (1826) (Kent); see *id.*, at 439–440 (the common law is "'not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men'"). The common law therefore rested on "unarticulated social processes to mobilize and coordinate knowledge" gained primarily through "the social experience of the many," rather than the "specifically articulated *reason* of the few." T. Sowell, A Conflict of Visions: Ideological Origins of Political Struggles 49, 42 (1987). In other words, the common law was based in the collective, systematic development of the law through reason. See *id.*, at 49–55.

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Importantly, however, the common law did not view precedent as unyielding when it was "most evidently contrary to reason" or "divine law." Blackstone 69–70. The founding generation recognized that a "judge may *mistake* the law."

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[3] Our founding documents similarly rest on the premise that certain fundamental principles are both knowable and objectively true. See, *e. g.*, Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

Id., at 71; see also 1 Kent 444 ("Even a series of decisions are not always conclusive evidence of what is law"). And according to Blackstone, judges *should* disregard precedent that articulates a rule incorrectly when necessary "to vindicate the old [rule] from misrepresentation." Blackstone 70; see also 1 Kent 443 ("If . . . any solemnly adjudged case can be shown to be founded in error, it is no doubt the right and the duty of the judges who have a similar case before them, to correct the error"). He went further: When a "former decision is manifestly absurd or unjust" or fails to conform to reason, it is not simply "bad law," but "not law" at all. Blackstone 70 (emphasis deleted). This view—that demonstrably erroneous "blunders" of prior courts should be corrected—was accepted by state courts throughout the 19th century. See, *e. g.*, *McDowell* v. *Oyer*, 21 Pa. 417, 423 (1853); *Guild* v. *Eager*, 17 Mass. 615, 622 (1822).

This view of precedent implies that even common-law judges did not act as legislators, inserting their own preferences into the law as it developed. Instead, consistent with the nature of the judicial power, common-law judges were tasked with identifying and applying objective principles of law—discerned from natural reason, custom, and other external sources—to particular cases. See Nelson 23–27. Thus, the founding generation understood that an important function of the Judiciary in a common-law system was to ascertain what reason or custom required; that it was possible for courts to err in doing so; and that it was the Judiciary's responsibility to "examin[e] without fear, and revis[e] without reluctance," any "hasty and crude decisions" rather than leaving "the character of [the] law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." 1 Kent 444.

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Federal courts today look to different sources of law when exercising the judicial power than did the common-law courts of England. The Court has long held that "[t]here is no federal general common law." *Erie R. Co.* v. *Tompkins*,

304 U. S. 64, 78 (1938). Instead, the federal courts primarily interpret and apply three bodies of federal positive law—the Constitution; federal statutes, rules, and regulations; and treaties.[4] That removes most (if not all) of the force that *stare decisis* held in the English common-law system, where judicial precedents were among the only documents identifying the governing "customs" or "rules and maxims." Blackstone 68. We operate in a system of written law in which courts need not—and generally cannot—articulate the law in the first instance. See U. S. Const., Art. I, § 1 (vesting "[a]ll legislative Powers" in Congress); Art. 1, § 7 (describing the bicameralism and presentment process). The Constitution, federal statutes, and treaties *are* the law, and the systematic development of the law is accomplished democratically. Our judicial task is modest: We interpret and apply written law to the facts of particular cases.

Underlying this legal system is the key premise that words, including written laws, are capable of objective, ascertainable meaning. As I have previously explained, "[m]y vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions." Thomas, Judging, 45 U. Kan. L. Rev. 1, 5 (1996). Accordingly, judicial decisions may incorrectly interpret the law, and when they do, subsequent courts must confront the question when to depart from them.

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C

Given that the primary role of federal courts today is to interpret legal texts with ascertainable meanings, precedent plays a different role in our exercise of the "judicial Power" than it did at common law. In my view, if the Court encoun-

[4] There are certain exceptions to this general rule, including areas of law in which federal common law has historically been understood to govern (*e. g.*, admiralty) and well-established judicial doctrines that are applied in the federal courts (*e. g.*, issue preclusion). Additionally, federal courts apply state law where it governs.

ters a decision that is demonstrably erroneous—*i. e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law. A demonstrably incorrect judicial decision, by contrast, is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.

1

When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents. That the Constitution outranks other sources of law is inherent in its nature. See A. Amar, America's Constitution 5 (2005) (explaining that the Constitution is a constitutive document); Kesavan, The Three Tiers of Federal Law, 100 Nw. U. L. Rev. 1479, 1499, n. 99 (2006) (arguing that "[i]t is unnecessary for the Constitution to specify that it is superior to other law because it is higher law made by We the People—and the only such law"). The Constitution's supremacy is also reflected in its requirement that all judicial officers, executive officers, Congressmen, and state legislators take an oath to "support this Constitution." Art. VI, cl. 3; see also Art. II, § 1, cl. 8 (requiring the President to "solemnly swear (or affirm)" to "preserve, protect and defend the Constitution of the United States"). Notably, the Constitution does not mandate that judicial officers swear to uphold judicial precedents. And the Court has long recognized the supremacy of the Constitution with respect to executive action and "legislative act[s] repugnant to" it. *Marbury*, 1 Cranch, at 177; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S.

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579, 587–589 (1952); see also The Federalist No. 78, at 467 ("No legislative act, therefore, contrary to the Constitution, can be valid").

The same goes for judicial precedent. The "'judicial Power'" must be understood in light of "the Constitution's status as the supreme legal document" over "lesser sources of law." Lawson 29–30. This status necessarily limits "the power of a court to give legal effect to prior judicial decisions" that articulate demonstrably erroneous interpretations of the Constitution because those prior decisions cannot take precedence over the Constitution itself. *Ibid.* Put differently, because the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict. I am aware of no legitimate reason why a court may privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself.[5]

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The same principle applies when interpreting statutes and other sources of law: If a prior decision demonstrably erred in interpreting such a law, federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error. A contrary rule would permit judges to "substitute their own pleasure" for the law. The Federalist No. 78, at 468; see *id.*, at 466 ("'[T]here is no

[5] Congress and the Executive likewise must independently evaluate the constitutionality of their actions; they take an oath to uphold the Constitution, not to blindly follow judicial precedent. In the context of a judicial case or controversy, however, their determinations do not bind the Judiciary in performing its constitutionally assigned role. See, *e. g.*, *Zivotofsky* v. *Clinton*, 566 U. S. 189, 197 (2012) (noting that there is "no exclusive commitment to the Executive of the power to determine the constitutionality of a statute"); *INS* v. *Chadha*, 462 U. S. 919, 944 (1983) (Congress' and President's endorsement of "legislative veto" "sharpened rather than blunted" Court's judicial review). Of course, consistent with the nature of the "judicial Power," the federal courts' judgments bind all parties to the case, including Government officials and agencies.

liberty if the power of judging be not separated from the legislative and executive powers' ").

In sum, my view of *stare decisis* requires adherence to decisions made by the People—that is, to the original understanding of the relevant legal text—which may not align with decisions made by the Court. Accord, *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 343–344 (1854) (Daniel, J., dissenting) ("Wherever the Constitution commands, discretion terminates" because continued adherence to "palpable error" is a "violation of duty, an usurpation"); *Commonwealth* v. *Posey*, 8 Va. 109, 116 (1787) (opinion of Tazewell, J.) ("[A]lthough I venerate precedents, I venerate the written law more"). Thus, no " 'special justification' " is needed for a federal court to depart from its own, demonstrably erroneous precedent. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014); see Nelson 62. Considerations beyond the correct legal meaning, including reliance, workability, and whether a precedent "has become well embedded in national culture," S. Breyer, Making Our Democracy Work: A Judge's View 152 (2010), are inapposite. In our constitutional structure, our role of upholding the law's original meaning is reason enough to correct course.[6]

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2

Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous. As discussed, the "judicial Power" requires the Court to clarify and settle—or, as Madison and Hamilton put it, to "liquidate"—the meaning of writ-

[6] I am not suggesting that the Court must independently assure itself that each precedent relied on in every opinion is correct as a matter of original understanding. We may, consistent with our constitutional duty and the Judiciary's historical practice, proceed on the understanding that our predecessors properly discharged their constitutional role until we have reason to think otherwise—as, for example, when a party raises the issue or a previous opinion persuasively critiques the disputed precedent.

ten laws. The Federalist No. 78, at 468 ("[I]t is the province of the courts to liquidate and fix [the] meaning and operation [of contradictory laws]"); *id.*, No. 37, at 229 (explaining that the indeterminacy of laws requires courts to "liquidat[e] and ascertai[n]" their meaning "by a series of particular discussions and adjudications"). This need to liquidate arises from the inability of human language to be fully unequivocal in every context. Written laws "have a range of indeterminacy," and reasonable people may therefore arrive at different conclusions about the original meaning of a legal text after employing all relevant tools of interpretation. See Nelson 11, 14. It is within that range of permissible interpretations that precedent is relevant. If, for example, the meaning of a statute has been "liquidated" in a way that is not demonstrably erroneous (*i. e.*, not an impermissible interpretation of the text), the judicial policy of *stare decisis* permits courts to constitutionally adhere to that interpretation, even if a later court might have ruled another way as a matter of first impression. Of course, a subsequent court may nonetheless conclude that an incorrect precedent should be abandoned, even if the precedent might fall within the range of permissible interpretations. But nothing in the Constitution requires courts to take that step.

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Put another way, there is room for honest disagreement, even as we endeavor to find the correct answer. Compare *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 358–371 (1995) (THOMAS, J., concurring in judgment) (concluding that the "historical evidence from the framing" supports the view that the First Amendment permitted anonymous speech), with *id.*, at 371–385 (Scalia, J., dissenting) (concluding that the First Amendment does not protect anonymous speech based on a century of practice in the States). Reasonable jurists can apply traditional tools of construction and arrive at different interpretations of legal texts.

"[L]iquidating" indeterminacies in written laws is far removed from expanding or altering them. See Writings of

Madison 477 (explaining that judicial decisions cannot "alter" the Constitution, only "expound" it). The original meaning of legal texts "usually . . . is easy to discern and simple to apply." A. Scalia, Common-Law Courts in a Civil-Law System, in A Matter of Interpretation: Federal Courts and the Law 45 (A. Gutmann ed. 1997). And even in difficult cases, that the original meaning is not obvious at first blush does not excuse the Court from diligently pursuing that meaning. Stopping the interpretive inquiry short—or allowing personal views to color it—permits courts to substitute their own preferences over the text. Although the law may be, on rare occasion, truly ambiguous—meaning susceptible to multiple, equally correct legal meanings—the law never "runs out" in the sense that a Court may adopt an interpretation beyond the bounds of permissible construction.[7] In that regard, a legal text is not capable of multiple permissible interpretations merely because discerning its original meaning "requires a taxing inquiry." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 707 (1991) (Scalia, J., dissenting).

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This case is a good example. The historical record presents knotty issues about the original meaning of the Fifth Amendment, and JUSTICE GORSUCH does an admirable job arguing against our longstanding interpretation of the Double Jeopardy Clause. Although JUSTICE GORSUCH identifies support for his view in several postratification treatises, see *post*, at 749–751 (dissenting opinion), I do not find these treatises conclusive without a stronger showing that they reflected the understanding of the Fifth Amendment at the time of ratification. At that time, the common law certainly had not coalesced around this view, see *ante*, at 690–702, and petitioner has not pointed to contemporaneous judicial opinions or other evidence establishing that his view was widely

[7] Indeed, if a statute contained no objective meaning, it might constitute an improper delegation of legislative power to the Judicial Branch, among other problems. See *Touby* v. *United States*, 500 U. S. 160, 165 (1991) (discussing the nondelegation doctrine).

shared. This lack of evidence, coupled with the unique two-sovereign federalist system created by our Constitution, leaves petitioner to rely on a general argument about "liberty." Ultimately, I am not persuaded that our precedent is incorrect as an original matter, much less demonstrably erroneous.

3

Although this case involves a constitutional provision, I would apply the same *stare decisis* principles to matters of statutory interpretation. I am not aware of any legal (as opposed to practical) basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions. Statutes are easier to amend than the Constitution, but our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change. Cf. *Clark* v. *Martinez*, 543 U. S. 371, 402 (2005) (THOMAS, J., dissenting) (explaining that "the realities of the legislative process" will "often preclude readopting the original meaning of a statute that we have upset"). Moreover, to the extent the Court has justified statutory *stare decisis* based on legislative inaction, this view is based on the "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 671 (1987) (Scalia, J., dissenting). Finally, even if congressional silence could be meaningfully understood as acquiescence, it still falls short of the bicameralism and presentment required by Article I and therefore is not a "valid way for our elected representatives to express their collective judgment." Nelson 76.

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II

For the reasons explained above, the Court's multifactor approach to *stare decisis* invites conflict with its constitutional duty. Whatever benefits may be seen to inhere in that approach—*e. g.*, "stability" in the law, preservation of

reliance interests, or judicial "humility," Tr. of Oral Arg. 20, 41–42—they cannot overcome that fundamental flaw.

In any event, these oft-cited benefits are frequently illusory. The Court's multifactor balancing test for invoking *stare decisis* has resulted in policy-driven, "arbitrary discretion." The Federalist No. 78, at 471. The inquiry attempts to quantify the unquantifiable and, by frequently sweeping in subjective factors, provides a ready means of justifying whatever result five Members of the Court seek to achieve. See *Holder* v. *Hall*, 512 U. S. 874, 943–944 (1994) (THOMAS, J., concurring in judgment) (describing a "'totality of circumstances'" test as "an empty incantation—a mere conjurer's trick"); *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003) (acknowledging that *stare decisis* is "'"a principle of policy and not a mechanical formula"'"); see also *Casey*, 505 U. S., at 854–856 (invoking the "kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"). These are not legal questions with right and wrong answers; they are policy choices. See, *e. g.*, A. Goldberg, Equal Justice: The Warren Era of the Supreme Court 96 (1971) ("[T]his concept of *stare decisis* both justifies the overruling involved in the expansion of human liberties during the Warren years and counsels against the future overruling of the Warren Court libertarian decisions").

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Members of this Court have lamented the supposed "uncertainty" created when the Court overrules its precedent. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 260–261 (2019) (BREYER, J., dissenting). But see *Lawrence*, *supra*, at 577 (asserting that *not* overruling precedent would "caus[e] uncertainty"). As I see it, we would eliminate a significant amount of uncertainty and provide the very stability sought if we replaced our malleable balancing test with a clear, principled rule grounded in the meaning of the text.

The true irony of our modern *stare decisis* doctrine lies in the fact that proponents of *stare decisis* tend to invoke it

most fervently when the precedent at issue is least defensible. See, *e. g.*, *Holder*, *supra*, at 944–945 (opinion of THOMAS, J.) ("*Stare decisis* should not bind the Court to an interpretation of the Voting Rights Act that was based on a flawed method of statutory construction from its inception" and that has created "an irreconcilable conflict" between the Act and the Equal Protection Clause and requires "methodically carving the country into racially designated electoral districts"). It is no secret that *stare decisis* has had a "ratchet-like effect," cementing certain grievous departures from the law into the Court's jurisprudence. Goldberg, *supra*, at 96. Perhaps the most egregious example of this illegitimate use of *stare decisis* can be found in our "substantive due process" jurisprudence. *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment). The Court does not seriously defend the "legal fiction" of substantive due process as consistent with the original understanding of the Due Process Clause. *Ibid.* And as I have explained before, "this fiction is a particularly dangerous one" because it "lack[s] a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." *Ibid.* Unfortunately, the Court has doggedly adhered to these erroneous substantive-due-process precedents again and again, often to disastrous ends. See, *e. g.*, *Stenberg* v. *Carhart*, 530 U. S. 914, 982 (2000) (THOMAS, J., dissenting) ("The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree" and "is the product of its authors' own philosophical views about abortion" with "no origins in or relationship to the Constitution"). Likewise, the Court refuses to reexamine its jurisprudence about the Privileges or Immunities Clause, thereby relegating a "'clause in the constitution'" "'to be without effect.'" *McDonald*, *supra*, at 813 (quoting *Marbury*, 1 Cranch, at 174); see *Timbs* v. *Indiana*, 586 U. S. 146, 157–159 (2019) (THOMAS, J., concurring in judgment) (criticizing the Court's incorporation doctrine through a clause that

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addresses procedures). No subjective balancing test can justify such a wholesale disregard of the People's individual rights protected by the Fourteenth Amendment.

* * *

Our judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous. Because petitioner and the dissenting opinions have not shown that the Court's dual-sovereignty doctrine is incorrect, much less demonstrably erroneous, I concur in the majority's opinion.

JUSTICE GINSBURG, dissenting

Terance Martez Gamble pleaded guilty in Alabama state court to both possession of a firearm by a person convicted of "a crime of violence" and drug possession, and was sentenced to ten years' imprisonment, all but one year suspended. Apparently regarding Alabama's sentence as too lenient, federal prosecutors pursued a parallel charge, possession of a firearm by a convicted felon, in violation of federal law. Gamble again pleaded guilty and received nearly three more years in prison.

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Had either the Federal Government or Alabama brought the successive prosecutions, the second would have violated Gamble's right not to be "twice put in jeopardy . . . for the same offence." U. S. Const., Amdt. 5, cl. 2. Yet the Federal Government was able to multiply Gamble's time in prison because of the doctrine that, for double jeopardy purposes, identical criminal laws enacted by "separate sovereigns" are different "offence[s]."

I dissent from the Court's adherence to that misguided doctrine. Instead of "fritter[ing] away [Gamble's] libert[y] upon a metaphysical subtlety, two sovereignties," Grant, The *Lanza* Rule of Successive Prosecutions, 32 Colum. L. Rev.

1309, 1331 (1932), I would hold that the Double Jeopardy Clause bars "successive prosecutions [for the same offense] by parts of the whole USA." *Puerto Rico* v. *Sánchez Valle*, 579 U. S. 59, 79 (2016) (GINSBURG, J., concurring).

I

A

Gamble urges that the Double Jeopardy Clause incorporates English common law. That law, he maintains, recognized a foreign acquittal or conviction as a bar to retrial in England for the same offense. See Brief for Petitioner 11–15. The Court, in turn, strives mightily to refute Gamble's account of the common law. See *ante*, at 690–702. This case, however, does not call for an inquiry into whether and when an 18th-century English court would have credited a foreign court's judgment in a criminal case. Gamble was convicted in both Alabama and the United States, jurisdictions that are not foreign to each other. English court decisions regarding the respect due to a foreign nation's judgment are therefore inapposite.

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B

In *United States* v. *Lanza*, 260 U. S. 377 (1922), this Court held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.*, at 382. Decades later, a sharply divided Court reaffirmed this separate-sovereigns doctrine. *Abbate* v. *United States*, 359 U. S. 187 (1959); *Bartkus* v. *Illinois*, 359 U. S. 121 (1959). I would not cling to those ill-advised decisions.

1

Justification for the separate-sovereigns doctrine centers on the word "offence": An "offence," the argument runs, is the violation of a sovereign's law, the United States and each State are separate sovereigns, ergo successive state and fed-

eral prosecutions do not place a defendant in "jeopardy . . . for the same offence." *Ante*, at 681, 683–684 (internal quotation marks omitted).

This "compact syllogism" is fatally flawed. See Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1, 25 (1992). The United States and its constituent States, unlike foreign nations, are "kindred systems," "parts of ONE WHOLE." The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton). They compose one people, bound by an overriding Federal Constitution. Within that "WHOLE," the Federal and State Governments should be disabled from accomplishing together "what neither government [could] do alone—prosecute an ordinary citizen twice for the same offence." Amar & Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 2 (1995).

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The notion that the Federal Government and the States are separate sovereigns overlooks a basic tenet of our federal system. The doctrine treats *governments* as sovereign, with state power to prosecute carried over from years predating the Constitution. See *Heath* v. *Alabama*, 474 U. S. 82, 89 (1985) (citing *Lanza*, 260 U. S., at 382). In the system established by the Federal Constitution, however, "ultimate sovereignty" resides in the *governed*. *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 820 (2015); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324–325 (1816); Braun, *supra*, at 26–30. Insofar as a crime offends the "peace and dignity" of a sovereign, *Lanza*, 260 U. S., at 382, that "sovereign" is the people, the "original fountain of all legitimate authority," The Federalist No. 22, at 152 (A. Hamilton); see Note, Double Prosecution by State and Federal Governments: Another Exercise in Federalism, 80 Harv. L. Rev. 1538, 1542 (1967). States may be separate, but their populations are part of the people composing the United States.

In our "compound republic," the division of authority between the United States and the States was meant to operate as "a double security [for] the rights of the people." The Federalist No. 51, at 323 (J. Madison); see *Bond* v. *United States*, 564 U. S. 211, 221 (2011). The separate-sovereigns doctrine, however, scarcely shores up people's rights. Instead, it invokes federalism to withhold liberty. See *Bartkus*, 359 U. S., at 155–156 (Black, J., dissenting).[1]

It is the doctrine's premise that each government has—and must be allowed to vindicate—a distinct interest in enforcing its own criminal laws. That is a peculiar way to look at the Double Jeopardy Clause, which by its terms safeguards the "person" and restrains the government. See, *e. g.*, *id.*, at 155; *United States* v. *All Assets of G. P. S. Automotive Corp.*, 66 F. 3d 483, 498 (CA2 1995) (Calabresi, J., concurring). The Double Jeopardy Clause embodies a principle, "deeply ingrained" in our system of justice,

> "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957).

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"Looked at from the standpoint of the individual who is being prosecuted," the liberty-denying potential of successive prosecutions, when Federal and State Governments prosecute in tandem, is the same as it is when either

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[1] The Court writes that federalism "advances individual liberty in many ways," but does not always do so. *Ante*, at 690 (citing, for example, state prohibition of activities authorized by federal law). The analogy of the separate-sovereigns doctrine to dual regulation is inapt. The former erodes a constitutional safeguard against successive prosecutions, while the Constitution contains no guarantee against dual regulation.

prosecutes twice. *Bartkus*, 359 U. S., at 155 (Black, J., dissenting).

2

I turn, next, to further justifications the Court has supplied for the separate-sovereigns doctrine. None should survive close inspection.

a

One rationale emphasizes that the Double Jeopardy Clause originally restrained only the Federal Government and did not bar successive state prosecutions. *Id.*, at 124; *Lanza*, 260 U. S., at 382; *Fox* v. *Ohio*, 5 How. 410, 434–435 (1847). Incorporation of the Clause as a restraint on action by the States, effected in *Benton* v. *Maryland*, 395 U. S. 784 (1969), has rendered this rationale obsolete.

b

Another justification is precedent. In adopting and reaffirming the separate-sovereigns doctrine, the Court relied on dicta from 19th-century opinions. See *Abbate*, 359 U. S., at 190–193; *Bartkus*, 359 U. S., at 129–132; *Lanza*, 260 U. S., at 382–384. The persuasive force of those opinions is diminished by their dubious reasoning. See *supra*, at 727–730. While drawing upon dicta from prior opinions, the Court gave short shrift to contrary authority. See Braun, *supra*, at 20–23.

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First, the Framers of the Bill of Rights voted down an amendment that would have permitted the Federal Government to reprosecute a defendant initially tried by a State. 1 Annals of Cong. 753 (1789); J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 30–31 (1969). But cf. *ante*, at 684. Nevermind that this amendment failed; the Court has attributed to the Clause the very meaning the First Congress refrained from adopting.[2]

[2] The Court sees this history as poor evidence of congressional intent. See *ante*, at 684. On another day, the Court looked to the First Congress' rejection of proposed amendments as instructive. See *Cook* v. *Gralike*,

Second, early American courts regarded with disfavor the prospect of successive prosecutions by the Federal and State Governments. In *Houston* v. *Moore*, 5 Wheat. 1 (1820), Justice Washington expressed concern that such prosecutions would be "very much like oppression, if not worse"; he noted that an acquittal or conviction by one sovereign "might be pleaded in bar of the prosecution before the other." *Id.*, at 23, 31. The Court today follows *Bartkus* in distinguishing Justice Washington's opinion as addressing only the "strange" situation in which a State has prosecuted an offense "against the United States." *Ante*, at 705; see *Bartkus*, 359 U. S., at 130. The distinction is thin, given the encompassing language in Justice Washington's opinion. Justice Story's dissent, moreover, declared successive prosecutions for the same offense contrary to "the principles of the common law, and the genius of our free government." *Houston*, 5 Wheat., at 72.

Most of the early state decisions cited by the parties regarded successive federal-state prosecutions as unacceptable. See *Bartkus*, 359 U. S., at 158–159 (Black, J., dissenting). Only one court roundly endorsed a separate-sovereigns theory. *Hendrick* v. *Commonwealth*, 32 Va. 707, 713 (1834). The Court reads the state-court opinions as "distin[guishing] between believing successive prosecutions by separate sovereigns unjust and holding them unlawful." *Ante*, at 703. I would not read the Double Jeopardy Clause to tolerate "unjust" prosecutions and believe early American courts would have questioned the Court's distinction. See *State* v. *Brown*, 2 N. C. 100, 101 (1794) (allowing successive prosecutions would be "against natural justice, and therefore I cannot believe it to be law").

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531 U. S. 510, 521 (2001). Moreover, a "compelling" principle of statutory interpretation is "the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 442–443 (1987) (internal quotation marks omitted).

c

Finally, the Court has reasoned that the separate-sovereigns doctrine is necessary to prevent either the Federal Government or a State from encroaching on the other's law enforcement prerogatives. Without this doctrine, the Court has observed, the Federal Government, by prosecuting first, could bar a State from pursuing more serious charges for the same offense, *Bartkus*, 359 U. S., at 137; and conversely, a State, by prosecuting first, could effectively nullify federal law, *Abbate*, 359 U. S., at 195. This concern envisions federal and state prosecutors working at cross purposes, but cooperation between authorities is the norm. See *Bartkus*, 359 U. S., at 123. And when federal-state tension exists, successive prosecutions for the federal and state offenses may escape double-jeopardy blockage under the test prescribed in *Blockburger* v. *United States*, 284 U. S. 299 (1932). Offenses are distinct, *Blockburger* held, if "each . . . requires proof of a fact which the other does not." *Id.*, at 304; see Amar, 95 Colum. L. Rev., at 45–46 (violation of federal civil rights law and state assault law are different offenses).

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II

The separate-sovereigns doctrine, I acknowledge, has been embraced repeatedly by the Court. But "*[s]tare decisis* is not an inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). Our adherence to precedent is weakest in cases "concerning procedural rules that implicate fundamental constitutional protections." *Alleyne* v. *United States*, 570 U. S. 99, 116, n. 5 (2013). Gamble's case fits that bill. I would lay the "separate-sovereigns" rationale to rest for the aforesaid reasons and those stated below.

A

First, *Benton* v. *Maryland*, 395 U. S. 784, which rendered the double jeopardy safeguard applicable to the States, left the separate-sovereigns doctrine the sort of "legal last-

man-standing for which we sometimes depart from *stare decisis*." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 458 (2015). In adopting and cleaving to the doctrine, the Court stressed that originally, the Clause restrained only federal, not state, action. *E. g.*, *Bartkus*, 359 U. S., at 127; *Lanza*, 260 U. S., at 382; cf. *Abbate*, 359 U. S., at 190.

Before incorporation, the separate-sovereigns doctrine had a certain logic: Without a carve-out for successive prosecutions by separate sovereigns, the Double Jeopardy Clause would have barred the Federal Government from prosecuting a defendant previously tried by a State, but would not have prevented a State from prosecuting a defendant previously tried by the Federal Government. Incorporation changed this. Operative against the States since 1969, when the Court decided *Benton* v. *Maryland*, 395 U. S. 784, the double jeopardy proscription now applies to the Federal Government and the States alike. The remaining office of the separate-sovereigns doctrine, then, is to enable federal and state prosecutors, proceeding one after the other, to expose defendants to double jeopardy.

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The separate-sovereigns doctrine's persistence contrasts with the fate of analogous dual-sovereignty doctrines following application of the rights at issue to the States. Prior to incorporation of the Fourth Amendment as a restraint on state action, federal prosecutors were free to use evidence obtained illegally by state or local officers, then served up to federal officers on a "silver platter." See *Elkins* v. *United States*, 364 U. S. 206, 208–214 (1960); *Weeks* v. *United States*, 232 U. S. 383, 398 (1914). Once the Fourth Amendment applied to the States, abandonment of this "silver platter doctrine" was impelled by "principles of logic" and the reality that, from the perspective of the victim of an unreasonable search and seizure, it mattered not at all "whether his constitutional right ha[d] been invaded by a federal agent or by a state officer." *Elkins*, 364 U. S., at 208, 215. As observed by Justice Harlan, *Elkins*' abandonment of a separate-

sovereigns exception to the exclusionary rule was at odds with retention of the separate-sovereigns doctrine for double jeopardy purposes in *Abbate* and *Bartkus*. See 364 U. S., at 252.

Similarly, before incorporation of the Fifth Amendment privilege against self-incrimination, the Court held that the privilege did not prevent state authorities from compelling a defendant to provide testimony that could incriminate him or her in another jurisdiction. *Knapp* v. *Schweitzer*, 357 U. S. 371, 375–381 (1958). After application of the self-incrimination privilege to the States, the Court concluded that its prior position was incompatible with the "policies and purposes" of the privilege. *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52, 55, 77 (1964). No longer, the Court held, could a witness "be whipsawed into incriminating himself under both state and federal law *even though the constitutional privilege against self-incrimination is applicable to each*." *Id.*, at 55 (internal quotation marks omitted; emphasis added).

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The Court regards incorporation as immaterial because application of the Double Jeopardy Clause to the States did not affect comprehension of the word "offence" to mean the violation of one sovereign's law. *Ante*, at 707–709. But the Court attributed a separate-sovereigns meaning to "offence" at least in part because the Double Jeopardy Clause did not apply to the States. See *supra*, at 730. Incorporation of the Clause should prompt the Court to consider the protection against double jeopardy from the defendant's perspective and to ask why each of two governments within the United States should be permitted to try a defendant once for the same offense when neither could try him or her twice.

B

The expansion of federal criminal law has exacerbated the problems created by the separate-sovereigns doctrine. Ill effects of the doctrine might once have been tempered by

the limited overlap between federal and state criminal law. *All Assets of G. P. S. Automotive*, 66 F. 3d, at 498 (Calabresi, J., concurring). In the last half century, however, federal criminal law has been extended pervasively into areas once left to the States. Guerra, The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy, 73 N. C. L. Rev. 1159, 1165–1192 (1995); Brief for Sen. Orrin Hatch as *Amicus Curiae* 8–14. This new "age of 'cooperative federalism,' [in which] the Federal and State Governments are waging a united front against many types of criminal activity," *Murphy*, 378 U. S., at 55–56, provides new opportunities for federal and state prosecutors to "join together to take a second bite at the apple," *All Assets of G. P. S. Automotive*, 66 F. 3d, at 498 (Calabresi, J., concurring).[3] This situation might be less troublesome if successive prosecutions occurred only in "instances of peculiar enormity, or where the public safety demanded extraordinary rigor." *Fox*, 5 How., at 435. The run-of-the-mill felon-in-possession charges Gamble encountered indicate that, in practice, successive prosecutions are not limited to exceptional circumstances.

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C

Against all this, there is little to be said for keeping the separate-sovereigns doctrine. Gamble's case "do[es] not implicate the reliance interests of private parties." *Alleyne*, 570 U. S., at 119 (SOTOMAYOR, J., concurring). The closest thing to a reliance interest would be the interest Federal and State Governments have in avoiding avulsive changes that could complicate ongoing prosecutions. As the Court correctly explains, however, overruling the separate-sovereigns doctrine would not affect large numbers of cases. See *ante*,

[3] *Bartkus* v. *Illinois*, 359 U. S. 121 (1959), left open the prospect that the double jeopardy ban might block a successive state prosecution that was merely "a sham and a cover for a federal prosecution." *Id.*, at 123–124. The Courts of Appeals have read this potential exception narrowly. See, *e. g.*, *United States* v. *Figueroa-Soto*, 938 F. 2d 1015, 1019 (CA9 1991).

at 709–710. In prosecutions based on the same conduct, federal and state prosecutors will often charge offenses having different elements, charges that, under *Blockburger*, will not trigger double jeopardy protection. See Poulin, Double Jeopardy Protection From Successive Prosecution: A Proposed Approach, 92 Geo. L. J. 1183, 1244–1245 (2004); Brief for Criminal Defense Experts as *Amici Curiae* 5–11.[4]

Notably, the Federal Government has endeavored to reduce the incidence of "same offense" prosecutions. Under the *Petite* policy adopted by the Department of Justice,[5] the Department will pursue a federal prosecution "based on substantially the same act(s) or transaction(s)" previously prosecuted in state court only if the first prosecution left a "substantial federal interest . . . demonstrably unvindicated" and a Department senior official authorizes the prosecution. Dept. of Justice, Justice Manual § 9–2.031(A) (rev. July 2009).

At oral argument, the Government estimated that it authorizes only "about a hundred" *Petite* prosecutions per year. Tr. of Oral Arg. 54. But see *id.*, at 65–66 (referring to the "few hundred successive prosecutions that [the Government] bring[s] each year"). Some of these prosecutions will not

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[4] The Government implies there is tension between Gamble's position and *Blockburger* v. *United States*, 284 U. S. 299 (1932). Brief for United States 18–20. But if courts can ascertain how laws enacted by different Congresses fare under *Blockburger*, they can do the same for laws enacted by Congress and a State, or by two States. But cf. Amar & Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 39 (1995) ("Because different legislatures often do not work from the same linguistic building blocks, they will not use uniform language to describe an offence, even when each is indeed outlawing the same crime with the same elements.").

[5] Formally the "Dual and Successive Prosecution Policy," the policy is popularly known by the name of the case in which this Court first took note of it, *Petite* v. *United States*, 361 U. S. 529 (1960) (*per curiam*). The policy was adopted "in direct response to" *Bartkus* and *Abbate* v. *United States*, 359 U. S. 187 (1959). *Rinaldi* v. *United States*, 434 U. S. 22, 28 (1977) (*per curiam*).

implicate double jeopardy, as the *Petite* policy uses a same-conduct test that is broader than the *Blockburger* same-elements test. And more than half the States forbid successive prosecutions for all or some offenses previously resolved on the merits by a federal or state court. Brief for Criminal Defense Experts as *Amici Curiae* 4–5, and n. 2 (collecting statutes); Brief for State of Texas et al. as *Amici Curiae* 28–30, and nn. 6–15 (same). In short, it is safe to predict that eliminating the separate-sovereigns doctrine would spark no large disruption in practice.

* * *

The separate-sovereigns doctrine, especially since *Bartkus* and *Abbate*, has been subject to relentless criticism by members of the bench, bar, and academy. Nevertheless, the Court reaffirms the doctrine, thereby diminishing the individual rights shielded by the Double Jeopardy Clause. Different parts of the "WHOLE" United States should not be positioned to prosecute a defendant a second time for the same offense. I would reverse Gamble's federal conviction.

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JUSTICE GORSUCH, dissenting.

A free society does not allow its government to try the same individual for the same crime until it's happy with the result. Unfortunately, the Court today endorses a colossal exception to this ancient rule against double jeopardy. My colleagues say that the federal government and each State are "separate sovereigns" entitled to try the same person for the same crime. So if all the might of one "sovereign" cannot succeed against the presumptively free individual, another may insist on the chance to try again. And if both manage to succeed, so much the better; they can add one punishment on top of the other. But this "separate sovereigns exception" to the bar against double jeopardy finds no meaningful support in the text of the Constitution, its original public meaning, structure, or history. Instead, the Con-

stitution promises all Americans that they will never suffer double jeopardy. I would enforce that guarantee.

I

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."[1] Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked. To address the problem, the law in ancient Athens held that "[a] man could not be tried twice for the same offense."[2] The Roman Republic and Empire incorporated a form of double jeopardy protection in their laws.[3] The Old Testament and later church teachings endorsed the bar against double jeopardy too.[4] And from the earliest days of the common law, courts recognized that to "punish a man twice over for one offence" would be deeply unjust.[5]

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The rule against double jeopardy was firmly entrenched in both the American Colonies and England at the time of our Revolution.[6] And the Fifth Amendment, which prohibits placing a defendant "twice . . . in jeopardy of life or limb"

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[1] *Bartkus* v. *Illinois*, 359 U. S. 121, 151 (1959) (Black, J., dissenting).

[2] R. Bonner, Lawyers and Litigants in Ancient Athens 195 (1927).

[3] J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 2–3 (1969); Digest of Justinian: Digest 48.2.7.2, translated in 11 S. Scott, The Civil Law 17 (1932).

[4] See *Bartkus*, 359 U. S., at 152, n. 4 (Black, J., dissenting); Z. Brooke, The English Church and the Papacy 204–205, n. 1 (1931).

[5] 1 F. Pollock & F. Maitland, The History of English Law 448 (2d ed. 1898).

[6] See, *e. g.*, The Body of Liberties of 1641, cl. 42, in The Colonial Laws of Massachusetts 42–43 (W. Whitmore ed. 1889); 4 W. Blackstone, Commentaries on the Laws of England 335–336 (5th ed. 1773) (Blackstone, Commentaries); 2 W. Hawkins, Pleas of the Crown 368 (1762) (Hawkins).

for "the same offence" sought to carry the traditional common law rule into our Constitution.[7] As Joseph Story put it, the Constitution's prohibition against double jeopardy grew from a "great privilege secured by the common law" and meant "that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him."[8]

Given all this, it might seem that Mr. Gamble should win this case handily. Alabama prosecuted him for violating a state law that "prohibits a convicted felon from possessing a pistol" and sentenced him to a year in prison.[9] But then the federal government, apparently displeased with the sentence, charged Mr. Gamble under 18 U. S. C. § 922(g)(1) with being a felon in possession of a firearm based on the same facts that gave rise to the state prosecution. Ultimately, a federal court sentenced him to 46 months in prison and three years of supervised release. Most any ordinary speaker of English would say that Mr. Gamble was tried twice for "the same offence," precisely what the Fifth Amendment prohibits. Tellingly, no one before us doubts that if either the federal government or Alabama had prosecuted Mr. Gamble twice on these facts and in this manner, it surely would have violated the Constitution.

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So how does the government manage to evade the Fifth Amendment's seemingly plain command? On the government's account, the fact that federal and state authorities split up the prosecutions makes all the difference. Though the Double Jeopardy Clause doesn't say anything about

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[7] *Ex parte Lange*, 18 Wall. 163, 170 (1874). See also *Benton* v. *Maryland*, 395 U. S. 784, 795–796 (1969); F. Wharton, Criminal Law 147 (1846).

[8] 3 J. Story, Commentaries on the Constitution of the United States § 1781, p. 659 (1833).

[9] *Ex parte Taylor*, 636 So. 2d 1246 (Ala. 1993); see Ala. Code §§ 13A–11–70(2), 13A–11–72(a) (2015).

allowing "separate sovereigns" to do sequentially what neither may do separately, the government assures us the Fifth Amendment's phrase "same offence" does this work. Adopting the government's argument, the Court supplies the following syllogism: "[A]n 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'" *Ante*, at 683.

But the major premise of this argument—that "where there are two laws there are 'two offenses'"—is mistaken. We know that the Constitution is not so easily evaded and that two statutes *can* punish the same offense.[10] The framers understood the term "offence" to mean a "transgression."[11] And they understood that the same transgression might be punished by two pieces of positive law: After all, constitutional protections were not meant to be flimsy things but to embody "principles that are permanent, uniform, and universal."[12] As this Court explained long ago in *Blockburger* v. *United States*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[13] So if two laws demand proof of the same facts to secure a conviction, they constitute a single offense under our Constitution and a second trial is forbidden. And by everyone's admission, that is exactly what we have here: The statute under which the federal government proceeded required it to prove no facts beyond those Alabama needed to prove under state law to win its conviction; the two prosecutions *were* for the same offense.

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[10] *Whalen* v. *United States*, 445 U. S. 684, 691–692 (1980).

[11] Dictionarium Britannicum (N. Bailey ed. 1730); see also N. Webster, An American Dictionary of the English Language (1828) (defining an "offense" as including "[a]ny transgression of law, divine or human").

[12] 4 Blackstone, Commentaries 3.

[13] 284 U. S. 299, 304 (1932).

That leaves the government and the Court to rest on the fact that distinct governmental entities, federal and state, enacted these identical laws. This, we are told, is enough to transform what everyone agrees would otherwise be the same offense into two different offenses. But where is *that* distinction to be found in the Constitution's text or original public understanding? We know that the framers didn't conceive of the term "same offence" in some technical way as referring only to the same statute. And if double jeopardy prevents *one* government from prosecuting a defendant multiple times for the same offense under the banner of separate statutory labels, on what account can it make a difference when *many* governments collectively seek to do the same thing?

The government identifies no evidence suggesting that the framers understood the term "same offence" to bear such a lawyerly sovereign-specific meaning. Meanwhile, Blackstone's Commentaries explained how "Roman law," "Athens," "the Jewish republic," and "English Law" addressed the singular "offence of homicide," and how the Roman, Gothic, and ancient Saxon law approached the singular "offence of arson."[14] Other treatises of the period contain similar taxonomies of "offences" that are not sovereign specific.[15] Members of the Continental Congress, too, used the word "offence" in this same way. In 1786, a congressional committee endorsed federal control over import duties because otherwise "thirteen separate authorities" might "ordain various penalties for the same offence."[16] In 1778, the Continental Congress passed a resolution declaring that a person should not be tried in state court "for the same offense, for which he had previous thereto been tried by a Court Mar-

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[14] 4 Blackstone, Commentaries 176–187, 222.

[15] See, *e. g.*, 2 J. Bishop, Commentaries on the Criminal Law §§ 90–120 (5th ed. 1872) (discussing the singular offense of "burglary" by reference to the "common law," English law, and the laws of multiple States).

[16] 30 Journals of the Continental Congress 440 (J. Fitzpatrick ed. 1934).

tial."[17] And in 1785, the Continental Congress considered an ordinance declaring that a defendant could "plead a formal Acquital on a Trial" in a maritime court "for the same supposed Offences, in a similar Court in one of the other United States."[18] In all of these examples, early legislators—including many of the same people who would vote to add the Fifth Amendment to the Bill of Rights just a few years later—recognized that transgressions of state and federal law could constitute the "same offence."

The history of the Double Jeopardy Clause itself supplies more evidence yet. The original draft prohibited "'more than one trial or one punishment for the same offence.'"[19] One representative then proposed adding the words "'by any law of the United States'" after "'same offence.'"[20] That proposal clearly would have codified the government's sovereign-specific view of the Clause's operation. Yet, Congress proceeded to reject it.

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Viewed from the perspective of an ordinary reader of the Fifth Amendment, whether at the time of its adoption or in our own time, none of this can come as a surprise. Imagine trying to explain the Court's separate sovereigns rule to a criminal defendant, then or now. Yes, you were sentenced to state prison for being a felon in possession of a firearm. And don't worry—the State can't prosecute you again. But a federal prosecutor *can* send you to prison again for exactly the same thing. What's more, that federal prosecutor may work hand in hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn't the first time around. And the federal prosecutor can pursue you even if you were *acquitted* in the state case. None of that offends the Constitution's plain words protecting a person from being placed

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[17] 10 *id.*, at 72 (W. Ford ed. 1908).

[18] 29 *id.*, at 803 (J. Fitzpatrick ed. 1933).

[19] 1 Annals of Cong. 753 (1789).

[20] *Ibid.*

"twice . . . in jeopardy of life or limb" for "the same offence." Really?

II

Without meaningful support in the text of the Double Jeopardy Clause, the government insists that the separate sovereigns exception is at least compelled by the structure of our Constitution. On its view, adopted by the Court today, allowing the federal and state governments to punish the same defendant for the same conduct "honors the substantive differences between the interests that two sovereigns can have" in our federal system. *Ante*, at 685.

But this argument errs from the outset. The Court seems to assume that sovereignty in this country belongs to the state and federal governments, much as it once belonged to the King of England. But as Chief Justice Marshall explained, "[t]he government of the Union . . . is emphatically, and truly, a government of the people," and all sovereignty "emanates from them."[21] Alexander Hamilton put the point this way: "[T]he national and State systems are to be regarded" not as different sovereigns foreign to one another but "as ONE WHOLE."[22] Under our Constitution, the federal and state governments are but two expressions of a single and sovereign people.

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This principle resonates throughout our history and law. State courts that refused to entertain federal causes of action found little sympathy when attempting the very separate sovereigns theory underlying today's decision.[23] In time, too, it became clear that federal courts may decide state-law issues, and state courts may decide federal questions.[24] Even in the criminal context, this Court has upheld removal of some state criminal actions to federal court.[25]

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[21] *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–405 (1819).

[22] The Federalist No. 82, p. 494 (C. Rossiter ed. 1961).

[23] See *Testa* v. *Katt*, 330 U. S. 386 (1947).

[24] *Claflin* v. *Houseman*, 93 U. S. 130 (1876).

[25] See *Tennessee* v. *Davis*, 100 U. S. 257 (1880).

And any remaining doubt about whether the States and the federal government are truly separate sovereigns was ultimately "resolved by war."[26]

From its mistaken premise, the Court continues to the flawed conclusion that the federal and state governments can successively prosecute the same person for the same offense. This turns the point of our federal experiment on its head. When the "ONE WHOLE" people of the United States assigned different aspects of their sovereign power to the federal and state governments, they sought not to *multiply* governmental power but to *limit* it. As this Court has explained, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[27] Yet today's Court invokes federalism not to protect individual liberty but to threaten it, allowing two governments to achieve together an objective denied to each. The Court brushes this concern aside because "the powers of the Federal Government and the States often overlap," which "often results in two layers of regulation." *Ante*, at 690. But the

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[26] *Testa*, 330 U. S., at 390. The Court tries to make the most of *McCulloch*, pointing out that Chief Justice Marshall distinguished between "'the people of a State'" and "'[t]he people of all the States.'" *Ante*, at 689. But of course our federal republic is composed of separate governments. My point is that the federal and state governments ultimately derive their sovereignty from one and the same source; they are not truly "separate" in the manner of, say, the governments of England and Portugal. The American people "'split the atom of sovereignty,'" *ante*, at 688, to set two levels of government against each other, not to set both against the people. *McCulloch* is consistent with that understanding. In holding that the States could not tax the national bank, *McCulloch* sought to ensure that the national and state governments remained each in its proper sphere; it did not hold that the two governments could work in concert to abridge the people's liberty in a way that neither could on its own.

[27] *Bond* v. *United States*, 564 U. S. 211, 222 (2011); see also *New York* v. *United States*, 505 U. S. 144, 181 (1992); *Alden* v. *Maine*, 527 U. S. 706, 758 (1999); The Federalist No. 51.

Court's examples—taxation, alcohol, and marijuana—involve areas that the federal and state governments each may regulate separately under the Constitution as interpreted by this Court. That is miles away from the separate sovereigns exception, which allows the federal and state governments to accomplish together what *neither* may do separately consistent with the Constitution's commands. As Justice Black understood, the Court's view today "misuse[s] and desecrat[es] . . . the concept" of federalism.[28] For "it is just as much an affront to . . . human freedom for a man to be punished twice for the same offense" by two parts of the people's government "as it would be for one . . . to throw him in prison twice for the offense."[29]

III

A

If the Constitution's text and structure do not supply persuasive support for the government's position, what about a more thorough exploration of the common law from which the Fifth Amendment was drawn?

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By 1791 when the Fifth Amendment was adopted, an array of common law authorities suggested that a prosecution in *any* court, so long as the court had jurisdiction over the offense, was enough to bar future reprosecution in another court. Blackstone, for example, reported that an acquittal "before any court having competent jurisdiction of the offence" could be pleaded "in bar of any subsequent accusation for the same crime."[30] For support, Blackstone pointed to *Beak* v. *Thyrwhit*,[31] a 1688 case in which the reporter described an acquittal in a foreign country followed by an attempted second prosecution in England that the

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[28] *Bartkus*, 359 U. S., at 155 (dissenting opinion).

[29] *Abbate* v. *United States*, 359 U. S. 187, 203 (1959) (same).

[30] 4 Blackstone, Commentaries 335, and n. j.

[31] 3 Mod. 194, 87 Eng. Rep. 124 (K. B.).

court held impermissible. Another treatise by William Hawkins likewise considered it "settled" as early as 1716 "[t]hat an Acquittal *in any Court whatsoever*, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime."[32]

What these authorities suggest many more confirm. Henry Bathurst's 1761 treatise on evidence taught that "a final Determination in a Court having competent Jurisdiction is conclusive in all Courts of concurrent Jurisdiction."[33] Nor was this merely a rule about the competency of evidence, as the next sentence reveals: "If *A.* having killed a Person in *Spain* was there prosecuted, tried, and acquitted, and afterwards was indicted here [in England], he might plead the Acquittal in *Spain* in Bar."[34] Francis Buller's 1772 treatise repeated the same rule, articulating it the same way.[35] And to illustrate their point, both treatises cited the 1678 English case of *King* v. *Hutchinson*. Although no surviving written report of *Hutchinson* remains, several early common law cases—including *Beak* v. *Thyrwhit*,[36] *Burrows* v. *Jemino*,[37] and *King* v. *Roche*[38]—described its holding in exactly the same way the treatise writers did: All agreed that it barred the retrial in England of a defendant previously tried for murder in Spain or Portugal.

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When they envisioned the relationship between the national government and the States under the new Constitution, the framers sometimes referenced by way of compari-

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[32] 2 Hawkins § 10, at 372 (emphasis added).

[33] H. Bathurst, Theory of Evidence 39.

[34] *Ibid.*

[35] F. Buller, An Introduction to the Law Relative to Trials at Nisi Prius 241.

[36] 3 Mod. 194, 87 Eng. Rep. 124, *sub nom. Beake* v. *Tyrrell*, 1 Shower, K. B. 6, 89 Eng. Rep. 411, *sub nom. Beake* v. *Tirrell*, Comb. 120, 90 Eng. Rep. 379.

[37] 2 Str. 733, 93 Eng. Rep. 815 (K. B. 1726)

[38] 1 Leach 134, 168 Eng. Rep. 169 (K. B. 1775).

son the relationship between Wales, Scotland, and England.[39] And prosecutions in one of these places pretty plainly barred subsequent prosecutions for the same offense in the others. So, for example, treatises explained that "an Acquittal of Murder at a Grand Sessions in *Wales*, may be pleaded to an Indictment for the same Murder in *England*. For the Rule is, That a Man's Life shall not be brought into Danger for the same Offence more than once."[40] Indeed, when an English county indicted a defendant "for a murder committed . . . in Wales," it was barred from proceeding when the court learned that the defendant had already been tried and acquitted "of the same offence" in Wales.[41]

Against this uniform body of common law weighs *Gage* v. *Bulkeley*—a civil, not criminal, case from 1744 that suggested *Hutchinson* had held only that the English courts lacked jurisdiction to try a defendant for an offense committed in Portugal. Because "the murder was committed in *Portugal*," *Gage* argued, "the Court of King's Bench could not indict him, and there was no method of trying him but upon a special commission."[42] But no one else—not the treatise writers or the other English cases that favorably cited *Hutchinson*—adopted *Gage*'s restrictive reading of that precedent.

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In the end, then, it's hard to see how anyone consulting the common law in 1791 could have avoided this conclusion: While the issue may not have arisen often, the great weight of authority indicated that successive prosecutions by different sovereigns—even sovereigns as foreign to each other as

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[39] See, *e. g.*, A. Amar, America's Constitution: A Biography 45 (2005); The Federalist No. 5, at 50–51; *id.*, No. 17; Jay, An Address to the People of the State of New York, in Pamphlets on the Constitution of the United States 84 (P. Ford ed. 1788).

[40] 2 Hawkins § 10, at 372.

[41] *King* v. *Thomas*, 1 Lev. 118, 83 Eng. Rep. 326 (K. B. 1664).

[42] *Gage* v. *Bulkeley*, Ridg. T. H. 263, 270–271, 27 Eng. Rep. 824, 827 (1744).

England and Portugal—were out of bounds. And anyone familiar with the American federal system likely would have thought the rule applied with even greater force to successive prosecutions by the United States and a constituent State, given that both governments derive their sovereignty from the American people.

Unable to summon any useful preratification common law sources of its own, the government is left to nitpick those that undermine its position. For example, the Court dismisses *Beak* because "*Hutchinson* is discussed only in the defendant's argument in that case, not the court's response." *Ante*, at 698. But the *Beak* court did not reject the *Hutchinson* argument, and counsel's use of the case sheds light on how 17th- and 18th-century lawyers understood the double jeopardy bar. The Court likewise derides *King* v. *Thomas* as "totally irrelevant" because in the 17th century, Wales and England shared the same laws. *Ante*, at 698. But our federal and state governments share the same fundamental law and source of authority, and the Wales example is at least somewhat analogous to our federal system.[43] Finally, the Court complains that *Roche*'s footnote citing *Hutchinson* was added only in 1800, after the Fifth Amendment's ratification. *Ante*, at 697–698. But that is hardly a point for the government, because even so it provides an example of a later reporter attempting to describe the *pre-existing* state of the law; nor, as it turns out, was the footnote even essential to the *Roche* court's original analysis and conclusion reached in 1775, well before the Fifth Amendment's ratification.[44] And among all these

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[43] Indeed, though England ruled Wales at the time, a contemporaneous lawyer might have thought that Wales' authority to prosecute a defendant derived at least in part from its earlier status as "an absolute and undependent Kingdom" rather than purely from authority delegated by England. 1 Keb. 663, 83 Eng. Rep. 1172 (K. B. 1663); see *United States* v. *Lara*, 541 U. S. 193, 210 (2004).

[44] Indeed, everything that matters was contained in the 1775 version of the *Roche* case report. Roche was indicted in England for a murder committed in South Africa. "To this indictment Captain Roche pleaded

complaints, we should not lose the forest for the trees. The Court's attempts to explain away so many uncomfortable authorities are lengthy, detailed, even herculean. But in the end, neither it nor the government has mustered a *single* preratification common law authority approving a case of successive prosecutions by separate sovereigns for the same offense.

B

What we know about the common law before the Fifth Amendment's ratification in 1791 finds further confirmation in how later legal thinkers in both England and America described the rule they had inherited.

Start with England. As it turns out, "it would have been difficult to have made more than the most cursory examination of nineteenth century or later English treatises or digests without encountering" the *Hutchinson* rule.[45] In 1802, a British treatise explained that "an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England."[46] Three decades later, another treatise observed (citing *Hutchinson*) that "[a]n acquittal by a competent jurisdiction abroad is a

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Autrefois acquit." *Roche*, 1 Leach 134, 168 Eng. Rep. 169. In response, the prosecution asked the court to charge the jury both with "this issue [the plea of *autrefois acquit*], and that of Not guilty." *Id.*, at 135, 168 Eng. Rep., at 169. The court rejected that proposal, reasoning that "if the first finding was for the prisoner, they could not go to the second, because that finding would be a bar." *Ibid.* Far from saying "absolutely nothing" about double jeopardy, *ante*, at 697, *Roche* is a serious problem for the government because it explicitly recognizes that a successful plea of *autrefois acquit*, even one based on a foreign conviction, would bar a prosecution in England. But the Court ignores this, focusing instead on the missing explanatory citation to *Hutchinson* that was, in any event, added shortly thereafter.

[45] Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 UCLA L. Rev. 1, 9–11 (1956) (footnotes omitted).

[46] 2 L. MacNally, Rules of Evidence on Pleas of the Crown 428 (1802); see also 1 T. Starkie, Criminal Pleading 300–301, n. h (1814); 1 J. Chitty, Criminal Law 458 (2d ed. 1816).

bar to an indictment for the same offence before any other tribunal."[47] In 1846, the Scottish High Court of Justiciary declared that "[i]f a man has been tried for theft in England, we would not try him again here."[48] Twentieth century treatises recited the same rule.[49] In 1931, the American Law Institute stated that "[i]f a person has been acquitted in a court of competent jurisdiction for an offense in another country he may not be tried for the same offense again in an English Court."[50] And in 1971, an English judge explained that the bar on "double jeopardy . . . has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court."[51] The Court today asks us to assume that all these legal authorities misunderstood the common law's ancient rule. I would not.

Even more pertinently, consider how 18th-century Americans understood the double jeopardy provision they had adopted. The legal treatises an American lawyer practicing

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[47] J. Archbold, Pleading and Evidence in Criminal Cases 89 (5th ed. 1834). Many more authorities are to the same effect. See, *e. g.*, 1 Encyc. of the Laws of England, Autrefois Aquit, 424–425 (A. Renton ed. 1897); 2 J. Gabbett, Criminal Law 334 (1843); 2 E. Deacon, Digest of the Criminal Law of England 931 (1831); R. Matthews, Digest of Criminal Law 26 (1833); H. Nelson, Private International Law 368, n. *y* (1889); 1 W. Russell, Crimes and Indictable Misdemeanors 471–472 (2d ed. 1826); H. Woolrych, Criminal Law 129 (1862); 2 M. Hale, Pleas of the Crown 255 (1st Am. ed., S. Emlyn ed. 1847); H. Smith, Roscoe on the Law of Evidence 199 (8th ed. 1874).

[48] *Her Majesty's Advocate* v. *MacGregor*, (1846) Ark. 49, 60.

[49] A. Gibb, International Law of Jurisdiction in England and Scotland 285–286 (1926); A. Gibson & A. Weldon, Criminal and Magisterial Law 225 (7th ed. 1919); S. Harris, Criminal Law 377 (9th ed. 1901); C. Kenny, Outlines of Criminal Law 469 (10th ed. 1920); H. Cohen, Roscoe on the Law of Evidence 172 (13th ed. 1908).

[50] ALI, Administration of Criminal Law § 16, p. 129 (Proposed Final Draft, Mar. 18, 1935).

[51] *Regina* v. *Treacy*, [1971] A. C. 537, 562, 2 W. L. R. 112, 125 (opinion of Diplock, L. J.) (citing *Roche*, 1 Leach 134, 168 Eng. Rep. 169).

between the founding and the Civil War might have consulted uniformly recited the *Hutchinson* rule as black letter law. Chancellor Kent wrote that "the plea of *autrefois acquit*, resting on a prosecution [in] any civilized state, would be a good plea in any other civilized state."[52] Thomas Sergeant explained that "[w]here the jurisdiction of the United States court and of a state Court is concurrent, the sentence of either court, whether of conviction or acquittal, may be pleaded in bar to a prosecution in the other."[53] William Rawle echoed that conclusion in virtually identical words.[54] Indeed, one early commentator wrote that a "principal reason" for the Double Jeopardy Clause was to prevent successive state and federal prosecutions, which he considered to be against "[n]atural justice."[55] Nor did these treatises purport to invent a new rule; they claimed only to recite the traditional one.

This Court's early decisions reflected the same principle. In *Houston* v. *Moore*, a Pennsylvania court-martial tried a member of the state militia for desertion under an "act of the legislature of Pennsylvania."[56] The defendant objected that the state court-martial lacked jurisdiction because federal law criminalized the same conduct and prosecuting him in the state court could thus expose him to double jeopardy. In an opinion by Justice Washington, the Court disagreed and allowed the prosecution, but reassured the defendant that "if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be [later] pleaded in bar of the prosecution before the other."[57] In dissent, Justice Story thought the state court

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[52] 1 J. Kent, Commentaries on American Law 176 (1826).

[53] T. Sergent, Constitutional Law 278 (1830).

[54] W. Rawle, View of the Constitution 191 (1825).

[55] J. Bayard, Brief Exposition of the Constitution of the United States 150–151 (1845).

[56] 5 Wheat. 1, 12 (1820).

[57] *Id.*, at 31.

lacked jurisdiction because otherwise the defendant would be "liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government."[58] But notice the point of agreement between majority and dissent: Both acknowledged that a second prosecution for the same underlying offense would be prohibited even if brought by a separate government.[59]

Another case decided the same year also reflected the *Hutchinson* rule. In *United States* v. *Furlong*, one British subject killed another on the high seas, and the killer was indicted in an American federal court for robbery and murder. This Court unanimously held that "[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations" that can therefore be "punished by all," and there can be "no doubt that the plea of *autre fois acquit* [double jeopardy] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."[60]

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A number of early state cases followed the same rule. Indeed, the Court today acknowledges that Massachusetts,

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[58] *Id.*, at 72.

[59] The Court insists that *Houston* involved an unusual state statute that "'imposed state sanctions for violation of a federal criminal law.'" *Ante*, at 705. But so what? Everyone involved in *Houston* agreed that the defendant had been tried by a Pennsylvania court, under a Pennsylvania statute, passed by the Pennsylvania Legislature. And though there were separate sovereigns with separate laws, everyone agreed there was only one offense.

[60] 5 Wheat. 184, 197 (1820). To be sure, *Furlong* proceeded to indicate that an acquittal for *murder* in an American court would not have prohibited a later prosecution in a British court in this case. But that was only because the British courts would not have recognized the jurisdiction of an American court to try a murder committed by a British subject on the high seas. *Furlong*'s discussion is therefore perfectly consistent with the *Hutchinson* principle—a rule that applied only when both courts had "competent jurisdiction of the offence" and could actually place the defendant in jeopardy. See 4 Blackstone, Commentaries 365.

Michigan, and Vermont all followed *Hutchinson*. *Ante*, at 703.[61] The Court agrees that South Carolina did too,[62] but it believes that a later South Carolina case might have deviated from the *Hutchinson* rule. That decision, however, contains at best only "an inconclusive discussion coming from a State whose highest court had previously stated unequivocally that a bar against double prosecutions would exist."[63]

In the face of so much contrary authority, the Court winds up leaning heavily on a single 1794 North Carolina Superior Court decision, *State* v. *Brown*. But the Court's choice here is revealing. True, *Brown* said that a verdict in North Carolina would not be "pleadable in bar to an indictment preferred against [the defendant] in the Territory South of the Ohio."[64] But the Court leaves out what happened next. *Brown* went on to *reject* concurrent jurisdiction because trying the defendant "according to the several laws of each State" could result in him being "cropped in one, branded and whipped in another, imprisoned in a third, and hanged in a fourth; and all for *one and the same offence*."[65] The North Carolina court viewed that result as "against natural justice" and "therefore [could] not believe it to be law."[66] So it is that the principal support the Court cites for its position is a state case that both (1) regarded transgressions of the laws of a State and a U. S. territory as the "same offence," and (2) expressed aversion at the thought of both jurisdictions punishing the defendant for that singular offense.[67]

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[61] Citing *Commonwealth* v. *Fuller*, 49 Mass. 313, 318 (1844); *Harlan* v. *People*, 1 Doug. 207, 212 (Mich. 1843); *State* v. *Randall*, 2 Aik. 89 (Vt. 1827).

[62] *State* v. *Antonio*, 7 S. C. L. 776 (1816).

[63] *Bartkus*, 359 U. S., at 158–159 (Black, J., dissenting).

[64] 2 N. C. 100, 101.

[65] *Ibid.* (emphasis added).

[66] *Ibid.*

[67] Perhaps the only early state-law discussion that truly supports the Court's position is dicta in an 1834 Virginia decision. *Hendrick* v. *Commonwealth*, 32 Va. 707. Yet even that support proves threadbare in the

IV

With the text, principles of federalism, and history now arrayed against it, the government is left to suggest that we should retain the separate sovereigns exception under the doctrine of *stare decisis*. But if that's the real basis for today's result, let's at least acknowledge this: By all appearances, the Constitution as originally adopted and understood did *not* allow successive state and federal prosecutions for the same offense, yet the government wants this Court to tolerate the practice anyway.

Stare decisis has many virtues, but when it comes to enforcing the Constitution this Court must take (and always has taken) special care in the doctrine's application. After all, judges swear to protect and defend the Constitution, not to protect what it prohibits. And while we rightly pay heed to the considered views of those who have come before us, especially in close cases, *stare decisis* isn't supposed to be "'the art of being methodically ignorant of what everyone knows.'"[68] Indeed, blind obedience to *stare decisis* would leave this Court still abiding grotesque errors like *Dred Scott* v. *Sandford*,[69] *Plessy* v. *Ferguson*,[70] and *Korematsu* v. *United States*.[71] As Justice Brandeis explained, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so

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end, given that "the highest court of the same State later expressed the view that such double trials would virtually never occur in our country." *Bartkus*, 359 U. S., at 159 (Black, J., dissenting) (citing *Jett* v. *Commonwealth*, 59 Va. 933, 947, 959 (1867)).

[68] R. Cross & J. Harris, Precedent in English Law, intro. comment (4th ed. 1991) (attributing the aphorism to Jeremy Bentham).

[69] 19 How. 393 (1857).

[70] 163 U. S. 537 (1896).

[71] 323 U. S. 214 (1944).

fruitful in the physical sciences, is appropriate also in the judicial function."[72]

For all these reasons, while *stare decisis* warrants respect, it has never been "'an inexorable command,'"[73] and it is "at its weakest when we interpret the Constitution."[74] In deciding whether one of our cases should be retained or overruled, this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[75] Each of these factors, I believe, suggests we should reject the separate sovereigns exception.

Take the "quality of [the] reasoning."[76] The first cases to suggest that successive prosecutions by state and federal authorities might be permissible did not seek to address the original meaning of the word "offence," the troubling federalism implications of the exception, or the relevant historical sources. Between 1847 and 1850, the Court decided a pair of cases, *United States* v. *Marigold*[77] and *Fox* v. *Ohio*.[78] While addressing other matters in those decisions, the Court offered passing approval to the possibility of successive state and federal prosecutions, but did so without analysis and without actually upholding a successive conviction. Indeed, in place of a careful constitutional analysis, the *Fox* Court merely offered its judgment that "the benignant spirit" of prosecutors could be relied on to protect individuals from too many repetitive prosecutions.[79] We do not normally give precedential effect to such stray commentary.

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[72] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (dissenting opinion) (footnotes omitted).

[73] *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009).

[74] *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997).

[75] *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 248 (2019).

[76] *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018).

[77] 9 How. 560 (1850).

[78] 5 How. 410 (1847).

[79] *Id.*, at 435.

Perhaps the first real roots of the separate sovereigns exception can be traced to this Court's 1852 decision in *Moore* v. *Illinois*.[80] As it did five years later and more notoriously in *Dred Scott*,[81] the Court in *Moore* did violence to the Constitution in the name of protecting slavery and slaveowners. In *Dred Scott*, the Court held that the Due Process Clause prevented Congress from prohibiting slavery in the territories, though of course the Clause did nothing of the sort.[82] And in *Moore*, the Court upheld a state fugitive slave law that it judged important because the States supposedly needed "to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals."[83] The defendant, who had harbored a fugitive slave, objected that upholding the state law could potentially expose him to double prosecutions by the state and federal governments. The Court rejected that argument, reasoning simply that such double punishment could be consistent with the Constitution if the defendant had violated both state and federal law.[84] Yet notably, even here, the Court did not actually approve a successive prosecution.

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Nor did the trajectory of the separate sovereigns exception improve much from there. The first time the Court actually approved an "instance of double prosecution [and] failed to find some remedy . . . to avoid it" didn't arrive until 1922.[85] In that case, *United States* v. *Lanza*,[86] the federal government prosecuted the defendants for manufacturing, transporting, and possessing alcohol in violation of the Na-

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[80] 14 How. 13.

[81] 19 How. 393.

[82] *Id.*, at 450.

[83] *Moore*, 14 How., at 18.

[84] *Id.*, at 16.

[85] Grant, The *Lanza* Rule of Successive Prosecutions, 32 Colum. L. Rev. 1309, 1311 (1932).

[86] 260 U. S. 377 (1922).

tional Prohibition Act. The defendants argued that they had already been prosecuted by the State of Washington for the same offense. But, notably, the defendants did not directly question the permissibility of successive prosecutions for the same offense under state and federal law. Instead, the defendants argued that both of the laws under which they were punished really derived from the "same sovereign:" the national government, by way of the Eighteenth Amendment that authorized Prohibition. After rejecting that argument as an "erroneous view of the matter," the Court proceeded on, perhaps unnecessarily, to offer its view that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[87] Given that the Court was not asked directly to consider the propriety of successive prosecutions under separate state and federal laws for the same offense, it is perhaps unsurprising the Court did not consult the original meaning of the Double Jeopardy Clause or consult virtually any of the relevant historical sources before offering its dictum.

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It matters, too, that these cases "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."[88] In *Moore*, Justice McLean wrote that although "the Federal and State Governments emanate from different sovereignties," they "operate upon the same people, and should have the same end in view."[89] He "deeply regret[ted] that our government should be an exception to a great principle of action, sanctioned by humanity and justice."[90] *Bartkus* and *Abbate*, cases decided in the 1950s that more clearly approved the separate sovereigns exception, were decided only by 5-to-4 and 6-to-3 margins, and Justice Black's eloquent dissents in

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[87] *Id.*, at 381, 382.

[88] *Payne* v. *Tennessee*, 501 U. S. 808, 828–829 (1991).

[89] 14 How., at 22 (dissenting opinion).

[90] *Ibid.*

those cases have triggered an avalanche of persuasive academic support.[91]

What is more, the "underpinnings" of the separate sovereigns exception have been "erode[d] by subsequent decisions of this Court."[92] When this Court decided *Moore*, *Lanza*, *Bartkus*, and *Abbate*, the Double Jeopardy Clause applied only to the *federal* government under this Court's decision in *Palko* v. *Connecticut*.[93] In those days, one might have thought, the separate sovereigns exception at least served to level the playing field between the federal government and the States: If a State could retry a defendant after a federal trial, then the federal government ought to be able to retry a defendant after a state trial. But in time the Court overruled *Palko* and held that the Double Jeopardy Clause *does* apply to the States—and, with that, a premise once thought important to the exception fell away.[94]

Nor has only the law changed; the world has too. And when "far-reaching systemic and structural changes" make an "earlier error all the more egregious and harmful," *stare decisis* can lose its force.[95] In the era when the separate sovereigns exception first emerged, the federal criminal code was new, thin, modest, and restrained. Today, it can make none of those of boasts. Some suggest that "the federal

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[91] See, *e. g.*, Cassell, The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine, 41 UCLA L. Rev. 693, 708–720 (1994); Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1 (1992); Amar & Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 6–15 (1995); King, The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, 31 Stan. L. Rev. 477 (1979).

[92] *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

[93] 302 U. S. 319, 328–329 (1937).

[94] *Benton*, 395 U. S., at 794.

[95] *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 184 (2018) (internal quotation marks omitted).

government has [now] duplicated virtually every major state crime."[96] Others estimate that the U. S. Code contains more than 4,500 criminal statutes, not even counting the hundreds of thousands of federal regulations that can trigger criminal penalties.[97] Still others suggest that "'[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.'"[98] If long ago the Court could have thought "the benignant spirit" of prosecutors rather than unwavering enforcement of the Constitution sufficient protection against the threat of double prosecutions, it's unclear how we still might.

That leaves reliance. But the only people who have relied on the separate sovereigns exception are prosecutors who have sought to double-prosecute and double-punish. And this Court has long rejected the idea that "law enforcement reliance interests outweig[h] the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule."[99] Instead, "[i]f it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence."[100] That is the case here.

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The Court today disregards these lessons. It worries that overturning the separate sovereigns rule could undermine the reliance interests of prosecutors in transnational cases who might be prohibited from trying individuals already acquitted by a foreign court. *Ante*, at 686–687. Yet even on its own

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[96] E. Meese, Big Brother on the Beat: The Expanding Federalization of Crime, 1 Tex. Rev. L. & Pol. 1, 22 (1997).

[97] See Wilson, That Justice Shall Be Done, 36 No. Ill. L. Rev. 111, 121 (2015).

[98] Clark & Joukov, Criminalization of America, 76 Ala. L. 225 (2015). See also Larkin, Public Choice Theory and Overcriminalization, 36 Harv. J. L. & Pub. Pol'y 715, 726 (2013) ("There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes").

[99] *Arizona* v. *Gant*, 556 U. S. 332, 350 (2009).

[100] *Id.*, at 349.

terms, this argument is unpersuasive. The government has not even attempted to quantify the scope of the alleged "problem," and perhaps for good reason. Domestic prosecutors regularly coordinate with their foreign counterparts when pursuing transnational criminals, so they can often choose the most favorable forum for their mutual efforts. And because *Blockburger* requires an identity of elements before the double jeopardy bar can take hold, domestic prosecutors, armed with their own abundant criminal codes, will often be able to find new offenses to charge if they are unsatisfied with outcomes elsewhere.

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Enforcing the Constitution always bears its costs. But when the people adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs. It is not for this Court to reassess this judgment to make the prosecutor's job easier. Nor is there any doubt that the benefits the framers saw in prohibiting double prosecutions remain real, and maybe more vital than ever, today. When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is "the poor and the weak,"[101] and the unpopular and controversial, who suffer first—and there is nothing to stop them from being the last. The separate sovereigns exception was wrong when it was invented, and it remains wrong today.

I respectfully dissent.

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[101] *Bartkus*, 359 U. S., at 163 (Black, J., dissenting).

Syllabus

VIRGINIA URANIUM, INC., ET AL. *v.* WARREN ET AL.

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

No. 16–1275. Argued November 5, 2018—Decided June 17, 2019

Petitioner Virginia Uranium, Inc., wants to mine raw uranium ore from a site near Coles Hill, Virginia, but Virginia law flatly prohibits uranium mining in the Commonwealth. The company filed suit, alleging that, under the Constitution's Supremacy Clause, the Atomic Energy Act (AEA) preempts state uranium mining laws like Virginia's and ensconces the Nuclear Regulatory Commission (NRC) as the lone regulator in the field. Both the District Court and the Fourth Circuit rejected the company's argument, finding that while the AEA affords the NRC considerable authority over the nuclear fuel life cycle, it offers no hint that Congress sought to strip States of their traditional power to regulate mining on private lands within their borders.

Held: The judgment is affirmed.

848 F. 3d 590, affirmed.

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JUSTICE GORSUCH, joined by JUSTICE THOMAS and JUSTICE KAVANAUGH, concluded that the AEA does not preempt Virginia's law banning uranium mining. Pp. 767–780.

(a) Virginia Uranium claims that the AEA is best read to reserve to the NRC alone the regulation of uranium mining based on nuclear safety concerns. But the AEA contains no provision expressly preempting state law. More pointedly, it grants the NRC extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining, expressly stating that the NRC's regulatory powers arise only "after [uranium's] removal from its place of deposit in nature," 42 U. S. C. § 2092. And statutory context confirms this reading: If the federal government wants to control uranium mining on private land, it must purchase or seize the land by eminent domain and make it federal land, § 2096, indicating that state authority remains untouched. Later amendments to the AEA point to the same conclusion. Section 2021 allows the NRC to devolve certain of its regulatory powers to the States but does nothing to extend the NRC's power to activities, like mining, historically beyond its reach. And § 2021(k) explains that States remain free to regulate the activities discussed in § 2021 for purposes other than nuclear safety without the NRC's consent. Virginia Uranium contends instead that subsection (k) greatly expands the AEA's preemptive effect by demanding the displacement of any state

law enacted for the purpose of protecting the public against "radiation hazards." But subsection (k) merely clarifies that nothing in § 2021 limits States' ability to regulate the activities subject to NRC control for other purposes. In addition, the company's reading would prohibit not only the States from regulating uranium mining to protect against radiation hazards but the federal government as well, since the AEA affords it no authority to regulate uranium mining on private land. Pp. 768–771.

(b) Virginia Uranium also submits that preemption may be found in this Court's precedents, pointing to *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, which rejected a preemption challenge to a state law prohibiting the construction of new nuclear power plants after the Court observed that it was enacted out of concern with economic development, not for the purpose of addressing radiation safety hazards. But *Pacific Gas* concerned a state moratorium on construction of new nuclear power plants, and nuclear plant construction has always been an area exclusively regulated by the federal government. It is one thing to inquire exactingly into state legislative purposes when state law comes close to trenching on core federal powers; it is another thing altogether to insist on the same exacting scrutiny for state laws far removed from core NRC powers. Later cases confirm the propriety of restraint in this area. See, *e. g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238; *English* v. *General Elec. Co.*, 496 U. S. 72. This Court has generally treated field preemption as depending on *what* the State did, not *why* it did it. See, *e. g.*, *Arizona* v. *United States*, 567 U. S. 387. And because inquiries into legislative purpose both invite well-known conceptual and practical problems and pose risks to federalism and individual liberty, this Court has long warned against undertaking potential misadventures into hidden state legislative intentions without a clear statutory mandate for the project, see, *e. g.*, *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 404–405. Pp. 771–777.

(c) Virginia Uranium alternatively suggests that the AEA displaces state law through so-called conflict preemption—in particular, that Virginia's mining law stands as an impermissible "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67. But any "[e]vidence of pre-emptive purpose," whether express or implied, must be "sought in the [statute's] text and structure." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664. Efforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent. The only thing a court can be sure of is what can be found in the law itself. And the compromise that Congress actually struck in the AEA leaves mining regulation on private land to

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the States and grants the NRC regulatory authority only *after* uranium is removed from the earth. It is also unclear whether laws like Virginia's might have a meaningful impact on the development of nuclear power in this country given the other available foreign and domestic sources of uranium. Pp. 777–780.

JUSTICE GINSBURG, joined by JUSTICE SOTOMAYOR and JUSTICE KAGAN, agreed with JUSTICE GORSUCH that the Commonwealth's mining ban is not preempted but concluded that his discussion of the perils of inquiring into legislative motive sweeps well beyond the confines of this case. Further, Virginia Uranium's obstacle preemption arguments fail under existing doctrine, so there is little reason to question whether that doctrine should be retained. Pp. 780–793.

(a) The Commonwealth has forbidden conventional uranium mining on private land. The AEA leaves that activity unregulated. State law on the subject is therefore not preempted, whatever the reason for the law's enactment. Pp. 786–787.

(b) Section 2021(k) lends no support for Virginia Uranium's cause. That provision is most sensibly read to clarify that the door newly opened for state regulation of certain activities for nuclear safety purposes left in place pre-existing state authority to regulate activities for nonradiological purposes. House and Senate Reports endorse this reading of § 2021(k). Pp. 787–788.

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(c) Virginia Uranium leans heavily on a statement in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, that "the Federal Government has occupied the entire field of nuclear safety concerns." *Id.*, at 212. But neither in that case nor in later decisions in its wake—*Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238; *English* v. *General Elec. Co.*, 496 U. S. 72—did the Court rest preemption on the purposes for which state laws were enacted. Indeed, in all three, the Court held that the laws at issue were not preempted. Moreover, the state law involved in *Pacific Gas* addressed an activity—construction of nuclear power plants—closely regulated by the AEA. Inquiry into why the state law at issue in that case was enacted was therefore proper under § 2021(k). The Commonwealth's mining ban, in contrast, governs an activity not regulated by the AEA. Pp. 788–789.

(d) The Solicitor General's argument—that the Commonwealth's mining ban is preempted because it is a pretext for regulating the radiological safety hazards of milling and tailings storage—is unpersuasive. To the degree the AEA preempts state laws based on the purposes for which they were enacted, § 2021(k) stakes out the boundaries of the preempted field. *National Meat Assn.* v. *Harris*, 565 U. S. 452, distinguished. Pp. 789–791.

Syllabus

(e) Virginia Uranium and the United States also fail to show that the mining ban creates an "unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth* v. *Levine*, 555 U. S. 555, 563–564. Pp. 791–793.

GORSUCH, J., announced the judgment of the Court and delivered an opinion, in which THOMAS and KAVANAUGH, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which SOTOMAYOR and KAGAN, JJ., joined, *post*, p. 780. ROBERTS, C. J., filed a dissenting opinion, in which BREYER and ALITO, JJ., joined, *post*, p. 793.

Charles J. Cooper argued the cause for petitioners. With him on the briefs were *Michael W. Kirk* and *John D. Ohlendorf*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Stewart*, *Ann O' Connell*, *Varu Chilakamarri*, and *Charles E. Mullens*.

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Toby J. Heytens, Solicitor General of Virginia, argued the cause for respondents. With him on the brief were *Mark R. Herring*, Attorney General, *Stephen A. Cobb*, Deputy Attorney General, *Paul Kugelman*, Senior Assistant Attorney General, *Matthew R. McGuire*, Principal Deputy Solicitor General, and *Michelle S. Kallen*, Deputy Solicitor General Designate.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Erin E. Murphy*; for Entergy Operations, Inc., et al. by *Kathleen M. Sullivan*, *Sanford I. Weisburst*, *Ellyde R. Thompson*, *William B. Glew, Jr.*, and *Timothy A. Ngau*; for Former Nuclear Regulators by *Jay E. Silberg* and *Cynthia Cook Robertson*; for the Nuclear Energy Institute by *Peter C. Meier*, *Stephen B. Kinnaird*, *Sean D. Unger*, and *Ellen C. Ginsberg*; and for Sen. Tom Cotton et al. by *Gordon D. Todd*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Kian J. Hudson* and *Julia C. Payne*, Deputy Attorneys General, by *Robert W. Ferguson*, Attorney General of Washing-

JUSTICE GORSUCH announced the judgment of the Court and delivered an opinion, in which JUSTICE THOMAS and JUSTICE KAVANAUGH join.

Virginia Uranium insists that the federal Atomic Energy Act of 1954 (AEA) preempts a state law banning uranium mining, but we do not see it. True, the AEA gives the Nuclear Regulatory Commission (NRC) significant authority over the milling, transfer, use, and disposal of uranium, as well as the construction and operation of nuclear power plants. But Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders. Nor do we see anything to suggest that the enforcement of Virginia's law would frustrate the AEA's purposes and objectives. And we are hardly free to extend a federal statute to a sphere Congress was well aware of but chose to leave alone. In this, as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write.

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I

Virginia Uranium thought its plan was pretty straightforward. First, the company wanted to use conventional mining techniques to extract raw uranium ore from a site

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ton, *Noah G. Purcell*, Solicitor General, and *Koalani Kaulukukui-Barbee*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Russell A. Suzuki* of Hawaii, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Gurbir S. Grewal* of New Jersey, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, and *Ken Paxton* of Texas; for the Members of the Southern Virginia Delegation to the Virginia General Assembly et al. by *Cale Jaffe* and *Anthony F. Troy*; for the National Conference of State Legislators et al. by *John J. Korzen* and *Lisa Soronen*; for Preemption Law Professors by *Derek T. Ho*; and for the Roanoke River Basin Association et al. by *Sean H. Donohue*, *David T. Goldberg*, and *Matthew Littleton*.

near Coles Hill, Virginia. Next, it intended to mill that ore into a usable form. Typically performed at the mine site, milling involves grinding the ore into sand-sized grains and then exposing it to a chemical solution that leaches out pure uranium. Once dried, the resulting mixture forms a solid "yellowcake," which the company planned to sell to enrichment facilities that produce fuel for nuclear reactors. Finally, because the leaching process does not remove all of the uranium from the ore, the company expected to store the leftover "tailings" near the mine to reduce the chances of contaminating the air or water.

But putting the plan into action didn't prove so simple. Pursuant to the AEA, ch. 724, 60 Stat. 755, 42 U. S. C. § 2011 *et seq.*, the NRC regulates milling and tailing storage activities nationwide, and it has issued an array of rules on these subjects. See, *e. g.*, 10 CFR § 40 *et seq.* (2018). None of those, though, proved the real problem for Virginia Uranium. The company hit a roadblock even before it could get to the point where the NRC's rules kick in: State law flatly prohibits uranium mining in Virginia. See Va. Code Ann. §§ 45.1–161.292:30, 45.1–283 (2013); 848 F. 3d 590, 593–594 (CA4 2017).

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To overcome that obstacle, Virginia Uranium filed this lawsuit. The company alleged that, under the Constitution's Supremacy Clause, the AEA preempts state uranium mining laws like Virginia's and ensconces the NRC as the lone regulator in the field. And because the NRC's regulations say nothing about uranium mining, the company continued, it remains free to mine as it will in Virginia or elsewhere.

Both the district court and a divided panel of the Fourth Circuit rejected the company's argument. The courts acknowledged that the AEA affords the NRC considerable authority over the nuclear fuel life cycle. But both courts found missing from the AEA any hint that Congress sought to strip States of their traditional power to regulate mining on private lands within their borders. Given the signifi-

cance of the question presented, we granted review. 584 U. S. 922 (2018).

II

The Supremacy Clause supplies a rule of priority. It provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are "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 Court has sometimes used different labels to describe the different ways in which federal statutes may displace state laws—speaking, for example, of express, field, and conflict preemption. But these categories "are not rigidly distinct." *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372, n. 6 (2000) (internal quotation marks omitted). And at least one feature unites them: Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to "a constitutional text or a federal statute" that does the displacing or conflicts with state law. *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988); see also 3 J. Story, Commentaries on the Constitution of the United States § 1831, p. 694 (1st ed. 1833) ("the supremacy of the laws is attached to those only, which are made in pursuance of the constitution").

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Before us, Virginia Uranium contends that the AEA (and only the AEA) unseats state uranium mining regulations and that it does so under the doctrines of both field and conflict preemption. We examine these arguments about the AEA's preemptive effect much as we would any other about statutory meaning, looking to the text and context of the law in question and guided by the traditional tools of statutory interpretation. Here, no more than in any statutory interpretation dispute, is it enough for any party or court to rest on a supposition (or wish) that "it must be in there somewhere."

A

We begin with the company's claim that the text and structure of the AEA reserve the regulation of uranium mining for the purpose of addressing nuclear safety concerns to the NRC alone—and almost immediately problems emerge. Unlike many federal statutes,[1] the AEA contains no provision preempting state law in so many words. Even more pointedly, the statute grants the NRC extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining. Companies like Virginia Uranium must abide the NRC's rules and regulations if they wish to handle enriched uranium, to mill uranium ore or store tailings, or to build or run a nuclear power plant. See 42 U. S. C. §§2111(a), 2113(a), 2073. But when it comes to mining, the statute speaks very differently, expressly stating that the NRC's regulatory powers arise only "*after* [uranium's] removal from its place of deposit in nature." §2092 (emphasis added). As the government itself has conceded, this means that "uranium mining" lies "outside the NRC's jurisdiction," Brief for United States as *Amicus Curiae* 14, and the agency's grip takes hold only "at the mill, rather than at the mine," *In re Hydro Resources, Inc.*, 63 N. R. C. 510, 512 (2006).

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What the text states, context confirms. After announcing a general rule that mining regulation lies outside the NRC's jurisdiction, the AEA carves out a notably narrow exception. On *federal* lands, the statute says, the NRC may regulate uranium mining. §2097. And if the federal government wants to control mining of uranium on *private* land, the AEA tells the NRC exactly what to do: It may purchase or seize the land by eminent domain and *make* it federal land. §2096. Congress thus has spoken directly to the question

[1] See, *e. g.*, *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 594–595 (2011); *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 867 (2000).

of uranium mining on private land, and every bit of what it's said indicates that state authority remains untouched.

Later amendments to the AEA point to the same conclusion. Some years after the statute's passage, Congress added a provision, currently codified in § 2021, allowing the NRC to devolve certain of its regulatory powers to the States. Unsurprisingly, Congress indicated that the NRC must maintain regulatory control over especially sensitive activities like the construction of nuclear power plants. § 2021(c). But under § 2021(b) the NRC may now, by agreement, pass to the States some of its preexisting authorities to regulate various nuclear materials "for the protection of the public health and safety from radiation hazards." Out of apparent concern that courts might (mis)read these new provisions as prohibiting States from regulating any activity even tangentially related to nuclear power without first reaching an agreement with the NRC, Congress added subsection (k):

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> "Nothing in this section [that is, § 2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

Section 2021, thus, did nothing to extend the NRC's power to activities, like mining, historically beyond its reach. Instead, it served only to allow the NRC to share with the States some of the powers previously reserved to the federal government. Even then, the statute explained in subsection (k) that States remain free to regulate the activities discussed in § 2021 for purposes *other than* nuclear safety without the NRC's consent. Indeed, if anything, subsection (k) might be described as a *non-preemption* clause.

Virginia Uranium's case hinges on a very different construction of subsection (k). The company suggests that, properly read, the provision greatly expands the preemptive effect of the AEA and demands the displacement of *any*

state law (touching on mining or any other subject) if that law was enacted for the purpose of protecting the public against "radiation hazards." And, the company adds, Virginia's law bears just such an impermissible purpose.

In our view, this reading nearly turns the provision on its head. Subsection (k) does not displace traditional state regulation over mining or otherwise extend the NRC's grasp to matters previously beyond its control. It does not expose every state law on every subject to a searching judicial inquiry into its latent purposes. Instead and much more modestly, it clarifies that "nothing in this [new] section [2021]"—a section allowing for the devolution-by-agreement of federal regulatory authority—should be construed to curtail the States' ability to regulate the activities discussed in that *same section* for purposes other than protecting against radiation hazards. So only state laws that seek to regulate the activities discussed in § 2021 without an NRC agreement—activities like the construction of nuclear power plants—may be scrutinized to ensure their purposes aim at something other than regulating nuclear safety. Really, to accomplish all it wants, Virginia Uranium would have to persuade us to read 13 words out of the statute and add 2 more:

> ~~Nothing in this section shall be construed to affect the authority of~~ any State or local agency ~~to~~ **may** regulate activities **only** for purposes other than protection against radiation hazards.

That may be a statute some would prefer, but it is not the statute we have.

Just consider what would follow from Virginia Uranium's interpretation. Not only would States be prohibited from regulating uranium mining to protect against radiation hazards; the federal government likely would be barred from doing so as well. After all, the NRC has long believed, and still maintains, that the AEA affords it no authority to regulate uranium mining on private land. Nor does Virginia

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Uranium dispute the federal government's understanding. Admittedly, if Virginia Uranium were to prevail here, the NRC might respond by changing course and seeking to regulate uranium mining for the first time. But given the statute's terms, the prospects that it might do so successfully in the face of a legal challenge appear gloomy. Admittedly, as well, federal air and water and other regulations might apply at a uranium mine much as at any other workplace. But the possibility that both state and federal authorities would be left unable to regulate the unique risks posed by an activity as potentially hazardous as uranium mining seems more than a little unlikely, and quite a lot to find buried deep in subsection (k). Talk about squeezing elephants into mouseholes. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

B

If the best reading of the AEA doesn't require us to hold the state law before us preempted, Virginia Uranium takes another swing in the same direction. Only this time, the company submits, our precedents have adopted a different, even if maybe doubtful, reading of the AEA that we must follow. Most prominently, Virginia Uranium points to this Court's decision in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983).

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But here, too, problems quickly appear. *Pacific Gas rejected* a preemption challenge to a state law prohibiting the construction of new nuclear power plants. Along the way, the Court expressly dismissed the notion that §2021 establishes the federal government as "the sole regulator of all matters nuclear." *Id.*, at 205. The Court observed that subsection (k) addresses itself only to "the pre-emptive effect of 'this section,' that is [§2021]." *Id.*, at 210. And the Court acknowledged that subsection (k) does not "cut back on pre-existing state authority outside the NRC's jurisdic-

tion," a field that surely includes uranium mining. *Id.*, at 209–210. None of this remotely helps Virginia Uranium's cause.

Still, Virginia Uranium seeks to make the best of a bad situation. The company points out that *Pacific Gas* upheld the state law at issue there only after observing that it was enacted out of concern with economic development, not for the purpose of addressing radiation safety hazards. *Id.*, at 205. From this, the company reasons, we should infer that *any* state law enacted with the purpose of addressing nuclear hazards must fall thanks to our precedent.

But even that much does not follow. Since the passage of the AEA, the NRC has always played a significant role in regulating the construction of nuclear power plants. Indeed, under § 2021(c) this remains one area where the NRC generally cannot devolve its responsibilities to the States. See *id.*, at 197–198, 206–207. And because § 2021 classifies the construction of nuclear power plants as one of the core remaining areas of special federal concern, any state law regulating that activity risks being subjected to an inquiry into its purposes under subsection (k). But the activity Virginia's law regulates—mining on private land—isn't one the AEA has ever addressed, and it isn't one § 2021 discusses, so subsection (k) does not authorize any judicial inquiry into state legislative purpose in this case.

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Admittedly, there is a wrinkle here. *Pacific Gas* seemed to accept California's argument that its law addressed *whether* new power plants may be built, while the NRC's regulatory power under § 2021(c) extends only to the question *how* such plants are constructed and operated. *Id.*, at 212. And accepting (without granting) these premises, it would appear that California's law did *not* implicate an activity addressed by § 2021, so an inquiry into state legislative purpose under subsection (k) was not statutorily authorized. Yet *Pacific Gas* inquired anyway, perhaps on the unstated belief that the state law just came "too close" to a core power § 2021(c) reserves to the federal government. Does that

mean we must do the same? Certainly Virginia Uranium sees it that way.

We do not. Just because *Pacific Gas* may have made more of state legislative purposes than the terms of the AEA allow does not mean we must make more of them yet. It is one thing to do as *Pacific Gas* did and inquire exactingly into state legislative purposes when state law prohibits a regulated activity like the construction of a nuclear plant, and thus comes close to trenching on core federal powers reserved to the federal government by the AEA. It is another thing to do as Virginia Uranium wishes and impose the same exacting scrutiny on state laws prohibiting an activity like mining far removed from the NRC's historic powers. And without some clearer congressional mandate suggesting an inquiry like that would be appropriate, we decline to undertake it on our own authority. The preemption of state laws represents "a serious intrusion into state sovereignty." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 488 (1996) (plurality opinion). And to order preemption based not on the strength of a clear congressional command, or even on the strength of a judicial gloss requiring that much of us, but based only on a doubtful *extension* of a questionable judicial gloss would represent not only a significant federal intrusion into state sovereignty. It would also represent a significant judicial intrusion into Congress's authority to delimit the preemptive effect of its laws. Being in for a dime doesn't mean we have to be in for a dollar.

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This Court's later cases confirm the propriety of restraint in this area. In a decision issued just a year after *Pacific Gas* (and by the same author), this Court considered whether the AEA preempted state tort remedies for radiation injuries after a nuclear plant accident. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984). In doing so, the Court did not inquire into state legislative purposes, apparently because it thought state tort law (unlike a law prohibiting the construction of a nuclear power plant) fell beyond any fair under-

standing of the NRC's reach under the AEA. *Id.*, at 251. Exactly the same, as we have seen, can be said of Virginia's mining law. In fact, if the *Silkwood* Court *had* inquired into state legislative purposes, the law there might well have been harder to sustain than the one now before us. State tort laws, after all, plainly intend to regulate public safety. And as applied in *Silkwood*, state tort law sought to regulate the safety of a nuclear plant's operations, an area of special federal interest under § 2021(c). *Id.*, at 256. Nothing comparable, of course, can be said of the mining regulations before us. Some years later, this Court in *English* v. *General Elec. Co.*, 496 U. S. 72 (1990), went further still, casting doubt on whether an inquiry into state legislative purposes had been either necessary or appropriate in *Pacific Gas* itself. 496 U. S., at 84–85, n. 7 ("Whether the *suggestion* of the majority in *Pacific Gas* that legislative purpose is relevant to the definition of the pre-empted field is part of the *holding* of that case is not an issue before us today" (emphasis added)).

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If *Pacific Gas* and its progeny alone marked our path, this case might be a close one, as our dissenting colleagues suggest. *Post*, at 795–797 (opinion of ROBERTS, C. J.). But for us any lingering doubt dissipates when we consult other cases in this area and this Court's traditional tools of statutory interpretation.[2]

Start with the fact that this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it. Indeed, this Court has analyzed most every other modern field preemption doctrine dispute in this way—from immigration, *Arizona* v. *United States*, 567 U. S. 387 (2012), to arbitration, *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), to foreign affairs, *Crosby*, 530 U. S. 363, to railroads, *Kurns* v. *Railroad Friction Products*

[2] Far from "sweep[ing] well beyond the confines of this case," as our concurring colleagues suggest, see *post*, at 781 (GINSBURG, J., concurring in judgment), these considerations are, to us, essential to its resolution.

Corp., 565 U. S. 625 (2012), to energy, *Hughes* v. *Talen Energy Marketing, LLC*, 578 U. S. 150 (2016), to civil procedure, *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010). It is unclear why we would proceed differently here without some clear congressional instruction requiring it.[3]

Our field preemption cases proceed as they do, moreover, for good reasons. Consider just some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative purpose too precipitately. The natural tendency of regular federal judicial inquiries into state legislative intentions would be to stifle deliberation in state legislatures and encourage resort to secrecy and subterfuge. That would inhibit the sort of open and vigorous legislative debate that our Constitution recognizes as vital to testing ideas and improving laws. In Virginia Uranium's vision as well, federal courts would have to allow depositions of state legislators and governors, and perhaps hale them into court for cross-examination at trial about their subjective motivations in passing a mining statute. And at the end of it all, federal courts would risk subjecting similarly situated persons to radically different legal rules as judges uphold and strike down materially identical state regulations based only on the happenstance of judicial as-

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[3] Certainly the dissent's case, *National Meat Assn.* v. *Harris*, 565 U. S. 452 (2012), doesn't command a different result. There, the Court merely enforced an express statutory preemption clause that prohibited States from setting standards for handling nonambulatory pigs that differed from federal standards. As we've seen, the AEA contains no comparable preemption clause forbidding Virginia to regulate mining in any way. Admittedly, *National Meat* went on to say that a State could not enforce a preempted animal-handling standard indirectly by banning the sale of meat from nonambulatory pigs if its law "function[ed] as a command to slaughterhouses to structure their operations in the exact way" state regulators desired rather than as federal standards required. *Id.*, at 464. But here, by contrast, no one suggests that Virginia's mining law requires anyone to disregard NRC regulations.

sessments of the "true" intentions lurking behind them. In light of all this, it can surprise no one that our precedents have long warned against undertaking potential misadventures into hidden state legislative intentions without a clear statutory mandate for the project. See, *e. g.*, *Shady Grove*, 559 U. S., at 404–405; *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 373–374 (2008); *Palmer* v. *Thompson*, 403 U. S. 217, 225 (1971); *Arizona* v. *California*, 283 U. S. 423, 455, n. 7 (1931) (collecting cases).

To be sure, Virginia Uranium insists that we don't need to worry about concerns like these in this case. We don't, the company says, because Virginia has admitted that it enacted its law with the (impermissible) purpose of protecting the public from nuclear safety hazards. But the Commonwealth denies making any such admission. Instead, it says it has merely accepted as true the allegations in the company's complaint about the intentions animating state law for purposes of the Commonwealth's own motion to dismiss this suit under Federal Rule of Civil Procedure 12(b)(6). If the case were to proceed beyond the pleadings stage, Virginia insists, a more searching judicial inquiry into the law's motivation would be inevitable. Whoever may be right about the status of Virginia's admissions in this case, though, the point remains that following Virginia Uranium's lead would require serious intrusions into state legislative processes in future cases.

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Beyond these concerns, as well, lie well-known conceptual and practical ones this Court has also advised against inviting unnecessarily. State legislatures are composed of individuals who often pursue legislation for multiple and unexpressed purposes, so what legal rules should determine when and how to ascribe a particular intention to a particular legislator? What if an impermissible intention existed but wasn't necessary to her vote? And what percentage of the legislature must harbor the impermissible intention before we can impute it to the collective institution? Putting all

that aside, how are courts supposed to conduct a reasonable inquiry into these questions when recorded state legislative history materials are often not as readily available or complete as their federal counterparts? And if trying to peer inside legislators' skulls is too fraught an enterprise, shouldn't we limit ourselves to trying to glean legislative purposes from the statutory text where we began? Even *Pacific Gas* warned future courts against too hastily accepting a litigant's invitation to "become embroiled in attempting to ascertain" state legislative "motive[s]," acknowledging that such inquiries "often" prove "unsatisfactory venture[s]. What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." 461 U. S., at 216 (citation omitted). See also *Shady Grove*, 559 U. S., at 403–404, n. 6; *Palmer*, 403 U. S., at 225; *Edwards* v. *Aguillard*, 482 U. S. 578, 636–639 (1987) (Scalia, J., dissenting). Cf. *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998). We think these warnings wise, and we heed them today.

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C

If the AEA doesn't occupy the field of radiation safety in uranium mining, Virginia Uranium suggests the statute still displaces state law through what's sometimes called conflict preemption. In particular, the company suggests, Virginia's mining law stands as an impermissible "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). On Virginia Uranium's account, Congress sought to capture the benefits of developing nuclear power while mitigating its safety and environmental costs. And, the company contends, Virginia's moratorium disrupts the delicate "balance" Congress sought to achieve between these benefits and costs. Maybe the text of the AEA doesn't touch on mining in so many words, but its authority to regulate later stages of the nuclear fuel life cycle would be effectively undermined if mining laws like Virginia's were allowed.

A sound preemption analysis cannot be as simplistic as that. No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws "made in pursuance of" the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect. Art. VI, cl. 2; *ISLA Petroleum*, 485 U. S., at 503. So any "[e]vidence of pre-emptive purpose," whether express or implied, must therefore be "sought in the text and structure of the statute at issue." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993).

Sound and well-documented reasons underlie this rule too. Efforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent. Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are fully realized in the final product. Hefty inferences may be required, as well, when trying to estimate whether Congress would have wanted to prohibit States from pursuing regulations that may happen to touch, in various degrees and different ways, on unenacted federal purposes and objectives. Worse yet, in piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text—compromises that sometimes may seem irrational to an outsider coming to the statute cold, but whose genius lies in having won the broad support our Constitution demands of any new law. In disregarding these legislative compromises, we may only wind up displacing perfectly legitimate state laws on the strength of "purposes" that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme. See, *e. g.*,

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Pacific Gas, 461 U. S., at 222 (acknowledging that under the AEA "the promotion of nuclear power is not to be accomplished 'at all costs' "); *Cyan, Inc.* v. *Beaver County Employees Retirement Fund*, 583 U. S. 416, 433–434 (2018); *Aguillard*, 482 U. S., at 636–639 (Scalia, J., dissenting); *United States* v. *O'Brien*, 391 U. S. 367, 382–384 (1968); *Fletcher* v. *Peck*, 6 Cranch 87, 130 (1810).

So it may be that Congress meant the AEA to promote the development of nuclear power. It may be that Congress meant the AEA to balance that goal against various safety concerns. But it also may be that Members of Congress held many other disparate or conflicting goals in mind when they voted to enact and amend the AEA, and many different views on exactly how to manage the competing costs and benefits. If polled, they might have reached very different assessments, as well, about the consistency of Virginia's law with their own purposes and objectives. The only thing a court can be sure of is what can be found in the law itself. And every indication in the law before us suggests that Congress elected to leave mining regulation on private land to the States and grant the NRC regulatory authority only *after* uranium is removed from the earth. That compromise may not be the only permissible or even the most rationally attractive one, but it is surely both permissible and rational to think that Congress might have chosen to regulate the more novel aspects of nuclear power while leaving to States their traditional function of regulating mining activities on private lands within their boundaries.[4]

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[4] The concurrence takes a slightly different tack. It seems to accept the premise that the Court can divine the unenacted "purposes" and "objectives" underlying the AEA and weigh them against Virginia's mining law. But in rejecting Virginia Uranium's argument, it winds up emphasizing repeatedly that the *text* of the AEA does not address mining. See *post*, at 791–793. That may not fully address Virginia Uranium's assertion that state mining regulations interfere with a latent statutory purpose lying *beyond* the text, but it does highlight the propriety of confining our inquiries to the statute's terms.

As an alternative to proceeding down the purposes-and-objectives branch of conflict preemption, Virginia Uranium might have pursued another. Our cases have held that we can sometimes infer a congressional intent to displace a state law that makes compliance with a federal statute impossible. *English*, 496 U. S., at 79. But Virginia Uranium hasn't pursued an argument along any of these lines, and understandably so. Not only *can* Virginia Uranium comply with both state and federal laws; it is also unclear whether laws like Virginia's might have a meaningful impact on the development of nuclear power in this country. Some estimate that the United States currently imports over 90 percent of the uranium used in this country. 848 F. 3d, at 599. Domestic uranium mines currently exist on federal lands as well and are thus beyond the reach of state authorities. *Ibid.* And if the federal government concludes that development of the Coles Hill deposit or any other like it is crucial, it may always purchase the site (or seize it through eminent domain) under the powers Congress has supplied. 42 U. S. C. § 2096. All this may be done without even amending the AEA, itself another course which Congress is always free to pursue—but which this Court should never be tempted into pursuing on its own.

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The judgment of the court of appeals is

Affirmed.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, concurring in the judgment.

Soon after discovery of a large deposit of uranium ore in Virginia in the late 1970s, the Commonwealth banned uranium mining. Petitioners (collectively, Virginia Uranium) now seek to mine that deposit. They challenge the Commonwealth's uranium mining ban as preempted by the Atomic Energy Act (AEA or Act), 42 U. S. C. § 2011 *et seq.*,

either because the ban intrudes on the federally occupied field of nuclear safety, or because it obstructs realization of federal purposes and objectives.

I reach the same bottom-line judgment as does JUSTICE GORSUCH: The Commonwealth's mining ban is not preempted. And I agree with much contained in JUSTICE GORSUCH's opinion. See *ante,* at 768–774. But his discussion of the perils of inquiring into legislative motive, see *ante,* at 774–777, sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court. Further, Virginia Uranium's obstacle preemption arguments fail under existing doctrine, so there is little reason to question, as JUSTICE GORSUCH does, see *ante,* at 777–779, whether that doctrine should be retained. For these reasons, I join the Court's judgment, and separately state how I would resolve the instant controversy.

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I

A

The production of nuclear fuel begins with mining uranium, a radioactive metal. See *ante,* at 765–766; Brief for Former Nuclear Regulators as *Amici Curiae* 7. Conventionally, uranium ore is mined and then "milled"—crushed and treated with chemicals that extract the usable uranium. *Ibid.* The resulting concentrated uranium oxide, known as yellowcake, is shipped elsewhere for conversion, enrichment, and fabrication into fuel. *Ibid.* Producing just a pound of usable uranium requires milling hundreds or even thousands of pounds of ore. H. R. Rep. No. 95–1480, pt. 1, p. 11 (1978). Milling thus generates vast quantities of "tailings": Sandy waste that is radioactive, contains toxic heavy metals, *ibid.*, and must "be carefully regulated, monitored, and controlled," U. S. NRC, Conventional Uranium Mills (rev. May 15, 2017), https://www.nrc.gov/materials/uranium-recovery/extraction-methods/conventional-mills.html (as last visited

June 12, 2019). Milling and tailings storage typically occur within 30 miles of the place where uranium is mined. *Ibid.*

The Federal Government regulates much of this process, primarily to protect public health and safety from radiation, but also for national security reasons. *English* v. *General Elec. Co.*, 496 U. S. 72, 81–82 (1990); *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 207, 211–212 (1983) (*PG&E*). Under the AEA, a federal license is required to, *inter alia*, "transfer or receive in interstate commerce" nontrivial quantities of "source material," including uranium ore, "after removal from its place of deposit in nature," §§ 2092, 2014(z). See also §§ 2091–2099. Licensing requirements also apply to the production, possession, or disposal of "byproduct material," including tailings. See §§ 2014(e), 2111–2114. Federal regulations govern, as well, subsequent processes, including uranium enrichment and nuclear power generation. See, *e. g.*, §§ 2131–2142.

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The Federal Government does not regulate conventional uranium mining on private land, having long taken the position that its authority begins "at the mill, rather than at the mine." *In re Hydro Resources, Inc.*, 63 N. R. C. 510, 512 (2006); Brief for United States as *Amicus Curiae* 4. See also *ante*, at 768–769. And while the Federal Government has exclusive authority over the radiation hazards of milling and subsequent stages of the nuclear fuel cycle, States may regulate these activities for other purposes. See § 2018 (AEA does not affect state authority over "the generation, sale, or transmission of electric power produced" by nuclear powerplants); *English*, 496 U. S., at 81–82; *PG&E*, 461 U. S., at 207, 211–212.

The AEA provides a means by which States may take over federal responsibility for regulating the nuclear safety aspects of milling and the disposal of tailings. See 42 U. S. C. § 2021. In 1959, Congress amended the AEA to "recognize the interests of the States in the peaceful uses of atomic en-

ergy, and to clarify the respective responsibilities under th[e] Act of the States and [federal authorities] with respect to the regulation of byproduc[t and] source . . . materials." Act of Sept. 23, 1959, 73 Stat. 688, as amended, 42 U. S. C. §2021(a)(1). The Nuclear Regulatory Commission (NRC) and a State may agree for the former to devolve to the latter authority to regulate source or byproduct materials "for the protection of the public health and safety from radiation hazards." §2021(b). "During the duration of such an agreement . . . the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." *Ibid.* Section 2021(c) prohibits the NRC, however, from devolving its authority over "more dangerous activities—such as nuclear reactors." S. Rep. No. 870, 86th Cong., 1st Sess., 8 (1959). Finally, and of critical importance to this case, §2021(k) provides that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

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B

In the late 1970s, uranium ore was discovered under Coles Hill, an unincorporated community in Pittsylvania County, Virginia. App. to Pet. for Cert. 216a. Totaling 119 million pounds of uranium ore, the deposit is the Nation's largest. *Id.*, at 201a. See also 848 F. 3d 590, 593 (CA4 2017) (case below). After a private company began leasing mineral rights to the deposit, the Virginia General Assembly directed the state Coal and Energy Commission to study the effects on the environment and public health of uranium exploration, mining, and milling. H. J. Res. No. 324, 1981 Va. Acts p. 1404; App. to Pet. for Cert. 216a.

The next year, the General Assembly authorized uranium exploration but imposed a one-year moratorium on uranium mining. 1982 Va. Acts ch. 269. The Assembly's stated pur-

pose was "to encourage and promote the safe and efficient exploration for uranium resources within the Commonwealth, and to assure . . . that uranium mining and milling will be subject to statutes and regulations which protect the environment and the health and safety of the public." *Ibid.* The Assembly soon extended the ban "until a program for permitting uranium mining is established by statute." 1983 Va. Acts ch. 3. The Commonwealth has not established a permitting program, so the ban remains in force.

A slowdown in construction of new nuclear powerplants in the 1980s contributed to a "precipitous decline in the price of uranium ore." *Huffman* v. *Western Nuclear, Inc.*, 486 U. S. 663, 666–667, and n. 5 (1988). Rising prices in the first decade of the new millennium prompted renewed interest in mining the deposit, and Virginia Uranium lobbied to have the ban repealed. App. to Pet. for Cert. 222a; Brief for United States as *Amicus Curiae* 9.

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When efforts to persuade the state legislature proved unsuccessful, Virginia Uranium brought this suit seeking a declaration that the ban is preempted by federal law and an injunction requiring the Commonwealth to issue uranium mining permits. App. to Pet. for Cert. 237a. Respondents, Virginia Department of Mines, Minerals, and Energy officials (together, the Commonwealth Defendants), moved to dismiss the complaint for failure to state a claim, and the District Court granted the motion. *Virginia Uranium, Inc.* v. *McAuliffe*, 147 F. Supp. 3d 462, 478 (WD Va. 2015).[1] The Court of Appeals for the Fourth Circuit affirmed, holding in principal part that because the Commonwealth's mining ban did not regulate an activity overseen by the NRC, there was

[1] The District Court also dismissed the Commonwealth's Governor and several other state officials as defendants on the ground that the Eleventh Amendment barred suit against them. *Virginia Uranium, Inc.* v. *McAuliffe*, 147 F. Supp. 3d 462, 467–468 (WD Va. 2015). Virginia Uranium did not appeal from that part of the District Court's decision.

no need to consider the purposes for which the ban was imposed. 848 F. 3d, at 597–598. Given the importance of the issue, and to resolve a division of authority among the Courts of Appeals, we granted Virginia Uranium's petition for a writ of certiorari. Compare *id.*, at 594–599 (case below), with, *e. g.*, *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F. 3d 1223, 1246 (CA10 2004) (state laws grounded in nuclear safety concerns are preempted).

II

Under the Supremacy Clause, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are "the supreme Law of the Land." Art. VI, cl. 2. "Put simply, federal law preempts contrary state law." *Hughes* v. *Talen Energy Marketing, LLC*, 578 U. S. 150, 162 (2016).

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This Court has delineated three circumstances in which state law must yield to federal law. *English*, 496 U. S., at 78–79. First, and most obvious, federal law operates exclusively when Congress expressly preempts state law. *Ibid.* Second, state law can play no part when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Hughes*, 578 U. S., at 163 (internal quotation marks omitted). Third, state law is rendered inoperative when it "actually conflicts with federal law," *English*, 496 U. S., at 79, as when a private party cannot "comply with both state and federal requirements," *Merck Sharp & Dohme Corp.* v. *Albrecht*, 587 U. S. 299, 303 (2019) (internal quotation marks omitted), or when state law "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Wyeth* v. *Levine*, 555 U. S. 555, 563–564 (2009) (quoting *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)). Whatever the category of preemption asserted, "the purpose of Congress is the ultimate touchstone" in determining

whether federal law preempts state law. *Hughes*, 578 U. S., at 163 (internal quotation marks omitted). Virginia Uranium invokes both field and obstacle preemption; I address each in turn.

A

Virginia Uranium's primary contention is that Congress has occupied the field of nuclear safety regulation, preempting state laws enacted because of concerns about the radiation safety of federally regulated activities. Defining the preempted field by reference to the purpose for which state laws were enacted finds "some support in the text of the [AEA]," *English*, 496 U. S., at 84, and, in particular, § 2021(k). Again, this provision states that "[n]othing in [§ 2021] shall be construed to affect the authority of any State . . . to regulate activities *for purposes other than protection against radiation hazards*." (Emphasis added.) Section 2021(k) presupposes federal preemption of at least some state laws enacted to guard "against radiation hazards." Virginia Uranium and the dissent read this subsection to include within the preempted sphere *all* state laws motivated by concerns about the radiation hazards of NRC-regulated activities. Brief for Petitioners 35; *post*, at 795–796. The Commonwealth Defendants would exclude from federal foreclosure state laws directed to activities not regulated by the NRC. *E. g.*, Tr. of Oral Arg. 33–34. The Commonwealth Defendants have the better reading of the statute.

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1

The Commonwealth has forbidden only conventional uranium mining on private land, an activity all agree is not federally regulated. *E. g.*, *id.*, at 9–10, 17–18, 30. The controlling AEA provision, § 2092, triggers federal regulation only when source material is "remov[ed] from its place of deposit in nature." Federal authorities have long read that provision to preclude federal regulation of conventional uranium mining. *Ante*, at 768; *supra*, at 782. In contrast to the AEA's

express provisions for uranium mining on public lands, §§2097–2098, the Act is nearly silent about conventional uranium mining on private lands. See *ante*, at 768–769. Indeed, insofar as the Act addresses private conventional mining, it does so to bar federal regulators from obtaining reports about ore "prior to removal from its place of deposit in nature." §2095. Every indication, then, is that Congress left private conventional mining unregulated. And if Congress did not provide for regulation of private conventional mining, it is hard to see how or why state law on the subject would be preempted, whatever the reason for the law's enactment.

2

Virginia Uranium's argument to the contrary rests on §2021(k), but that provision, correctly read, lends no support for Virginia Uranium's cause. By its terms, §2021(k) addresses only state authority to regulate "activities" for nonradiological purposes. Read in context of §2021 as a whole, "activities" means activities *regulated by the NRC*. See §2021(c), (*l*), (m), (*o*); *ante*, at 769 (§2021(k) "might be described as a *non-preemption* clause").

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The AEA's context and history are corroborative. Prior to enactment of §2021(k), the Federal Government and States shared responsibility for most steps of the nuclear fuel cycle, with the former regulating primarily for public health and safety, and the latter regulating for economic and other nonradiological purposes. See *supra*, at 782–783. Section 2021 was designed "to heighten the States' role," *PG&E*, 461 U. S., at 209, by enabling federal regulators to cede their previously exclusive authority over the nuclear safety of several lower risk activities, §2021(b). Given this aim, §2021(k) is most sensibly read to clarify that the door newly opened for state regulation left in place pre-existing state authority "to regulate activities for purposes other than protection against radiation hazards." See *ante*, at 769. The House and Senate Reports are explicit on this point: Section

§2021(k) was "intended to make it clear that the bill does not impair the State[s'] authority to regulate activities of [federal] licensees for the manifold health, safety, and economic purposes other than radiation protection"; the bill simply provides a means for States to obtain heretofore exclusively federal authority to regulate these activities for "protection against radiation hazards." S. Rep. No. 870, 86th Cong., 1st Sess., at 12; accord H. R. Rep. No. 1125, 86th Cong., 1st Sess., 12 (1959). Nothing suggests that Congress "intended to cut back on pre-existing state authority outside the NRC's jurisdiction." *PG&E*, 461 U. S., at 209–210. That authority encompassed state laws regulating conventional uranium mining, even if enacted because of concerns about the radiological safety of postextraction, NRC-regulated steps in the nuclear fuel cycle.

3

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Virginia Uranium leans most heavily on a statement in the Court's *PG&E* opinion: "[T]he Federal Government has occupied the entire field of nuclear safety concerns." 461 U. S., at 212. But in neither *PG&E* nor in later decisions in its wake, *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984), and *English*, 496 U. S. 72, did the Court rest preemption on the purposes for which state laws were enacted. Indeed, in all three, the Court held that the state laws at issue were not preempted. See *ante*, at 771–774.

Moreover, without gainsaying that it may sometimes be appropriate to inquire into the purpose for which a state law was enacted, *PG&E* calls for no such inquiry here. *PG&E* considered whether the AEA preempted a California law conditioning approval to build new nuclear plants on a finding that an adequate method existed for disposing of spent nuclear fuel. 461 U. S., at 197–198. The Court upheld the law because it was enacted out of concern for economic development, not because of radiation safety hazards. *Id.*, at 205, 213–216.

It is unsurprising that the *PG&E* Court asked why the California law had been enacted. The State's law addressed construction of a nuclear powerplant, an activity closely regulated by the Federal Government for nuclear safety purposes. See 42 U. S. C. §§ 2021(c)(1), 2132–2142; 10 CFR pt. 50 (2018). The Court therefore inquired whether the state law was enacted, in § 2021(k)'s words, "for purposes other than protection against radiation hazards." Here, in contrast, the Commonwealth's mining ban targets an exclusively state-regulated activity. See *ante,* at 771–774.[2]

4

I am not persuaded by the Solicitor General's argument that the Commonwealth's mining ban is preempted because it is a pretext for regulating the radiological safety hazards of milling and tailings storage. See Brief for United States as *Amicus Curiae* 28–30. To the degree the AEA preempts state laws enacted for certain purposes, § 2021(k) stakes out the boundaries of the preempted field, *i. e.,* state laws that apply to federally licensed activities and are driven by concerns about the radiological safety of those activities. We have no license to expand those boundaries.

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The case on which the Solicitor General primarily relies, *National Meat Assn.* v. *Harris*, 565 U. S. 452 (2012), does not counsel otherwise. *National Meat* concerned a set of California laws that "dictat[ed] what slaughterhouses must do with pigs that cannot walk, known in the trade as nonambulatory pigs." *Id.*, at 455. The question presented: Did California's prescriptions conflict with the Federal Meat In-

[2] The dissent insists that we are bound by language in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983) (*PG&E*), unnecessary to that decision. *Post*, at 796–798. But as JUSTICE GORSUCH explains, *PG&E*'s inquiry into the purpose for which *some* state laws were enacted does not mean we must now extend that inquiry to *all* state laws. *Ante,* at 773 ("Being in for a dime doesn't mean we have to be in for a dollar.").

spection Act's express preemption of state law that imposed requirements "in addition to, or different than those made under" the Act? 21 U. S. C. § 678. One of the California provisions, a ban on the sale of meat or products from nonambulatory pigs, regulated a subject outside the scope of the Federal Meat Inspection Act. *National Meat*, 565 U. S., at 463. The Court nevertheless concluded that the sale ban fell within the scope of the Act's express preemption clause because it was intended to work together with other California provisions to impose additional requirements on slaughterhouse operations. *Id.*, at 463–464.

National Meat is not controlling here. No express preemption provision is involved. The mining ban sets no safety standards for federally supervised milling or tailings storage activities. True enough, the ban makes it far less likely, though not impossible, that such activities will take place in the Commonwealth.[3] In that regard, the Commonwealth's mining ban is more aptly analogized to state bans on slaughtering horses, upheld by courts of appeals and distinguished in *National Meat* from California's nonambulatory pig laws. Horse slaughtering bans, *National Meat* explained, "work[ed] at a remove from the sites and activities that the FMIA most directly governs" by ensuring that "no horses will be delivered to, inspected at, or handled by a slaughterhouse, because no horses will be ordered for purchase in the first instance." *Id.*, at 465, 467 (citing *Cavel Int'l, Inc.* v. *Madigan*, 500 F. 3d 551 (CA7 2007), and *Empacadora de Carnes de Fresnillo, S. A. de C. V.* v. *Curry*, 476 F. 3d 326 (CA5 2007)). The distinction drawn in *National Meat* thus supports this conclusion: A state law regulating an upstream activity within the State's authority is not pre-

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[3] Were a similar deposit found over the state line, the mining ban at issue would not prevent uranium ore mined in North Carolina from being milled, and the resulting tailings stored, in the Commonwealth.

empted simply because a downstream activity falls within a federally occupied field.[4]

B

Nor is the Commonwealth's mining ban preempted as an "unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth*, 555 U. S., at 563–564 (internal quotation marks omitted). Together, Virginia Uranium and the United States identify four ways in which the mining ban supposedly conflicts with federal purposes and objectives. None carry the day.

First, Virginia Uranium contends that the mining ban conflicts with the "delicate balance" federal law has struck between promoting nuclear power and ensuring public safety. Brief for Petitioners 55–56; see Brief for United States as *Amicus Curiae* 31–33. But the Federal Government does not regulate the radiological safety of conventional uranium mining on private land, so federal law struck *no* balance in this area.

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Second, Virginia Uranium contends that the mining ban "*prohibit[s]* the achievement of one of Congress[']s 'primary purpose[s]': 'the promotion of nuclear power.'" Brief for Petitioners 56 (quoting *PG&E*, 461 U. S., at 221). *PG&E*, however, dismissed the suggestion that Congress had a policy of promoting nuclear power "at all costs." *Id.*, at 222 (internal quotation marks omitted). Given the absence of federal regulation in point, it is improbable that the Federal Government has a purpose or objective of promoting conventional uranium mining on private land. Cf. *ante*, at 779.

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[4] The distinction drawn here does not turn, as the dissent misperceives, *post*, at 800, on whether the state-regulated activity is upstream or downstream of the federally preempted field. The Commonwealth regulated an activity, conventional uranium mining, that Congress left to state regulation. Again, nothing in the AEA shows that Congress intended to preempt such a law based on the purpose for which it was enacted.

Virginia Uranium warns of dire consequences if all 50 States enact bans similar to the Commonwealth's. Brief for Petitioners 56–57. But, as the Court of Appeals explained, numerous domestic uranium recovery facilities are federally regulated (either because they sit on federal land or use unconventional mining techniques) and are "thus beyond the reach of any state bans"; and the AEA authorizes the Federal Government to develop uranium deposits on public lands and to acquire private deposits. 848 F. 3d, at 599; see 42 U. S. C. §§ 2096–2097. Federal purposes and objectives do not require judicial supplementation of the AEA's express provisions for maintaining the uranium supply. Cf. *ante*, at 780.

The dissent suggests that national security may require further domestic uranium production. *Post*, at 794, n. 2. If the Executive Branch—which presumably knows more about "the critical role of uranium to the country's energy industry and national defense," *ibid.*—agrees, it can arrange for acquisition of the site by the United States, and then for commencement of mining notwithstanding the Commonwealth's ban. Yet the site remains in private hands.

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Third, Virginia Uranium argues that § 2021 provides the sole means for States to regulate radiological safety hazards resulting from milling and tailings storage, and that Virginia has effectively regulated milling and tailings storage without obtaining authority to do so through an adequate § 2021 agreement. Brief for Petitioners 57–59 (citing *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 98–101 (1992)); see Brief for United States as *Amicus Curiae* 33–34. As explained, see *supra*, at 786–789, 790–791, Virginia has not regulated the radiological safety of tailings storage; it has prohibited only an antecedent activity subject to exclusive state authority.

Finally, the United States contends that Virginia's mining ban frustrates federal purposes and objectives by "prevent-[ing] the occurrence of" activities that Congress intended the

Federal Government to regulate. Brief for United States as *Amicus Curiae* 31 (quoting 848 F. 3d, at 600 (Traxler, J., dissenting)). But federal regulation of certain activities does not mean that States must authorize activities antecedent to those federally regulated. For example, federal regulation of nuclear powerplants does not demand that States allow the construction of such powerplants in the first place. *PG&E*, 461 U. S., at 222.

* * *

For the reasons stated, I concur in the Court's judgment affirming the judgment of the Court of Appeals.

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE ALITO join, dissenting.

Although one party will be happy with the result of today's decision, both will be puzzled by its reasoning. That's because the lead opinion sets out to defeat an argument that no one made, reaching a conclusion with which no one disagrees. Specifically, the opinion devotes its analysis to whether the field of uranium mining safety is preempted under the Atomic Energy Act, ultimately concluding that it is not. But no party disputes that. Rather, the question we agreed to address is whether a State can purport to regulate a field that is *not* preempted (uranium mining safety) as an indirect means of regulating other fields that *are* preempted (safety concerns about uranium milling and tailings). And on that question, our precedent is clear: The AEA prohibits state laws that have the purpose and effect of regulating preempted fields.

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As relevant here, processing uranium ore involves three steps: mining, milling, and storing "tailings." *Mining* is the extracting of uranium ore from the ground; *milling* is the process of turning the substance into a usable form; and *tailings* are the leftover radioactive waste that must be safely stored.

There is no dispute over which of these fields the AEA reserves to the exclusive jurisdiction of the Nuclear Regulatory Commission. The parties agree that the field of uranium *mining* safety is not preempted. See Brief for Petitioners 3, 22, n. 4, 27; Reply Brief 8; Brief for Respondents 1; Brief for United States as *Amicus Curiae* 4, 14. And it is undisputed that radiological safety concerns about *milling* and *tailings* are preempted fields. See Brief for Petitioners 32; Tr. of Oral Arg. 36–37 (counsel for respondents); Brief for United States as *Amicus Curiae* 23. Indeed, that shared understanding was the basis of the question presented.[1]

Despite all this, the lead opinion insists that petitioners (hereafter the company) press an entirely different argument. "Before us, Virginia Uranium contends that the AEA (and only the AEA) unseats state uranium mining regulations," *ante*, at 767, but "almost immediately problems emerge," *ante*, at 768. Problems do immediately emerge in the opinion, but they are of its own making. The company does not argue that the AEA reserves the field of uranium *mining* safety. After attributing this failing argument to the company, the lead opinion then proceeds to explain why the argument must, in fact, fail. See *ante*, at 767–773.

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Turning to the question presented, however, the company's theory of the case is fairly straightforward. The property at issue here contains the largest known uranium deposit in the country and one of the largest in the world.[2]

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[1] "Does the AEA preempt a state law that on its face regulates an activity within its jurisdiction (here uranium mining), but has the purpose and effect of regulating the radiological safety hazards of activities entrusted to the NRC (here, the milling of uranium and the management of the resulting tailings)?" Pet. for Cert. i.

[2] Oddly, the lead opinion and concurrence suggest that developing this site is unnecessary because domestic production accounts for less than ten percent of the uranium used in the country. See *ante*, at 780 (lead opinion); *ante*, at 791–792 (GINSBURG, J., concurring in judgment). But given the critical role of uranium to the country's energy industry and national defense, the near complete reliance on foreign sources of uranium—includ-

Shortly after its discovery, Virginia enacted a complete ban on uranium mining. According to the company, the ban was not motivated by concerns about mining safety. Instead, it was motivated by Virginia's desire to ban the more hazardous steps that come after mining—uranium milling and the storage of radioactive tailings—due to the Commonwealth's disagreement with the NRC over how to safely regulate those activities. And, crucially, Virginia has yet to put forward any other rationale to support the ban.[3] Thus, the question before us is whether, consistent with the AEA and our precedents, the Commonwealth may purport to regulate a non-preempted field (mining safety) with the purpose and effect of indirectly regulating a preempted field (milling and tailings). That should have made for an easy case.

Under our AEA precedents, a state law is preempted not only when it "conflicts with federal law," but also when its *purpose* is to regulate within a preempted field. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 212–213 (1983). Because "the Federal Government has occupied the entire field

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ing substantial imports from Russia, Kazakhstan, and Uzbekistan—would seem to suggest just the opposite. See App. to Pet. for Cert. 353a (detailing foreign sources of uranium imports); 42 U. S. C. § 2012(d) ("The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public."); Energy Futures Initiatives, Inc., The U. S. Nuclear Energy Enterprise: A Key National Security Enabler 18 (Aug. 2017) ("A vibrant domestic nuclear energy industry, including a healthy supply chain . . . is essential for the achievement of U. S. national security objectives.").

[3] As the lead opinion acknowledges, Virginia has thus far in the litigation accepted the company's claim that the actual purpose of the mining ban is to regulate the radiological safety of uranium milling and tailings storage. See *ante*, at 776. Virginia contends that if the case were to proceed past the pleadings stage, it could establish a nonsafety rationale for the ban. See Brief for Respondents 47. That may well be true. See *id.*, at 11 (discussing environmental concerns). But for our purposes today, we must resolve the case on the terms that it has come to us.

of nuclear safety concerns," a state law that is "grounded in [such] safety concerns falls squarely within the prohibited field." *Ibid.*; see also *English* v. *General Elec. Co.*, 496 U. S. 72, 84 (1990) (state regulations "motivated by [nuclear] safety concerns" are preempted by the AEA (citing 42 U. S. C. § 2021(k))). For example, even though a State may generally regulate its roads, it may not shut down all of the roads to a nuclear power plant simply because it disagrees with the NRC's nuclear safety regulations. Here, because Virginia has not even disputed that its uranium mining ban was "grounded in" its "nuclear safety concerns" about uranium milling and tailings, the company's preemption claim should not have been dismissed.

The lead opinion and the concurrence miss that simple analysis because they shrink from our AEA precedents, particularly *Pacific Gas*. In *Pacific Gas*, California had banned the construction of nuclear power plants until the State could ensure that new plants would have a viable method for permanently disposing of nuclear waste. See 461 U. S., at 197–198. On its face, the ban did not purport to regulate a preempted field; it did not regulate the *manner* in which nuclear power plants may be constructed or operated, which is a field preempted by the AEA. See *id.*, at 212. If it had, the Court noted, the ban "would clearly be impermissible." *Ibid.* The California statute instead purported to address the antecedent question *whether* new plants should be constructed at all—an area within the State's traditional authority over the generation and cost of electricity.

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But the Court did not stop its preemption analysis there. Instead, it was "necessary" to look beyond the face of the statute to determine California's "rationale" for the ban. *Id.*, at 213. California had argued that it could exercise its traditional authority over power generation to "completely prohibit new construction until its safety concerns [we]re satisfied by the Federal Government." *Id.*, at 212. The Court flatly "reject[ed] this line of reasoning." *Ibid.* Be-

cause the AEA reserves the "field of nuclear safety concerns" to the Federal Government, a state law that was "grounded in" those concerns would fall "squarely within the prohibited field." *Id.*, at 212–213. In other words, if the purpose of California's ban on nuclear plant construction was to regulate radiological safety, it would be preempted. California's statute ultimately avoided that outcome, however, because the State had put forward an independent "nonsafety rationale"—namely, its concern that new nuclear plants would not be economically viable if they were unable to permanently dispose of nuclear waste. *Id.*, at 213. On that basis, the Court determined that the ban was not preempted. *Id.*, at 216 ("[W]e accept California's avowed economic *purpose* as the rationale for enacting [the statute]. Accordingly, the statute lies outside the occupied field of nuclear safety regulation." (emphasis added)).

Pacific Gas should control the outcome here. Like California's ban in that case, Virginia's ban on its face regulates a non-preempted field—uranium mining safety. Like the plaintiffs challenging the California ban, the mining company argues that the statute's purpose is really to regulate a preempted field—safety concerns about uranium milling and tailings. But unlike California in *Pacific Gas*, Virginia in this case has not put forward a "nonsafety rationale." That should have been the end of the story, at least at this stage of the litigation.

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Neither the lead opinion nor the concurrence explain why this Court inquired into purpose in *Pacific Gas* but can dispense with that "necessary" step here, *id.*, at 213; they just say the Court can. See *ante*, at 772–773 (lead opinion); *ante*, at 789, n. 2 (opinion of GINSBURG, J.). At one point, the lead opinion suggests that the AEA "authorize[s]" a purpose inquiry only when a state law "comes close to trenching on core federal powers." *Ante*, at 772. But the opinion does not say where that rule comes from. Certainly not the statute or our precedents. And the lead opinion never explains why

the safety concerns about nuclear plants in *Pacific Gas* are more "core" to the AEA than the safety concerns about uranium milling and tailings storage at issue here.

The central argument from my colleagues appears to be that the AEA authorizes a purpose inquiry only when a State "targets" or "seek[s] to regulate" an activity that is also regulated by the federal statute. *Ante*, at 770 (lead opinion); *ante*, at 789 (opinion of GINSBURG, J.). And because the Virginia statute *seeks* to regulate mining, the AEA "does not authorize any judicial inquiry into state legislative purpose in this case." *Ante*, at 772 (lead opinion); see *ante*, at 788–789 (opinion of GINSBURG, J.). But it is conceded that the mining ban was adopted because of radiological safety concerns about milling and tailings. That is why Virginia argues, as it must, that its mining ban would not be preempted even if it expressly stated that it was enacted due to the Commonwealth's disagreement with the NRC's nuclear safety regulations. Tr. of Oral Arg. 33. If such a statute does not "target" or "seek to regulate" a preempted field, what would?

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States may try to regulate one activity by exercising their authority over another. That is the whole point of the purpose inquiry mandated by *Pacific Gas*. Indeed, *Pacific Gas* specifically "emphasize[d]" that the California law did *not* expressly seek to regulate "the construction or operation of a nuclear powerplant," that is, the statute on its face was not directed at a preempted field. 461 U. S., at 212.

The AEA's purpose inquiry is most useful precisely when the challenged state law does *not* purport to regulate a preempted field. If a State disagrees with the AEA's nuclear safety regulations, and thus wants to block nuclear development within its borders, it has myriad ways to do so through its broad police powers. Under the rule adopted by the lead opinion and the concurrence, so long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free rein to subvert Congress's judgment on nuclear safety.

A State could, for instance, restrict the ability of a county to provide a nuclear facility with municipal services like law enforcement, fire protection, and garbage collection. If it wanted to target investors, a State could eliminate limited liability for the stockholders of companies that operate nuclear facilities. Although these examples may seem far-fetched, they have already happened. See *Skull Valley Band of Goshute Indians* v. *Nielson*, 376 F. 3d 1223, 1247–1248, 1250–1252 (CA10 2004). In *Skull Valley*, however, the Tenth Circuit correctly applied our precedent and concluded that the "state cannot use its authority to regulate law enforcement and other similar matters as a means of regulating radiological hazards." *Id.*, at 1248; see *Entergy Nuclear Vermont Yankee, LLC* v. *Shumlin*, 733 F. 3d 393 (CA2 2013) (applying *Pacific Gas* and concluding that a state statute was a pretext for regulating radiological safety). Neither the lead opinion nor the concurrence hazards an answer for cases like *Skull Valley*.

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As these examples show, AEA preemption cannot turn on the label a State affixes to its regulations. That approach would simply invite evasion, which is why we have rejected it in our preemption cases more generally. For example, in *National Meat Assn.* v. *Harris*, 565 U. S. 452 (2012), we addressed a preemption challenge involving slaughterhouses in California. A federal statute preempted state regulation of slaughterhouses' front-end procedures for inspecting, handling, and slaughtering livestock. California, however, had regulated the back-end operations of slaughterhouses by prohibiting the *sale* of meat from livestock that had not been inspected, handled, and slaughtered according to the State's regulations. *Id.*, at 455, 463–464.

Although the federal statute's preemption clause did "not usually foreclose state regulation of the commercial sales activities of slaughterhouses," we unanimously held that California's sales regulation was preempted because it was a transparent attempt to circumvent federal law. *Id.*, at 463

(internal quotation marks omitted). Concluding otherwise, we noted, would allow a State to "impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.*, at 464. And that "would make a mockery of the [federal statute's] preemption provision." *Ibid.*; see also *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 255 (2004) (stating that it "would make no sense" to allow a state regulation to evade preemption simply because it addressed the purchase, rather than manufacture, of a federally regulated product).

The concurrence argues that *National Meat* is distinguishable because there the State regulated a downstream, nonpreempted activity (sale of meat) in an effort to regulate an upstream, preempted activity (processing of livestock). Here, however, Virginia's regulation is upstream (mining) and the preempted activity is downstream (milling and tailings). *Ante*, at 790–791. That's true but beside the point. Regardless whether the state regulation is downstream like *National Meat*, upstream like here and *Pacific Gas*, or entirely out of the stream like *Skull Valley*, States may not legislate with the purpose and effect of regulating a federally preempted field.[4]

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[4] In a footnote, the concurrence appears to reject its own analysis, stating that it makes no difference whether the state law is upstream or downstream of the federally preempted field. See *ante*, at 791, n. 4. Instead, the concurrence contends, the difference is that here the Commonwealth "regulated an activity, conventional uranium mining, that Congress left to state regulation." *Ibid.* But that is equally true in *National Meat*, where the State had likewise regulated an activity, the sale of meat, that Congress left to state regulation. See 565 U. S., at 463. The concurrence and lead opinion also note that *National Meat* involved an "express" preemption provision whereas this case does not. *Ante*, at 775, n. 3 (lead opinion); *ante*, at 790 (opinion of GINSBURG, J.). But they do not explain why that matters, and there's no reason it should. In both cases, the plaintiffs alleged that the State regulated an undisputedly non-preempted activity as an indirect means to regulate an undisputedly preempted activity.

That common sense approach is consistent with the text of the AEA, which recognizes that States continue to have authority "to regulate activities for *purposes* other than protection against radiation hazards." 42 U. S. C. § 2021(k) (emphasis added). The lead opinion finds this purpose-based approach discomfiting, citing the "well-known conceptual and practical" difficulties about inquiring into legislative motive. *Ante*, at 776. The statute and our precedent plainly require such an approach here, however, and the difficulty of the task does not permit us to choose an easier way. I respectfully dissent.

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Syllabus

MANHATTAN COMMUNITY ACCESS CORP. ET AL. *v.* HALLECK ET AL.

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

No. 17–1702. Argued February 25, 2019—Decided June 17, 2019

New York state law requires cable operators to set aside channels on their cable systems for public access. Those channels are operated by the cable operator unless the local government chooses to itself operate the channels or designates a private entity to operate the channels. New York City (the City) has designated a private nonprofit corporation, petitioner Manhattan Neighborhood Network (MNN), to operate the public access channels on Time Warner's cable system in Manhattan. Respondents DeeDee Halleck and Jesus Papoleto Melendez produced a film critical of MNN to be aired on MNN's public access channels. MNN televised the film. MNN later suspended Halleck and Melendez from all MNN services and facilities. The producers sued, claiming that MNN violated their First Amendment free-speech rights when it restricted their access to the public access channels because of the content of their film. The District Court dismissed the claim on the ground that MNN is not a state actor and therefore is not subject to First Amendment constraints on its editorial discretion. Reversing in relevant part, the Second Circuit concluded that MNN is a state actor subject to First Amendment constraints.

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Held: MNN is not a state actor subject to the First Amendment. Pp. 808–809.

(a) The Free Speech Clause of the First Amendment prohibits only *governmental*, not *private*, abridgment of speech. See, *e. g.*, *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 737. This Court's state-action doctrine distinguishes the government from individuals and private entities. Pp. 808–816.

(1) A private entity may qualify as a state actor when, as relevant here, the entity exercises "powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 352. The Court has stressed that "very few" functions fall into that category. *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 158. The relevant function in this case—operation of public access channels on a cable system—has not traditionally and exclusively been performed by government. Since the 1970s, a variety of private and public actors have operated

public access channels. Early Manhattan public access channels were operated by private cable operators with some help from private nonprofit organizations. That practice continued until the early 1990s, when MNN began to operate the channels. Operating public access channels on a cable system is not a traditional, exclusive public function. Pp. 809–811.

(2) The producers contend that the relevant function here is more generally the operation of a public forum for speech, which, they claim, is a traditional, exclusive public function. But that analysis mistakenly ignores the threshold state-action question. Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. See *Hudgens* v. *NLRB*, 424 U. S. 507, 520–521. Pp. 811–813.

(3) The producers note that the City has designated MNN to operate the public access channels on Time Warner's cable system, and that the State heavily regulates MNN with respect to those channels. But the City's designation is analogous to a government license, a government contract, or a government-granted monopoly, none of which converts a private entity into a state actor—unless the private entity is performing a traditional, exclusive public function. See, *e. g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 543–544. And the fact that MNN is subject to the State's extensive regulation "does not by itself convert its action into that of the State." *Jackson*, 419 U. S., at 350. Pp. 814–816.

(b) The producers alternatively contend that the public access channels are actually the City's property and that MNN is essentially managing government property on the City's behalf. But the City does not own or lease the public access channels and does not possess any formal easement or other property interest in the channels. It does not matter that a provision in the franchise agreements between the City and Time Warner allowed the City to designate a private entity to operate the public access channels on Time Warner's cable system. Nothing in the agreements suggests that the City possesses any property interest in the cable system or in the public access channels on that system. Pp. 816–818.

882 F. 3d 300, reversed in part and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 819.

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Michael B. de Leeuw argued the cause for petitioners. With him on the briefs were *Tamar S. Wise*, *Stuart A. Shorenstein*, *Jesse R. Loffler*, and *William A. Lesser*.

Paul W. Hughes argued the cause for respondents. With him on the brief were *Michael B. Kimberly*, *Andrew J. Pincus*, *Charles A. Rothfeld*, *Robert T. Perry*, *Eugene Volokh*, and *Eugene R. Fidell*.*

JUSTICE KAVANAUGH delivered the opinion of the Court.

The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function "traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 352 (1974).

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*Briefs of *amici curiae* urging reversal were filed for the CATO Institute by *David Debold* and *Ilya Shapiro*; for Chicago Access Corporation by *Erin E. Murphy*, *Michael D. Lieberman*, and *Jim McVane*; and for the Pacific Legal Foundation et al. by *James M. Manley* and *Daniel M. Ortner*.

Briefs of *amici curiae* urging affirmance were filed for the Alliance for Community Media et al. by *James N. Horwood*, *Tillman L. Lay*, *Peter J. Hopkins*, and *Jeffrey M. Bayne*; for the American Civil Liberties Union et al. by *David D. Cole*, *Arthur N. Eisenberg*, and *Amanda Shanor*; for the Knight First Amendment Institute at Columbia University by *Katherine Fallow* and *Jameel Jaffer*; for the National Police Accountability Project by *David M. Shapiro* and *Daniel M. Greenfield*; and for the New York County Lawyers Association by *Carolyn A. Kubitschek*.

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States of America by *Catherine E. Stetson*, *Colleen E. Roh Sinzdak*, and *Daryl Joseffer*; for Electronic Frontier Foundation by *David Greene*; for Internet Association by *Chad Golder*; and for NCTA–The Internet & Television Association by *Howard J. Symons*, *Jessica Ring Amunson*, *Rick C. Chessen*, *Neal M. Goldberg*, *Michael S. Schooler*, and *Diane B. Burstein*.

This state-action case concerns the public access channels on Time Warner's cable system in Manhattan. Public access channels are available for private citizens to use. The public access channels on Time Warner's cable system in Manhattan are operated by a private nonprofit corporation known as MNN. The question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels. In other words, is operation of public access channels on a cable system a traditional, exclusive public function? If so, then the First Amendment would restrict MNN's exercise of editorial discretion over the speech and speakers on the public access channels.

Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

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I

A

Since the 1970s, public access channels have been a regular feature on cable television systems throughout the United States. In the 1970s, Federal Communications Commission regulations required certain cable operators to set aside channels on their cable systems for public access. In 1979, however, this Court ruled that the FCC lacked statutory authority to impose that mandate. See *FCC* v. *Midwest Video Corp.*, 440 U. S. 689 (1979). A few years later, Congress passed and President Reagan signed the Cable Communica-

tions Policy Act of 1984. 98 Stat. 2779. The Act authorized state and local governments to require cable operators to set aside channels on their cable systems for public access. 47 U. S. C. § 531(b).

The New York State Public Service Commission regulates cable franchising in New York State and requires cable operators in the State to set aside channels on their cable systems for public access. 16 N. Y. Codes, Rules & Regs. §§ 895.1(f), 895.4(b) (2018). State law requires that use of the public access channels be free of charge and first-come, first-served. §§ 895.4(c)(4) and (6). Under state law, the cable operator operates the public access channels unless the local government in the area chooses to itself operate the channels or designates a private entity to operate the channels. § 895.4(c)(1).

Time Warner (now known as Charter) operates a cable system in Manhattan. Under state law, Time Warner must set aside some channels on its cable system for public access. New York City (the City) has designated a private nonprofit corporation named Manhattan Neighborhood Network, commonly referred to as MNN, to operate Time Warner's public access channels in Manhattan. This case involves a complaint against MNN regarding its management of the public access channels.

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B

Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009).

DeeDee Halleck and Jesus Papoleto Melendez produced public access programming in Manhattan. They made a film about MNN's alleged neglect of the East Harlem community. Halleck submitted the film to MNN for airing on MNN's public access channels, and MNN later televised the film. Afterwards, MNN fielded multiple complaints about the film's content. In response, MNN temporarily suspended Halleck from using the public access channels.

Halleck and Melendez soon became embroiled in another dispute with MNN staff. In the wake of that dispute, MNN ultimately suspended Halleck and Melendez from all MNN services and facilities.

Halleck and Melendez then sued MNN, among other parties, in Federal District Court. The two producers claimed that MNN violated their First Amendment free-speech rights when MNN restricted their access to the public access channels because of the content of their film.

MNN moved to dismiss the producers' First Amendment claim on the ground that MNN is not a state actor and therefore is not subject to First Amendment restrictions on its editorial discretion. The District Court agreed with MNN and dismissed the producers' First Amendment claim.

The Second Circuit reversed in relevant part. 882 F. 3d 300, 308 (2018). In the majority opinion authored by Judge Newman and joined by Judge Lohier, the court stated that the public access channels in Manhattan are a public forum for purposes of the First Amendment. Reasoning that "public forums are usually operated by governments," the court concluded that MNN is a state actor subject to First Amendment constraints. *Id.*, at 306–307. Judge Lohier added a concurring opinion, explaining that MNN also qualifies as a state actor for the independent reason that "New York City delegated to MNN the traditionally public function of administering and regulating speech in the public forum of Manhattan's public access channels." *Id.*, at 309.

Judge Jacobs dissented in relevant part, opining that MNN is not a state actor. He reasoned that a private entity's operation of an open forum for speakers does not render the host entity a state actor. Judge Jacobs further stated that the operation of public access channels is not a traditional, exclusive public function.

We granted certiorari to resolve disagreement among the Courts of Appeals on the question whether private operators of public access cable channels are state actors subject to the

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First Amendment. 586 U. S. 942 (2018). Compare 882 F. 3d 300 (case below), with *Wilcher* v. *Akron*, 498 F. 3d 516 (CA6 2007); and *Alliance for Community Media* v. *FCC*, 56 F. 3d 105 (CADC 1995).

II

Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." § 1. The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech. See, *e. g.*, *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 737 (1996) (plurality opinion); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995); *Hudgens* v. *NLRB*, 424 U. S. 507, 513 (1976); cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256 (1974).

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In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. See *Brentwood Academy* v. *Tennessee Secondary School Athletic Assn.*, 531 U. S. 288, 295–296 (2001). By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty.

Here, the producers claim that MNN, a private entity, restricted their access to MNN's public access channels because of the content of the producers' film. The producers have advanced a First Amendment claim against MNN.

The threshold problem with that First Amendment claim is a fundamental one: MNN is a private entity.

Relying on this Court's state-action precedents, the producers assert that MNN is nonetheless a state actor subject to First Amendment constraints on its editorial discretion. Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, see, *e. g.*, *Jackson*, 419 U. S., at 352–354; (ii) when the government compels the private entity to take a particular action, see, *e. g.*, *Blum* v. *Yaretsky*, 457 U. S. 991, 1004–1005 (1982); or (iii) when the government acts jointly with the private entity, see, *e. g.*, *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 941–942 (1982).

The producers' primary argument here falls into the first category: The producers contend that MNN exercises a traditional, exclusive public function when it operates the public access channels on Time Warner's cable system in Manhattan. We disagree.

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A

Under the Court's cases, a private entity may qualify as a state actor when it exercises "powers traditionally exclusively reserved to the State." *Jackson*, 419 U. S., at 352. It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function. See *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 842 (1982); *Jackson*, 419 U. S., at 352–353; *Evans* v. *Newton*, 382 U. S. 296, 300 (1966).

The Court has stressed that "very few" functions fall into that category. *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 158 (1978). Under the Court's cases, those functions include, for example, running elections and operating a company town.

See *Terry* v. *Adams*, 345 U. S. 461, 468–470 (1953) (elections); *Marsh* v. *Alabama*, 326 U. S. 501, 505–509 (1946) (company town); *Smith* v. *Allwright*, 321 U. S. 649, 662–666 (1944) (elections); *Nixon* v. *Condon*, 286 U. S. 73, 84–89 (1932) (elections).[1] The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 55–57 (1999) (insurance payments); *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 197, n. 18 (1988) (college sports); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 544–545 (1987) (amateur sports); *Blum*, 457 U. S., at 1011–1012 (nursing home); *Rendell-Baker*, 457 U. S., at 842 (special education); *Polk County* v. *Dodson*, 454 U. S. 312, 318–319 (1981) (public defender); *Flagg Bros.*, 436 U. S., at 157–163 (private dispute resolution); *Jackson*, 419 U. S., at 352–354 (electric service).

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The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government.

Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries. See *Denver*

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[1] Relatedly, this Court has recognized that a private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity. In *West* v. *Atkins*, for example, the State was constitutionally obligated to provide medical care to prison inmates. 487 U. S. 42, 56 (1988). That scenario is not present here because the government has no such obligation to operate public access channels.

Area, 518 U. S., at 761–762 (plurality opinion); R. Oringel & S. Buske, The Access Manager's Handbook: A Guide for Managing Community Television 14–17 (1987).

The history of public access channels in Manhattan further illustrates the point. In 1971, public access channels first started operating in Manhattan. See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video §6:29, p. 6–47 (2018). Those early Manhattan public access channels were operated in large part by private cable operators, with some help from private nonprofit organizations. See G. Gillespie, Public Access Cable Television in the United States and Canada 37–38 (1975); Janes, History and Structure of Public Access Television, 39 J. Film & Video, No. 3, pp. 15–17 (1987). Those private cable operators continued to operate the public access channels until the early 1990s, when MNN (also a private entity) began to operate the public access channels.

In short, operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases.

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B

To avoid that conclusion, the producers widen the lens and contend that the relevant function here is not simply the operation of public access channels on a cable system, but rather is more generally the operation of a public forum for speech. And according to the producers, operation of a public forum for speech is a traditional, exclusive public function.

That analysis mistakenly ignores the threshold state-action question. When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content. See, *e. g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 547, 555 (1975) (private

theater leased to the city); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 93, 96 (1972) (sidewalks); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515–516 (1939) (streets and parks).

By contrast, when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum. This Court so ruled in its 1976 decision in *Hudgens* v. *NLRB*. There, the Court held that a shopping center owner is not a state actor subject to First Amendment requirements such as the public forum doctrine. 424 U. S., at 520–521; see also *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 569–570 (1972); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 547 (1972); *Alliance for Community Media*, 56 F. 3d, at 121–123.

The *Hudgens* decision reflects a commonsense principle: Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. After all, private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights. As Judge Jacobs persuasively explained, it "is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." 882 F. 3d, at 311 (opinion concurring in part and dissenting in part).

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In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.

If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would

lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether. "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Hudgens*, 424 U. S., at 519 (internal quotation marks omitted). Benjamin Franklin did not have to operate his newspaper as "a stagecoach, with seats for everyone." F. Mott, American Journalism 55 (3d ed. 1962). That principle still holds true. As the Court said in *Hudgens*, to hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." 424 U. S., at 517 (internal quotation marks omitted). The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.[2]

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The producers here are seeking in effect to circumvent this Court's case law, including *Hudgens*. But *Hudgens* is sound, and we therefore reaffirm our holding in that case.[3]

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[2] A distinct question not raised here is the degree to which the First Amendment *protects* private entities such as Time Warner or MNN from government legislation or regulation requiring those private entities to open their property for speech by others. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 636–637 (1994).

[3] In *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, this Court said in passing dicta that "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns." 473 U. S. 788, 801 (1985). But *Cornelius* dealt with government-owned property. As JUSTICE THOMAS explained in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, the Court's admittedly imprecise and overbroad phrase in *Cornelius* is not consistent with this Court's case law and should not be read to suggest that private property owners or private lessees are subject to First Amendment constraints whenever they dedicate their private property to

C

Next, the producers retort that this case differs from *Hudgens* because New York City has designated MNN to operate the public access channels on Time Warner's cable system, and because New York State heavily regulates MNN with respect to the public access channels. Under this Court's cases, however, those facts do not establish that MNN is a state actor.

New York City's designation of MNN to operate the public access channels is analogous to a government license, a government contract, or a government-granted monopoly. But as the Court has long held, the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function. See, *e. g.*, *San Francisco Arts & Athletics*, 483 U. S., at 543–544 (exclusive-use rights and corporate charters); *Blum*, 457 U. S., at 1011 (licenses); *Rendell-Baker*, 457 U. S., at 840–841 (contracts); *Polk County*, 454 U. S., at 319, n. 9, and 320–322 (law licenses); *Jackson*, 419 U. S., at 351–352 (electric monopolies); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 120–121 (1973) (broadcast licenses); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 176–177 (1972) (liquor licenses); cf. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 638–639 (1819) (corporate charters). The same principle applies if the government funds or subsidizes a private entity. See *Blum*, 457 U. S., at 1011; *Rendell-Baker*, 457 U. S., at 840.

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Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private en-

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public use or otherwise open their property for speech. 518 U. S. 727, 827–828 (1996) (opinion concurring in judgment in part and dissenting in part).

tity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities. As this Court's many state-action cases amply demonstrate, that is not the law. Here, therefore, the City's designation of MNN to operate the public access channels on Time Warner's cable system does not make MNN a state actor.

So, too, New York State's extensive regulation of MNN's operation of the public access channels does not make MNN a state actor. Under the State's regulations, air time on the public access channels must be free, and programming must be aired on a first-come, first-served basis. Those regulations restrict MNN's editorial discretion and in effect require MNN to operate almost like a common carrier. But under this Court's cases, those restrictions do not render MNN a state actor.

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In *Jackson* v. *Metropolitan Edison Co.*, the leading case on point, the Court stated that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." 419 U. S., at 350. In that case, the Court held that "a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory," was not a state actor. *Id.*, at 358. The Court explained that the "mere existence" of a "regulatory scheme"—even if "extensive and detailed"—did not render the utility a state actor. *Id.*, at 350, and n. 7. Nor did it matter whether the State had authorized the utility to provide electric service to the community, or whether the utility was the only entity providing electric service to much of that community.

This case closely parallels *Jackson*. Like the electric utility in *Jackson*, MNN is "a heavily regulated, privately owned" entity. *Id.*, at 358. As in *Jackson*, the regulations do not transform the regulated private entity into a state actor.

Put simply, being regulated by the State does not make one a state actor. See *Sullivan*, 526 U. S., at 52; *Blum*, 457 U. S., at 1004; *Rendell-Baker*, 457 U. S., at 841–842; *Jackson*, 419 U. S., at 350; *Moose Lodge*, 407 U. S., at 176–177. As the Court's cases have explained, the "being heavily regulated makes you a state actor" theory of state action is entirely circular and would significantly endanger individual liberty and private enterprise. The theory would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms. Not surprisingly, as JUSTICE THOMAS has pointed out, this Court has "never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights," could justify subjecting the regulated private entity to the constraints of the First Amendment. *Denver Area*, 518 U. S., at 829 (opinion concurring in judgment in part and dissenting in part).

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In sum, we conclude that MNN is not subject to First Amendment constraints on how it exercises its editorial discretion with respect to the public access channels. To be sure, MNN is subject to state-law constraints on its editorial discretion (assuming those state laws do not violate a federal statute or the Constitution). If MNN violates those state laws, or violates any applicable contracts, MNN could perhaps face state-law sanctions or liability of some kind. We of course take no position on any potential state-law questions. We simply conclude that MNN, as a private actor, is not subject to First Amendment constraints on how it exercises editorial discretion over the speech and speakers on its public access channels.

III

Perhaps recognizing the problem with their argument that MNN is a state actor under ordinary state-action principles applicable to private entities and private property, the pro-

ducers alternatively contend that the public access channels are actually the property of New York City, not the property of Time Warner or MNN. On this theory, the producers say (and the dissent agrees) that MNN is in essence simply managing government property on behalf of New York City.

The short answer to that argument is that the public access channels are not the property of New York City. Nothing in the record here suggests that a government (federal, state, or city) owns or leases either the cable system or the public access channels at issue here. Both Time Warner and MNN are private entities. Time Warner is the cable operator, and it owns its cable network, which contains the public access channels. MNN operates those public access channels with its own facilities and equipment. The City does not own or lease the public access channels, and the City does not possess a formal easement or other property interest in those channels. The franchise agreements between the City and Time Warner do not say that the City has any property interest in the public access channels. On the contrary, the franchise agreements expressly place the public access channels "under the jurisdiction" of MNN. App. 22. Moreover, the producers did not allege in their complaint that the City has a property interest in the channels. And the producers have not cited any basis in state law for such a conclusion. Put simply, the City does not have "any formal easement or other property interest in those channels." *Denver Area*, 518 U. S., at 828 (opinion of THOMAS, J.).

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It does not matter that a provision in the franchise agreements between the City and Time Warner allowed the City to designate a private entity to operate the public access channels on Time Warner's cable system. Time Warner still owns the cable system. And MNN still operates the public access channels. To reiterate, nothing in the franchise agreements suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system.

It is true that the City has allowed the cable operator, Time Warner, to lay cable along public rights-of-way in the City. But Time Warner's access to public rights-of-way does not alter the state-action analysis. For Time Warner, as for other cable operators, access to public rights-of-way is essential to lay cable and construct a physical cable infrastructure. See *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 628 (1994). But the same is true for utility providers, such as the electric utility in *Jackson*. Put simply, a private entity's permission from government to use public rights-of-way does not render that private entity a state actor.

Having said all that, our point here should not be read too broadly. Under the laws in certain States, including New York, a local government may decide to itself operate the public access channels on a local cable system (as many local governments in New York State and around the country already do), or could take appropriate steps to obtain a property interest in the public access channels. Depending on the circumstances, the First Amendment might then constrain the local government's operation of the public access channels. We decide only the case before us in light of the record before us.

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It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case.

MNN is a private entity that operates public access channels on a cable system. Operating public access channels on

a cable system is not a traditional, exclusive public function. A private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. Under the text of the Constitution and our precedents, MNN is not a state actor subject to the First Amendment. We reverse in relevant part the judgment of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

The Court tells a very reasonable story about a case that is not before us. I write to address the one that is.

This is a case about an organization appointed by the government to administer a constitutional public forum. (It is not, as the Court suggests, about a private property owner that simply opened up its property to others.) New York City (the City) secured a property interest in public-access television channels when it granted a cable franchise to a cable company. State regulations require those public-access channels to be made open to the public on terms that render them a public forum. The City contracted out the administration of that forum to a private organization, petitioner Manhattan Community Access Corporation (MNN). By accepting that agency relationship, MNN stepped into the City's shoes and thus qualifies as a state actor, subject to the First Amendment like any other.

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I

A

A cable-television franchise is, essentially, a license to create a system for distributing cable TV in a certain area. It is a valuable right, usually conferred on a private company by a local government. See 47 U. S. C. §§ 522(9)–(10), 541(a)(2), (b)(1); *Turner Broadcasting System, Inc.* v. *FCC*,

512 U. S. 622, 628 (1994). A private company cannot enter a local cable market without one. § 541(b)(1).

Cable companies transmit content through wires that stretch "between a transmission facility and the television sets of individual subscribers." *Id.*, at 627–628. Creating this network of wires is a disruptive undertaking that "entails the use of public rights-of-way and easements." *Id.*, at 628.

New York State authorizes municipalities to grant cable franchises to cable companies of a certain size only if those companies agree to set aside at least one public-access channel. 16 N. Y. Codes, Rules & Regs. §§ 895.1(f), 895.4(b)(1) (2016). New York then requires that those public-access channels be open to all comers on "a first-come, first-served, nondiscriminatory basis." § 895.4(c)(4). Likewise, the State prohibits both cable franchisees and local governments from "exercis[ing] any editorial control" over the channels, aside from regulating obscenity and other unprotected content. §§ 895.4(c)(8)–(9).

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Years ago, New York City (no longer a party to this suit) and Time Warner Entertainment Company (never a party to this suit) entered into a cable-franchise agreement. App. 22. Time Warner received a cable franchise; the City received public-access channels. The agreement also provided that the public-access channels would be operated by an independent, nonprofit corporation chosen by the Manhattan borough president. But the City, as the practice of other New York municipalities confirms, could have instead chosen to run the channels itself. See § 895.4(c)(1); Brief for Respondents 35 (citing examples).

MNN is the independent nonprofit that the borough president appointed to run the channels; indeed, MNN appears to have been incorporated in 1991 for that precise purpose, with seven initial board members selected by the borough president (though only two thus selected today). See App. 23;

Brief for Respondents 7, n. 1. The City arranged for MNN to receive startup capital from Time Warner and to be funded through franchise fees from Time Warner and other Manhattan cable franchisees. App. 23; Brief for New York County Lawyers Association (NYCLA) as *Amicus Curiae* 27; see also App. to Brief for Respondents 19a. As the borough president announced upon MNN's formation in 1991, MNN's "central charge is to administer and manage all the public access channels of the cable television systems in Manhattan." App. to Brief for NYCLA as *Amicus Curiae* 1.

As relevant here, respondents DeeDee Halleck and Jesus Papoleto Melendez sued MNN in U. S. District Court for the Southern District of New York under 42 U. S. C. §1983. They alleged that the public-access channels, "[r]equired by state regulation and [the] local franchise agreements," are "a designated public forum of unlimited character"; that the City had "delegated control of that public forum to MNN"; and that MNN had, in turn, engaged in viewpoint discrimination in violation of respondents' First Amendment rights. App. 39.

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The District Court dismissed respondents' First Amendment claim against MNN. The U. S. Court of Appeals for the Second Circuit reversed that dismissal, concluding that the public-access channels "are public forums and that [MNN's] employees were sufficiently alleged to be state actors taking action barred by the First Amendment." 882 F. 3d 300, 301–302 (2018). Because the case before us arises from a motion to dismiss, respondents' factual allegations must be accepted as true. *Hernández* v. *Mesa*, 582 U. S. 548, 550 (2017) (*per curiam*).

II

I would affirm the judgment below. The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had

a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.

A

When a person alleges a violation of the right to free speech, courts generally must consider not only what was said but also in what context it was said.

On the one hand, there are "public forums," or settings that the government has opened in some way for speech by the public (or some subset of it). The Court's precedents subdivide this broader category into various subcategories, with the level of leeway for government regulation of speech varying accordingly. See *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. 1, 11 (2018). Compare *Frisby* v. *Schultz*, 487 U. S. 474, 480 (1988) (streets and public parks, traditional public forums), with *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975) (city-leased theater, designated public forum), with *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. 661, 669, 679, and n. 12 (2010) (program for registered student organizations, limited public forum). But while many cases turn on which type of "forum" is implicated, the important point here is that viewpoint discrimination is impermissible in them all. See *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106 (2001).

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On the other hand, there are contexts that do not fall under the "forum" rubric. For one, there are contexts in which the government is simply engaging in its own speech and thus has freedom to select the views it prefers. See, *e. g.*, *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. 200, 207–209 (2015) (specialty license plates);

Pleasant Grove City v. *Summum*, 555 U. S. 460, 467–469, 481 (2009) (privately donated permanent monuments in a public park).[1] In addition, there are purely private spaces, where the First Amendment is (as relevant here) inapplicable. The First Amendment leaves a private store owner (or homeowner), for example, free to remove a customer (or dinner guest) for expressing unwanted views. See, *e. g.*, *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 569–570 (1972). In these settings, there is no First Amendment right against viewpoint discrimination.

Here, respondents alleged viewpoint discrimination. App. 39. So a key question in this case concerns what the Manhattan public-access channels are: a public forum of some kind, in which a claim alleging viewpoint discrimination would be cognizable, or something else, such as government speech or purely private property, where picking favored viewpoints is appropriately commonplace.[2] Neither MNN nor the majority suggests that this is an instance of government speech. This case thus turns first and foremost on whether the public-access channels are or are not purely private property.[3]

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[1] That does not mean that no restrictions apply at all to the government's expression in such spaces, but it does mean that the government can pick and choose among different views. See *Walker*, 576 U. S., at 207–208, 219; *Summum*, 555 U. S., at 468.

[2] The channels are not, of course, a physical place. Under the Court's precedents, that makes no difference: Regardless of whether something "is a forum more in a metaphysical than in a spatial or geographic sense, . . . the same principles are applicable." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830 (1995) (treating "Student Activities Fund" as the forum at issue and citing cases in which a school's mail system and a charity drive were the relevant forums).

[3] As discussed below, it is possible that some (or even many) public-access channels are government speech. The channels that MNN administers, however, are clearly better thought of as a public forum given the New York regulations mandating open and equal access. See *infra*, at 827–828, and n. 7.

1

This Court has not defined precisely what kind of governmental property interest (if any) is necessary for a public forum to exist. See *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 801 (1985) ("a speaker must seek access to public property or to private property dedicated to public use"). But see *ante*, at 813, n. 3 (appearing to reject the phrase "private property dedicated to public use" as "passing dicta"). I assume for the sake of argument in this case that public-forum analysis is inappropriate where the government lacks a "significant property interest consistent with the communicative purpose of the forum." *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 829 (1996) (THOMAS, J., concurring in judgment in part and dissenting in part).

Such an interest is present here. As described above, New York State required the City to obtain public-access channels from Time Warner in exchange for awarding a cable franchise. See *supra*, at 820. The exclusive right to use these channels (and, as necessary, Time Warner's infrastructure) qualifies as a property interest, akin at the very least to an easement.

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The last time this Court considered a case centering on public-access channels, five Justices described an interest like the one here as similar to an easement. Although JUSTICE BREYER did not conclude that a public-access channel was indeed a public forum, he likened the cable company's agreement to reserve such channels "to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land." *Denver Area*, 518 U. S., at 760–761 (joined by Stevens and Souter, JJ.). And Justice Kennedy observed not only that an easement would be an appropriate analogy, *id.*, at 793–794 (opinion concurring in part, concurring in judgment in part, and dissenting in part, joined by GINSBURG, J.), but also that "[p]ublic access channels meet the definition of a

public forum," *id.*, at 791, "even though they operate over property to which the cable operator holds title," *id.*, at 792; see also *id.*, at 792–793 (noting that the entire cable system's existence stems from the municipality's decision to grant the franchise). What those five Justices suggested in 1996 remains true today.

"A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." *United States* v. *Craft*, 535 U. S. 274, 278 (2002). Rights to exclude and to use are two of the most crucial sticks in the bundle. See *id.*, at 283. "State law determines . . . which sticks are in a person's bundle," *id.*, at 278, and therefore defining property itself is a state-law exercise.[4] As for whether there is a sufficient property interest to trigger First Amendment forum analysis, related precedents show that there is.

As noted above, there is no disputing that Time Warner owns the wires themselves. See *Turner*, 512 U. S., at 628. If the wires were a road, it would be easy to define the public's right to walk on it as an easement. See, *e. g.*, *In re India Street*, 29 N. Y. 2d 97, 100–103, 272 N. E 2d 518, 518–520 (1971). Similarly, if the wires were a theater, there would be no question that a government's long-term lease to use it would be sufficient for public-forum purposes. *Southeastern Promotions*, 420 U. S., at 547, 555. But some may find this case more complicated because the wires are not a road or a theater that one can physically occupy; they are a conduit for transmitting signals that appear as television channels. In other words, the question is how to understand the right to place content on those channels using those wires.

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[4] The parties have not pointed this Court to any New York law definitively establishing the status of the channels. But even if there were uncertainty about the status of the channels under New York law, that would not be a reason to resolve the case against respondents (plaintiffs below) at the motion-to-dismiss stage. See *infra*, at 830, n. 9, 831–832.

The right to convey expressive content using someone else's physical infrastructure is not new. To give another low-tech example, imagine that one company owns a billboard and another rents space on that billboard. The renter can have a property interest in placing content on the billboard for the lease term even though it does not own the billboard itself. See, *e. g.*, *Naegele Outdoor Advertising Co. of Minneapolis* v. *Lakeville*, 532 N. W. 2d 249, 253 (Minn. 1995); see also *In re XAR Corp.* v. *Di Donato*, 76 App. Div. 2d 972, 973, 429 N. Y. S. 2d 59, 60 (1980) ("Although invariably labeled 'leases,' agreements to erect advertising signs or to place signs on walls or fences are easements in gross").

The same principle should operate in this higher tech realm. Just as if the channels were a billboard, the City obtained rights for exclusive use of the channels by the public for the foreseeable future; no one is free to take the channels away, short of a contract renegotiation. Cf. *Craft*, 535 U. S., at 283. The City also obtained the right to administer, or delegate the administration of, the channels. The channels are more intangible than a billboard, but no one believes that a right must be tangible to qualify as a property interest. See, *e. g.*, *Armstrong* v. *United States*, 364 U. S. 40, 48–49 (1960) (treating destruction of valid liens as a taking); *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 219 (1897) (treating "privileges, corporate franchises, contracts or obligations" as taxable property). And it is hardly unprecedented for a government to receive a right to transmit something over a private entity's infrastructure in exchange for conferring something of value on that private entity; examples go back at least as far as the 1800s.[5]

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[5] For example, during the railroad boom, governments obtained not only physical easements in favor of the public over tracks used, owned, and managed by private railroads, including rights to use the rails and all relevant "fixtures and appurtenances," see, *e. g.*, *Lake Superior & Mississippi R. Co.* v. *United States*, 93 U. S. 442, 444, 453–454 (1877), but also, in

I do not suggest that the government always obtains a property interest in public-access channels created by franchise agreements. But the arrangement here is consistent with what the Court would treat as a governmental property interest in other contexts. New York City gave Time Warner the right to lay wires and sell cable TV. In exchange, the City received an exclusive right to send its own signal over Time Warner's infrastructure—no different than receiving a right to place ads on another's billboards. Those rights amount to a governmental property interest in the channels, and that property interest is clearly "consistent with the communicative purpose of the forum," *Denver Area*, 518 U. S., at 829 (opinion of THOMAS, J.). Indeed, it is the right to transmit the very content to which New York law grants the public open and equal access.

2

With the question of a governmental property interest resolved, it should become clear that the public-access channels are a public forum.[6] Outside of classic examples like sidewalks and parks, a public forum exists only where the government has deliberately opened up the setting for speech by at least a subset of the public. *Cornelius*, 473 U. S., at 802. "Accordingly, the Court has looked to the policy and practice of the government," as well as the nature of the property itself, "to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Ibid.* For example, a state college might make its facilities open to student groups, or a municipality might open up an auditorium for certain public meetings. See *id.*, at 802–803.

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some situations, rights to transmit personnel and freight for free or at reduced rates, Ellis, Railroad Land Grant Rates, 1850–1945, 21 J. Land & P. U. Econ. 207, 209, 211–212 (1945).

[6] Though the majority disagrees on the property question, I do not take it seriously to dispute that this point would follow. See *ante*, at 816–818.

The requisite governmental intent is manifest here. As noted above, New York State regulations require that the channels be made available to the public "on a first-come, first-served, nondiscriminatory basis." 16 N. Y. Codes, Rules & Regs. § 895.4(c)(4); see also §§ 895.4(c)(8)–(9). The State, in other words, mandates that the doors be wide open for public expression. MNN's contract with Time Warner follows suit. App. 23. And that is essentially how MNN itself describes things. See Tr. of Oral Arg. 9 ("We do not prescreen videos. We—they come into the door. We put them on the air").[7] These regulations "evidenc[e] a clear intent to create a public forum." *Cornelius*, 473 U. S., at 802.

B

If New York's public-access channels are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent. When MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor for purposes of 42 U. S. C. § 1983.

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This conclusion follows from the Court's decision in *West* v. *Atkins*, 487 U. S. 42 (1988). The Court in *West* unanimously held that a doctor hired to provide medical care to state prisoners was a state actor for purposes of § 1983. *Id.*, at 54; see also *id.*, at 58 (Scalia, J., concurring in part and concurring in judgment). Each State must provide medical care to prisoners, the Court explained, *id.*, at 54, and when a State hires a private doctor to do that job, the doctor becomes a state actor, "'clothed with the authority of state law,'" *id.*, at 55. If a doctor hired by the State abuses his role, the harm is "caused, in the sense relevant for state-

[7] New York may be uncommon (as it often is); public-access channels in other States may well have different policies and practices that make them more like government speech than constitutional forums. See Brief for Respondents 30–31; Brief for American Civil Liberties Union et al. as *Amici Curiae* 13–15. New York's scheme, however, is the only one before us.

action inquiry," by the State's having incarcerated the prisoner and put his medical care in that doctor's hands. *Ibid.*

The fact that the doctor was a private contractor, the Court emphasized, made no difference. *Ibid.* It was "the physician's function within the state system," not his private-contractor status, that determined whether his conduct could "fairly be attributed to the State." *Id.*, at 55–56. Once the State imprisoned the plaintiff, it owed him duties under the Eighth Amendment; once the State delegated those duties to a private doctor, the doctor became a state actor. See *ibid.*; see also *id.*, at 56–57. If the rule were any different, a State would "'be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied.'" *Id.*, at 56, n. 14.

West resolves this case. Although the settings are different, the legal features are the same: When a government (1) makes a choice that triggers constitutional obligations, and then (2) contracts out those constitutional responsibilities to a private entity, that entity—in agreeing to take on the job—becomes a state actor for purposes of § 1983.[8]

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Not all acts of governmental delegation necessarily trigger constitutional obligations, but this one did. New York State regulations required the City to secure public-access channels if it awarded a cable franchise. 16 N. Y. Codes, Rules &

[8] Governments are, of course, not constitutionally required to open prisons or public forums, but once they do either of these things, constitutional obligations attach. The rule that a government may not evade the Constitution by substituting a private administrator, meanwhile, is not a prison-specific rule. More than 50 years ago, for example, this Court made clear in *Evans* v. *Newton*, 382 U. S. 296 (1966), that the city of Macon, Georgia, could not evade the Fourteenth Amendment's Equal Protection Clause by handing off control of a park to a group "of 'private' trustees." *Id.*, at 301. Rather, "the public character of [the] park require[d] that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who ha[d] title under state law." *Id.*, at 302.

Regs. § 895.4(b)(1). The City did award a cable franchise. The State's regulations then required the City to make the channels it obtained available on a "first-come, first-served, nondiscriminatory basis."[9] § 895.4(c)(4). That made the channels a public forum. See *supra*, at 828. Opening a public forum, in turn, entailed First Amendment obligations.

The City could have done the job itself, but it instead delegated that job to a private entity, MNN. MNN could have said no, but it said yes. (Indeed, it appears to exist entirely to do this job.) By accepting the job, MNN accepted the City's responsibilities. See *West*, 487 U. S., at 55. The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor.

III

The majority acknowledges that the First Amendment could apply when a local government either (1) has a prop-

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[9] Accordingly, this is not a case in which a private entity has been asked to exercise standardless discretion. See, *e. g.*, *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 52 (1999). Had New York law left MNN free to choose its favorite submissions, for example, a different result might well follow.

MNN has suggested to this Court that its contract with Time Warner allows it "to curate content, to decide to put shows together on one of our channels or a different channel." Tr. of Oral Arg. 6; see Reply Brief 9. But MNN's contract cannot defeat New York law's "first-come, first-served, nondiscriminatory" scheduling requirement, 16 N. Y. Codes, Rules & Regs. § 895.4(c)(4), and the discretion MNN asserts seems to be at most some limited authority to coordinate the exact placement and timing of the content it is obliged to accept indiscriminately, see Tr. of Oral Arg. 25–26. That seems akin to the authority to make reasonable time, place, and manner provisions, which is consistent with administering any public forum. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). As for any factual assertions about how the channels are operated in practice, this case arises from MNN's motion to dismiss, so the facts asserted against it must be accepted as true. *Hernández* v. *Mesa*, 582 U. S. 548, 550 (2017) (*per curiam*). And any uncertainty about the facts or New York law, in any event, would be a reason to vacate and remand, not reverse.

erty interest in public-access channels or (2) is more directly involved in administration of those channels than the City is here. *Ante*, at 817. And it emphasizes that it "decide[s] only the case before us in light of the record before us." *Ibid.* These case-specific qualifiers sharply limit the immediate effect of the majority's decision, but that decision is still meaningfully wrong in two ways. First, the majority erroneously decides the property question against the plaintiffs as a matter of law. Second, and more fundamentally, the majority mistakes a case about the government choosing to hand off responsibility to an agent for a case about a private entity that simply enters a marketplace.

A

The majority's explanation for why there is no governmental property interest here, *ante*, at 816–818, does not hold up. The majority focuses on the fact that "[b]oth Time Warner and MNN are private entities"; that Time Warner "owns its cable network, which contains the public access channels"; and that "MNN operates those public access channels with its own facilities and equipment." *Ante*, at 817; see also *ante*, at 818. Those considerations cannot resolve this case. The issue is not who owns the cable network or that MNN uses its own property to operate the channels. The key question, rather, is whether the channels themselves are purely private property. An advertiser may not own a billboard, but that does not mean that its long-term lease is not a property interest. See *supra*, at 826.

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The majority also says that "[n]othing in the record here suggests that a government . . . owns or leases either the cable system or the public access channels at issue here." *Ante*, at 817. But the cable system itself is irrelevant, and, as explained above, the details of the exchange that yielded Time Warner's cable franchise suggest a governmental property interest in the channels. See *supra*, at 824–827.

The majority observes that "the franchise agreements expressly place the public access channels 'under the juris-

diction' of MNN," *ante*, at 817, but that language simply describes the City's appointment of MNN to administer the channels. The majority also chides respondents for failing to "alleg[e] in their complaint that the City has a property interest in the channels," *ibid.*, but, fairly read, respondents' complaint includes such an assertion.[10] In any event, any ambiguity or imprecision does not justify resolving the case against respondents at the motion-to-dismiss stage. To the extent the majority has doubts about respondents' complaint—or factual or state-law issues that may bear upon the existence of a property interest—the more prudent course would be to vacate and remand for the lower courts to consider those matters more fully. In any event, as I have explained, the best course of all would be to affirm.

B

More fundamentally, the majority's opinion erroneously fixates on a type of case that is not before us: one in which a private entity simply enters the marketplace and is then

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[10] Respondents alleged that the City "created an electronic public forum" and "delegat[ed] control of that forum to" MNN. App. 17. They further alleged that "[a]lmost all cable franchise agreements require cable operators—as a condition for easements to use the public rights-of-way—to dedicate some channels for programming by the public," *id.*, at 20, invoked the state regulations requiring the designation of a channel here, *id.*, at 21, and then alleged that the City's franchise agreement "requires Time Warner to set aside" the channels, *id.*, at 22. While the complaint does not use the words "property interest," those allegations can be read to include the idea that whatever was "set aside" or "dedicate[d]," *id.*, at 20, 22, qualified as a sufficient City property interest to support respondents' assertion of a public forum. Cf. *People* v. *Brooklyn & Queens Transit Corp.*, 273 N. Y. 394, 400–401, 7 N. E. 2d 833, 835 (1937) (discussing dedications of property to public use); cf. also *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 794 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part) (noting this theory).

subject to government regulation. The majority swings hard at the wrong pitch.

The majority focuses on *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974), which is a paradigmatic example of a line of cases that reject § 1983 liability for private actors that simply operate against a regulatory backdrop. *Jackson* emphasized that the "fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Id.*, at 350; accord, *ante*, at 815. Thus, the fact that a utility company entered the marketplace did not make it a state actor, even if it was highly regulated. See *Jackson*, 419 U. S., at 358; accord, *ante*, at 815. The same rule holds, of course, for private comedy clubs and grocery stores. See *ante*, at 812.[11]

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[11] There was a time when this Court's precedents may have portended the kind of First Amendment liability for purely private property owners that the majority spends so much time rejecting. See *Marsh* v. *Alabama*, 326 U. S. 501, 505–509 (1946) (treating a company-owned town as subject to the First Amendment); *Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308, 315–320, and n. 9, 325 (1968) (extending *Marsh* to cover a private shopping center to the extent that it sought to restrict speech about its businesses). But the Court soon stanched that trend. See *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 561–567 (1972) (cabining *Marsh* and refusing to extend *Logan Valley*); *Hudgens* v. *NLRB*, 424 U. S. 507, 518 (1976) (making clear that "the rationale of *Logan Valley* did not survive" *Lloyd*). Ever since, this Court has been reluctant to find a "public function" when it comes to "private commercial transactions" (even if they occur against a legal or regulatory backdrop), see, *e. g.*, *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 161–163 (1978), instead requiring a closer connection between the private entity and a government or its agents, see, *e. g.*, *Brentwood Academy* v. *Tennessee Secondary School Athletic Assn.*, 531 U. S. 288, 298 (2001) (nonprofit interscholastic athletic association "pervasive[ly] entwine[d]" with governmental institutions and officials); *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 942 (1982) (state-created system "whereby state officials [would] attach property on the *ex parte* application of one party to a private dispute"); see also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 723–725 (1961) (restaurant in municipal parking garage partly maintained by municipal agency); accord, *ante*, at 809–810. *Jack-*

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The *Jackson* line of cases is inapposite here. MNN is not a private entity that simply ventured into the marketplace. It occupies its role because it was asked to do so by the City, which secured the public-access channels in exchange for giving up public rights of way, opened those channels up (as required by the State) as a public forum, and then deputized MNN to administer them. That distinguishes MNN from a private entity that simply sets up shop against a regulatory backdrop. To say that MNN is nothing more than a private organization regulated by the government is like saying that a waiter at a restaurant is an independent food seller who just happens to be highly regulated by the restaurant's owners.

The majority also relies on the Court's statements that its "public function" test requires that a function have been "traditionally and exclusively performed" by the government. *Ante*, at 809 (emphasis deleted); see *Jackson*, 419 U. S., at 352. Properly understood, that rule cabins liability in cases, such as *Jackson*, in which a private actor ventures of its own accord into territory shared (or regulated) by the government (*e. g.*, by opening a power company or a shopping center). The Court made clear in *West* that the rule did not reach further, explaining that "the fact that a state employee's role parallels one in the private sector" does not preclude a finding of state action. 487 U. S., at 56, n. 15.

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When the government hires an agent, in other words, the question is not whether it hired the agent to do something that can be done in the private marketplace too. If that were the key question, the doctor in *West* would not have been a state actor. Nobody thinks that orthopedics is a function "traditionally exclusively reserved to the State," *Jackson*, 419 U. S., at 352.

The majority consigns *West* to a footnote, asserting that its "scenario is not present here because the government has

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son exemplifies the line of cases that supplanted cases like *Logan Valley*—not cases like this one.

no [constitutional] obligation to operate public access channels." *Ante*, at 810, n. 1. The majority suggests that *West* is different because "the State was constitutionally obligated to provide medical care to prison inmates." *Ante*, at 810, n. 1. But what the majority ignores is that the State in *West* had no constitutional obligation to open the prison or incarcerate the prisoner in the first place; the obligation to provide medical care arose when it made those prior choices.

The City had a comparable constitutional obligation here—one brought about by its own choices, made against a state-law backdrop. The City, of course, had no constitutional obligation to award a cable franchise or to operate public-access channels. But once the City did award a cable franchise, New York law required the City to obtain public-access channels, see *supra*, at 820, and to open them up as a public forum, see *supra*, at 827–828. That is when the City's obligation to act in accordance with the First Amendment with respect to the channels arose. That is why, when the City handed the administration of that forum off to an agent, the Constitution followed. See *supra*, at 828–830.[12]

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The majority is surely correct that "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment." *Ante*, at 812. That is because the majority is not talking about *constitutional* forums—it is talking about spaces where private entities have simply invited others to come speak. A comedy

[12] *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974), by contrast, exemplifies a type of case in which a private actor provides a service that there is no governmental obligation to provide at all. See *id.*, at 353 (no state requirement for government to provide utility service); see also, *e. g.*, *Hudgens*, 424 U. S. 507 (shopping center). In *West* v. *Atkins*, 487 U. S. 42 (1988), by contrast, the prison was obligated to provide healthcare in accordance with the Eighth Amendment to its prisoners once it incarcerated them, and here, the City was required to provide a public forum to its residents in accordance with the First Amendment once it granted the cable franchise. See *supra*, at 828–830.

club can decide to open its doors as wide as it wants, but it cannot appoint itself as a government agent. The difference is between providing a service of one's own accord and being asked by the government to administer a constitutional responsibility (indeed, here, existing to do so) on the government's behalf.[13]

To see more clearly the difference between the cases on which the majority fixates and the present case, leave aside the majority's private comedy club. Imagine instead that a state college runs a comedy showcase each year, renting out a local theater and, pursuant to state regulations mandating open access to certain kinds of student activities, allowing students to sign up to perform on a first-come, first-served basis. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). After a few years, the college decides that it is tired of running the show, so it hires a performing-arts nonprofit to do the job. The nonprofit prefers humor that makes fun of a certain political party, so it allows only student acts that share its views to participate. Does the majority believe that the nonprofit is indistinguishable, for purposes of state action, from a private comedy club opened by local entrepreneurs?

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I hope not. But two dangers lurk here regardless. On the one hand, if the City's decision to outsource the channels to a private entity did render the First Amendment irrelevant, there would be substantial cause to worry about the potential abuses that could follow. Can a state university evade the First Amendment by hiring a nonprofit to appor-

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[13] Accordingly, the majority need not fear that "all private property owners and private lessees who open their property for speech [c]ould be subject to First Amendment constraints." *Ante*, at 812. Those kinds of entities are not the government's agents; MNN is. Whether such entities face "extensive regulation" or require "government licenses, government contracts, or government-granted monopolies," *ante*, at 814, 815, is immaterial, so long as they have not accepted the government's request to fulfill the government's duties on its behalf.

tion funding to student groups? Can a city do the same by appointing a corporation to run a municipal theater? What about its parks?

On the other hand, the majority hastens to qualify its decision, see *ante*, at 810, n. 1, 818, and to cabin it to the specific facts of this case, *ante*, at 818. Those are prudent limitations. Even so, the majority's focus on *Jackson* still risks sowing confusion among the lower courts about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution.

In any event, there should be no confusion here. MNN is not a private entity that ventured into the marketplace and found itself subject to government regulation. It was asked to do a job by the government and compensated accordingly. If it does not want to do that job anymore, it can stop (subject, like any other entity, to its contractual obligations). But as long as MNN continues to wield the power it was given by the government, it stands in the government's shoes and must abide by the First Amendment like any other government actor.

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IV

This is not a case about bigger governments and smaller individuals, *ante*, at 818; it is a case about principals and agents. New York City opened up a public forum on public-access channels in which it has a property interest. It asked MNN to run that public forum, and MNN accepted the job. That makes MNN subject to the First Amendment, just as if the City had decided to run the public forum itself.

While the majority emphasizes that its decision is narrow and factbound, *ibid.*, that does not make it any less misguided. It is crucial that the Court does not continue to ignore the reality, fully recognized by our precedents, that private actors who have been delegated constitutional responsibilities like this one should be accountable to the Constitution's demands. I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 837 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.

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ORDERS FOR MARCH 26 THROUGH
JUNE 17, 2019

MARCH 26, 2019

Dismissal Under Rule 46

No. 18–1129. CADIAN CAPITAL MANAGEMENT, LP, ET AL. *v.* KLEIN ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 906 F. 3d 215.

MARCH 28, 2019

Miscellaneous Orders

No. 18A963. GUN OWNERS OF AMERICA, INC., ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied.

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No. 18A985. MURPHY *v.* COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, granted. The State may not carry out Murphy's execution pending the timely filing and disposition of a petition for writ of certiorari unless the State permits Murphy's Buddhist spiritual adviser or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution. JUSTICE THOMAS and JUSTICE GORSUCH would deny the application for stay of execution.

JUSTICE KAVANAUGH, concurring.

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution. The government may not discriminate against religion generally or against particular religious denominations. See *Morris County Bd. of Chosen Freeholders* v. *Freedom from*

Religion Foundation, 586 U. S. 1213, 1214 (2019) (statement of KAVANAUGH, J., respecting denial of certiorari); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 465–466 (2017); *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). In this case, the relevant Texas policy allows a Christian or Muslim inmate to have a state-employed Christian or Muslim religious adviser present either in the execution room *or* in the adjacent viewing room. But inmates of other religious denominations—for example, Buddhist inmates such as Murphy—who want their religious adviser to be present can have the religious adviser present *only* in the viewing room and *not* in the execution room itself for their executions. In my view, the Constitution prohibits such denominational discrimination.

In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. See *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975). For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. A State may choose a remedy in which it would allow religious advisers only into the viewing room and not the execution room because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions. The solution to that concern would be to allow religious advisers only into the viewing room.

In any event, the choice of remedy going forward is up to the State. What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.*

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*Under all the circumstances of this case, I conclude that Murphy made his request to the State in a sufficiently timely manner, one month before the scheduled execution.

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

Patrick H. Murphy, who was convicted and sentenced to death in 2003, was scheduled to be executed at 7 p.m. on March 28. Murphy's attorneys waited until March 26 before filing this suit in Federal District Court. The complaint they filed challenges a feature of the Texas execution protocol that has been in place and on the public record since 2012. The complaint claims that the Texas protocol violates the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.*, insofar as it permits only a prison chaplain and not any outside cleric to be present in the room where executions are carried out. Murphy is a Buddhist, and none of the more than 100 Texas prison chaplains is a Buddhist priest.

In carefully reasoned opinions based squarely on precedents of this Court, both the District Court and the Court of Appeals rejected Murphy's request for a stay of execution due to his dilatory litigation tactics, see 919 F. 3d 913, 916 (CA5 2019); 376 F. Supp. 3d 734, 735 (SD Tex. 2019). Then, on the afternoon of March 28, only hours before his execution was scheduled to occur, Murphy asked this Court to block his execution. And despite his inexcusable delay in raising his claims, the Court granted Murphy's request.

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I did not agree with the decision of the Court when it was made. Because inexcusably late stay applications present a recurring and important problem and because religious liberty claims like Murphy's may come before the Court in future cases, I write now to explain why, in my judgment, the Court's decision in this case was seriously wrong.

I

In 2000, while serving a 55-year sentence for aggravated sexual assault, Murphy and six other inmates executed a well-planned, coordinated, and violent escape from a Texas prison. About two weeks later, on Christmas Eve, the group robbed a sporting goods store and killed Irving, Texas, police officer Aubrey Hawkins when he arrived at the scene. The escapees shot Hawkins 11

*[REPORTER'S NOTE: This opinion was filed on May 13, 2019.]

times, dragged him from his vehicle, drove over him, and dragged his body for some distance. Six of the seven were eventually captured, convicted of capital murder, and sentenced to death. See *Murphy* v. *Davis*, 737 Fed. Appx. 693, 696–697 (CA5 2018); *Murphy* v. *State*, 2006 WL 1096924, *1, *4 (Tex. Crim. App., Apr. 26, 2006). Murphy was convicted and sentenced in 2003, and his direct appeal ended in 2007. *Murphy* v. *Texas*, 549 U. S. 1119 (2007). During the next 11 years, he unsuccessfully pursued post-conviction relief in state and federal court. See *Murphy* v. *Davis*, 737 Fed. Appx., at 695, 699, 709. In November 2018, the State obtained a death warrant setting Murphy's execution for March 28, 2019.

By this time, Murphy had become a Pure Land Buddhist. According to his papers, he converted nearly a decade ago and has been visited by a Buddhist priest, Rev. Hui-Yong Shih, for the past six years.[1] In 2012, Texas made publicly available its policy regarding the presence of a member of the clergy in the room where an execution by lethal injection is carried out. Under that policy, any of the prison system's chaplains, but no other cleric, may enter this room. Texas has more than 100 chaplains, who are either employees of or under contract with the prison system. These chaplains include Christians, Muslims, Jews, and practitioners of a Native American religion, but no Buddhist priest. The inadequate record compiled in this case does not explain the reason for this omission. It does not tell us how many Texas prisoners are Buddhists, whether any Texas prisoners ever requested a Buddhist chaplain, whether Texas made any effort to recruit such a chaplain, or whether any Buddhist priest is willing to do whatever is needed to serve as a chaplain. Nor do we know anything about the vetting of potential chaplains, any general training that chaplains receive, and any special orientation provided to a chaplain who accompanies a prisoner during the process of execution. And we also do not know what a chaplain is permitted to do during an execution or whether there are specific restrictions on movements or sounds that might interfere with the work of those carrying out an execution.

On February 28, 2019, about three months after Murphy's execution date was set, his attorneys wrote to the general counsel

[1] See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–13.

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of the Texas Department of Criminal Justice and inquired whether Rev. Shih would be permitted to enter the execution room with their client, and on March 5, the department responded that only a chaplain is permitted in the room. Two days later, Murphy's attorney responded and said that he believed Murphy would be satisfied with a Buddhist chaplain but that he assumed none of Texas's chaplains were Buddhists. Texas did not respond, and Murphy's attorneys never renewed their inquiry.

After receiving Texas's response, Murphy's attorneys waited 15 days—until March 20—before challenging this decision in state court. The state court rejected the claim as untimely late in the evening of March 25, see *In re Murphy*, 2019 WL 1379859, *1 (Tex. Crim. App.), and on March 26, Murphy's lawyers filed this lawsuit in federal court. They asked the District Court to grant a stay of execution, but the District Court refused, citing the well-established rule that a stay of execution is an equitable remedy that should not be granted to an applicant who engages in inexcusably dilatory litigation tactics. 376 F. Supp. 3d, at 735, 740. On March 27, the Court of Appeals for the Fifth Circuit likewise refused to grant a stay, holding that the District Court had not abused its discretion in denying that relief. See 919 F. 3d, at 916.

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On March 28, at about 1 p.m.—six hours before the scheduled time of Murphy's execution—his attorneys brought his religious liberty claims to this Court. They filed, among other things, an application for a stay of execution pending the filing of a petition for a writ of certiorari.[2] At about 4 p.m., Texas filed a response, and shortly after 9 p.m., more than two hours after the time scheduled for Murphy's execution, the Court issued an order staying Murphy's execution unless the State allowed Rev. Shih "or another Buddhist reverend of the State's choosing" to accompany Murphy during the execution. 587 U. S. 901. Murphy's death warrant was set to expire at midnight on March 28, and Texas announced that Murphy's execution would not proceed. Under Texas law, a new death warrant may be issued, but such a warrant may not set a date less than 90 days in the future. Tex. Code Crim. Proc. Ann., Art. 43.141(c) (Vernon 2018).

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[2] They also filed a petition for a writ of prohibition and an application for a stay pending the consideration of that petition.

II

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). An applicant for a stay of execution must satisfy all the traditional stay factors and therefore must show that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," and, in a close case, that the equities favor the granting of relief. *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*).

A court must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson* v. *Campbell*, 541 U. S. 637, 650 (2004); see also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

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Thus, in granting a stay in this case, the Court must have concluded that there is a reasonable probability that we will grant review of the question whether the District Court abused its discretion in finding that Murphy's delay in raising his religious liberty claims disentitled him to the equitable remedy of a stay. We do not generally grant review of such factbound questions. See this Court's Rule 10. But in death penalty matters, it appears, ordinary procedural rules do not apply, see *Madison* v. *Alabama*, 586 U. S. 265, 284 (2019) (ALITO, J., dissenting). And in light of the dissent in *Dunn* v. *Ray*, 586 U. S. 1138 (2019)—about which I will say more later—I do not contest the Court's prediction about the probability of certiorari (as opposed to its propriety).

The likelihood of review, however, is not enough to justify a stay, so the Court's decision must also mean that, in its view, there is a significant likelihood that Murphy will succeed in showing that the District Court abused its discretion. And that I do contest. It is established that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief," *Gomez*, *supra*, at 654, and

the District Court's decision—and the Fifth Circuit's affirmance—cannot reasonably be thought to represent anything other than the careful and measured consideration of that matter. It is particularly remarkable to conclude that the District Court abused its discretion by ruling exactly as we had less than two months earlier. Compare 376 F. Supp. 3d, at 737 (relying on *Gomez* to deny untimely stay application), with *Dunn* v. *Ray*, 586 U. S. 1138 (same).

By granting a stay in this case, the Court disregards the "strong equitable presumption" against the grant of such relief when the applicant unreasonably delayed in raising the underlying claims. This presumption deserves greater respect because it serves many important interests.

First, it honors a State's strong interest in the timely enforcement of valid judgments of its courts. See *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). In this case, direct review of the judgment ended more than a decade ago. Moreover, if a State is pressured to modify a rule adopted for security reasons, the State has a legitimate claim to be given sufficient time to consider whether acceptable modifications are possible.

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Second, eleventh-hour stay requests can impair valid interests of the federal courts. When courts do not have adequate time to consider a claim, the decisionmaking process may be compromised. And last-minute applications may disrupt other important work.

Third, the hasty decisionmaking resulting from late applications may harm the interests of applicants with potentially meritorious claims. Attorneys do not serve such clients well by unduly delaying the filing of claims that hold a real prospect of relief.

Finally, the cancellation of a scheduled execution only hours before (or even after) it is scheduled to take place may inflict further emotional trauma on the family and friends of the murder victim and the affected community.

In the present case, Murphy cannot overcome the presumption against last-minute applications. As I will explain, see Part III, *infra*, his religious liberty claims are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level. Those questions cannot be properly resolved in a matter of hours on a woefully deficient record. But that is precisely what Murphy asked of the lower courts and this Court.

As of at least 2013, Murphy and his attorneys knew or had reason to know everything necessary to assert the claim that the First Amendment and RLUIPA entitled him to have Rev. Shih at his side during his execution. By that date, Murphy had converted to Pure Land Buddhism, had begun to see Rev. Shih, and should have been aware of the Texas policy now at issue. Had Murphy begun to pursue his claims at that time, they could have been properly adjudicated long ago.

Even if Murphy is not held responsible for failing to act in 2013 or shortly thereafter, he and his attorneys certainly should have been spurred to action when, in November of last year, his execution date was set. Instead, his lawyers waited three months before writing to the Texas Department of Criminal Justice. How can that be justified?

Then, after receiving word on March 5 that Texas would adhere to its long-established policy, the attorneys waited three more weeks before filing suit. While they blame Texas's failure to respond to their second e-mail for their delay, that is simply untenable. If they could not act without further communication from Texas, why did they fail to follow up with the State? Why did the attorneys decide they could file on March 20 in state court without further response from Texas but not before? What justified that delay? And why didn't the attorneys file in federal court at the same time?

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By the time they got around to filing in federal court, it was March 26, two days before the scheduled execution date. And by the time they filed in this Court, the scheduled execution time and the time when the death warrant would expire were only hours away. If the tactics of Murphy's attorneys in this case are not inexcusably dilatory, it is hard to know what the concept means.

This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent. By countenancing the dilatory litigation in this case, the Court, I fear, will encourage this damaging practice.[3]

[3] In my judgment, the tactics in this case are just as unjustified as those that led the Court to vacate a stay of execution a few weeks ago in *Dunn* v. *Ray*, 586 U. S. 1138 (2019). In that case, Ray, a Muslim, objected to Alabama's refusal to allow an imam to be present in the execution room. Ray filed suit in Federal District Court 10 days before his execution date. The

III

While I strongly disagree with the decision to grant a stay in this case, I recognize that Murphy, like Ray, raises serious questions under both the First Amendment and RLUIPA. Murphy argues, among other things, that Texas's policy of admitting only authorized chaplains illegally discriminates on the basis of religion. That is the argument embraced by both the concurrence in this case and the dissent in *Ray*. Both of those opinions seem to see this religious discrimination claim as one that is easily resolved under our Establishment Clause precedents, but that is simply not so.

Both opinions invoke precedents involving the constitutional rights of persons who are not incarcerated, see *Ray*, 586 U. S., at 1139; *ante*, at 901–902, and there is no question that, if Murphy were not in prison, Texas could not tell him that the only cleric he could have at his side in the moments before death is one who is approved by the State. But this Court's precedents hold that imprisonment necessarily imposes limitations on a prisoner's constitutional rights. See *Turner* v. *Safley*, 482 U. S. 78, 90 (1987); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348–350 (1987). Under those cases, it is not enough for a prisoner to assert a claim that would succeed in the outside world. Instead, we must consider the following four factors: (1) whether a prison rule bears a "valid, rational connection to a legitimate governmental interest"; (2) "whether alternative means are open to inmates to exercise the asserted right"; (3) "what impact an accommodation of the right would have on guards, inmates, and prison resources"; and (4) "whether there are ready alternatives to the regulation." *Overton* v. *Bazzetta*, 539 U. S. 126, 132 (2003) (quoting *Turner*, *supra*, at 89–91; internal quotation marks omitted). Neither the

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District Court refused to issue a stay of execution, holding, among other things, that the application was untimely, *Ray* v. *Dunn*, 2019 WL 418105, *1 (MD Ala., Feb. 1, 2019), but on February 6, the Eleventh Circuit granted a stay on the ground that Alabama's policy of allowing only its official chaplain, a Christian minister, to enter the execution room likely violated the Establishment Clause. *Ray* v. *Commissioner, Ala. Dept. of Corrections*, 915 F. 3d 689, 695–701, 703 (2019). The State asked us to vacate this stay, and we did so based on Ray's delay in raising his religious liberty claims. See *Ray*, 586 U. S., at 1138. In both *Ray* and this case, the Court was presented at the last minute with claims that raised complicated issues that cannot be adequately decided with hasty briefing and an inadequate record.

Ray dissent nor the concurrence in this case even mentions these precedents. Indeed, the *Ray* dissent is based on strict scrutiny, 586 U. S., at 1139, even though *Turner* specifically and emphatically rejected the use of that test in prisoner cases, 482 U. S., at 89.

On the flimsy record now before us, I would not presume to apply the *Turner* factors to Murphy's First Amendment claims, but there can be no doubt that *Turner* presents a serious obstacle. Here, Texas argues that it must be able to regulate the members of the clergy who are allowed in the execution room in order to ensure that these individuals do not intentionally or unintentionally engage in any conduct that might interfere with an execution. Murphy responds that Texas has failed to show that this is a real concern in his case because Rev. Shih has visited him in prison without incident and because Texas had sufficient time to do whatever additional vetting and training it thinks is needed. But on the present record, we cannot tell whether this is true. Visiting a living prisoner is not the same as watching from a short distance and chanting while a lethal injection is administered. And Texas may have an interest that goes beyond interference with Murphy's execution, namely, that allowing members of the clergy and spiritual advisers other than official chaplains to enter the execution room would set an unworkable precedent.

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Specifically, Texas may be concerned that if it admits any cleric other than an official chaplain, every prisoner will insist on the presence of whichever outside cleric he prefers. Although the Court's order in this case permitted Texas to proceed with Murphy's execution if *any* Buddhist priest was allowed in the execution room, such a limited accommodation would not be acceptable in the outside world. There, Texas surely could not successfully defend a policy of admitting to the side of a dying patient only a state-approved cleric. Texas could not force a dying Baptist to settle for a Catholic priest; it could not tell an Orthodox Jew that only a Reform rabbi would be allowed at his side; it could not force a Shi'ite to accept a Sunni imam; and so forth. I am aware of no single authoritative tally of the number of religions and denominations that exist in the United States, but the number is certainly very large. And of course, even within a particular religion or denomination, all clerics are not fungible. Moreover, I assume that, in the world outside prison walls, a State could not discriminate between clerics and any other person whose

presence a dying patient might want at his side for spiritual or emotional support.

In permitting Murphy's execution to go forward provided that *some* Buddhist priest was allowed in the execution room, the Court may perhaps be understood to have concluded that a prison need not afford a prisoner facing execution the same array of choices that he would enjoy in the outside world. But if that is the Court's reasoning, what it shows is that the prison setting justifies important adjustments in the rules that apply outside prison walls. Determining just how far those adjustments may go is a sensitive question requiring an understanding of many factual questions that cannot be adequately decided on the thin record before us.[4]

So far, I have discussed the prospects of Murphy's Establishment Clause claim, but even if that claim cannot succeed, he might still prevail under RLUIPA, which was enacted by Congress to provide greater protection for religious liberty than do this Court's First Amendment precedents. To prevail under RLUIPA, Murphy would have to show at the outset that excluding Rev. Shih would impose a substantial burden on his exercise of religion. See 42 U. S. C. § 2000cc–1(a).

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We have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, which contains an identical threshold requirement, § 2000bb–1(b), there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred. In past

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[4] I have discussed the constitutional claim set out in the concurrence in this case and in the *Ray* dissent, namely, an Establishment Clause claim based on discrimination among religions. But Murphy also asserts Free Exercise Clause and RLUIPA claims, which, as he frames them, do not depend on disparate treatment of different religions or denominations. If States respond to the decision on Murphy's stay application by banning all clerics from the execution room, that may obviate any conflict with the Establishment Clause, but a prisoner might still press free exercise claims. A claim under the Free Exercise Clause of the First Amendment would have to contend with both *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), and *Turner* v. *Safley*, 482 U. S. 78 (1987). Under RLUIPA, such a claim would present issues similar to those discussed below. See *infra* this page and 912.

cases, we have assessed regulations that compel an activity that a practitioner's faith prohibits. See, *e. g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 725–726 (2014); *Holt* v. *Hobbs*, 574 U. S. 352 (2015). And, while some Members of this Court have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden, see *Hobby Lobby*, 573 U. S., at 758–760 (GINSBURG, J., joined by BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (arguing that it is not a substantial burden to require Christian-owned businesses to facilitate the acquisition of abortifacients), a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected belief or practice, see *id.*, at 723–726. Similarly, it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." § 2000cc–5(7)(A) (emphasis added).

But this does not answer what results when the State offers a prisoner an alternative practice that, in terms of religious significance, is indistinguishable from the prohibited practice. Persons of many faiths may *desire* the support of a cleric in the moments before death, but not every religion would draw a distinction between a meeting with a clergyman shortly before death and one precisely at the moment of death. Murphy's situation, however, may be different because he believes that he will be reborn in the Pure Land only if he succeeds in remaining focused on Buddha while dying and that the chants of a Buddhist priest will help him in this endeavor. See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–17.

I will assume for present purposes that a policy like Texas's imposes a substantial burden on *any* prisoner who seeks the presence of a cleric other than one of the official chaplains, but that does not necessarily mean that the prisoner's RLUIPA claim would prevail. The State claims that its policy furthers its compelling interest in security and that the policy is narrowly tailored to serve that interest, see Brief in Opposition 20–23, 29, and in deciding whether its policy can be sustained on that basis, we would face unresolved factual questions that are similar to those

discussed above. The RLUIPA standard, § 2000cc–1(a)(2), to be sure, would be more favorable to the prisoner, but the nature of the underlying issues would be similar.

IV

The claims raised by Murphy and Ray are important and may ultimately be held to have merit. But they are not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons. See *Holt* v. *Hobbs*, *supra*. Prisoners should bring such claims well before their scheduled executions so that the courts can adjudicate them in the way that the claims require and deserve and so that States are afforded sufficient time to make any necessary modifications to their execution protocols.

In this case, however, Murphy egregiously delayed in raising his claims. By countenancing such tactics, the Court invites abuse.

For these reasons, Murphy's stay application, like Ray's, should have been denied.

Statement of JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, respecting grant of application for stay.*

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In light of JUSTICE ALITO's opinion dissenting from the Court's March 28 order, I write to respectfully add two points.

1. On March 28, the Court stayed Murphy's execution. Murphy is Buddhist and wanted a Buddhist minister in the execution room. Under Texas' policy at the time, inmates who were Christian or Muslim could have ministers of their religions in the execution room. But inmates such as Murphy who were of other religions could have ministers of their religions only in the adjacent viewing room and not in the execution room. That discriminatory state policy violated the Constitution's guarantee of religious equality.

On April 2, five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately. Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution

*[REPORTER'S NOTE: This statement was filed on May 13, 2019.]

room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq.*, and the Free Exercise Clause.

Put simply, this Court's stay facilitated the prompt resolution of a significant religious equality problem with the State's execution protocol and should alleviate any future litigation delays or disruptions that otherwise might have occurred as a result of the State's prior discriminatory policy.

2. I greatly respect JUSTICE ALITO's position that the Court nonetheless should have denied Murphy's stay application as untimely, although I ultimately disagree. In saying that the Court should have denied a stay in this case, JUSTICE ALITO points in part to the execution earlier this year of Domineque Ray in Alabama, where this Court did not approve a stay. But several significant differences between the two cases demonstrate why a stay was warranted in Murphy's case but not in Ray's case.

First, unlike Murphy, Ray did not raise an equal-treatment claim. Ray raised an Establishment Clause claim to have the State's Christian chaplain removed from the execution room. The State of Alabama then agreed to remove the Christian chaplain, thereby mooting that claim. Notably, in the District Court, Ray expressly agreed that his Establishment Clause claim would be moot if the State removed the Christian chaplain from the execution room, as the State subsequently agreed to do. Ray also raised a RLUIPA claim to have his Muslim religious minister in the execution room and not just in the viewing room. As noted above, however, the State has a compelling interest in controlling access to the execution room, which means that an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room, as opposed to the viewing room.

To be sure, in granting Ray a stay, the Eleventh Circuit relied on an equal-treatment theory, on the idea that the State's policy discriminated against non-Christian inmates. But Ray did not raise an equal-treatment argument in the District Court or the Eleventh Circuit. The Eleventh Circuit came up with the equal-treatment argument on its own, as the State correctly pointed out when the case later came to this Court. Amended Emer-

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gency Motion and Application to Vacate Stay of Execution in *Dunn* v. *Ray*, O. T. 2018, No. 18A815, pp. 10–11, 17. Given that Ray did not raise an equal-treatment argument, the Eleventh Circuit's stay of Ray's execution on that basis was incorrect.

For present purposes, the bottom line is that Ray did not raise an equal-treatment claim. Murphy did.

Second, in response to the Eleventh Circuit's stay in Ray's case, Alabama indicated to this Court that an equal-treatment problem, if there were one, would typically be remedied by removing ministers of all religions from the execution room (as Texas has now done). *Id.*, at 17. That remedy would of course have done nothing for Ray, who wanted his religious minister *in the execution room*. That presumably explains why Ray raised a RLUIPA claim, but did not raise an equal-treatment claim. And that further explains why it was incorrect for the Eleventh Circuit to stay Ray's execution on the basis of an argument (the equal-treatment theory) that was not raised by Ray and that, even if successful, would not have afforded Ray the relief he sought of having his religious minister in the execution room.

Third, Murphy made his request to the State of Texas a full month before his scheduled execution. Yet the State never responded to Murphy's request to have any Buddhist minister in the execution room. The timing of Murphy's request, when combined with the State's foot-dragging in response and the ease with which the State could have promptly responded and addressed this discrete issue, was relevant to the assessment of the equities for purposes of the stay. See *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). As we have now seen, moreover, it took Texas only five days to change its discriminatory policy after a stay was granted. Texas' prompt response in the wake of the stay further underscores that Murphy's request was made in plenty of time for Texas to fix its discriminatory policy before Murphy's scheduled execution. Moreover, unlike Alabama in Ray's case, Texas did not indicate to this Court whether it would remedy any unconstitutional discrimination by allowing all ministers into the execution room or by keeping all ministers out. (After this Court granted the stay, the State of Texas chose the latter option.)

* * *

In sum, this Court's stay in Murphy's case was appropriate, and the stay facilitated a prompt fix to the religious equality problem

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in Texas' execution protocol. That said, both the facts and the religious equality claim in Murphy's case were highly unusual. I fully agree with JUSTICE ALITO that counsel for inmates facing execution would be well advised to raise any potentially meritorious claims in a timely manner, as this Court has repeatedly emphasized. See generally *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*).

APRIL 1, 2019

Certiorari Dismissed

No. 18–8061. GRIGSBY *v.* BALTAZAR, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 744 Fed. Appx. 592.

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Miscellaneous Orders

No. 18M121. RIDGEWAY *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL.;

No. 18M122. KENON *v.* UNITED STATES;

No. 18M123. FRANKLIN *v.* MAY, WARDEN, ET AL.; and

No. 18M124. DANIELS *v.* BRENNAN, POSTMASTER GENERAL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–9560. REHAIF *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 586 U. S. 1113.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–459. EMULEX CORP. ET AL. *v.* VARJABEDIAN ET AL. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–481. FOOD MARKETING INSTITUTE *v.* ARGUS LEADER MEDIA, DBA ARGUS LEADER. C. A. 8th Cir. [Certiorari

granted, 586 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–5881. VURIMINDI *v.* HOOPSKIRT LOFTS CONDOMINIUM ASSN. Commw. Ct. Pa. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 986] denied.

No. 18–7530. UDOH ET VIR *v.* MINNESOTA DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 8th Cir.;

No. 18–7647. SMITH ET VIR *v.* MANASQUAN SAVINGS BANK. Sup. Ct. N. J.; and

No. 18–7907. HASSAN *v.* MARKS, CHIEF ADMINISTRATIVE JUDGE, ET AL. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 22, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8322. IN RE MADKINS; and

No. 18–8356. IN RE EASON. Petitions for writs of habeas corpus denied.

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No. 18–982. IN RE HENNAGER ET AL.;

No. 18–7596. IN RE RUSSO;

No. 18–7630. IN RE FREY;

No. 18–8156. IN RE BOWDEN;

No. 18–8169. IN RE AGUIRRE; and

No. 18–8220. IN RE GRAHAM. Petitions for writs of mandamus denied.

No. 18–7583. IN RE HERRON. 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. 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*).

No. 18–7704. IN RE ALBRA. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 18–7013. In re Zimmermann;
No. 18–7673. In re Hiramanek; and
No. 18–7686. In re Thomas Bey. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 18–556. Kansas *v.* Glover. Sup. Ct. Kan. Certiorari granted. Reported below: 308 Kan. 590, 422 P. 3d 64.

Certiorari Denied

No. 18–579. Alaska Airlines, Inc. *v.* Schurke et al. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 3d 904.

No. 18–608. Capital Medical Center *v.* National Labor Relations Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 909 F. 3d 427.

No. 18–682. Santana *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 543.

No. 18–694. Williams *v.* Merit Systems Protection Board et al. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 3d 1156.

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No. 18–696. Center for Medical Progress et al. *v.* Planned Parenthood Federation of America et al. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 3d 828.

No. 18–814. Walker, Individually and on Behalf of All Others Similarly Situated *v.* City of Calhoun, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 3d 1245.

No. 18–959. Rooks *v.* Rooks. Sup. Ct. Colo. Certiorari denied. Reported below: 429 P. 3d 579.

No. 18–965. Sullivan *v.* Pugh et ux. Ct. App. N. C. Certiorari denied. Reported below: 258 N. C. App. 691, 814 S. E. 2d 117.

No. 18–968. Najda *v.* Paterakis. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass. App. 1103, 103 N. E. 3d 767.

No. 18–975. Stuart *v.* Lane et al. Ct. App. Ariz. Certiorari denied.

No. 18–978. Robertson *v.* Republic of Nicaragua et al. C. A. 9th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 705.

No. 18–992. Beltran Ortiz *v.* Barr, Attorney General. C. A. 5th Cir. Certiorari denied.

No. 18–1012. Lafferty et al. *v.* Wells Fargo Bank, N. A. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 25 Cal. App. 5th 398, 235 Cal. Rptr. 3d 842.

No. 18–1030. United States ex rel. Berg et al. *v.* Honeywell International, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 535.

No. 18–1032. Mawhinney *v.* American Airlines, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 3d 1114.

No. 18–1046. Callahan et al. *v.* Pacific Cycle, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 216.

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No. 18–1051. Dickey *v.* City of Boston Inspectional Services Department. C. A. 1st Cir. Certiorari denied.

No. 18–1066. Chang et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 385.

No. 18–1080. Anderson Living Trust, fka James H. Anderson Living Trust, et al. *v.* WPX Energy Production, LLC, fka WPX Energy San Juan, LLC, et al. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 3d 1135.

No. 18–1088. Asghari-Kamrani et al. *v.* United Services Automobile Assn. C. A. Fed. Cir. Certiorari denied. Reported below: 737 Fed. Appx. 542.

No. 18–1100. Ramsay *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 307.

No. 18–1101. Classic Cab, Inc. *v.* District of Columbia et al. Ct. App. D. C. Certiorari denied.

No. 18–1102. Cuff *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 18–1103. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–1107. CHANDLER *v.* VERMONT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 728 Fed. Appx. 73.

No. 18–1123. SOUTHERN TRUST METALS, INC., ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 3d 1313.

No. 18–1124. STEPHENS INSTITUTE, DBA ACADEMY OF ART UNIVERSITY *v.* UNITED STATES EX REL. ROSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 3d 1012.

No. 18–1126. SEJOUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 825.

No. 18–1127. SPEEDYPC SOFTWARE *v.* BEATON. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 1018.

No. 18–1167. SAM FRANCIS FOUNDATION ET AL. *v.* SOTHEBY'S, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 3d 1204.

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No. 18–6547. BROOKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–6823. WILLIAMS *v.* COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 536.

No. 18–6936. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 974.

No. 18–7241. KERRIGAN *v.* QBE INSURANCE CORP. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 481.

No. 18–7326. SOLIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 282.

No. 18–7548. ONAFEKO *v.* GREAT BRITAIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 157.

No. 18–7549. ROBLES *v.* BROOKWOOD TERRACE APARTMENTS; and

No. 18–7595. ROBLES *v.* BROOKWOOD TERRACE APARTMENTS. Ct. App. Kan. Certiorari denied.

No. 18–7568. SHERE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 18–7569. SCOTT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–7590. JACOBS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 560 S. W. 3d 205.

No. 18–7591. KYEI *v.* SWIFT ET AL. Ct. App. Ore. Certiorari denied.

No. 18–7597. PONCE *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7603. ZAYAS *v.* LUTHER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT LAUREL HIGHLANDS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7604. VILLAFANA *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 252.

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No. 18–7610. COLBAUGH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7620. ADEYINKA *v.* HARRIS COUNTY JAIL ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–7622. DEMUS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7624. GRIFFIN *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7625. FLORENCE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7629. BARNETT *v.* ALLBAUGH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 653.

No. 18–7631. HALEY *v.* LEIBACH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7633. HEARD *v.* SOLOMAN ET AL. Sup. Ct. Ark. Certiorari denied.

No. 18–7636. GLOVER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7637. VALDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7640. HOCKMAN *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 277.

No. 18–7641. HUERTA *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7643. KEARSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 252 So. 3d 693.

No. 18–7651. ANDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 5th 372, 420 P. 3d 825.

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No. 18–7653. BONNER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7655. SPENGLER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7657. SMITH *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7658. JONES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 18–7659. HARDWICK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 18–7665. GARRETT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7671. GONZALEZ *v.* MALOY, CLERK. Sup. Ct. Fla. Certiorari denied.

No. 18–7676. HILL *v.* LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7677. GEETER *v.* LESATZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7683. ANDERSON *v.* LESATZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7685. BARGO *v.* PORTER COUNTY, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 375.

No. 18–7688. JOHNSON *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. C. A. 6th Cir. Certiorari denied.

No. 18–7690. BELL *v.* LEIGH ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–7691. ARUNACHALAM *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7701. SCHNEIDER *v.* BANK OF AMERICA, N. A., ET AL. C. A. 9th Cir. Certiorari denied.

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No. 18–7703. SMITH *v.* PENNYWELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 230.

No. 18–7708. KOEBEL *v.* CHANDLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 418.

No. 18–7710. GARCIA MEJIA *v.* HATTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7718. GANT *v.* PETERSON. C. A. 6th Cir. Certiorari denied.

No. 18–7719. GOMEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7724. JOHNSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7729. HARRIS *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7730. FRAZIER *v.* LEE, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–7731. CIAVONE *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7761. HARRIS *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7793. CHASSON, AKA HANSON *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 18–7807. YOUNG *v.* KRAUS ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7810. TRAXLER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7811. THOMPSON *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7819. DENT, AKA JIMENEZ-MENDEZ *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 3d 1075.

No. 18–7826. LEACHMAN *v.* WINN, WARDEN. C. A. 6th Cir. Certiorari denied.

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No. 18–7831. LOCKETT *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 243 So. 3d 393.

No. 18–7854. WILLS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2017 IL App (2d) 150240, 92 N. E. 3d 1057.

No. 18–7866. GRANT-DAVIS *v.* SOUTH CAROLINA OFFICE OF THE GOVERNOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 790.

No. 18–7870. BALIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7872. TORRES *v.* REWERTS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7929. BURNS *v.* SHOOP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7937. SULLIVAN *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 347.

No. 18–7972. VICKERS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 560 S. W. 3d 3.

No. 18–8022. ARIAS COREAS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 193.

No. 18–8089. MORRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8095. GAMINO-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 238.

No. 18–8117. PETE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 151.

No. 18–8131. PAMATMAT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 537.

No. 18–8133. MINGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8139. HARDISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

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No. 18–8143. TALBERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8145. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 367.

No. 18–8159. CAMILLO-AMISANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8160. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 440.

No. 18–8162. BARTOLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 424.

No. 18–8165. GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 543.

No. 18–8166. WINSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 124.

No. 18–8167. BANKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 737 Fed. Appx. 639.

No. 18–8168. LONG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 193 A. 3d 1077 and 1078.

No. 18–8171. ALARCON FUENTES, AKA FUENTES ALARCON, AKA QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8172. BOSTIC *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 228.

No. 18–8177. MACRI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2018 IL App (5th) 160325–U.

No. 18–8181. SOTO-LUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 561.

No. 18–8183. SPEROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8185. FERRARI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 560.

No. 18–8186. GANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 898.

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No. 18–8187. TONEY *v.* STOCK, WARDEN. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 18–8190. PINEDA-PINEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 547.

No. 18–8195. BOLDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8198. LISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 706 Fed. Appx. 48.

No. 18–8205. BASHIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 Fed. Appx. 743.

No. 18–8210. ALEXANDER *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8213. SANTILLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 3d 49.

No. 18–8216. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 742 Fed. Appx. 616.

No. 18–8217. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 749 Fed. Appx. 29.

No. 18–8218. HOSKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 320.

No. 18–8226. BIRD *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 18–8238. GOMEZ URANGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 3d 1292.

No. 18–8247. KOFALT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8252. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8259. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8260. HARRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

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No. 18–8280. WILLIAMS *v.* REYNOLDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 278.

No. 18–8291. GARCIA *v.* JOHNSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 402.

No. 18–8298. BRAZILL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141068–U.

No. 17–1269. KUMAR, INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE AND NEXT FRIEND OF C. K., A MINOR, ET AL. *v.* REPUBLIC OF SUDAN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 880 F. 3d 144.

No. 18–1105. PIERCE *v.* YALE UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 18–6747. FIGUEROA-BELTRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

No. 18–7486. MONTE *v.* VANCE ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 18–7944. WALLACE *v.* UNITED STATES; and

No. 18–8239. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of these petitions. Reported below: 755 Fed. Appx. 63.

No. 18–8107. POWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 739 Fed. Appx. 511.

Rehearing Denied

No. 17–9149. GREEN *v.* UNITED STATES, 586 U. S. 845;

No. 18–5135. HONISH *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 1116;

No. 18–5664. CHEESEBORO *v.* LITTLE RICHIE BUS SERVICE, INC., 586 U. S. 1077;

No. 18–6261. VARGAS, AKA VARGAS ROMERO *v.* MCMAHON, 586 U. S. 1079;

No. 18–6263. VARGAS, AKA VARGAS ROMERO *v.* MCMAHON ET AL., 586 U. S. 1079;

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No. 18–6926. VALENTINE *v.* UNITED STATES, 586 U. S. 1095; and

No. 18–7360. MATHIS *v.* UNITED STATES, 586 U. S. 1170. Petitions for rehearing denied.

APRIL 2, 2019

Dismissal Under Rule 46

No. 18–645. WINN *v.* MELLEN ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 900 F. 3d 1085.

APRIL 3, 2019

Miscellaneous Order

No. 18A942. REPUBLIC OF HUNGARY ET AL. *v.* SIMON ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

APRIL 5, 2019

Miscellaneous Order

No. 18A1019. GUEDES ET AL. *v.* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ET AL. Application for stay,

presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Applicants request that if we deny this application we grant a limited stay of 120 hours to allow them to come into compliance with the final Rule. We refer the issue of such stay to the D. C. Circuit for its consideration. JUSTICE THOMAS and JUSTICE GORSUCH would grant the application.

APRIL 12, 2019

Miscellaneous Orders

No. 18A1053. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* PRICE. Application to vacate the stay of execution, presented to JUSTICE THOMAS, and by him referred to the Court, is granted, and the stays entered by the District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit on April 11, 2019, are vacated. In June 2018, death-row inmates in Alabama whose convictions were final before June 1, 2018, had 30 days to elect to be executed via nitrogen hypoxia. Ala. Code § 15–18–82.1(b)(2). Price, whose conviction became final in 1999, did not do so, even though the record indicates that all death-row inmates were provided a written election form, and 48 other death-row inmates elected nitrogen hypoxia. He then waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time. See *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief").

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

Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening.

1. This case comes to us on the assumption that executing Christopher Lee Price using Alabama's current three-drug protocol is likely to cause him severe pain and needless suffering. Price submitted an expert declaration explaining why that is so, and the State "submitted nothing" to rebut his expert's assertions. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 920

F. 3d 1317, 1330 (CA11 2019). The Court of Appeals thus correctly held that Price satisfied his burden to show a severe risk of pain from lethal injection, "since the only evidence of record supports that conclusion." *Ibid.*

2. Price proposed nitrogen hypoxia as an alternative method of execution. Alabama expressly authorized execution by nitrogen hypoxia in 2018, and state officials have actively worked to develop a hypoxia protocol since that time. The State is mere months away from finalizing its protocol. In light of those facts, the Court of Appeals correctly held that nitrogen hypoxia is "available," "feasible," and "readily implemented" by the State. *Id.*, at 1326–1329.

3. The only remaining question was whether Price could show that death by nitrogen hypoxia would be substantially less painful than death by the existing lethal injection protocol. To make this showing, Price submitted an academic study on which the Oklahoma Legislature had relied in adopting nitrogen hypoxia as a method of execution. That study noted that death by nitrogen hypoxia has been described as "painless," "peaceful," and unlikely to cause "any substantial physical discomfort." Record in No. 1:19–00057 (SD Ala.), Doc. 45–2, pp. 6, 9. It concluded that nitrogen hypoxia is "an effective and humane alternative to the current methods of capital punishment practiced in Oklahoma." *Id.*, at 2.

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Crucially, as the District Court noted, the State *did not challenge* Price's evidence on this question. It did not question the reliability of the Oklahoma study. And it did not otherwise dispute (either in the District Court or on appeal) that nitrogen hypoxia was likely to be less painful than the State's lethal injection protocol. The District Court thus correctly held that "Price is likely to prevail on the issue of whether execution by nitrogen . . . would provide a significant reduction in the substantial risk of severe pain Price would incur if he were executed" by lethal injection. *Price* v. *Dunn*, 385 F. Supp. 3d 1215, 1233 (SD Ala. 2019).

4. The Court of Appeals found the District Court's determination on this question clearly erroneous. It reached that conclusion primarily because the version of the Oklahoma study that Price's counsel submitted was "a preliminary draft report that is stamped with the words 'Do Not Cite.' " *Price* v. *Commissioner*, 920 F. 3d, at 1330. The Court of Appeals appeared to believe that

a "preliminary" report could not constitute "reliable evidence" on the effects of nitrogen hypoxia. *Ibid.*

5. It turns out, however, that a *final* version of the same Oklahoma study was published and available. That version is identical in every relevant respect to the preliminary version that Price submitted. That is, the final report also describes nitrogen hypoxia as "painless," "humane," and unlikely to cause "any substantial physical discomfort," based on exactly the same evidence discussed in the earlier draft.

6. Price's counsel, realizing the error, quickly sought to ensure the District Court would be able to consider the final version of the report. Price filed a new motion for preliminary injunction in the District Court, along with the final report and additional expert declarations.

7. The District Court found this new evidence "reliable" and noted that the State had "not submit[ted] anything in contradiction." *Price* v. *Dunn*, 2019 WL 1578277, *8 (SD Ala., Apr. 11, 2019). The District Court concluded "based on the current record" that "Price has a substantial likelihood of succeeding on the merits." *Ibid.* The District Court then considered the remaining stay factors. Notably, the District Court found that Price had *not* "timed his motion in an effort to manipulate the execution." *Ibid.* "Rather, Price, the State and the [District Court] have been proceeding *as quickly as possible* on this issue *since before the execution date was set*." *Ibid.* (emphasis added). The District Court ultimately concluded that a 60-day stay of the execution was warranted.

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8. The State then asked the Court of Appeals to vacate the stay in part because, in its view, the District Court did not have jurisdiction to issue it. The Court of Appeals had not yet issued its mandate, the appeal remained pending, and, in the State's view, the arguments Price raised in his new motion in the District Court were the same arguments at issue in his pending appeal. The District Court had rejected the argument that the pending appeal deprived it of jurisdiction; Price, it explained, has "presented a *new* motion for preliminary injunction accompanied by *new* evidence." *Id.*, at *2 (emphasis added).

9. The Court of Appeals refused to vacate the District Court's stay. It explained that the parties had raised "substantial questions" about jurisdiction. *Price* v. *Commissioner, Ala. Dept. of*

Corrections, 2019 WL 1591475, *1 (CA11, Apr. 11, 2019). "In light of the jurisdictional questions raised by the parties' motions," it stayed Price's execution until further order of the court. *Ibid.*

10. Shortly before 9 p.m. this evening, the State filed an application to the Justice of this Court who is the Circuit Justice for the Eleventh Circuit. It was later referred to the Conference. I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days. But in my judgment, that delay was warranted, at least on the facts as we have them now. During the pendency of our consideration, the State called off this evening's scheduled execution.

The Court nevertheless grants the State's application to vacate the stay, thus preventing full discussion among the Court's Members. In doing so, it overrides the discretionary judgment of not one, but two lower courts. Why? The Court suggests that the reason is delay. But that suggestion is untenable in light of the District Court's express finding that Price has been "proceeding *as quickly as possible* on this issue since *before the execution date was set*." 2019 WL 1578277, *8 (emphasis added). Surely the District Court is in a better position than we are to gauge whether Price has engaged in undue delay.

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The Court also points out that Price did not elect nitrogen hypoxia within 30 days of the legislature authorizing this method of execution on June 1, 2018. State law appeared to provide death row inmates only until June 30, 2018, to make the election. See 2018 Ala. Laws Act 2018–353. Yet based on the limited information before us, it appears no inmate received a copy of the election form (prepared by a public defender) until June 26, and the State makes no representation about when Price received it other than that it was "before the end of June." Brief for Appellee in No. 19–11268 (CA11), p. 9. Thus, it is possible that Price was given no more than 72 hours to decide how he wanted to die, notwithstanding the 30-day period prescribed by state law. That is not a reason to override the lower courts' discretionary determination that the equitable factors warrant a stay.

The State also argues that the District Court lacked jurisdiction to entertain Price's new motion for a preliminary injunction. But as the Court of Appeals appeared to recognize, that jurisdic-

tional question is a substantial one, the answer to which is by no means clear. See 2019 WL 1591475; cf. 16A C. Wright, A. Miller, E. Cooper, & C. Struve, Federal Practice and Procedure § 3949.1, p. 63 (4th ed. 2008) ("An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal"). To resolve it with minimal briefing on an extraordinarily compressed timeline would be deeply misguided.

What is at stake in this case is the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment. At a minimum, "before acting irretrievably" to vacate a stay and allow a potentially cruel execution to proceed, the Court should decide whether the District Court did in fact lack jurisdiction to issue the stay. See *Bowersox* v. *Williams*, 517 U. S. 345, 347 (1996) (Ginsburg, J., dissenting). "Appreciation of our own fallibility . . . demand[s] as much." *Ibid.*

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Alabama will soon subject Price to a death that he alleges will cause him severe pain and needless suffering. It can do so *not* because Price failed to prove the likelihood of severe pain and *not* because he failed to identify a known and readily implemented alternative, as this Court has recently required inmates to do. Instead, Alabama can subject him to that death due to a minor oversight (the submission of a "preliminary" version of a final report) and a significant mistake of law by the Court of Appeals (the suggestion that a report marked "preliminary" carries *no* evidentiary value). These mistakes could be easily remedied by simply allowing the lower courts to consider the final version of the report. Yet instead of allowing the lower courts to do just that, the Court steps in and vacates the stays that both courts have exercised their discretion to enter. To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate.

No. 18–389. Parker Drilling Management Services, Ltd. *v.* Newton. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1112.]

Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–485. McDonough *v.* Smith, Individually and as Special District Attorney for the County of Rensselaer, New York. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1112.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motions of Indiana et al., International Municipal Lawyers Association et al., and St. Thomas More Lawyers Guild of Rochester, New York, for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 18–489. Taggart *v.* Lorenzen, Executor of the Estate of Brown, et al. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1063.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–525. Fort Bend County, Texas *v.* Davis. C. A. 5th Cir. [Certiorari granted, 586 U. S. 1113.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

Federal Judicial Publication

No. 18–966. Department of Commerce et al. *v.* New York et al. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1140.] Motion of the United States House of Representatives for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Joint motion of respondents for enlargement of time for oral argument and for divided argument granted in part, and the time is divided as follows: 40 minutes for petitioners, 20 minutes for respondent New York et al., 10 minutes for respondent New York Immigration Coalition et al., and 10 minutes for United States House of Representatives as *amicus curiae.*

Certiorari Denied

No. 18–8766 (18A1044). Price *v.* Dunn, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application for stay of execution. Reported below: 920 F. 3d 1317.

April 15, 2019

Certiorari Granted—Vacated and Remanded

No. 18–609. Robertson *v.* United States. C. A. 9th Cir. Motion to substitute Carri Robertson, authorized representative, as petitioner in place of Joseph D. Robertson, deceased, granted. Certiorari granted, judgment vacated, and case remanded for consideration of question whether case is moot. Reported below: 875 F. 3d 1281.

No. 18–852. Precythe *v.* Johnson. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bucklew* v. *Precythe*, 587 U. S. 119 (2019). Reported below: 901 F. 3d 973.

Certiorari Dismissed

No. 18–7894. McNeill *v.* Wayne County Third Circuit Court et al. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

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No. 18–7980. Ladeairous *v.* Department of Justice. 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. Justice Kavanaugh took no part in the consideration or decision of this motion and this petition.

No. 18–7988. Forney *v.* Florida. Dist. Ct. App. Fla., 4th Dist. 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: 238 So. 3d 839.

No. 18–8201. Butler *v.* Clarke, Director, Virginia Department of Corrections. 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: 740 Fed. Appx. 360.

No. 18–8377. BOOKER *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 717 Fed. Appx. 301.

Miscellaneous Orders

No. 18M125. GABRIEL NUNEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 18M127. VAUGHN *v.* GIBSON, WARDEN, ET AL.;

No. 18M128. DIEP *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION;

No. 18M130. FAWEMIMO *v.* AMERICAN AIRLINES, INC.; and

No. 18M133. MERAZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M126. DECK *v.* JENNINGS, WARDEN. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

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No. 18M129. YI S. *v.* ADMINISTRATION FOR CHILDREN'S SERVICES OF THE CITY OF NEW YORK. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 18M131. SEALED APPELLANT *v.* SEALED APPELLEE. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 18M132. REYNOLDS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with appendix B available for the public record granted.

No. 18–540. RUTLEDGE, ATTORNEY GENERAL OF ARKANSAS *v.* PHARMACEUTICAL CARE MANAGEMENT ASSN. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–7806. BERKA *v.* CITY OF MIDDLETOWN, CONNECTICUT. App. Ct. Conn.;

No. 18–7891. HAYMOND *v.* HELMAND INVESTMENT, LLC. Sup. Ct. Va.;

No. 18–8023. A. R. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 3d Dist.; and

No. 18–8060. SOLBERG *v.* FIRST NATIONAL BANK & TRUST CO. OF WILLISTON ET AL. Sup. Ct. N. D. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 6, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8475. IN RE FUNK;

No. 18–8503. IN RE WELLS;

No. 18–8579. IN RE WETER; and

No. 18–8587. IN RE STEGAWSKI. Petitions for writs of habeas corpus denied.

No. 18–1008. IN RE HOLLOWELL ET AL.;

No. 18–1014. IN RE RUSSO; and

No. 18–8123. IN RE FAGAN. Petitions for writs of mandamus denied.

No. 18–7939. IN RE SALLEY. Petition for writ of mandamus denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

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Certiorari Denied

No. 18–722. SOUNDBOARD ASSN. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 888 F. 3d 1261.

No. 18–755. ILLINOIS LIBERTY PAC ET AL. *v.* RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 3d 463.

No. 18–811. JPAY, INC. *v.* KOBEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 3d 923.

No. 18–838. KASEBURG ET AL. *v.* PORT OF SEATTLE ET AL. (Reported below: 744 Fed. Appx. 356); and HORNISH ET AL. *v.* KING COUNTY, WASHINGTON (899 F. 3d 680). C. A. 9th Cir. Certiorari denied.

No. 18–868. ELECTRIC POWER SUPPLY ASSN. ET AL. *v.* STAR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 3d 518.

No. 18–879. ELECTRIC POWER SUPPLY ASSN. ET AL. *v.* RHODES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 3d 41.

No. 18–899. SAINT REGIS MOHAWK TRIBE ET AL. *v.* MYLAN PHARMACEUTICALS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 896 F. 3d 1322.

No. 18–996. STRINGER *v.* STORESONLINE, INC., ET AL. Sup. Ct. Miss. Certiorari denied.

No. 18–1004. SEAMAN *v.* WESTFIELD MEDICAL CENTER, L. P., ET AL. Sup. Ct. Pa. Certiorari denied.

No. 18–1020. GOUNDER *v.* COMMUNICAR, INC., ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–1024. JOHNSON *v.* WINFREY. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 483.

No. 18–1026. KINNEY ET AL. *v.* ANDERSON LUMBER CO., INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–1031. LITTLE *v.* CSRA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 679.

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No. 18–1033. GRIFFIN *v.* UNITED HEALTHCARE OF GEORGIA, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 793.

No. 18–1034. MCGEE *v.* CITY OF SACRAMENTO, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 18–1035. THOMAS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 18–1036. RAMOS *v.* FIRESTONE BUILDING PRODUCTS CO., LLC. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 777.

No. 18–1037. ZHENG CAI *v.* DIAMOND HONG, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 901 F. 3d 1367.

No. 18–1039. LEVIN ET UX. *v.* JPMORGAN CHASE BANK, N. A. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 143.

No. 18–1040. LICONG LI *v.* DANG. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 18–1041. Konieczko et al. *v.* Adventist Health System/Sunbelt, Inc., et al. Sup. Ct. Fla. Certiorari denied.

No. 18–1042. Gonzalez *v.* City of Hialeah, Florida. C. A. 11th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 611.

No. 18–1045. Brent et al. *v.* Wayne County Department of Human Services et al. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 3d 656.

No. 18–1050. Wu et ux. *v.* Prudential Financial, Inc., et al. C. A. 7th Cir. Certiorari denied.

No. 18–1058. Smets *v.* Wilson, Secretary of the Air Force. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 662.

No. 18–1060. Weiss, Individually and as Executor of the Estate of Marsh, Deceased *v.* Marsh, as Executor of the Estate of Marsh, Deceased, et al. (two judgments). Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

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No. 18–1071. Stokes *v.* Sulak. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 589.

No. 18–1072. Macor *v.* United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 742 Fed. Appx. 510.

No. 18–1073. King et al. *v.* Murphy, Governor of New Jersey, et al. C. A. 3d Cir. Certiorari denied.

No. 18–1091. Adesanya et vir *v.* Novartis Pharmaceuticals Corp. C. A. 3d Cir. Certiorari denied. Reported below: 755 Fed. Appx. 154.

No. 18–1099. Robinson *v.* State Compensation Mutual Insurance Fund. Sup. Ct. Mont. Certiorari denied. Reported below: 393 Mont. 178, 430 P. 3d 69.

No. 18–1110. Daughtrey et al. *v.* Rivera. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 3d 1255.

No. 18–1114. TS Patents LLC *v.* Yahoo! Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 731 Fed. Appx. 978.

No. 18–1133. LANGER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 804.

No. 18–1135. SHAKARI *v.* ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 170285, 97 N. E. 3d 199.

No. 18–1141. BROWN *v.* NEW HAMPSHIRE BOARD OF VETERINARY MEDICINE. Sup. Ct. N. H. Certiorari denied. Reported below: 171 N. H. 468, 198 A. 3d 276.

No. 18–1155. MURPHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 471.

No. 18–1163. HUTCHINGS ET AL. *v.* AMEREN TRANSMISSION COMPANY OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2018 IL 122973, 120 N. E. 3d 998.

No. 18–1169. THORNE *v.* UNION PACIFIC CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 875.

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No. 18–1194. CRUTCHFIELD *v.* DENNISON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 968.

No. 18–1204. HAYNIE *v.* UNITED AIRLINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 273.

No. 18–6450. RUSSELL *v.* EPPINGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–6672. MILLAN VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 3d 363.

No. 18–6777. HYATT *v.* MICHIGAN; and
No. 18–6782. SKINNER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 502 Mich. 89, 917 N. W. 2d 292.

No. 18–6905. SZCZERBA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 897 F. 3d 929.

No. 18–6908. MANNERS *v.* CANNELLA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 3d 959.

No. 18–6919. SANTOS-CORDERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 530.

No. 18–7033. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–7091. BUTLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 528.

No. 18–7204. ROLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–7217. C. G., A MINOR *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–7219. AMADOR ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 541.

No. 18–7226. BLANCO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 249 So. 3d 536.

No. 18–7233. SWOPES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 3d 961.

No. 18–7379. BRUNO GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 601.

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No. 18–7618. NEAL *v.* ASTA FUNDING, INC. C. A. 3d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 184.

No. 18–7733. COWAN *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7743. DRISCOLL *v.* GASTELO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7744. CLARK *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 18–7749. GONZALEZ *v.* MALOY. Sup. Ct. Fla. Certiorari denied.

No. 18–7752. HARIHAR *v.* U. S. BANK N. A. ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–7753. MUNT *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 920 N. W. 2d 410.

No. 18–7757. DAVENPORT *v.* FALK, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 877.

No. 18–7767. SANCHEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 18–7771. BROTHERTON *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–7772. FRANKLIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 152 Ohio St. 3d 1419, 2018-Ohio-923, 93 N. E. 3d 1001.

No. 18–7774. BOYETT *v.* SANTISTEVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 569.

No. 18–7775. OLIVARES *v.* MICHIGAN WORKERS' COMPENSATION AGENCY ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7782. MASON *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–7785. DERRINGER *v.* SAENZ. Sup. Ct. N. M. Certiorari denied.

No. 18–7786. SHOTWELL *v.* GENOVESE, WARDEN. C. A. 6th Cir. Certiorari denied.

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No. 18–7789. RICHARDS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7791. SMITH *v.* CITY OF PRINCETON, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–7798. VOSS *v.* SECOND JUDICIAL DISTRICT COURT OF NEVADA, WASHOE COUNTY. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 1025.

No. 18–7803. HEGSTROM *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 258 So. 3d 554.

No. 18–7813. BARTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7815. DEASE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–7816. BROOKS *v.* WEISER, ATTORNEY GENERAL OF COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 18–7820. PIERCE *v.* HOOKS. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 187.

No. 18–7822. MCDONALD *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–7827. KAUFMAN *v.* KEMPER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–7828. LARGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–7832. HARRIS *v.* MULLINS, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7834. BOGSETH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7837. BLACHER *v.* SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY, ET AL. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

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No. 18–7845. GRIGSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 375.

No. 18–7850. HOWARD *v.* LESATZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7851. YOUNG *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7852. HUG *v.* CONLEY, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–7853. FLETCHER *v.* SCHWARTZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 71.

No. 18–7855. THUNDER *v.* WEBER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–7860. BARNES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 502 Mich. 265, 917 N. W. 2d 577.

No. 18–7864. COTTON *v.* HARRIS, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1428, 2018-Ohio-2418, 100 N. E. 3d 444.

No. 18–7865. DROZDOVSKA *v.* SEMINOLE COUNTY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 237 So. 3d 454.

No. 18–7867. BRADLEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7873. SIERRA *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7879. COLKLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 235 Md. App. 734.

No. 18–7885. VANGUILDER *v.* MARTUSCELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–7888. SALOMON *v.* NOGAN, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–7889. ROMERO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 143132, 105 N. E. 3d 1048.

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No. 18–7892. HALOUSEK *v.* CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7893. HALOUSEK *v.* BANK OF AMERICA, N. A. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–7897. OWENS *v.* ZUCKER ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7899. DEWBERRY *v.* THIRD CIRCUIT COURT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 18–7901. COHEE *v.* YATES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 717.

No. 18–7902. AKOTHE *v.* BEAR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 207.

No. 18–7906. FLORES *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 18–7908. HAYNES *v.* WALMART ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7909. WILSON *v.* CORRECT CARE, LLC, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7912. TISDALE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 257 So. 3d 357.

No. 18–7917. WILKINS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7919. GRUND *v.* MURPHY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 601.

No. 18–7924. LYLES *v.* BROACH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 247.

No. 18–7925. ALI *v.* FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 438.

No. 18–7926. BABB *v.* SMITH ET AL. C. A. 11th Cir. Certiorari denied.

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No. 18–7932. HAMER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–7933. CHARLESTON *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7934. FARTHING *v.* WATSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 295.

No. 18–7935. SMITH *v.* HOFFNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7936. HENDERSON *v.* SKIPPER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7940. JOHNS *v.* ALABAMA DEPARTMENT OF HUMAN RESOURCES. C. A. 11th Cir. Certiorari denied.

No. 18–7942. LANCASTER *v.* RUANE. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 372.

No. 18–7945. WATTS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–7953. PETERSON ET UX. *v.* NEW HAMPSHIRE DIVISION OF CHILDREN, YOUTH AND FAMILIES, ET AL. Sup. Ct. N. H. Certiorari denied.

No. 18–7955. BARNES *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7956. IBEABUCHI *v.* PENZONE. C. A. 9th Cir. Certiorari denied.

No. 18–7957. IBEABUCHI *v.* STEINFELD. C. A. 9th Cir. Certiorari denied.

No. 18–7959. MAZE *v.* TERRELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7962. ABDULLAH *v.* PLANT CITY POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–7963. REYNOLDS *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7967. SMITH *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

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No. 18–7970. CALDERON-LOPEZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 569.

No. 18–7976. ADGER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 156 App. Div. 3d 1458, 66 N. Y. S. 3d 584.

No. 18–7982. JAIMES-AVILES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 257 So. 3d 431.

No. 18–7985. BAHRAMPOUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7987. IBEABUCHI *v.* PENZONE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–7990. BROOKINS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 18–7991. KERSEY *v.* TRUMP, PRESIDENT OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–7992. LIVINGSTON *v.* ESSLINGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 352.

No. 18–7998. BYRD *v.* LINDSEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 465.

No. 18–7999. GALAN *v.* GEGENHEIMER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 84.

No. 18–8000. FREEMAN *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8001. FYKES *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–8004. CRAIG *v.* BRADLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8007. BEAGLE *v.* LINDSEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8008. DRAPER *v.* MUY PIZZA SOUTHEAST LLC, DBA PIZZA HUT. C. A. 4th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 187.

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No. 18–8030. RHINES *v.* YOUNG, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 482.

No. 18–8062. TAYLOR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied. Reported below: 193 A. 3d 749.

No. 18–8069. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 784.

No. 18–8074. MORGAN *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2017–0932 (La. App. 1 Cir. 2/20/18).

No. 18–8077. ESTES *v.* BAKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 143.

No. 18–8078. WALKER *v.* CALDWELL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 18–8085. THOMASON *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 18–8088. MENIUS *v.* STEPHAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 195.

No. 18–8093. FERREIRA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 345 Ga. App. XXV.

No. 18–8118. DAVIS *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2016–1524 (La. App. 1 Cir. 7/5/17).

No. 18–8119. JENKINS *v.* HAMILTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 158.

No. 18–8120. LOFTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 248 So. 3d 798.

No. 18–8126. WILSON *v.* STEPHAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 230.

No. 18–8134. VASQUEZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 188 A. 3d 543.

No. 18–8136. ONG VUE *v.* BARR, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 910.

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No. 18–8146. GEER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 257 So. 3d 447.

No. 18–8147. HORN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 53 Kan. App. 2d xii, 386 P. 3d 929.

No. 18–8150. LIVIZ *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8155. SMITH *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8161. LORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 549.

No. 18–8164. FREEMAN *v.* LASHBROOK, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 18–8173. HERRERA *v.* PRICE. C. A. 9th Cir. Certiorari denied.

No. 18–8175. GUNCHICK *v.* BANK OF AMERICA, N. A. C. A. 7th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 786.

No. 18–8194. HENDERSON *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8206. CLARK *v.* CARR, ATTORNEY GENERAL OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 18–8215. SANDLAIN *v.* JOHNSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 861.

No. 18–8225. DRUILHET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 557.

No. 18–8231. BRIGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8233. REID *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8234. SNIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 3d 183.

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No. 18–8237. BRISCOE *v.* EPPINGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8244. CORNELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8245. FITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 530.

No. 18–8256. NAUSHAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 526.

No. 18–8261. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 237.

No. 18–8262. WOMACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 Fed. Appx. 136.

No. 18–8264. AVENDANO-VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 691.

No. 18–8265. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 909 F. 3d 671.

No. 18–8266. ABDUL-SAMAD, AKA HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 525.

No. 18–8267. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 931.

No. 18–8268. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 238.

No. 18–8269. CASILLAS PRIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 88.

No. 18–8274. ANTHONY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 364.

No. 18–8275. SAWYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 585.

No. 18–8277. RANSFER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8281. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 524.

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No. 18–8282. WRIGHT *v.* OREGON. C. A. 9th Cir. Certiorari denied.

No. 18–8289. ASAFO-ADJEI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 734.

No. 18–8293. RIVERO GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 559.

No. 18–8294. FITZGERALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 971.

No. 18–8299. LINGARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 785.

No. 18–8302. LASKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 532.

No. 18–8306. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8307. CLEVELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 3d 423.

No. 18–8308. JONES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8310. LAL *v.* FLORES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 24.

No. 18–8311. ADEYEMI *v.* UNITED STATES; ANDERSON *v.* UNITED STATES; BANDY *v.* UNITED STATES; BELL *v.* UNITED STATES; BERKLEY *v.* UNITED STATES; BETTS *v.* UNITED STATES; BOND *v.* UNITED STATES; BORDEN *v.* UNITED STATES; BROWN *v.* UNITED STATES; BULLARD *v.* UNITED STATES; CANTU *v.* UNITED STATES; CARR *v.* UNITED STATES; CARUTHERS *v.* UNITED STATES; DAY *v.* UNITED STATES; DE LA TORRE *v.* UNITED STATES; DENNIS *v.* UNITED STATES; DOUGLAS *v.* UNITED STATES; DUMBRIQUE *v.* UNITED STATES; ENRIQUEZ *v.* UNITED STATES; FLOTT *v.* UNITED STATES; GIBSON *v.* UNITED STATES; GOOD *v.* UNITED STATES; HACKNEY *v.* UNITED STATES; HARRELL *v.* UNITED STATES; HARRIS *v.* UNITED STATES; MANUEL IBARRA *v.* UNITED STATES; JACKSON *v.* UNITED STATES; JOHNSON *v.* UNITED STATES; KUFFEL *v.* UNITED STATES; LEWIS, AKA FOSTER *v.* UNITED STATES; LINDSEY *v.* UNITED STATES; MANROW *v.* UNITED STATES; MAXWELL *v.* UNITED STATES; MCCRACKEN *v.* UNITED STATES; MCCRAW *v.* UNITED STATES; MCFARLAND *v.* UNITED STATES; NICOLAS MEDINA *v.* UNITED STATES; MITCHELL *v.* UNITED STATES; MORENO *v.* UNITED STATES; MORENO *v.* UNITED STATES; NEWSOME *v.* UNITED STATES; NICKSON *v.* UNITED STATES; PIAZZA *v.* UNITED STATES; ROBINSON *v.* UNITED STATES; RODRIGUEZ *v.* UNITED STATES; RUSSELL *v.* UNITED STATES; SAMPSON *v.* UNITED STATES; SANDERS *v.* UNITED STATES; SHELTON *v.* UNITED STATES; SINGLETON *v.* UNITED STATES; STROBEHN *v.* UNITED STATES; TABLADA *v.* UNITED STATES; TURNER *v.* UNITED STATES; WALDEN *v.* UNITED STATES; WALKER *v.* UNITED STATES; WALKER *v.* UNITED STATES; WILLIAMS *v.* UNITED STATES; WINKLES *v.* UNITED STATES; and WOLTERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

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No. 18–8313. NEWTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 436.

No. 18–8315. DREVALEVA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 18–8316. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8317. GERING *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 252 So. 3d 334.

No. 18–8318. GARDNER *v.* VERIZON COMMUNICATIONS INC. C. A. 2d Cir. Certiorari denied.

No. 18–8320. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8321. LOVELL *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8324. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8325. VILLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 716.

No. 18–8327. ALM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 524.

No. 18–8328. BURGUENO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 737.

No. 18–8329. DUARTEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 34.

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No. 18–8330. CONNORS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8331. BOWERS *v.* LAWRENCE, ACTING WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8333. SOSA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 3d 920.

No. 18–8336. DUNBAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8337. DECKER *v.* LANEY, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 663.

No. 18–8339. SHEPHERD *v.* KRUEGER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 911 F. 3d 861.

No. 18–8344. WHITNEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 18–8345. LAKEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8346. VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 283.

No. 18–8347. TISZAI *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 90 So. 3d 304.

No. 18–8349. FOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 572.

No. 18–8352. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 395.

No. 18–8355. TABRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 819.

No. 18–8357. WILFORD *v.* TRATE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 27.

No. 18–8358. ELLIOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 624.

No. 18–8359. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 242.

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No. 18–8360. CASTILLO-QUINTANILLA *v.* UNITED STATES (Reported below: 747 Fed. Appx. 986); CHOY-SOTO *v.* UNITED STATES (747 Fed. Appx. 262); RUIZESPARZA NAVARRETTE *v.* UNITED STATES (747 Fed. Appx. 245); NEVAREZ-MARTELL *v.* UNITED STATES (746 Fed. Appx. 432); VILLARREAL-CARDENAS *v.* UNITED STATES (746 Fed. Appx. 427); and VITE-GARCIA *v.* UNITED STATES (749 Fed. Appx. 290). C. A. 5th Cir. Certiorari denied.

No. 18–8361. SARLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 913 F. 3d 491.

No. 18–8362. RODRIGUEZ-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 431.

No. 18–8363. STEGEMANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–8364. SULLIVAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 799.

No. 18–8366. WOOLLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 893.

No. 18–8373. GALIANY-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8378. BRIGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8382. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 838.

No. 18–8387. VREELAND *v.* ZUPAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 3d 866.

No. 18–8388. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 530.

No. 18–8390. SALVADOR LANTIGUA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 875.

No. 18–8391. NAM NHAT NGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 532.

No. 18–8392. OBIORA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 910 F. 3d 555.

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No. 18–8394. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 528.

No. 18–8395. SCHONEWOLF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 3d 683.

No. 18–8400. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 739.

No. 18–8401. BURGESS *v.* WILMINGTON SAVINGS FUND SOCIETY, FSB, DBA CHRISTIANA TRUST, AS TRUSTEE FOR PREMIUM MORTGAGE ACQUISITION TRUST. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–8402. DAUENHAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 41.

No. 18–8403. CABALLERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 32.

No. 18–8404. SEYMORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 558.

No. 18–8405. ROBLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 193 A. 3d 744.

No. 18–8406. RULE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 960.

No. 18–8411. PIERCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 969.

No. 18–8423. WHITE *v.* HAMMERS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8424. JENKINS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8427. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 3d 346.

No. 18–8430. ALVAREZ *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 569.

No. 18–8433. LOGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 910 F. 3d 864.

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No. 18–8436. HARDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 222.

No. 18–8439. LACEY *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 364 Ore. 171, 431 P. 3d 400.

No. 18–8442. DUTCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 632.

No. 18–8445. MCADOO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 736.

No. 18–8448. BISHOP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 335.

No. 18–8451. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 708.

No. 18–8455. SHIROMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 647.

No. 18–8469. ANDRUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 235.

No. 18–8470. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 348.

No. 18–8471. ABRAHAM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–8473. BROWN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 256 So. 3d 643.

No. 18–8490. MITCHELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–759. SAMPLE *v.* UNITED STATES. C. A. 10th Cir. Motion of National Association of Criminal Defense Lawyers for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 901 F. 3d 1196.

No. 18–949. KNOX *v.* PENNSYLVANIA. Sup. Ct. Pa. Motions of Michael Render et al., Cato Institute et al., Art Scholars and Historians, and National Association of Criminal Defense Lawyers for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 647 Pa. 593, 190 A. 3d 1146.

No. 18–7235. BUSH *v.* ARIZONA. Sup. Ct. Ariz. Motion of respondent for leave to file brief in opposition with appendix under seal granted. Motion of petitioner for leave to file reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 244 Ariz. 575, 423 P. 3d 370.

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No. 18–8005. BROOKS *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 717 Fed. Appx. 831.

No. 18–8029. RHINES *v.* YOUNG, WARDEN. C. A. 8th Cir. Motions of Law Professors, NAACP Legal Defense & Educational Fund, Inc., and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 18–8182. SHELTON *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 732 Fed. Appx. 495.

No. 18–8230. AKERS *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: 740 Fed. Appx. 633.

No. 18–8353. HICKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 693 Fed. Appx. 209.

No. 18–8370. LILLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari before judgment denied.

No. 18–8410. MILLER *v.* MCFADDEN, WARDEN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 733 Fed. Appx. 133.

No. 18–8435. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 3d 315.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United State*s, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

Rehearing Denied

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No. 17–8969. NOE *v.* DANIELS, WARDEN, 585 U. S. 1023;

No. 17–9561. POLK *v.* HILL, ACTING WARDEN, 586 U. S. 867;

No. 18–686. KING ET AL. *v.* CALIBER HOME LOANS, INC., 586 U. S. 1146;

No. 18–701. TANKSLEY *v.* DANIELS ET AL., 586 U. S. 1146;

No. 18–723. RODRIGUEZ *v.* BANK OF AMERICA, N. A., 586 U. S. 1147;

No. 18–732. COULTER *v.* TATANANNI ET AL., 586 U. S. 1147;

No. 18–783. BARONE *v.* WELLS FARGO BANK, N. A., 586 U. S. 1193;

No. 18–799. DAVIS *v.* BHATT, 586 U. S. 1149;

No. 18–800. SHAO *v.* MCMANIS FAULKNER, LLP, 586 U. S. 1194;

No. 18–888. BENT *v.* STRANGE ET AL., 586 U. S. 1151;

No. 18–961. SWARTZ *v.* UNITED STATES PATENT AND TRADEMARK OFFICE ET AL., 586 U. S. 1195;

No. 18–5798. C. B. *v.* FISCHGRUND, 586 U. S. 972;

No. 18–6314. KHOUANMANY *v.* UNITED STATES, 586 U. S. 1003;

No. 18–6784. IN RE RIVERA, 586 U. S. 1067;

No. 18–6793. BOOTH *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 586 U. S. 1092;

No. 18–6878. DALEY *v.* MARYLAND ET AL., 586 U. S. 1155;
No. 18–6947. GILLARD *v.* ILLINOIS, 586 U. S. 1156;
No. 18–6965. LEI YIN *v.* BIOGEN, INC., FKA BIOGEN-IDEC, 586 U. S. 1157;
No. 18–7052. WILKERSON *v.* WOODS, 586 U. S. 1160;
No. 18–7070. JACKSON *v.* GMAC MORTGAGE CORP., 586 U. S. 1160;
No. 18–7092. CAIN *v.* ATELIER ESTHETIQUE INSTITUTE OF ESTHETICS, INC., 586 U. S. 1161;
No. 18–7160. ARANOFF *v.* ARANOFF, 586 U. S. 1197;
No. 18–7161. MARTIN *v.* WHITAKER, ACTING ATTORNEY GENERAL, 586 U. S. 1164;
No. 18–7211. MONTE *v.* KESSLING ET AL., 586 U. S. 1209;
No. 18–7237. SAUNDERS *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 586 U. S. 1198; and
No. 18–7404. LAAKE *v.* TURNING STONE RESORT CASINO, 586 U. S. 1199. Petitions for rehearing denied.

APRIL 18, 2019

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see 587 U. S. 1072.)

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APRIL 19, 2019

Dismissal Under Rule 46

No. 18–855. ALLEN, SECRETARY, WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 904 F. 3d 490.

APRIL 22, 2019

Certiorari Dismissed

No. 18–8287. KILPATRICK *v.* DHILLON, ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Mar-*

tin v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 18M134. TAHA ET UX. *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari by Ali M. Taha denied.

No. 18M135. PIERCE *v.* LIVINGSTON ET AL.; and
No. 18M137. ROSS *v.* FRANKE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M136. ROBERTS *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. 18–328. ROTKISKE *v.* KLEMM ET AL. C. A. 3d Cir. [Certiorari granted, 586 U. S. 1190.] Motion of petitioner to dispense with printing joint appendix granted.

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No. 18–926. PUTNAM INVESTMENTS, LLC, ET AL. *v.* BROTHERSTON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–5813. KILPATRICK *v.* HENKIN. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1031] denied.

No. 18–6130. KILPATRICK *v.* CUOMO, GOVERNOR OF NEW YORK. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1032] denied.

No. 18–6131. KILPATRICK *v.* ARP; and KILPATRICK *v.* SCOTT. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1032] denied.

No. 18–8541. IN RE JONES. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 13, 2019, 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. 18–8619. In re Gilchrist. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 18–565. CITGO Asphalt Refining Co. et al. *v.* Frescati Shipping Co., Ltd., et al. C. A. 3d Cir. Certiorari granted. Reported below: 886 F. 3d 291.

No. 18–725. Barton *v.* Barr, Attorney General. C. A. 11th Cir. Certiorari granted. Reported below: 904 F. 3d 1294.

No. 17–1618. Bostock *v.* Clayton County, Georgia. C. A. 11th Cir.; and

No. 17–1623. Altitude Express, Inc., et al. *v.* Zarda et al., Co-Independent Executors of the Estate of Zarda. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 17–1618, 723 Fed. Appx. 964; No. 17–1623, 883 F. 3d 100.

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No. 18–107. R. G. & G. R. Harris Funeral Homes, Inc. *v.* Equal Employment Opportunity Commission et al. C. A. 6th Cir. Certiorari granted limited to the following question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989)." Reported below: 884 F. 3d 560.

Certiorari Denied

No. 18–709. Bentley et al. *v.* Vooys et al. C. A. 3d Cir. Certiorari denied. Reported below: 901 F. 3d 172.

No. 18–710. Demirayak *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 746 Fed. Appx. 49.

No. 18–847. BNSF Railway Co. *v.* Nye, as Personal Representative of the Estate of Nye. Sup. Ct. Okla. Certiorari denied. Reported below: 2018 OK 51, 428 P. 3d 863.

No. 18–894. McNeal et ux. *v.* Navajo Nation et al. C. A. 10th Cir. Certiorari denied. Reported below: 896 F. 3d 1196.

No. 18–896. Missouri Ethics Commission et al. *v.* Free and Fair Election Fund et al. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 3d 759.

No. 18–932. Osburn et al. *v.* Loeb et al. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 385.

No. 18–974. Mar-Bow Value Partners, LLC *v.* McKinsey Recovery & Transformation Services US LLC. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 412.

No. 18–1063. Cottam *v.* Pelton. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 791.

No. 18–1068. Mittal *v.* County of Clark, Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 644.

No. 18–1079. Flores Gaytan *v.* Hardee. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 774.

No. 18–1081. Wilson *v.* Horton's Towing et al. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 773.

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No. 18–1108. Stucky *v.* Takeno et al. Int. Ct. App. Haw. Certiorari denied. Reported below: 142 Haw. 356, 418 P. 3d 1212.

No. 18–1125. ZocDoc, Inc. *v.* Radha Geismann, M. D., P. C. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 3d 534.

No. 18–1130. Charron *v.* Morris et al. C. A. 6th Cir. Certiorari denied.

No. 18–1161. Bryant *v.* UnitedHealth Group, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 488.

No. 18–1188. Jacobi *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2018 WI App 39, 382 Wis. 2d 833, 917 N. W. 2d 234.

No. 18–1190. DoctorDirectory.com, LLC, et al. *v.* Davis Neurology, P. A. C. A. 8th Cir. Certiorari denied. Reported below: 896 F. 3d 872.

No. 18–1201. Gartenlaub *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 998.

No. 18–6423. McRae *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 978.

No. 18–6702. Combs *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 250.

No. 18–6972. Pereira-Gomez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 3d 155.

No. 18–7431. Batiste *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 189.

No. 18–8009. Aguirre *v.* Clark, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8013. Pieczynski *v.* Wells Fargo & Co., N. A. C. A. 3d Cir. Certiorari denied.

No. 18–8014. Baird *v.* Foss, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8017. Kindred *v.* Titus, Warden. C. A. 8th Cir. Certiorari denied.

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No. 18–8018. Kendrick *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8020. Besteder *v.* Bowerman, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–8021. Baker *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8024. Rodriguez *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–8032. Arellano *v.* California. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 18–8035. Adigun *v.* Express Scripts, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 474.

No. 18–8037. Brandon *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 2016–1817 (La. 2/9/18), 235 So. 3d 1092.

No. 18–8039. BARSTAD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 18–8045. MITCHELL *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8086. THOMASON *v.* ONEWEST BANK, FSB, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8121. HARRISON *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8127. NGUYEN VU *v.* BYRD, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, FIRST JUDICIAL DISTRICT, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 18–8140. WASHINGTON *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 750.

No. 18–8144. ALBRA *v.* SELENE FINANCE ET AL. C. A. 9th Cir. Certiorari denied.

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No. 18–8188. WILLIAMS *v.* DESANTIS, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8189. TOVAR *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 18–8236. BIANCHI *v.* MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 18–8253. BROWN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 18–8263. WEATHERLY *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8284. WINTERS *v.* CITY OF WEST JORDAN, UTAH, ET AL. Ct. App. Utah. Certiorari denied.

No. 18–8286. TORRES *v.* WILLIAMS, JUDGE, JUDICIAL CIRCUIT COURT OF FLORIDA, HILLSBOROUGH COUNTY. Sup. Ct. Fla. Certiorari denied.

No. 18–8312. AGUILAR *v.* GITTERE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8335. CHAPMAN *v.* OBAMA. C. A. D. C. Cir. Certiorari denied. Reported below: 719 Fed. Appx. 13.

No. 18–8342. SPEARS *v.* R&R CLEANING SERVICES ET AL. Ct. App. S. C. Certiorari denied.

No. 18–8348. GARNER *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 908 F. 3d 845.

No. 18–8371. GRANT *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 501 Mich. 1059, 910 N. W. 2d 257.

No. 18–8381. SCHNEIDER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 18–8397. VICTORY *v.* CALIFORNIA BOARD OF PAROLE HEARINGS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 422.

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No. 18–8416. KINNEY *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8428. MARTINEZ *v.* TRANI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 759.

No. 18–8437. COLEMAN *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT I. Sup. Ct. Wis. Certiorari denied. Reported below: 2017 WI 90, 378 Wis. 2d 26, 904 N. W. 2d 124.

No. 18–8449. BUSTOS-CHAVEZ *v.* HANSEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 84.

No. 18–8458. SCARLETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8463. DYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 3d 995.

No. 18–8464. MIMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8467. BEYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 285.

No. 18–8468. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 620.

No. 18–8481. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 398.

No. 18–8492. GIBSON *v.* HAVILAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8493. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8494. SOSTRE-CINTRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 911 F. 3d 54.

No. 18–8498. YAZZIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 772.

No. 18–8499. VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 291.

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No. 18–8500. ARDD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 3d 348.

No. 18–8501. BAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8504. WHALEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 148.

No. 18–8506. JAIME LOPEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 537.

No. 18–8536. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8537. SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8540. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 218.

No. 18–8543. PEOPLES *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8570. PRESTON *v.* FERGUSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PHOENIX, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 3d 365.

No. 18–8574. BURTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 200 A. 3d 1206.

No. 18–8577. LONG *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2018 IL App (4th) 160015–U.

No. 18–8585. BLOODYWONE *v.* BELLNIER, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–964. GALLAGHER *v.* DIOCESE OF PALM BEACH, INC. Dist. Ct. App. Fla., 4th Dist. Motion of CHILD USA for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 249 So. 3d 657.

No. 18–7426. EZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 743 Fed. Appx. 784.

No. 18–8376. FARMER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

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Rehearing Denied

No. 17–9317. HALL *v.* CITY OF DETROIT, MICHIGAN, ET AL., 586 U. S. 853;

No. 18–6449. IN RE SULTAANA, 586 U. S. 1067;

No. 18–7008. WHITE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 586 U. S. 1158;

No. 18–7317. DAVIS *v.* UNITED STATES, 586 U. S. 1169;

No. 18–7338. JONES *v.* OFFICE OF ADMINISTRATIVE HEARINGS ET AL., 586 U. S. 1230;

No. 18–7372. CUEVAS *v.* KELLY, SUPERINTENDENT, OREGON STATE PRISON, 586 U. S. 1170;

No. 18–7461. IN RE LEE, 586 U. S. 1144; and

No. 18–7559. DALEY *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 586 U. S. 1233. Petitions for rehearing denied.

No. 18–7260. IN RE DANIELS, 586 U. S. 1144. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

April 24, 2019

Certiorari Denied

No. 18–8970 (18A1091). King *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied.

April 25, 2019

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see 587 U. S. 1079; amendments to the Federal Rules of Bankruptcy Procedure, see 587 U. S. 1089; amendments to the Federal Rules of Criminal Procedure, see 587 U. S. 1097; and an amendment to the Federal Rules of Evidence, see 587 U. S. 1103.)

April 29, 2019

Certiorari Dismissed

No. 18–8174. Hall *v.* United States District Court for the Eastern District of Michigan. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

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No. 18–8197. Boone *v.* Texas. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–8250. Munt *v.* Minnesota Department of Corrections et al. 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. Reported below: 745 Fed. Appx. 656.

No. 18–8279. Brooks *v.* Pennsylvania. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 192 A. 3d 214.

No. 18–8532. WRIGHT *v.* NORTH CAROLINA. Sup. Ct. N. C. 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: 372 N. C. 63, 822 S. E. 2d 41.

Miscellaneous Orders

No. 18A995 (18–8559). SMITH *v.* DANIEL. Cir. Ct. Madison County, Fla. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 18M138. IN RE ASHLEY. Motion for leave to proceed as a veteran denied.

No. 18M139. KHOUANMANY *v.* DOE ET AL.;
No. 18M140. MATTHEWS *v.* ROBLES; and
No. 18M142. WILLIAMS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

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No. 18M141. MARIA S., AS NEXT FRIEND FOR E. H. F. ET AL., MINORS, ET AL. *v.* GARZA. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 18–280. NEW YORK STATE RIFLE & PISTOL ASSN., INC., ET AL. *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 586 U. S. 1126.] Motion of respondents to hold briefing schedule in abeyance denied.

No. 18–956. GOOGLE LLC *v.* ORACLE AMERICA, INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 18–5924. RAMOS *v.* LOUISIANA. Ct. App. La., 4th Cir. [Certiorari granted, 586 U. S. 1221.] Motion of petitioner for appointment of counsel granted, and G. Ben Cohen, Esq., of New Orleans, La., is appointed to serve as counsel for petitioner in this case.

No. 18–7225. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS, INC. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1206] denied.

No. 18–8128. COLLIE *v.* SOUTH CAROLINA COMMISSION ON LAWYER CONDUCT. Sup. Ct. S. C.; and

No. 18–8520. HAAS ET AL. *v.* CITY OF RICHMOND, VIRGINIA, ET AL. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 20, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8726. IN RE CALHOUN; and

No. 18–8730. IN RE DIXON. Petitions for writs of habeas corpus denied.

No. 18–962. IN RE ARPAIO;

No. 18–1076. IN RE HUDNALL;

No. 18–8170. IN RE CLONINGER; and

No. 18–8208. IN RE DIAZ. Petitions for writs of mandamus denied.

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No. 18–8615. IN RE MURPHY. Petition for writ of prohibition denied.

Certiorari Denied

No. 18–319. E. & J. GALLO WINERY ET AL. *v.* ARREGUIN. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 18–670. SFR INVESTMENTS POOL 1, LLC *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 3d 1136.

No. 18–679. HALL *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 163 Idaho 744, 419 P. 3d 1042.

No. 18–772. AVILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 263.

No. 18–782. BOND *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 735.

No. 18–790. TIN CUP, LLC *v.* ARMY CORPS OF ENGINEERS. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 3d 1068.

No. 18–952. MOUNTJOY *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 430 P. 3d 389.

No. 18–957. NEXTERA ENERGY, INC. *v.* ELLIOTT ASSOCIATES, L. P., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 3d 298.

No. 18–979. BOHMKER ET AL. *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 1029.

No. 18–1077. JAHI, AKA CARTER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–1087. CHAVEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–1089. BENJAMIN *v.* FELDER SERVICES, L. L. C., DBA OXFORD HEALTH AND REHAB CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 298.

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No. 18–1095. KINNEY *v.* ROTHSCHILD ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1096. KINNEY *v.* CANTIL-SAKAUYE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1098. WITTE *v.* HUYNH, NKA SCACCO. Ct. App. Utah. Certiorari denied.

No. 18–1104. RINGGOLD *v.* PROVIDENCE HEALTH & SERVICES ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1106. DELAWARE RIVERKEEPER NETWORK ET AL. *v.* SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 3d 65.

No. 18–1112. KANOFSKY *v.* BETHLEHEM AREA SCHOOL DISTRICT. Commw. Ct. Pa. Certiorari denied. Reported below: 177 A. 3d 1070.

No. 18–1113. THOMAS *v.* ZELON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 780.

No. 18–1115. DeCoster *v.* Waushara County Highway Department et al. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 3d 1093.

No. 18–1118. Kerrigan *v.* Qualstar Credit Union et al. C. A. 9th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 787.

No. 18–1121. Linlor *v.* Polson. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 167.

No. 18–1128. Minchuk *v.* Strand. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 909.

No. 18–1136. Hennager *v.* Troutman Sanders LLP. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 173.

No. 18–1138. Kinney *v.* Superior Court of California, Los Angeles County, et al. Sup. Ct. Cal. Certiorari denied.

No. 18–1146. Ong et al. *v.* Hudson County Superior Court et al. C. A. 3d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 133.

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No. 18–1148. Franett-Fergus *v.* Omak School District 19 et al. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 855.

No. 18–1153. Rizzo *v.* Applied Materials, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 743 Fed. Appx. 484.

No. 18–1159. Universal Church, Inc. *v.* Toellner et al. C. A. 2d Cir. Certiorari denied. Reported below: 752 Fed. Appx. 67.

No. 18–1174. Goldenberg et al. *v.* Transcontinental Gas Pipe Line Co., LLC. C. A. 11th Cir. Certiorari denied. Reported below: 910 F. 3d 1130.

No. 18–1175. Shillinglaw *v.* Baylor University et al. (two judgments). Sup. Ct. Tex. Certiorari denied.

No. 18–1176. Wenzel et al. *v.* Storm. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 3d 598.

No. 18–1216. Lussy *v.* Florida Elections Commission et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 18–1234. MORIARTY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 18–1248. KIENAST ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 522.

No. 18–1251. ANNABI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–1254. KING *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 218.

No. 18–6611. PHILIPS *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 724.

No. 18–6734. REDDICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 3d 636.

No. 18–6758. BORDMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 895 F. 3d 1048.

No. 18–6774. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 3d 785.

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No. 18–6870. FREDERICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 522.

No. 18–7188. DAVIS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 315.

No. 18–7203. SALAZAR *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 18–7470. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 707.

No. 18–7527. WILSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 273 So. 3d 862.

No. 18–7543. LANDINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7546. VICKERS *v.* MARINA DEL REY MARINA, LLC. Sup. Ct. Cal. Certiorari denied.

No. 18–7573. HEARN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7576. CREQUE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 272 So. 3d 659.

No. 18–7648. STEVENSON *v.* CORDOVA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 939.

No. 18–8027. SAMPLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–8052. ZACK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 18–8063. LAWLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8071. THOMAS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8072. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–8073. THOMPSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 18–8081. KING *v.* CREED ET AL. C. A. 2d Cir. Certiorari denied.

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No. 18–8082. BAKER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 249 So. 3d 647.

No. 18–8084. TAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8087. KURZ *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 51,781 (La. App. 2 Cir. 2/28/18), 245 So. 3d 1219.

No. 18–8092. BLANKUMSEE *v.* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 773.

No. 18–8097. HERRERA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8102. HOLMAN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8103. HEARD *v.* BERRY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 18–8105. HERRIOTT *v.* HERRIOTT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 18–8108. BUSH *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 3d 1188.

No. 18–8109. ADAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8122. HALL *v.* LACLAIR ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8124. GROSS *v.* HAVLIN, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1440, 2018-Ohio-2715, 102 N. E. 3d 498.

No. 18–8129. RUSSELL *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 18–8135. WILLIAMS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

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No. 18–8137. STEELE *v.* PEDRO ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8138. HUGHES *v.* SCHNURR, WARDEN. Ct. App. Kan. Certiorari denied. Reported below: 56 Kan. App. 2d xxi, 423 P. 3d 557.

No. 18–8141. TAYLOR *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8142. WILLIAMSON *v.* SLUSHER ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8149. FRIES *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8151. WILLIAMSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8152. TRIGG *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8154. Romero *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 18–8157. Brinson *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–8158. Anderson *v.* Miller et al. C. A. 6th Cir. Certiorari denied.

No. 18–8163. Basson *v.* Mortgage Electronic Registration Systems, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 770.

No. 18–8176. Brightwell *v.* Capozza, Superintendent, State Correctional Institution at Fayette, et al. C. A. 3d Cir. Certiorari denied.

No. 18–8179. Lewis *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–8180. Lucy, Personal Representative of Fox, Deceased *v.* Dialysis Associates et al. Sup. Ct. Ala. Certiorari denied.

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No. 18–8184. Sharp *v.* Dolan. C. A. D. C. Cir. Certiorari denied. Reported below: 744 Fed. Appx. 705.

No. 18–8192. Barnett *v.* Alamance County Sheriff Office Detention Center et al. C. A. 4th Cir. Certiorari denied. Reported below: 726 Fed. Appx. 192.

No. 18–8193. Albors Gonzalez *v.* Stern et al. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 244 So. 3d 1187.

No. 18–8196. Tart *v.* Hooks, Secretary, North Carolina Department of Public Safety. C. A. 4th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 829.

No. 18–8199. Johnson *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–8200. Boone *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8203. Burghardt *v.* Stein-Graham. C. A. 9th Cir. Certiorari denied.

No. 18–8204. MOLINA BRACERO *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 200.

No. 18–8207. DILTS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–8209. BRADFORD *v.* MARCHAK ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8211. BERGER *v.* GIBSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–8212. BRANTLEY *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 202.

No. 18–8219. HERNANDEZ *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–8221. JUDKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

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No. 18–8222. LEWIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8223. YOUNG *v.* OLIVER, JUDGE, SUPERIOR COURT OF CONNECTICUT, TOLLAND JUDICIAL DISTRICT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8227. COOK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 142134, 99 N. E. 3d 73.

No. 18–8228. BOCOOK *v.* MOHR, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 1459, 2018-Ohio-3257, 104 N. E. 3d 790.

No. 18–8229. CHINN *v.* NOETH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8290. WARE BEY *v.* PONTE ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8343. BAEZ CARMONA LOPEZ CORDERO *v.* CONNECTICUT DEPARTMENT OF CORRECTION ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8443. OLIVEIRA *v.* COYNE-FAGUE ET AL. C. A. 1st Cir. Certiorari denied.

No. 18–8476. GRANDISON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 238 Md. App. 728.

No. 18–8477. FLETCHER *v.* CARTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 175.

No. 18–8489. MOORE *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 482.

No. 18–8495. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 213.

No. 18–8496. SWATZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 833.

No. 18–8507. JENNETTE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 741 Fed. Appx. 140.

No. 18–8508. COOPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 609.

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No. 18–8512. GADSDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 546.

No. 18–8514. HOMEDEW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 895 F. 3d 1083.

No. 18–8518. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 295.

No. 18–8519. BANKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 747 Fed. Appx. 41.

No. 18–8521. GALAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 74.

No. 18–8522. FERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8523. REINERIO, NKA AAEBO *v.* BANK OF AMERICA, N. A., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 725 Fed. Appx. 442.

No. 18–8525. WINSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8526. HENDERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 911 F. 3d 32.

No. 18–8528. ROBERTSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 914.

No. 18–8531. BEASLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 379.

No. 18–8534. CARLUCCI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8539. SANDLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8556. BARRIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 544.

No. 18–8558. RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 629.

No. 18–8566. LOWE *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 269 So. 3d 244.

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No. 18–8568. PIPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 3d 847.

No. 18–8575. CAMARGO-ALEJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 551.

No. 18–8576. ALLEN *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 68.

No. 18–8581. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8582. NATER-AYALA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8584. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 452.

No. 18–8586. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 260.

No. 18–8589. RANKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 257.

No. 18–8599. JENKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–8600. MCLEOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 670.

No. 18–8601. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 379.

No. 18–8602. PONZO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 3d 162.

No. 18–8603. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8614. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8617. DOYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 321.

No. 18–8623. MILAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 289.

No. 18–8624. MILLER *v.* ALABAMA. C. A. 11th Cir. Certiorari denied.

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No. 18–8625. NERE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2018 IL 122566, 115 N. E. 3d 205.

No. 18–8626. MURRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8627. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 748.

No. 18–8629. BARAJAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 838.

No. 18–8630. BIRDTAIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 492.

No. 18–8631. FISEKU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 3d 863.

No. 18–8632. LOPEZ-GUZMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 417.

No. 18–8634. CHAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–8647. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8649. COBBLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 748 Fed. Appx. 345.

No. 18–8650. EASLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 3d 1074.

No. 18–8654. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 228.

No. 18–8660. MANSELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8662. LAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8665. BENANTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 556.

No. 18–8672. HOLDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 3d 395 and 732 Fed. Appx. 619.

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No. 18–8673. STUBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 159.

No. 18–8676. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 652.

No. 18–8698. WALTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 3d 548.

No. 18–719. URADNIK *v.* INTER FACULTY ORGANIZATION ET AL. C. A. 8th Cir. Motion of Freedom Foundation for leave to file brief as *amicus curiae* granted. Certiorari denied.

No. 18–1143. BLAKE *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

No. 18–8350. ASLAN *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 637 Fed. Appx. 509.

No. 18–8616. HARDMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–8495. VELEZ *v.* UNITED STATES, 586 U. S. 944;

No. 18–757. CHUANG *v.* CALIFORNIA, 586 U. S. 1148;

No. 18–1005. ZELL *v.* KLINGELHAFER ET AL., 586 U. S. 1208;

No. 18–6881. ALSTON *v.* MISSISSIPPI DEPARTMENT OF EMPLOYMENT SECURITY, 586 U. S. 1155;

No. 18–7017. BLACK *v.* LINDSAY, 586 U. S. 1158;

No. 18–7321. YOUNG *v.* CHAPDELAINE, WARDEN; YOUNG *v.* CHAPDELAINE, WARDEN; and YOUNG *v.* CHAPDELAINE, WARDEN, ET AL., 586 U. S. 1229;

No. 18–7450. MILLER *v.* TEXAS ET AL., 586 U. S. 1232;

No. 18–7713. GRIMSLEY *v.* MCGINLEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL., 586 U. S. 1202;

No. 18–7911. KUN *v.* STATE BAR OF CALIFORNIA, 586 U. S. 1239; and

No. 18–7916. WREN *v.* MISSISSIPPI, 586 U. S. 1240. Petitions for rehearing denied.

MAY 2, 2019

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Certiorari Denied

No. 18–9117 (18A1133). MORROW *v.* FORD, 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 3, 2019

Dismissal Under Rule 46

No. 18–1262. CORONA REGIONAL MEDICAL CENTER ET AL. *v.* SALI ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 909 F. 3d 996.

MAY 13, 2019

Certiorari Granted—Vacated and Remanded

No. 18–6859. MYERS *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019. Reported below: 896 F. 3d 866.

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

I dissent from the Court's decision to grant the petition, vacate the judgment, and remand the case. Nothing has changed since the Eighth Circuit held that Myers's conviction for first-degree terroristic threatening qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U. S. C. § 924(e). The Government continues to believe that classification is correct, for the same reasons that it gave to the Eighth Circuit. But the Solicitor General asks us to send the case back, and this Court obliges, because he believes the Eighth Circuit made some mistakes in its legal analysis, even if it ultimately reached the right result. He wants the hard-working judges of the Eighth Circuit to take a "fresh" look at the case, so that they may "consider the substantial body of Arkansas case law supporting the conclusion that the statute's death-or-serious-injury language sets forth an element of the crime," and then re-enter the same judgment the Court vacates today. Brief in Opposition 9, 11.

I see no basis for this disposition in these circumstances. See *Machado* v. *Holder*, 559 U. S. 966 (2010) (ROBERTS, C. J., dissenting); *Nunez* v. *United States*, 554 U. S. 911, 912 (2008) (Scalia, J., dissenting). Unless there is some new development to consider, we should vacate the judgment of a lower federal court only after affording that court the courtesy of reviewing the case on the merits and identifying a controlling legal error. This case does not warrant our independent review. If the Government wants to ensure that the Eighth Circuit does not repeat its alleged error, it should have no difficulty presenting the matter to subsequent panels of the Eighth Circuit, employing the procedure for en banc review should it be necessary.

I would deny the petition.

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Certiorari Dismissed

No. 18–8297. BACCUS *v.* CLEMENTS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 728 Fed. Appx. 233.

No. 18–8384. SMALL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. 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: 278 So. 3d 627.

No. 18–8486. MUNT *v.* MILES, WARDEN. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–8713. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 1. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders**

No. 18M143. GRETHEN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.;

No. 18M145. TAYLOR *v.* EDWARDS ET AL.;

No. 18M146. CUNNINGHAM *v.* UNITED STATES MARSHALS SERVICE;

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No. 18M150. ACEDO *v.* PINEDO ET AL.;

No. 18M151. LONG *v.* KEETON, WARDEN; and

No. 18M152. BONANNO *v.* BARR, ATTORNEY GENERAL, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M144. OULTON *v.* FLORIDA; and

No. 18M149. GOSSAGE *v.* MERIT SYSTEMS PROTECTION BOARD. Motions for leave to proceed as veterans denied.

No. 18M147. SHOOP *v.* TERRY, ACTING WARDEN; and

No. 18M148. CORDOBA *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari with supplemental appendixes under seal granted.

No. 18M153. SEALED APPELLANT *v.* SEALED APPELLEE. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

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*[REPORTER'S NOTE: For dissenting opinion of JUSTICE ALITO and statement of JUSTICE KAVANAUGH in No. 18A985, see *Murphy* v. *Collier*, 587 U. S. 901, 903, 913.]

No. 17–1618. BOSTOCK *v.* CLAYTON COUNTY, GEORGIA. C. A. 11th Cir.; and

No. 17–1623. ALTITUDE EXPRESS, INC., ET AL. *v.* ZARDA ET AL., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF ZARDA. C. A. 2d Cir. [Certiorari granted, 587 U. S. 960]; and

No. 18–107. R. G. & G. R. HARRIS FUNERAL HOMES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. [Certiorari granted, 587 U. S. 960.] Petitioner in No. 17–1618, respondents in No. 17–1623, and respondent Aimee Stephens in No. 18–107 shall file their briefs on the merits, pursuant to this Court's Rule 33.1(g)(v), on or before Wednesday, June 26, 2019. Respondent in No. 17–1618, petitioners in No. 17–1623, and petitioner and respondent EEOC in No. 18–107 shall file their briefs on the merits, pursuant to Rule 33.1(g)(vi), on or before Friday, August 16, 2019. Reply briefs, if any, pursuant to Rule 33.1(g)(vii), shall be filed on or before Monday, September 16, 2019. *Amicus curiae* briefs shall be filed pursuant to Rule 37.3.

No. 18–431. UNITED STATES *v.* DAVIS ET AL. C. A. 5th Cir. [Certiorari granted, 586 U. S. 1063.] Motion for appointment of counsel granted, and J. Joseph Mongaras, Esq., of Dallas, Tex., is appointed to serve as counsel for respondent Andre L. Glover.

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No. 18–8191. BURKE, MOTHER OF CAUDLE, DECEASED *v.* RAVEN ELECTRIC, INC., ET AL. Sup. Ct. Alaska; and

No. 18–8270. HETTINGA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 3, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–8886. IN RE RODGERS;

No. 18–8922. IN RE CAMPOS; and

No. 18–8960. IN RE WINKEL. Petitions for writs of habeas corpus denied.

No. 18–8872. IN RE SURLES. 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. 18–8907. IN RE WILLIAMS. 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*).

No. 18–8452. In re Mason; and

No. 18–8485. In re Hower. Petitions for writs of mandamus denied.

No. 18–1274. In re Bhagat. Motion of Mr. Marcos Gonzalez for leave to file brief as *amicus curiae* granted. Petition for writ of mandamus denied.

No. 18–1164. In re Giordani;

No. 18–1229. In re Fjord et al.; and

No. 18–8724. In re Cabello. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 18–673. Prince *v.* Lizarraga, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 382.

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No. 18–766. Bierman et al. *v.* Walz, Governor of Minnesota, et al. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 3d 570.

No. 18–807. Baskins et al. *v.* Oklahoma Tax Commission. Ct. Civ. App. Okla. Certiorari denied.

No. 18–813. Velasquez et al. *v.* Barr, Attorney General. C. A. 4th Cir. Certiorari denied.

No. 18–830. Township of Millburn, New Jersey, et al. *v.* Palardy. C. A. 3d Cir. Certiorari denied. Reported below: 906 F. 3d 76.

No. 18–842. Mendez *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–881. American Fuel & Petrochemical Manufacturers et al. *v.* O'Keeffe et al. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 903.

No. 18–944. Tree of Life Christian Schools *v.* City of Upper Arlington, Ohio. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 3d 357.

No. 18–1017. ANGELEX, LTD. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 907 F. 3d 612.

No. 18–1117. KABANI & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 918.

No. 18–1142. TOCZYLOWSKI *v.* GIULIANO ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 188 A. 3d 567.

No. 18–1144. NATURAL ALTERNATIVES INTERNATIONAL, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 904 F. 3d 1375 and 738 Fed. Appx. 1016.

No. 18–1147. BRUNSON *v.* HOGAN ET AL. Ct. App. Utah. Certiorari denied.

No. 18–1149. GALLENTHIN *v.* BOROUGH OF PAULSBORO ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–1152. STEELE ET AL. *v.* MCCAULEY ET AL. Ct. App. Mich. Certiorari denied.

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No. 18–1158. TAYLOR *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–1168. FLORIMONTE *v.* BOROUGH OF DALTON, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 53.

No. 18–1172. WILLIAMS *v.* CITY OF CLEVELAND, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 3d 924.

No. 18–1178. PAIGE ET UX. *v.* LERNER MASTER FUND, LLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 Fed. Appx. 85.

No. 18–1179. MBAWE *v.* FERRIS STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 832.

No. 18–1180. NEW VISION HOME HEALTH CARE, INC., ET AL. *v.* ANTHEM, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 228.

No. 18–1183. SMULLEY *v.* FEDERAL HOUSING FINANCE AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 754 Fed. Appx. 18.

No. 18–1184. KINNEY *v.* CLARK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 18–1213. GONZALEZ GARITA *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 18–1217. WAPLES MOBILE HOME PARK L. P. ET AL. *v.* GIRON DE REYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 903 F. 3d 415.

No. 18–1247. RIES *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 293 Ore. App. 121, 432 P. 3d 1168.

No. 18–1250. LEA *v.* PERDUE, SECRETARY OF AGRICULTURE. C. A. 6th Cir. Certiorari denied.

No. 18–1268. JHOKKE *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–1270. JAGOS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 18–1273. CALDAVADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 166 App. Div. 3d 792, 88 N. Y. S. 3d 236.

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No. 18–1278. KERNS ET AL. *v.* CHESAPEAKE EXPLORATION, L. L. C., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 762 Fed. Appx. 289.

No. 18–1282. SANDERS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 279 So. 3d 618.

No. 18–1286. BAUR *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 181 A. 3d 1261.

No. 18–1312. MATESKI *v.* RAYTHEON CO. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 49.

No. 18–6750. PULTRO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 181 A. 3d 1209.

No. 18–6993. BJERKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 319.

No. 18–7130. ALDEN *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass. App. 438, 105 N. E. 3d 282.

No. 18–7232. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 801.

No. 18–7369. GHOSH *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 18–7378. HILL *v.* DANIELS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 353.

No. 18–7540. RILEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 270 So. 3d 291.

No. 18–7542. HARNDEN *v.* ST. CLAIR COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–7584. MARBERRY *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 18–7613. ACKELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 3d 67.

No. 18–7670. PORTER *v.* ZOOK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 3d 408.

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No. 18–7680. CIRINO *v.* UNITED STATES; MACHADO *v.* UNITED STATES; NEWMAN *v.* UNITED STATES; SUGGS *v.* UNITED STATES; TELLEZ *v.* UNITED STATES (Reported below: 744 Fed. Appx. 528); and WEILBURG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–7695. WILLIAMS *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 725 Fed. Appx. 1012.

No. 18–7809. WERE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 1422, 2018-Ohio-4496, 111 N. E. 3d 20.

No. 18–7907. HASSAN *v.* MARKS, CHIEF ADMINISTRATIVE JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 19.

No. 18–8057. SHORT *v.* OHIO. Ct. App. Ohio, 2d App. Dist., Montgomery County. Certiorari denied. Reported below: 2018-Ohio-2429.

No. 18–8090. ZAKRZEWSKI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 254 So. 3d 324.

No. 18–8153. WALCOTT *v.* NAQUIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 413.

No. 18–8178. JUSTISE *v.* LIEBEL ET AL. Ct. App. Ind. Certiorari denied. Reported below: 107 N. E. 3d 1111.

No. 18–8232. ROSALES *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 548 S. W. 3d 796.

No. 18–8235. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 18–8240. MONIZ *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–8241. MORET *v.* GARRETT. C. A. 9th Cir. Certiorari denied.

No. 18–8242. MCCREARY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 334.

No. 18–8248. JONES *v.* SUPREME COURT OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 83.

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No. 18–8249. MORGAN *v.* STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari denied.

No. 18–8251. PETERSON *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8255. PONDER *v.* AVALON CORRECTIONAL SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 546.

No. 18–8257. MCCLAIN *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 797.

No. 18–8258. JACKSON *v.* CLIMMER ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8271. HERNANDEZ *v.* SIMS ET AL. Ct. App. Wis. Certiorari denied.

No. 18–8272. FAIRLEY *v.* FORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 356.

No. 18–8276. SAMPLE *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 18–8278. SCHIEVE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 110 N. E. 3d 1193.

No. 18–8283. BURLISON *v.* ANGUS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS MARION COUNTY, FLORIDA COURT DEPUTY CLERK. C. A. 11th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 523.

No. 18–8285. MARTINEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 560 S. W. 3d 681.

No. 18–8288. ALLEN *v.* ENVIROGREEN LANDSCAPE PROFESSIONALS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 721 Fed. Appx. 322.

No. 18–8295. LUMSDEN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 564 S. W. 3d 858.

No. 18–8296. ALEXANDER *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE. C. A. 3d Cir. Certiorari denied.

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No. 18–8303. ALFORD *v.* CARLTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8304. BROACH *v.* PEAKE, CHAPTER 13 TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 728 Fed. Appx. 395.

No. 18–8305. ZAINULABEDDIN *v.* UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 776.

No. 18–8319. FLICK *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8323. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 265 So. 3d 460.

No. 18–8326. GRAY *v.* ROMERO ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8334. GONZALEZ *v.* ERNESTO GONZALEZ. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 18–8338. JACKSON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2018 IL App (5th) 150090–U.

No. 18–8340. ROBLERO *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 688.

No. 18–8351. FRESSADI *v.* ARIZONA MUNICIPAL RISK RETENTION POOL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 672.

No. 18–8354. ANDERSON *v.* HOWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 484.

No. 18–8365. SCOTT *v.* STARK ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8367. WILLIAMS *v.* AMERICAN AUTO LOGISTICS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–8368. MARTIN *v.* GARMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

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No. 18–8372. GREEN *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 18–8374. HILL *v.* BREWER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8375. HOLLAND *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 503 Mich. 913, 920 N. W. 2d 115.

No. 18–8379. DOBBS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 18–8383. SOUTHGATE *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 809.

No. 18–8385. REPELLA *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 201.

No. 18–8398. WATTERS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 18–8399. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 803.

No. 18–8409. MUNGIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 716.

No. 18–8412. PERRYMAN *v.* GEORGIA ET AL. Ct. App. Ga. Certiorari denied. Reported below: 345 Ga. App. XXIII.

No. 18–8413. AVOKI *v.* CAROLINAS TELCO FEDERAL CREDIT UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 493.

No. 18–8414. DENNIS E. *v.* D'EMIC, ADMINISTRATIVE JUDGE, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DISTRICT, ET AL. (Reported below: 159 App. Div. 3d 699, 69 N. Y. S. 3d 514); and WAI-KIM C. *v.* OZZI, ACTING JUSTICE, SUPREME COURT OF NEW YORK, 13TH JUDICIAL DISTRICT, ET AL. (164 App. Div. 3d 1444, 81 N. Y. S. 3d 913). App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–8420. BRIGGS *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 394 Mont. 387, 429 P. 3d 275.

No. 18–8421. THOMAS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

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No. 18–8422. YOUNG *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 18–8425. LUCAS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8438. COLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 342, 806 S. E. 2d 387.

No. 18–8444. NOVERO *v.* DUKE ENERGY FLORIDA, LLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 759.

No. 18–8446. WERNER *v.* CITY OF GREEN BAY, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 10.

No. 18–8459. BISSO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 259 So. 3d 838.

No. 18–8460. AVILEZ *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 94 Mass. App. 1109, 113 N. E. 3d 934.

No. 18–8474. HENNEBERRY *v.* COUNTY OF ALAMEDA, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 721.

No. 18–8479. FELS *v.* MCCONNELL ET AL. C. A. 7th Cir. Certiorari denied.

No. 18–8482. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 3d 1255.

No. 18–8497. LYNCH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 18–8509. KOMATSU *v.* NTT DATA, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 730 Fed. Appx. 98.

No. 18–8510. THANIEL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 238 Md. App. 343, 192 A. 3d 804.

No. 18–8533. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 18–8535. HELEVA *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

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No. 18–8545. LOHRI *v.* SPECIALIZED LOAN SERVICING, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 857.

No. 18–8549. GOODMAN *v.* HAMILTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 295.

No. 18–8559. SMITH *v.* DANIEL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 266 So. 3d 141.

No. 18–8560. SULTAANA *v.* HARRIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8567. MCDERMOTT *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–8571. PELLECER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 18–8580. MARTS *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 260 So. 3d 1057.

No. 18–8590. RAMOS *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2018 UT App 161, 428 P. 3d 334.

No. 18–8592. GRISSOM *v.* CARPENTER, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 3d 1265.

No. 18–8594. TISZAI *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8596. BERNAZARD *v.* KOCH. C. A. 2d Cir. Certiorari denied.

No. 18–8606. SMITH *v.* DOZIER ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8620. HICKLIN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 18–8633. GREENE *v.* WALGREEN EASTERN CO., INC. C. A. 1st Cir. Certiorari denied.

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No. 18–8635. WILLIS *v.* ROSS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 629.

No. 18–8644. FINCH *v.* GRAHAM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 556.

No. 18–8656. HAMES *v.* YELDELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 739 Fed. Appx. 206.

No. 18–8675. SEDILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 826.

No. 18–8678. CAMPBELL *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 18–8684. YOUNG *v.* BRENNAN, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 423.

No. 18–8688. MCSHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 454.

No. 18–8690. ONTIVEROS *v.* PACHECO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 601.

No. 18–8691. BOISVERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–8694. HENDERSON *v.* UNITED STATES (Reported below: 906 F. 3d 1109); and HAMMOND *v.* UNITED STATES (740 Fed. Appx. 573). C. A. 9th Cir. Certiorari denied.

No. 18–8695. TATE *v.* TITUS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8696. BROWN *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 17–348 (La. App. 5 Cir. 12/20/17), 235 So. 3d 1314.

No. 18–8699. CHERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 687.

No. 18–8700. GIVENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 421.

No. 18–8703. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

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No. 18–8708. CLARK *v.* COAKLEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 59.

No. 18–8711. LUSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8714. WHIGHAM, AKA PRINGLE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–8715. SPRAY *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SHIRLEY. C. A. 1st Cir. Certiorari denied.

No. 18–8716. DONAHUE *v.* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY ET AL. Sup. Ct. Pa. Certiorari denied.

No. 18–8717. ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8718. BARRETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 134.

No. 18–8721. REED *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–8725. MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 280.

No. 18–8729. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8740. MANLEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 198 A. 3d 724.

No. 18–8741. APODACA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8743. TORRES-CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 361.

No. 18–8747. AGUILAR-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 362.

No. 18–8752. SANDHU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 595.

No. 18–8755. MURDOCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

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No. 18–8767. SLATON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 689.

No. 18–8775. MAINES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8779. HUDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8781. KALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 667.

No. 18–8782. LOPEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 234.

No. 18–8783. KENDRICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 687.

No. 18–8784. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 505.

No. 18–8786. KRELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2017–0013 (La. 1/8/19), 260 So. 3d 583.

No. 18–8808. REDMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 150081–U.

No. 18–8816. HOOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8824. GONZALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 3d 808.

No. 18–8829. DJUGA, AKA DZHUGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8923. WATKINS *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–761. DAHNE *v.* RICHEY. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 881.

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

Does the First Amendment require a prison to entertain a prisoner grievance that contains veiled threats to kill or injure a guard? Or may the prison insist that the prisoner rewrite the grievance to eliminate any threatening language? In this case, respondent Thomas Richey, an inmate currently serving a sentence for murder in Washington state prison, submitted a written prison grievance complaining that a guard had improperly denied him shower privileges. His grievance not only insulted the guard, referring to her as a "fat Hispanic," but contained language that may reasonably be construed as a threat. Specifically, the grievance stated:

> "It is no wonder [why] guards are assaulted and even killed by some prisoners. When guards like this fat Hispanic female guard abuse their position . . . it can make prisoners less civilized than myself to resort to violent behavior in retaliation." App. to Pet. for Cert. 109a–110a.

The prison refused to entertain the grievance, but permitted Richey to refile his complaint with the offensive language omitted. Richey refused to comply and instead submitted a second grievance that repeated much of the original language, adding, "[i]t is no wonder why guards are slapped and strangled by some prisoners." *Id.*, at 111a. The record reflects that Richey's grievance came "just a few months after an inmate actually did murder a DOC staff member" at a Washington state prison "by strangling her to death." *Id.*, at 106a.

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Petitioner Dennis Dahne, a prison employee who processes inmate grievances, refused to accept Richey's modified grievance. Dahne later explained that his decision was based on the fact that the grievance contained "so much irrelevant, inappropriate, and borderline threatening extra language." *Ibid.* When Dahne refused to process Richey's modified grievance, Richey filed this action in Federal District Court, claiming that Dahne violated his First Amendment free speech and petition rights. Although the District Court originally dismissed Richey's claim, that decision was reversed by the United States Court of Appeals for the Ninth Circuit, which held that Richey stated a valid claim for relief under the First Amendment. See *Richey* v. *Dahne*, 624 Fed. Appx. 525, 526 (2015). In the decision below, the Ninth Circuit doubled down on its earlier ruling, holding that prisoners have a clearly established constitutional right to use "disrespectful" language in prison grievances and that Richey was entitled to summary judgment on his First Amendment claim. 733 Fed. Appx. 881, 883–884 (2018).

We have made it clear that prisoners do not retain all of the free speech rights enjoyed by persons who are not incarcerated. See, *e. g.*, *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001). Prisons are dangerous places. To maintain order, prison authorities may insist on compliance with rules that would not be permitted in the outside world. See *Turner* v. *Safley*, 482 U. S. 78, 89–91 (1987). Even if a prison must accept grievances containing personal insults of guards, a proposition that is not self-evident,* does it follow that prisons must tolerate veiled threats? I doubt it, but if the Court is uncertain, we should grant review in this case. Perhaps there is more here than is apparent on the submissions before us, but based on those submissions, the decision of the Ninth Circuit defies both our precedents and common sense.

No. 18–809. LOVELACE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motions of Fines and Fees Justice Center et al. and National Association of Criminal Defense Lawyers for leave to file briefs

*Indeed, several courts have upheld prison rules barring or punishing prisoners' use of insolent, disrespectful, or profane language in written grievances and complaints. See, *e. g.*, *Smith* v. *Mosley*, 532 F. 3d 1270, 1274, 1277 (CA11 2008); *Ustrak* v. *Fairman*, 781 F. 2d 573, 580 (CA7 1986); *In re Parmelee*, 115 Wash. App. 273, 283–285, 63 P. 3d 800, 806–807 (2003).

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as *amici curiae* granted. Certiorari denied. Reported below: 2018 IL App (4th) 170401, 104 N. E. 3d 532.

No. 18–983. CITY OF MACKINAC ISLAND, MICHIGAN, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 898 F. 3d 1.

No. 18–1249. PRICE *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 701.

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

I concur in the denial of certiorari. I write separately to set the record straight regarding the Court's earlier orders vacating the stays of execution entered by the District Court and the Court of Appeals in this case. See *Dunn* v. *Price*, 587 U. S. 929 (2019). In a late-night dissenting opinion accompanying one of those orders, JUSTICE BREYER asserted that petitioner's death sentence was being "carried out in an arbitrary way" and that Members of this Court deviated from "basic principles of fairness." *Id.*, at 929, 933. There is nothing of substance to these assertions. An accurate recounting of the circumstances leading to the now-delayed execution makes clear that petitioner's execution was set to proceed in a procedurally unremarkable and constitutionally acceptable manner.

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I

The dissent omitted any discussion of the murder that warranted petitioner's sentence of death and the extensive procedural protections afforded to him before his last-minute, dilatory filings. I therefore begin by more fully recounting the "circumstances as they [were] presented to our Court." *Id.*, at 929.

On the evening of Sunday, December 22, 1991, Bill Lynn, a minister, and his wife Bessie returned home after church. *Price* v. *State*, 725 So. 2d 1003, 1011 (Ala. Crim. App. 1997). Bill began assembling Christmas toys for his grandchildren while Bessie prepared for bed. *Ibid.* After the electricity appeared to fail, Bill went outside to check the power box. *Ibid.* He was then brutally attacked with a sword and a knife by petitioner and his accomplice. *Id.*, at 1011, 1015. According to the trial court, Bill

suffered a total of 38 "cuts, lacerations, and stab wounds." App. to Pet. for Cert., O. T. 2018, No. 18–8766, p. 230a (App. in No. 18–8766). "One of his arms was almost severed," and "[h]is scalp was detached from [his] skull." *Ibid.* Bessie tried to call the police, but the phone lines were cut. *Price*, 725 So. 2d, at 1011. When she tried to escape and go get help, petitioner and his accomplice ordered her out of the van and attacked her, too. *Ibid.* They also stole checks, cash, and firearms, and even demanded Bessie hand over her wedding bands. *Id.*, at 1011–1012. Bill "died a slow, lingering and painful death." App. in No. 18–8766, at 230a.

Petitioner later confessed, and an Alabama jury convicted him of capital murder and first-degree robbery. *Price*, 725 So. 2d, at 1011–1012. The jury recommended death, which the trial court imposed after finding that the killing was committed during the course of a robbery and that it was particularly heinous, atrocious, or cruel. *Id.*, at 1011, 1034–1035. Petitioner's conviction and sentence were affirmed on direct appeal and his conviction became final in 1999. See *Price*, 725 So. 2d 1003, aff'd, *Ex parte Price*, 725 So. 2d 1063 (Ala. 1998), cert. denied, 526 U. S. 1133 (1999).

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Twenty years later, after multiple unsuccessful attempts to obtain postconviction relief,* petitioner brought an action under 42 U. S. C. § 1983 attacking the constitutionality of the State's lethal injection protocol. Record in *Price* v. *Dunn*, No. 14–cv–472 (SD Ala.), Doc. 1 (Record in No. 14–cv–472). Following our decision in *Glossip* v. *Gross*, 576 U. S. 863, 878 (2015), which confirmed that prisoners challenging a State's method of execution must "establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk" of pain, petitioner amended his complaint to propose an alternative compounded drug. See Record in No. 14–cv–472, Doc. 32, at 19–20. The District Court entered judgment for the State, explaining that petitioner had failed to show that this alternative was readily available. App. in No. 18–8766, at 38a–39a.

While petitioner's appeal was pending before the Eleventh Circuit, Alabama enacted Act 2018–353, which approved nitrogen hypoxia as an alternative to lethal injection. Death-row inmates

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*See *Price* v. *State*, 880 So. 2d 502 (Ala. Crim. App. 2003) (Table); *Price* v. *Allen*, 679 F. 3d 1315 (CA11 2012), cert. denied, 568 U. S. 1212 (2013); *Price* v. *State*, 265 So. 3d 366 (Ala. Crim. App. 2017) (Table).

whose convictions were final before June 1, 2018, had 30 days from that date to elect to be executed via nitrogen hypoxia. Ala. Code § 15–18–82.1(b)(2) (2018). As the Eleventh Circuit noted in affirming the District Court, petitioner did not do so. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 752 Fed. Appx. 701, 703, n. 3 (2018).

According to JUSTICE BREYER, the warden may not have given petitioner an election form until "72 hours" before the June 30 deadline. *Price*, 587 U. S., at 932. That "possib[ility]," *ibid.*, even if true, is irrelevant. As an initial matter, petitioner (like all other individuals) is presumed to be aware of the law and thus the June 30 deadline. Moreover, the Alabama statute neither required special notice to inmates nor mandated the use of a particular form. It merely required that the election be "personally made by the [inmate] in writing and delivered to the warden." Ala. Code § 15–18–82.1(b)(2). Cynthia Stewart, the warden at Holman Correctional Facility, went beyond what the statute required by affirmatively providing death-row inmates at Holman a written election form and an envelope in which they could return it to her. App. in No. 18–8766, at 181a. No fewer than 48 other inmates took advantage of this election. Petitioner did not, even though he was represented throughout this time period by a well-heeled Boston law firm.

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It was not until January 27, 2019—two weeks after the State sought to set an execution date and six months after petitioner declined to elect nitrogen hypoxia—that petitioner's counsel asked the warden, for the first time, that petitioner be executed through nitrogen hypoxia instead of lethal injection. The warden explained that she was unable to accept the belated request under state law. Petitioner's counsel then approached the State's counsel, who gave the same response. On February 8, petitioner filed another § 1983 action challenging the constitutionality of Alabama's lethal injection protocol under the Eighth Amendment and proposing nitrogen hypoxia as an alternative. See *Bucklew* v. *Precythe*, 587 U. S. 119, 140 (2019) (requiring a prisoner bringing a § 1983 method of execution claim to "identif[y] a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain"). On March 1, the Alabama Supreme Court set petitioner's execution date for April 11.

On April 5, the District Court denied petitioner's motion for a preliminary injunction to stay his execution pending resolution of his new § 1983 claim. App. in No. 18–8766, at 54a. The court found that nitrogen hypoxia could not be "readily implemented" because although Alabama had legally approved nitrogen hypoxia as a future method of execution, the State was still preparing its execution protocol. *Id.*, at 48a–49a. It also found that the State had "'legitimate' reason[s]" for declining to use nitrogen hypoxia—namely, that petitioner failed to comply with the statutory deadline. *Id.*, at 49a–50a. But the court stated that petitioner was likely to prevail on the question whether execution by nitrogen "would provide a significant reduction in the substantial risk of severe pain" as compared to execution by lethal injection. *Id.*, at 52a. That same day, petitioner filed a motion for reconsideration in which he proposed, for the first time, his own one-page "execution protocol" for nitrogen hypoxia. Record in *Price* v. *Dunn*, No. 19–0057, Doc. 33, p. 4, and n. 2 (Record in No. 19–0057). The court denied the motion because petitioner "still fail[ed] to show that [a nitrogen hypoxia execution protocol] may be readily implemented by the State and that the State does not have [a] legitimate reason for refusing his untimely request." App. in No. 18–8766, at 28a.

Image Proof Binding Application

On April 10, the Eleventh Circuit affirmed on alternative grounds and denied petitioner's motion to stay his execution. *Price* v. *Commissioner, Ala. Dept. of Corrections*, 920 F. 3d 1317 (2019). The court acknowledged that petitioner "did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution." *Id.*, at 1328. But it concluded that this failure was irrelevant because the State had officially adopted that method of execution. *Id.*, at 1328–1329. Nonetheless, the court held that the District Court erred in concluding that petitioner had met his burden to show that his proposed alternative method would significantly reduce the risk of substantial pain. *Id.*, at 1329–1331. In particular, the court held that the District Court had before it "no reliable evidence" from which to conclude that nitrogen would reduce petitioner's risk of pain in execution, as compared to the lethal injection protocol. *Id.*, at 1330. It noted that in reaching the contrary conclusion, the District Court had relied on a preliminary draft report by East Central University marked "'Do Not Cite.'" *Ibid.*

A few hours before his scheduled execution on April 11, petitioner filed a petition for a writ of certiorari and an accompanying application for a stay of his execution. *Price* v. *Dunn*, O. T. 2018, No. 18–8766 (18A1044). While that petition and application were pending here, and before any mandate issued from the Eleventh Circuit, petitioner filed yet another motion for a preliminary injunction in the District Court. Record in No. 19–0057, Doc. 45. Petitioner attached several affidavits and a final version of the report by the East Central University. The District Court granted a stay approximately two hours before the scheduled execution time of 6 p.m. central time, holding that, in light of the Eleventh Circuit's opinion and the new submissions, petitioner had now demonstrated a likelihood of success on the merits. *Id.*, Doc. 49, at 9–10, 13. The State immediately filed in the Eleventh Circuit a motion to vacate on the ground that the District Court lacked jurisdiction over the case, which was still at the Eleventh Circuit. But the Eleventh Circuit entered its own stay "in light of the jurisdictional questions raised by the parties' motions." 2019 WL 1591475, *1 (Apr. 11, 2019). The State then promptly filed an application to vacate the stays in this Court so that it could carry out the execution as planned before the warrant expired at midnight. *Dunn* v. *Price*, O. T. 2018, No. 18A1053.

Preliminary Publication

II

We granted the State's application to vacate the stays. Consistent with our usual practice in resolving eleventh-hour applications, we did not issue a full opinion explaining our reasoning. Yet our brief order was not issued until hours after the execution warrant had already expired. The Court's delay in issuing the order happens to have the same effect as JUSTICE BREYER's preferred course of action. As he explained in his dissent, he preferred to discuss the matter at Conference the following day, which would require the State to "obtain a new execution warrant, thus delaying the execution." *Price*, 587 U. S., at 932. JUSTICE BREYER asserted that "delay was warranted" in part because the legal issues raised were "substantial." *Id.*, at 932–933. That rationale does not withstand even minimal legal scrutiny.

JUSTICE BREYER framed the issue before the Court as "the right of a condemned inmate not to be subjected to cruel and unusual punishment in violation of the Eighth Amendment." *Id.*, at 933. That framing was incorrect. The issue before the Court

was whether the lower courts abused their discretion in staying the execution. For three independent reasons—all raised by the State in its application—the State was entitled to vacatur. The dissent failed to adequately address any of them.

First, the District Court abused its discretion in granting a preliminary injunction because it manifestly lacked jurisdiction over the case, which was pending in the Court of Appeals. It is well settled that "[f]iling a notice of appeal," as petitioner did, "transfers adjudicatory authority from the district court to the court of appeals." *Manrique* v. *United States*, 581 U. S. 116, 120 (2017). "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56, 58 (1982) (*per curiam*). Thus, as the Eleventh Circuit has long recognized, "a district court generally is without jurisdiction to rule in a case that is on appeal"—even after the court has rendered a decision—"until the mandate has issued." *Zaklama* v. *Mount Sinai Medical Center*, 906 F. 2d 645, 649 (1990); see also *Kusay* v. *United States*, 62 F. 3d 192, 194 (CA7 1995) (Easterbrook, J.) (until the Court of Appeals issues its mandate, the case remains in the Court of Appeals, and "any action by the district court is a nullity"); 16AA C. Wright, A. Miller, E. Cooper, & C. Struve, Federal Practice and Procedure § 3987, p. 612 (4th ed. 2008) (Wright & Miller). In this case, there was no dispute that the Eleventh Circuit had not yet issued its mandate when petitioner sought a preliminary injunction from the District Court on the same issues pending in the Court of Appeals. The District Court therefore lacked authority to grant the preliminary injunction, and the Court of Appeals abused its discretion in granting a stay instead of vacating the preliminary injunction.

Even if the Eleventh Circuit believed that the jurisdictional issue was difficult, that belief still would not have been a sufficient reason to grant a stay. Under the traditional stay factors, a petitioner is required to make "'a strong showing that he is likely to succeed on the merits.'" *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). It is not enough, as the dissent suggests, that the question be "substantial." *Price*, 587 U. S., at 933. But the question is not even "substantial." The dissent relied only on an out-of-context quote from a treatise to support its position that this

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jurisdictional question was difficult. See *ibid.* ("'An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal'" (quoting 16A Wright & Miller § 3949.1, p. 63)). The section from which this statement is plucked, however, reiterates that a notice of appeal "'is an event of jurisdictional significance'" that "'divests the district court of its control over those aspects of the case involved in the appeal.'" *Id.*, at 50 (quoting *Griggs*, *supra* at 58). The exceptions to this rule pertain to matters outside the scope of the appeal or in aid of the Court of Appeals' jurisdiction, such as taxing costs, awarding attorney's fees, or reducing to writing an earlier oral decision without altering its substance. 16A Wright & Miller § 3949.1. Those exceptions were not applicable to petitioner's case. The issue before the Eleventh Circuit was whether petitioner was entitled to a preliminary injunction based on petitioner's claim that he should be executed using nitrogen hypoxia—the exact claim petitioner raised in the District Court. There is no question that the District Court was deprived of jurisdiction to hear the identical claim and award the exact same relief petitioner sought from the Eleventh Circuit. To suggest that this question was difficult or that the Court was "deeply misguided" to follow black-letter law is at best disingenuous. See *Price*, 587 U. S., at 933.

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Second, the Eleventh Circuit did not consider how petitioner's unjustified delay in presenting his "new evidence" to the District Court factored into the equitable considerations of a stay. See *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006) (equity weighs against a stay when "'a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay'"). Notably, the Eleventh Circuit did not conclude that petitioner's new affidavits or the "final" version of the report made him likely to succeed on the merits or that those materials were unavailable to him earlier. And more broadly, petitioner delayed in bringing this successive § 1983 action until almost a year after Alabama enacted the legislation authorizing nitrogen hypoxia as an alternative method, six months after he forwent electing it as his preferred method, and weeks after the State sought to set an execution date. There is simply no plausible explanation for the delay other than litigation strategy. A stay

under these circumstances—in which the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place—only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage. See *Bucklew*, 587 U. S., at 150–151; *Dunn* v. *Ray*, 586 U. S. 1138 (2019).

Third, petitioner was unlikely to succeed on the merits of his method-of-execution claim. The three-drug protocol petitioner attacks is the very one we upheld in *Glossip*. And the Eleventh Circuit's April 10 analysis about whether nitrogen hypoxia was "available" and could be "readily implemented" was suspect under our precedent. As we recently held, "the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Bucklew*, *supra*, at 141 (internal quotation marks omitted). Here, petitioner's haphazard, one-page proposed protocol—provided for the first time in his motion for reconsideration less than a week before his scheduled execution date—was, to put it charitably, untested. It contemplated that the execution team could use a "hose fitting" to "fill" a "hood" with nitrogen gas, and then attempt to "[p]lace [the] hood over [the] inmate's head" and "secure" it with an "elastic strap/drawstring to ensure seal." Record in No. 19–0057, Doc. 33, at 4. Even if all the equipment were available on Amazon.com, as he alleged, many details remained unanswered, particularly regarding the actual process of administering the gas and, critically, the safety of the state employees administering it. For instance, what does "a robust yet controlled flow of nitrogen" mean? *Ibid.* How full of nitrogen gas should the hood be before placing it over the inmate's head? How does one prevent nitrogen from seeping out of the hood into the execution chamber before the hood is secured? The need to settle on details like these explains why the State has repeatedly stated that it will not be ready to implement its nitrogen hypoxia method until the end of the summer or later (and why the State requested that inmates elect nitrogen within a set time period). Petitioner's proposal certainly fell short of showing a safe alternative that could be "readily implemented" by Alabama, particularly in the week before his scheduled execution.

The facts of this case cast serious doubt on the Eleventh Circuit's suggestion that the State bears a heavy burden of showing that a method of execution is unavailable as soon as its legislature

authorizes it to employ a new method. That kind of burden-shifting framework would perversely incentivize States to delay or even refrain from approving even the most humane methods of execution.

As for petition No. 18–8766—the challenge to the original order denying petitioner a preliminary injunction—and its accompanying stay application, four Justices noted, without explanation, that they would have stayed the execution to allow consideration of this petition as well. It is unclear what legal issue they believed warranted our review. Petitioner did not identify a lower court conflict on an important question of law—certainly not one passed on by the Eleventh Circuit. Instead, petitioner asked the Court to engage in mere error correction about the scope of evidence that the District Court may consider in deciding whether to grant a preliminary-injunction motion, and about the scope of appellate review. The dissenting Justices made no attempt to explain how those issues warranted our review.

For these reasons, our decisions to vacate the stays entered by the lower courts and decline to grant a stay were undoubtedly correct.

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III

Given petitioner's weak position under the law, it is difficult to see his litigation strategy as anything other than an attempt to delay his execution. Yet four Members of the Court would have countenanced his tactics without a shred of legal support. Indeed, JUSTICE BREYER's six-page dissent musters only one, non-precedential case citation for a proposition of law. See *Price*, 587 U. S., at 933 (citing *Bowersox* v. *Williams*, 517 U. S. 345, 347 (1996) (GINSBURG, J., dissenting)). To be sure, the dissent gestures at a compressed timeframe, as if to suggest the legal issues were too complicated to allow reasoned consideration before the State's execution warrant expired. But as explained above, the legal issues were remarkably straightforward. And any blame for decisions "in the middle of the night," 587 U. S., at 933, falls on petitioner, who filed the new preliminary injunction-motion that resulted in the stays just *five hours* before his execution.

Insofar as JUSTICE BREYER was serious in suggesting that the Court simply "take no action" on the State's emergency motion to vacate until the following day, *id.*, at 932, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.

This approach would only further incentivize prisoners to file dilatory challenges to their executions by rewarding them with *de facto* stays of execution while requiring timely petitioners to meet the ordinary legal standards for a stay. JUSTICE BREYER's approach would also have significant real-world consequences. It would hamper the States' ability to carry out lawful judgments, while simultaneously flooding the courts with last-minute, meritless filings. And this practice would harm victims. Take Bessie Lynn, Bill's widow who witnessed his horrific slaying and was herself attacked by petitioner. She waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure. See Alabama, Running Out of Time, Halts Execution of Sword and Dagger Killer of Pastor, CBS News (Apr. 12, 2019), https://www.cbsnews.com/news/alabama-sword-dagger-killer-christopher-lee-price-execution-halted-pastor-bill-lynn/ (all Internet materials as last visited on May 9, 2019); Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late (Apr. 11 2019), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html. This "injustice, in the form of justice delayed," *ibid.*, would become the norm if the Court were to regularly delay resolution of emergency applications.

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Of course, the dissent got its way by default. Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously. The Court instead failed to issue an order before the expiration of the warrant at midnight, forcing the State to "cal[l] off" the execution. *Price*, 587 U. S., at 932. To the extent the Court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-minute stay applications the norm instead of the exception. See *Bucklew*, 587 U. S., at 150.

Perhaps those who oppose capital punishment will celebrate the last-minute cancellation of lawful executions. But "[t]he Constitution allows capital punishment," *id.*, at 129, and by enabling the delay of petitioner's execution on April 11, we worked a "miscarriage of justice" on the State of Alabama, Bessie Lynn, and her

family. Governor Ivey Releases Statement on Stay of Execution for Death Row Inmate Christopher Lee Price (Apr. 12, 2019), https://governor.alabama.gov/statements/governor-ivey-releases-statement-on-stay-of-execution-for-death-row-inmate-christopher-lee-price.

No. 18–8300. EVERETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 258 So. 3d 1199.

JUSTICE SOTOMAYOR, dissenting.

I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. 1004, 1011 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

No. 18–8332. ABDUR'RAHMAN ET AL. *v.* PARKER, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 558 S. W. 3d 606.

JUSTICE SOTOMAYOR, dissenting.

I have already explained my opposition to the "perverse requirement that inmates offer alternative methods for their own executions." *McGehee* v. *Hutchinson*, 581 U. S. 933, 935 (2017) (opinion dissenting from denial of application for stay and denial of certiorari); see generally *Glossip* v. *Gross*, 576 U. S. 863, 969–973 (2015). I have likewise addressed the added perversity of the secrecy laws that Tennessee imposes on death-row prisoners seeking to meet this requirement. See *Zagorski* v. *Parker*, 586 U. S. 938, 941–942 (2018) (opinion dissenting from denial of application for stay and denial of certiorari) (discussing prisoners' inability to depose those with firsthand knowledge of the State's efforts to procure an alternative drug or to learn which sellers the State had contacted).

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The Court has recently reaffirmed (and extended) the alternative-method requirement. See *Bucklew* v. *Precythe*, 587 U. S. 119, 134–140 (2019). And today, the Court again ignores the further injustice of state secrecy laws denying death-row prisoners access to potentially crucial information for meeting that requirement. Because I continue to believe that the alternative-method requirement is fundamentally wrong—and particularly so when compounded by secrecy laws like Tennessee's—I dissent.

No. 18–8396. WEIDRICK *v.* TRUMP, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari before judgment denied.

No. 18–8738. MACHADO-ERAZO ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 901 F. 3d 326.

Rehearing Denied

No. 18–793. BREWSTER *v.* UNITED STATES, 586 U. S. 1127;
No. 18–798. BLAUCH *v.* COLORADO, 586 U. S. 1203;
No. 18–859. PEEL *v.* H. E. BUTT GROCERY CO., 586 U. S. 1223;
No. 18–869. LECUONA *v.* LECUONA, 586 U. S. 1223;
No. 18–917. BENT *v.* TALKIN, MARSHAL, SUPREME COURT OF THE UNITED STATES, ET AL., 586 U. S. 1224;
No. 18–5453. ELLIOTT *v.* PALMER, WARDEN, 586 U. S. 923;
No. 18–5818. KILPATRICK *v.* KONDAVEETI, 586 U. S. 989;
No. 18–5819. KILPATRICK *v.* FIELDS, 586 U. S. 989;
No. 18–5833. KILPATRICK *v.* VOLTERRA, 586 U. S. 989;
No. 18–5834. KILPATRICK *v.* ROBINSON, 586 U. S. 989;
No. 18–5877. STOLTZFOOS *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., 586 U. S. 990;
No. 18–5906. KILPATRICK *v.* WEISS, 586 U. S. 1000;
No. 18–5907. KILPATRICK *v.* ELIA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF EDUCATION, 586 U. S. 1000;
No. 18–5908. KILPATRICK *v.* ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF PROFESSIONAL MEDICAL CONDUCT; and KILPATRICK *v.* DRESLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF PROFESSIONAL MEDICAL CONDUCT, 586 U. S. 1000;
No. 18–6794. BRADSHAW *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 1153;
No. 18–7016. WASHINGTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 586 U. S. 1158;
No. 18–7051. TAYLOR *v.* CVS CAREMARK CORP., 586 U. S. 1159;
No. 18–7063. IN RE DREAD, 586 U. S. 1220;
No. 18–7153. J. E., AKA J. E. C. *v.* OREGON DEPARTMENT OF HUMAN SERVICES, 586 U. S. 1163;
No. 18–7191. PENDERGRAFT ET AL. *v.* NETWORK OF NEIGHBORS, INC., 586 U. S. 1165;

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No. 18–7213. DIXIT *v.* BRASHER, JUDGE, SUPERIOR COURT OF GEORGIA, ATLANTA JUDICIAL CIRCUIT, 586 U. S. 1209;

No. 18–7236. STOUTAMIRE *v.* LA ROSE, WARDEN, 586 U. S. 1166;

No. 18–7325. ZINKAND *v.* HERNANDEZ, SUPERINTENDENT, AVERY-MITCHELL CORRECTIONAL INSTITUTION, ET AL., 586 U. S. 1169;

No. 18–7486. MONTE *v.* VANCE ET AL., 587 U. S. 927;

No. 18–7539. ROSSI *v.* THE CROWN, 586 U. S. 1251;

No. 18–7580. NEAL *v.* WAYNE COUNTY TREASURER, 586 U. S. 1252;

No. 18–7601. CHHIM *v.* GOLDEN NUGGETT LAKE CHARLES, L. L. C., 586 U. S. 1234;

No. 18–7755. GARCIA *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS, 586 U. S. 1236;

No. 18–7756. CHAMBERS *v.* SARCONE, 586 U. S. 1252;

No. 18–7790. SIMPSON *v.* COOPER, JUDGE, COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO, 586 U. S. 1237;

No. 18–7824. KILLINGBECK *v.* UNITED STATES, 586 U. S. 1237;

No. 18–7859. MONSEGUE *v.* UNITED STATES, 586 U. S. 1238;

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No. 18–7895. ANDERSON *v.* MICHIGAN, 586 U. S. 1253; and

No. 18–8110. IN RE ANDERSON, 586 U. S. 1220. Petitions for rehearing denied.

MAY 14, 2019

Miscellaneous Order

No. 18–9031 (18A1120). IN RE SAMRA. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 18–9033 (18A1121). SAMRA *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. Certiorari denied.

MAY 17, 2019

Dismissal Under Rule 46

No. 16–317. DEUTSCHE BANK TRUST COMPANY AMERICAS ET AL. *v.* ROBERT R. MCCORMICK FOUNDATION ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.

MAY 20, 2019

Certiorari Granted—Vacated and Remanded

No. 17–1348. NEVADA DEPARTMENT OF WILDLIFE *v.* SMITH. Ct. App. Cal., 3d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230 (2019).

No. 18–7096. SANTOS *v.* UNITED STATES. 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 the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2019.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court grants, vacates, and remands in this case, apparently because it harbors doubt that petitioner's 1987 conviction under Florida law for battery on a law enforcement officer qualifies as a "violent felony" as defined by the Armed Career Criminal Act's elements clause, which covers a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U. S. C. § 924(e)(2)(B)(i). I share no such doubt: As the case comes to us, it is undisputed that petitioner was convicted of battery on a law enforcement officer after he "'struck [an] officer in the face using a closed fist.'" App. to Pet. for Cert. A–1, p. 11. See Fla. Stat. § 784.03(1)(a) (2018) (a person commits battery when he "[a]ctually and intentionally touches or strikes another person against the will of the other," among other things). Because the record makes "perfectly clear" that petitioner "was convicted of battery on a law enforcement officer by striking, which involves the use of physical force against the person of another," App. to Pet. for Cert. A–1, at 11, I would count the conviction as a "violent felony" under the elements clause and would therefore deny the petition. *Mathis* v. *United States*, 579 U. S. 500, 537 (2016) (ALITO, J., dissenting).

Legal Text Recognition Application

Miscellaneous Orders

No. 18A1062 (18–1164). IN RE GIORDANI. Application for stay, addressed to JUSTICE KAVANAUGH and referred to the Court, denied.

No. 18M154. BREWINGTON *v.* OKLAHOMA; and

No. 18M156. BOWLES *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. Motions for leave to proceed as veterans denied.

No. 18M155. MOODY *v.* BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES;

No. 18M157. PIDANICK *v.* MADDALONI ET AL.;

No. 18M158. ROBINSON *v.* HALL;

No. 18M159. JACKSON *v.* FERGUSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PHOENIX, ET AL.; and

No. 18M161. CRYSTAL M. *v.* RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18M160. MOORE ET AL. *v.* POMPEO, SECRETARY OF STATE, 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. 18–725. BARTON *v.* BARR, ATTORNEY GENERAL. C. A. 11th Cir. [Certiorari granted, 587 U. S. 960.] Motion of petitioner to dispense with printing joint appendix granted.

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No. 18–8407. SAVOY *v.* BURNS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 10, 2019, 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. 18–8967. IN RE BRINSON. Petition for writ of habeas corpus denied.

No. 18–9035. IN RE AVERY. 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*).

No. 18–1196. IN RE KINNEY ET UX. Petition for writ of mandamus denied.

Certiorari Granted

No. 18–938. RITZEN GROUP, INC. *v.* JACKSON MASONRY, LLC. C. A. 6th Cir. Certiorari granted. Reported below: 906 F. 3d 494.

Certiorari Denied

No. 18–672. CITY OF NEWPORT BEACH, CALIFORNIA, ET AL. *v.* VOS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 3d 1024.

No. 18–733. 1A AUTO, INC., ET AL. *v.* SULLIVAN, DIRECTOR, MASSACHUSETTS OFFICE OF CAMPAIGN AND POLITICAL FINANCE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 480 Mass. 423, 105 N. E. 3d 1175.

No. 18–810. MAGUIRE ET AL. *v.* EDREI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 892 F. 3d 525.

No. 18–827. SHABO *v.* BARR, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 3d 237.

No. 18–853. UNITED PARCEL SERVICE, INC. *v.* POSTAL REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 890 F. 3d 1053.

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No. 18–873. CASINO PAUMA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 3d 1066.

No. 18–941. DAVIS, CHAPTER 13 TRUSTEE *v.* TYSON PREPARED FOODS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 163.

No. 18–1010. HAGAN ET AL. *v.* KHOJA. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 988.

No. 18–1049. HOFFMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 3d 523.

No. 18–1056. JOHANKNECHT, SHERIFF, KING COUNTY, WASHINGTON *v.* MOORE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 1094.

No. 18–1057. VON SAHER *v.* NORTON SIMON MUSEUM OF ART AT PASADENA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 3d 1141.

No. 18–1061. GRAVISS *v.* DEPARTMENT OF DEFENSE, DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS. C. A. Fed. Cir. Certiorari denied. Reported below: 898 F. 3d 1222.

No. 18–1173. I. B. ET AL. *v.* WOODARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 3d 1278.

No. 18–1187. MIORELLI ET AL. *v.* ROYAL CARIBBEAN CRUISE LINES, LTD. C. A. 11th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 871.

No. 18–1193. MOON *v.* COUNTY OF EL PASO, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 3d 352.

No. 18–1200. FLUID DYNAMICS, LLC *v.* JEA, FKA JACKSONVILLE ELECTRIC AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 924.

No. 18–1202. MONTALVO *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Knox County. Certiorari denied. Reported below: 2018-Ohio-3142.

No. 18–1205. LEISER ET AL. *v.* LEMON, CHIEF JUSTICE, SUPREME COURT OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 841.

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No. 18–1208. TURNER *v.* MIDDLE RIO GRANDE CONSERVANCY DISTRICT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 715.

No. 18–1209. BONACCI *v.* TRANSPORTATION SECURITY ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 909 F. 3d 1155.

No. 18–1215. KANOFSKY *v.* CITY OF BETHLEHEM, PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 175 A. 3d 467.

No. 18–1221. HUNT *v.* GOODRICH ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1226. CLINTON COUNTY CHILDREN AND YOUTH SERVICES *v.* A. A. R., NATURAL MOTHER, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 650 Pa. 266, 199 A. 3d 868.

No. 18–1227. KANOFSKY *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 174 A. 3d 1209.

No. 18–1228. BRUNDO *v.* CHRIST THE KING CHURCH OF OMAHA. C. A. 8th Cir. Certiorari denied.

No. 18–1232. ZEINY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1237. GOUNDER *v.* GRIPPA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1040, 113 N. E. 3d 453.

No. 18–1239. HAVASUPAI TRIBE *v.* PROVENCIO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 1155.

No. 18–1241. JACKSON *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-3492.

No. 18–1243. MONTOYA-AGUILAR *v.* BARR, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 741 Fed. Appx. 129.

No. 18–1244. PICKUP ET AL. *v.* NEWSOM, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

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No. 18–1275. XIAOHUA HUANG *v.* HUAWEI TECHNOLOGIES CO., LTD. C. A. Fed. Cir. Certiorari denied. Reported below: 735 Fed. Appx. 715.

No. 18–1294. LYNCH ET UX. *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 920.

No. 18–1304. ASHBAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 Fed. Appx. 425.

No. 18–1313. MORAN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 18–1321. ATES *v.* GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–6907. KULICK *v.* LEISURE VILLAGE ASSN., INC. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 459.

No. 18–7414. FREENEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 198.

No. 18–7444. TALADA *v.* COLE, SHERIFF, STEUBEN COUNTY JAIL. C. A. 2d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 73.

No. 18–7471. HENRY, AKA WEIDA ZHENG, AKA RUSSEL, AKA WILSON, AKA ZHONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 3d 589.

No. 18–7530. UDOH ET VIR *v.* MINNESOTA DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 906.

No. 18–8408. MCCRAY *v.* DRISCOLL ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 719 and 725.

No. 18–8418. WADDLETON *v.* RODRIGUEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 248.

No. 18–8450. CARDER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 18–8454. SCOTT *v.* GOODWIN, WARDEN. C. A. 5th Cir. Certiorari denied.

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No. 18–8457. SMITH *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 18–8461. WILLIAMSON *v.* BOYER, JUDGE, CIRCUIT COURT OF FLORIDA, FOURTH JUDICIAL CIRCUIT. C. A. 11th Cir. Certiorari denied.

No. 18–8462. TRUESDALE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8465. KUNSMAN *v.* WALL. C. A. 11th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 938.

No. 18–8478. HALOUSEK *v.* YUBA COUNTY ANIMAL CARE SERVICES. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–8480. FUNK *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 18–8483. AGOSTO *v.* MILLER, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8484. BAILEY *v.* FOXWELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 208.

No. 18–8491. FLOWERS *v.* URIARTE ET AL. Sup. Ct. Fla. Certiorari denied.

No. 18–8502. ALEXANDER *v.* REWERTS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8516. DRUMMOND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 1456, 2018-Ohio-5085, 113 N. E. 3d 562.

No. 18–8527. RIVERA *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8538. SPEARMAN *v.* PARSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8542. S. N. ET AL. *v.* SAN DIEGO HEALTH AND HUMAN SERVICES AGENCY ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 18–8544. MYLES *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 260 So. 3d 266.

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No. 18–8548. BELSER *v.* WOODS ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8553. HICKS *v.* DALLAS COUNTY COMMUNITY COLLEGES. C. A. 5th Cir. Certiorari denied.

No. 18–8564. HEATH *v.* BRAMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8638. BENNEFIELD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 304 Ga. 491, 819 S. E. 2d 10.

No. 18–8646. HAMPTON *v.* MCLAUGHLIN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–8655. HOLLOWAY *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 18–8759. JUAREZ-AQUINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 337.

No. 18–8761. JONES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 18–8763. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 3d 1026.

No. 18–8777. GOULD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 371 N. C. 474, 818 S. E. 2d 290.

No. 18–8792. CHEERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 272.

No. 18–8798. LYNCH *v.* MILES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8810. MARTINEZ-NEGRETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 967.

No. 18–8814. PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 258.

No. 18–8821. SEALED APPELLANT *v.* SEALED APPELLEE. C. A. 5th Cir. Certiorari denied.

No. 18–8825. HEDSPETH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 236.

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No. 18–8830. CESAR DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 759 Fed. Appx. 318.

No. 18–8831. CONTRERAS VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–8833. DEASE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 18–8834. AMAYA-VASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 78.

No. 18–8842. NIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 995.

No. 18–8843. MILNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 739.

No. 18–8852. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8856. ESTUPINAN MICOLTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8865. LOPEZ-AGUILAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 3d 1327.

No. 18–8868. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8885. ROMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 969.

No. 18–8891. CRIDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8893. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 678.

No. 18–8894. MAYFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 956.

No. 18–8898. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 476.

No. 18–8900. GARCIA HERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 539.

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No. 18–8902. KLOSZEWSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 760 Fed. Appx. 12.

No. 18–8920. GLASSCOCK *v.* TAYLOR. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 566.

No. 18–8975. SMILEY *v.* MUNIZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 341.

No. 18–460. DANIEL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE GINSBURG would grant the petition for writ of certiorari. Reported below: 889 F. 3d 978.

JUSTICE THOMAS, dissenting.

Petitioner Walter Daniel filed this tort suit against the United States after his wife, Navy Lieutenant Rebekah Daniel, died at a naval hospital due to a complication following childbirth. The District Court determined that the suit was barred by *Feres* v. *United States*, 340 U. S. 135 (1950), which held that military personnel injured by the negligence of a federal employee cannot

sue the United States under the Federal Tort Claims Act. The Court of Appeals "regretfully" reached the same conclusion and affirmed. 889 F. 3d 978, 980 (CA9 2018).

Petitioner now asks the Court to reconsider *Feres*. I have explained before that "'*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.'" *Lanus* v. *United States*, 570 U. S. 932, 933 (2013) (opinion dissenting from denial of certiorari) (quoting *United States* v. *Johnson*, 481 U. S. 681, 700 (1987) (Scalia, J., dissenting)). I write again to point out the unintended consequences of this Court's refusal to revisit *Feres*.

Earlier this Term, in *Air & Liquid Systems Corp.* v. *DeVries*, 586 U. S. 446 (2019), we confronted the case of two veterans who alleged that their exposure to asbestos caused them to develop cancer. *Id.*, at 450. Both veterans served in the U. S. Navy on ships outfitted with equipment that used asbestos insulation or parts. *Id.*, at 449. The manufacturers of that equipment delivered much of it to the Navy in "bare-metal" condition, *i. e.*, without asbestos, meaning that the Navy added the asbestos to the equipment after delivery. *Id.*, at 451. Neither veteran was exposed to any asbestos sold or delivered by the equipment manufacturers, as opposed to asbestos added by the Navy. See *id.*, at 450, and n. 1. Yet because the Navy was likely immune from suit under *Feres*, the veterans sued the manufacturers. 586 U. S., at 450. This Court then twisted traditional tort principles to afford them the possibility of relief. *Id.*, at 458–460 (GORSUCH, J., dissenting).

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Such unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*. Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits "would (insofar as we are permitted to inquire into such things) be just." *Johnson*, *supra*, at 703 (Scalia, J., dissenting). But it did not. Accordingly, I respectfully dissent from the Court's decision to deny this petition.

No. 18–756. GITTERE, WARDEN, ET AL. *v.* ECHAVARRIA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 896 F. 3d 1118.

No. 18–981. JONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 903.

JUSTICE THOMAS, dissenting.

I dissent for the reasons set out in *Daniel* v. *United States*, 587 U. S. 1020 (2019) (THOMAS, J., dissenting from denial of certiorari).

No. 18–1181. SHOOP, WARDEN *v.* ISSA. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 904 F. 3d 446.

No. 18–1212. PAPPAS *v.* LORINTZ, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPREME COURT JUDGE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 18–8822. REYNOLDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 740 Fed. Appx. 3.

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Rehearing Denied

No. 18–930. BRANDON *v.* BRANDON, 586 U. S. 1248;

No. 18–1025. LEON *v.* NEW YORK CITY DEPARTMENT OF EDUCATION ET AL., 586 U. S. 1248;

No. 18–1031. LITTLE *v.* CSRA ET AL., 587 U. S. 938;

No. 18–1103. EVANS *v.* UNITED STATES, 587 U. S. 920;

No. 18–7322. YERTON *v.* BRYANT, WARDEN, 586 U. S. 1229;

No. 18–7564. HOWARD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 586 U. S. 1252;

No. 18–7591. KYEI *v.* SWIFT ET AL., 587 U. S. 921;

No. 18–7667. TAYLOR *v.* VANNOY, WARDEN, 586 U. S. 1202;

No. 18–7690. BELL *v.* LEIGH ET AL., 587 U. S. 923;

No. 18–7731. CIAVONE *v.* HORTON, WARDEN, 587 U. S. 924;

No. 18–7794. KROTT *v.* MAY, WARDEN, ET AL., 586 U. S. 1213;

No. 18–7876. CALLAHAN *v.* UNITED STATES, 586 U. S. 1253;

No. 18–8024. RODRIGUEZ *v.* NEW JERSEY, 587 U. S. 962;

No. 18–8038. BURKE *v.* UNITED STATES, 586 U. S. 1256;

No. 18–8062. TAYLOR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, 587 U. S. 947;

No. 18–8112. BROWN *v.* UNITED STATES, 586 U. S. 1258;

No. 18–8246. In re Jackson, 586 U. S. 1247; and

No. 18–8315. Drevaleva *v.* United States District Court for the Northern District of California, 587 U. S. 951. Petitions for rehearing denied.

May 21, 2019

Dismissal Under Rule 46

No. 18–1246. BNSF Railway Co. et al. *v.* Montana Eighth Judicial District Court, Cascade County, et al. Sup. Ct. Mont. Certiorari dismissed under this Court's Rule 46. Reported below: 395 Mont. 524, 437 P. 3d 115.

May 23, 2019

Certiorari Denied

No. 18–9356 (18A1200). Long *v.* Inch, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

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No. 18–9358 (18A1202). Long *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 271 So. 3d 938.

No. 18–9396 (18A1216). Long *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 924 F. 3d 1171.

May 24, 2019

Miscellaneous Orders

No. 18A1165. Householder et al. *v.* Ohio A. Philip Randolph Institute et al. Application for stay, presented to Justice Sotomayor, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Southern District of Ohio, case No. 1:18–CV–00357, entered May 3, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1166. CHABOT ET AL. *v.* OHIO A. PHILIP RANDOLPH INSTITUTE ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Southern District of Ohio, case No. 1:18–CV–00357, entered May 3, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1170. MICHIGAN SENATE ET AL. *v.* LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Eastern District of Michigan, case No. 2:17–CV–14148, entered April 25, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

No. 18A1171. CHATFIELD ET AL. *v.* LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL. Application for stay, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Eastern District of Michigan, case No. 2:17–CV–14148, entered April 25, 2019, is stayed pending the timely filing and disposition of an appeal in this Court or further order of this Court.

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MAY 28, 2019

Certiorari Granted—Reversed. (See *Box* v. *Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. 490 (2019) (*per curiam*).)

Miscellaneous Orders

No. 18A296. BARNES *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS. Application to file petition for writ of certiorari in excess of the page limitation, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 18M162. RANDOLPH *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.; and

No. 18M163. BENHAM *v.* HAGEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 18–556. KANSAS *v.* GLOVER. Sup. Ct. Kan. [Certiorari granted, 587 U. S. 918.] Motion of petitioner to dispense with printing joint appendix granted.

No. 18–8060. SOLBERG *v.* FIRST NATIONAL BANK & TRUST CO. OF WILLISTON ET AL. Sup. Ct. N. D. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [587 U. S. 937] denied.

No. 18–8061. GRIGSBY *v.* BALTAZAR, WARDEN. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [587 U. S. 916] denied. JUSTICE GORSUCH took no part in the consideration or decision of this motion.

No. 18–9057. IN RE KAUFMAN. Petition for writ of habeas corpus denied.

No. 18–8929. IN RE FLANDERS. Petition for writ of mandamus denied.

Certiorari Granted

No. 17–1678. HERNANDEZ ET AL. *v.* MESA. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 885 F. 3d 811.

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Certiorari Denied. (See also *Box* v. *Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. 490 (2019) (*per curiam*).)

No. 18–803. DOLIN *v.* GLAXOSMITHKLINE, LLC, FKA SMITHKLINE BEECHAM CORP. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 3d 803.

No. 18–891. JIM *v.* UNITED STATES; and

No. 18–895. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 3d 1242.

No. 18–923. CARTER, NEXT FRIEND OF A. D. ET AL., ET AL. *v.* SWEENEY, ASSISTANT SECRETARY OF BUREAU OF INDIAN AFFAIRS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 823.

No. 18–937. MANRIQUEZ *v.* DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. Sup. Ct. Cal. Certiorari denied.

No. 18–1022. MURPHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–1225. MATSIBORCHUK *v.* HOLCOMBE. C. A. 2d Cir. Certiorari denied. Reported below: 747 Fed. Appx. 875.

No. 18–1231. XIU JAIN SUN *v.* OHENE ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 18–1235. RIBAKOFF *v.* CITY OF LONG BEACH, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist., Div. 9. Certiorari denied. Reported below: 27 Cal. App. 5th 150, 238 Cal. Rptr. 3d 81.

No. 18–1236. HIRAN ET AL. *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL. Sup. Ct. Tex. Certiorari denied.

No. 18–1238. GOUNDER *v.* PROGRESSIVE CREDIT UNION ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1040, 113 N. E. 3d 454.

No. 18–1242. GLENN *v.* NORDIC SERVICES, INC. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 2d 1032.

No. 18–1261. COMANCHE NATION OF OKLAHOMA *v.* ZINKE, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 768.

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No. 18–1263. BRAUN *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. D. C. Cir. Certiorari denied.

No. 18–1271. WHITE ET AL. *v.* CHEVRON CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 453.

No. 18–1291. THURMAN ET AL. *v.* JUDICIAL CORRECTION SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 733.

No. 18–1293. EVERGREEN FREEDOM FOUNDATION, DBA FREEDOM FOUNDATION *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 192 Wash. 2d 782, 432 P. 3d 805.

No. 18–1302. COHEN, CHAPTER 7 TRUSTEE *v.* CHERNUSHIN. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 3d 1265.

No. 18–1305. O'NEILL *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 6th Cir. Certiorari denied.

No. 18–1310. CLEMENT *v.* DURBAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 337, 115 N. E. 3d 614.

No. 18–1314. MEADOR ET AL. *v.* APPLE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 3d 260.

No. 18–1322. ALLIANCE TO END CHICKENS AS KAPOROS ET AL. *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 3d 1091, 114 N. E. 3d 1070.

No. 18–1324. WATTS ET UX. *v.* ENTERGY ARKANSAS, INC. Ct. App. Ark. Certiorari denied. Reported below: 2018 Ark. App. 539, 561 S. W. 3d 774.

No. 18–1325. VOGT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–1336. REED *v.* UNITED STATES; and
No. 18–9001. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 3d 102.

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No. 18–1370. BURKE ET AL. *v.* DEUTSCHE BANK NATIONAL TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 3d 548.

No. 18–7139. GIPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 364.

No. 18–7500. MANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 899 F. 3d 898.

No. 18–7536. REEVES *v.* VANNOY, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 2018–0270 (La. 10/15/18), 254 So. 3d 665.

No. 18–7581. ERWIN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION COLEMAN-LOW. C. A. 11th Cir. Certiorari denied.

No. 18–7599. MORENO ORNELAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 3d 1138.

No. 18–7652. ANDERSON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 18–7868. BURGETT *v.* GENERAL STORE NO. TWO, INC., DBA MARSH'S SUNFRESH MARKET, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 898.

No. 18–7961. MARTINKO *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 171 N. H. 239, 194 A. 3d 69.

No. 18–8202. MARTINEZ ESCOBAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 228.

No. 18–8389. WILSON *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 3d 1314.

No. 18–8453. SPENCER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 712.

No. 18–8487. NEYSMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 192 A. 3d 184.

No. 18–8488. MITCHELL *v.* PRECYTHE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

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No. 18–8505. BURRELL *v.* LOUNGO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 750 Fed. Appx. 149.

No. 18–8511. CARLSON ET VIR *v.* PIPER, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES, ET AL. Ct. App. Minn. Certiorari denied.

No. 18–8513. HALPER *v.* PASSES. Ct. App. Colo. Certiorari denied.

No. 18–8515. DRAKE *v.* MURPHY, AUSTIN, ADAMS, SCHOENFELD, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 91.

No. 18–8517. HALL *v.* SPRINT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 228.

No. 18–8529. SMITH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2018 IL App (4th) 150856–U.

No. 18–8530. YOUNG *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8546. MURRAY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 262 So. 3d 26.

No. 18–8547. BIGGS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 2d 1017.

No. 18–8550. FLOWERS *v.* URIARTE ET AL. Sup. Ct. Fla. Certiorari denied.

No. 18–8551. IBEABUCHI *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 18–8552. GAINES *v.* BUSNARDO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 Fed. Appx. 799.

No. 18–8554. HETTINGA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 18–8555. FLOYD *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8557. RUIZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

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No. 18–8562. TICE *v.* DENNIS. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 114.

No. 18–8563. GRAYER *v.* FILLIYAW, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 215.

No. 18–8565. JACKSON *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 487 S. W. 3d 648.

No. 18–8569. BONNELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 155 Ohio St. 3d 176, 2018-Ohio-4069, 119 N. E. 3d 1285.

No. 18–8572. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 262 So. 3d 708.

No. 18–8573. ATTERBERRY *v.* VARGA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8578. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2018 IL App (3d) 160556–U.

No. 18–8588. ROSSY *v.* LUPKIN ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8595. WALLACE *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. Sup. Ct. La. Certiorari denied. Reported below: 2018–0047 (La. 1/8/19), 260 So. 3d 588.

No. 18–8598. MAGANA *v.* WELLS FARGO BANK, N. A., AS TRUSTEE FOR THE BENEFIT OF CERTIFICATE HOLDERS OF ASSET BACKED PASS THROUGH CERTIFICATE SERIES 2004–MCW, ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8605. SWECKER ET UX. *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 349.

No. 18–8621. INGRAM *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 304.

No. 18–8663. MALLORY *v.* BARR, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied.

No. 18–8667. ANSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

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No. 18–8701. FRANKLIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 258 So. 3d 1239.

No. 18–8732. MILLER *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8749. BLANKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 278.

No. 18–8750. CAMPBELL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 18–8758. GASTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 576.

No. 18–8760. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8769. RIOS-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 3d 38.

No. 18–8791. BISSONETTE *v.* DOOLEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–8793. BURSTEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 893.

No. 18–8794. BALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8795. ARMENDARIZ-CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 266.

No. 18–8796. COPELAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 791.

No. 18–8797. LOPEZ-ZUNIGA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 906.

No. 18–8799. LOCKWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8807. QUINTERO-CORRAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 945.

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No. 18–8811. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 859.

No. 18–8817. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 18–8819. REVELES-SANTANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 996.

No. 18–8827. MCSHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 454.

No. 18–8828. OVERBY *v.* PENNSYLVANIA (two judgments). Super. Ct. Pa. Reported below: 185 A. 3d 1142 (both judgments). Certiorari denied.

No. 18–8832. ANNAMALAI *v.* HARMON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 843.

No. 18–8846. LOPEZ CUELLAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 274.

No. 18–8847. BOCANEGRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 998.

No. 18–8854. ZINNEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 Fed. Appx. 453.

No. 18–8860. CLUM *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8866. BRAKEALL *v.* DOOLEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8869. DAVENPORT, AKA FLAMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 476.

No. 18–8870. TAYLOR *v.* JONES. C. A. 5th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 305.

No. 18–8873. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 161.

No. 18–8874. WHITE, AKA BRAITHWAITE, AKA VALENTINE, AKA BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 748 Fed. Appx. 446.

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No. 18–8879. AROJOJOYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 461.

No. 18–8882. DONALDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–8889. FLANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8895. WATKINS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 93 Mass. App. 1105, 103 N. E. 3d 770.

No. 18–8896. VOLIS *v.* HOUSING AUTHORITY OF THE CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 430.

No. 18–8909. GENTLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8910. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 77.

No. 18–8912. FLORES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8913. AGUILERA-ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 975.

No. 18–8915. ZEPEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–8917. AGUILAR *v.* FORD, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8924. WEAVER *v.* BOWERSOX, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8928. GUILLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 643.

No. 18–8931. COLEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 748 Fed. Appx. 403.

No. 18–8932. SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 3d 895.

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No. 18–8935. MISERENDINO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 949.

No. 18–8940. CHI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 407.

No. 18–8943. CONCEPCION *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 904.

No. 18–8948. MORALES-DEJESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 896 F. 3d 122.

No. 18–8949. MUHAMMAD *v.* TAYLOR, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 18–8952. MURPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 Fed. Appx. 175.

No. 18–8956. JUCUTAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 691.

No. 18–8957. GOSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 620.

No. 18–8961. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8964. MIRANDA-MANUEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 613.

No. 18–8965. OLLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 168.

No. 18–8968. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–8978. REID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 850.

No. 18–8980. LOUIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 167.

No. 18–8983. EDWARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 3d 1026.

No. 18–8985. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 916 F. 3d 701.

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No. 18–8995. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 217.

No. 18–8996. DYAB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–8997. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 263 So. 3d 34.

No. 18–8998. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 815.

No. 18–8999. HILLSTROM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 836.

No. 18–9003. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 291.

No. 18–9006. BOLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 3d 95.

No. 18–9010. MAYOKOK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 441.

No. 18–9020. MARSHALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 533.

No. 18–9026. MELITON-SALTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 525.

No. 18–9027. NIELSEN *v.* KELLY, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 18–9028. REED *v.* FLOOD, ACTING WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 192.

No. 18–9056. FOX *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 18–658. DOE ET AL. *v.* BOYERTOWN AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Motion of Ryan T. Anderson for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 897 F. 3d 518.

No. 18–1206. LIKE ET AL. *v.* TRANSCONTINENTAL GAS PIPE LINE CO., LLC. C. A. 3d Cir. Motion of Owners' Counsel of America et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 907 F. 3d 725.

No. 18–1264. FLESHMAN *v.* VOLKSWAGEN, AG, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 895 F. 3d 597.

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No. 18–8855. HICKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 911 F. 3d 623.

Rehearing Denied

No. 18–867. JACKSON ET AL. *v.* JACKSON, 586 U. S. 1223;
No. 18–965. SULLIVAN *v.* PUGH ET UX., 587 U. S. 918;
No. 18–7433. ARDANEH *v.* MASSACHUSETTS ET AL., 586 U. S. 1232;
No. 18–7437. ANIMASHAUN *v.* SCHMIDT ET AL., 586 U. S. 1232;
No. 18–7513. COBAS *v.* LINDSEY, WARDEN, 586 U. S. 1251;
No. 18–7701. SCHNEIDER *v.* BANK OF AMERICA, N. A., ET AL., 587 U. S. 923;
No. 18–7766. REEDER *v.* REYNOLDS, WARDEN, 586 U. S. 1213;
No. 18–7856. IN RE ALEXANDER, 586 U. S. 1207;
No. 18–7865. DROZDOVSKA *v.* SEMINOLE COUNTY, FLORIDA, 587 U. S. 944; and

No. 18–7970. CALDERON-LOPEZ *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL., 587 U. S. 946. Petitions for rehearing denied.

MAY 30, 2019

Miscellaneous Order

No. 18A1238. PRICE *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Applications for leave to file application for stay and response under seal with redacted copies for the public record granted.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, and with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join as to all but Part II, dissenting.

Christopher Lee Price seeks to be executed by nitrogen hypoxia rather than Alabama's current lethal injection protocol. He claims that executing him by lethal injection will violate his Eighth Amendment right not to be subjected to cruel and unusual punishment. A trial on this claim is scheduled to begin on June 10—only 11 days from today. He has asked this Court to temporarily stay his execution to allow the trial to proceed. I would grant his application.

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I

As I explained the last time this case was before us, the Court of Appeals for the Eleventh Circuit has held that nitrogen hypoxia is an available, feasible, and readily implemented alternative in Alabama. See *Dunn* v. *Price*, 587 U. S. 929, 930 (2019) (opinion dissenting from grant of application to vacate stay); see also *Price* v. *Commissioner, Dept. of Corrections*, 920 F. 3d 1317, 1326–1329 (CA11 2019), cert. denied, 587 U. S. 934 (2019). That holding is the law of the case. And although the State previously disputed whether nitrogen hypoxia would be less painful than lethal injection, it appears that the State no longer does so. The parties have conducted discovery in the weeks since our last decision, and the State's expert does not dispute that death by nitrogen hypoxia is virtually painless.

From my perspective, then, there are two remaining questions. The first is whether Price will experience severe pain if executed by lethal injection. Price has presented considerable expert testimony supporting his claim that midazolam, the initial drug in

the protocol, is too weak a sedative to prevent him from feeling the excruciating pain that the remaining two drugs will cause him. See, *e. g.*, 3 Record in No. 19–12026 (CA11), Tab K, pp. 47–60 (testimony of Dr. Zivot). The District Court has agreed to hold a trial to resolve this factual issue, and nothing in this Court's prior order vacating the stays speaks to this question.

The second question is whether, even if Alabama's lethal injection protocol will cause Price severe pain and even if a painless alternative method is available, we should nonetheless decline to stay his execution because he failed to select nitrogen hypoxia in time. I recognize that the Court relied on this reasoning in vacating the prior stays of execution. See *Dunn* v. *Price*, 587 U. S. 929. As I previously stated, however, there is reason to believe that Price had no more than 72 hours to decide whether to die by nitrogen hypoxia. See *id.*, at 932. If that is so, I cannot agree that his failure to make the selection within the 30-day statutory window amounted to unreasonable delay.

Nor do I believe there is any other basis for concluding that Price engaged in undue delay. *Ibid.* (noting the District Court's finding that Price has been "'proceeding as quickly as possible on this issue since before the execution date was set'" (emphasis deleted)). I therefore continue to believe that the Court's prior decision in this case was misguided. For the same reasons I expressed before, I would grant Price's request for a stay and allow the trial on his Eighth Amendment claim to proceed as planned.

Case Not Yet Pending Publication

II

By allowing Price's execution to proceed, the Court leaves an important and potentially meritorious Eighth Amendment claim unresolved, even though a trial to resolve it is just days away. I understand, of course, that the State has a significant interest in carrying out lawfully imposed punishments. But "ensuring that executions run on time" is not the only legal value at stake, *Bucklew* v. *Precythe*, 587 U. S. 119, 174 (2019) (SOTOMAYOR, J., dissenting), and the Court, I believe, has disregarded important procedural values in this case. This case demonstrates once again the unfortunate manner in which death sentences are often—perhaps inevitably—carried out in this country. We have here an illustration of why I believe, as I have previously argued, that the Court should reconsider the constitutionality of the death penalty in an appropriate case. See *Glossip* v. *Gross*, 576 U. S. 863, 908 (2015) (dissenting opinion).

JUNE 3, 2019

Certiorari Granted—Vacated and Remanded

No. 18–7187. WHEELER *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for the court to consider the First Step Act of 2018, Pub. L. 115–391. Reported below: 742 Fed. Appx. 646.

Certiorari Dismissed

No. 18–8680. BROOKS *v.* MCGINLEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 18–8686. FRANCISCO VEGA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 266 So. 3d 838.

No. 18–9148. IBEABUCHI *v.* BLOMO. Ct. App. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

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Miscellaneous Orders

No. 18A1126 (18–1441). PRESBYTERIAN CHURCH U. S. A. *v.* EDWARDS, JUDGE, JEFFERSON CIRCUIT COURT, ET AL. Sup. Ct. Ky. Application for stay, addressed to JUSTICE GORSUCH and referred to the Court, denied.

No. 18M164. WHITE *v.* KEE NGUYEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. The Solicitor General is invited to file a brief in this case expressing the views of the United States with respect to the motion for review of the River Master's final determination. [For earlier order herein, see, *e. g.*, 586 U. S. 986.]

No. 18–1469. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* CASA DE MARYLAND ET AL. C. A. 4th Cir. Motion to expedite consideration of petition for writ of certiorari denied.

No. 18–8622. IN RE GARRETT. Petition for writ of mandamus denied.

Certiorari Granted

No. 18–877. ALLEN ET AL. *v.* COOPER, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 895 F. 3d 337.

No. 18–1165. RETIREMENT PLANS COMMITTEE OF IBM ET AL. *v.* JANDER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 910 F. 3d 620.

No. 18–7739. HOLGUIN-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 746 Fed. Appx. 403.

Certiorari Denied

No. 18–972. MARTOMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 3d 64.

No. 18–1000. AMERICAN FREEDOM DEFENSE INITIATIVE ET AL. *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 901 F. 3d 356.

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No. 18–1083. GARDA CL NORTHWEST, INC., FKA AT SYSTEMS, INC. *v.* HILL ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 191 Wash. 2d 553, 424 P. 3d 207.

No. 18–1094. CANADIAN PACIFIC RAILWAY LTD. ET AL. *v.* WHATLEY, TRUSTEE. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 3d 614.

No. 18–1252. BILDER *v.* MATHERS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 802.

No. 18–1253. BURMASTER *v.* SWITZERLAND. C. A. 3d Cir. Certiorari denied.

No. 18–1257. LEE ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 3d 1175.

No. 18–1277. SORIN *v.* DEPARTMENT OF JUSTICE. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 28.

No. 18–1284. WILSON *v.* SUNTRUST BANK ET AL. Ct. App. N. C. Certiorari denied. Reported below: 257 N. C. App. 237, 809 S. E. 2d 286.

No. 18–1289. ALLERGAN, INC., ET AL. *v.* TEVA PHARMACEUTICALS USA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 742 Fed. Appx. 511.

No. 18–1290. MCDONALD *v.* ARAPAHOE COUNTY, COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 786.

No. 18–1292. ROTH *v.* NASSAU COUNTY, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 747 Fed. Appx. 891.

No. 18–1326. SHULTZ ET AL. *v.* COLE. C. A. 3d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 252.

No. 18–1342. UCHEOMUMU *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 462 Md. 280, 200 A. 3d 282.

No. 18–1347. KINNEY *v.* CLARK. C. A. 9th Cir. Certiorari denied.

No. 18–1349. KINNEY *v.* CLARK. C. A. 9th Cir. Certiorari denied.

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No. 18–1351. KINNEY *v.* CLARK. C. A. 9th Cir. Certiorari denied.

No. 18–1358. ECHOLS *v.* LAWTON. C. A. 11th Cir. Certiorari denied. Reported below: 913 F. 3d 1313.

No. 18–1363. MORTON *v.* BANK OF AMERICA, N. A., ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–1364. MILLER *v.* OLSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 625.

No. 18–1365. MOGUL MEDIA, INC., ET AL. *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 744 Fed. Appx. 739.

No. 18–1383. HALE *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 268.

No. 18–1385. DELHORNO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 3d 449.

No. 18–6826. CARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 651.

No. 18–7115. CLARK *v.* HARMON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 732 Fed. Appx. 309.

No. 18–7208. MASLONKA *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 269.

No. 18–7639. WHETSTONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 18–7647. SMITH ET VIR *v.* MANASQUAN SAVINGS BANK. Sup. Ct. N. J. Certiorari denied.

No. 18–7725. DELEO *v.* QUINTANA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–7747. JAE YUNG KIM *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–7825. JENKINS *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-2397.

No. 18–7891. HAYMOND *v.* HELMAND INVESTMENT, LLC. Sup. Ct. Va. Certiorari denied.

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No. 18–8002. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2018 Ark. 277, 555 S. W. 3d 881.

No. 18–8023. A. R. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 253 So. 3d 1158.

No. 18–8060. SOLBERG *v.* FIRST NATIONAL BANK & TRUST CO. OF WILLISTON ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 2018 ND 118, 910 N. W. 2d 856.

No. 18–8273. CUERO PAYAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 889.

No. 18–8292. GREER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–8583. POSTELLE *v.* CARPENTER, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 901 F. 3d 1202.

No. 18–8591. SALAZAR-HERNANDEZ *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 18–8593. CALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 18–8597. BROWN *v.* BURTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 53.

No. 18–8607. STERLING *v.* DWYER. C. A. 8th Cir. Certiorari denied.

No. 18–8608. RAMIREZ ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 18–8609. CLARK *v.* CARROLL COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 968.

No. 18–8610. SIERRA *v.* SHAPIRO, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8611. BAILEY *v.* GASAWAY. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 18–8612. JOHNSON *v.* GONYEA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 752 Fed. Appx. 14.

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No. 18–8613. MAGEE *v.* WALT DISNEY CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 18–8618. HATCH *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 265.

No. 18–8628. LEE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 853.

No. 18–8637. ARLOTTA *v.* NIAGARA FRONTIER TRANSPORTATION AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8639. FRANKLIN *v.* NOGAN, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8640. HUOT *v.* MONTANA STATE DEPARTMENT OF CHILD AND FAMILY SERVICES ET AL. (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 727 Fed. Appx. 382 (second judgment) and 397 (first judgment).

No. 18–8641. HOUSTON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8643. FLORES *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 734 Fed. Appx. 278.

No. 18–8645. HARRIS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8648. BRASSFIELD *v.* KING, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 18–8651. BUTRIM *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8652. HARRIS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 134 Nev. 877, 432 P. 3d 207.

No. 18–8653. WRIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 256 So. 3d 766.

No. 18–8657. IBEABUCHI *v.* MARICOPA COMMISSIONERS. Ct. App. Ariz. Certiorari denied.

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No. 18–8658. IBEABUCHI *v.* PENZONE ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8659. IBEABUCHI *v.* WOOD. C. A. 9th Cir. Certiorari denied.

No. 18–8661. JACKSON *v.* MCCAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8668. TEAGUE *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 259 N. C. App. 904, 817 S. E. 2d 239.

No. 18–8671. VON FOX *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 18–8674. MONTGOMERY *v.* GARRY LEWIS PROPERTIES. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2017–1720 (La. App. 1 Cir. 8/10/18), 256 So. 3d 391.

No. 18–8679. BELL *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 204.

No. 18–8681. CARMOUCHE *v.* KENT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8685. THOMAS *v.* JESS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–8710. JOHNSON *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 755.

No. 18–8720. REEP *v.* DEPARTMENT OF JUSTICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 18–8735. MEYERS *v.* SWINEY ET AL. C. A. 4th Cir. Certiorari denied.

No. 18–8745. PICCONE *v.* SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 18–8762. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8764. DREVALEVA *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied.

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No. 18–8771. BARR *v.* PEARSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 919.

No. 18–8772. BENNETT *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8778. HUFFMAN *v.* METZGER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8803. RAMIREZ *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 265 So. 3d 614.

No. 18–8861. DORSEY *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8880. EDWARDS *v.* SEMPLE, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 18–8888. GOMEZ *v.* CLARK, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–8944. Doucet *v.* Louisiana. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 17–200 (La. App. 5 Cir. 12/27/17), 237 So. 3d 598.

No. 18–8946. Peterson *v.* Johnson, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 18–8963. Cobian *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 18–8971. Liepe *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 453 N. J. Super. 126, 180 A. 3d 353.

No. 18–8986. Kelly *v.* Arpaio et al. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 548.

No. 18–9002. Smith *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 386.

No. 18–9008. Udoh *v.* Minnesota. Ct. App. Minn. Certiorari denied.

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No. 18–9015. Rodrigo Perea *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–9017. Myles *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–9024. Littles *v.* Florida. Sup. Ct. Fla. Certiorari denied.

No. 18–9032. Slager *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 3d 224.

No. 18–9037. Brown *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 302 Neb. 53, 921 N. W. 2d 804.

No. 18–9041. Gakuba *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2019 IL App (2d) 170794–U.

No. 18–9042. Holden *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 18–9044. Ramsey *v.* Premo, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied.

No. 18–9046. SHUSTERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 948.

No. 18–9049. MADORE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 18–9050. KAILIHIWA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 689.

No. 18–9053. HILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–9055. HORNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 30.

No. 18–9058. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 348.

No. 18–9060. HARRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 765.

No. 18–9063. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 222.

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No. 18–9069. RENGIFO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–9079. DEDUAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 339.

No. 18–9081. BOOKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 3d 574.

No. 18–9082. ANDREWS *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2018-Ohio-3050.

No. 18–9084. GLADNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 185.

No. 18–9085. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 255.

No. 18–9086. GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 207.

No. 18–9091. LOWRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–9092. LOPEZ-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 455.

No. 18–9104. ZAMOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 960.

No. 18–9105. GEDDIE *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 262 N. C. App. 154, 819 S. E. 2d 416.

No. 18–9106. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 Fed. Appx. 278.

No. 18–9109. NUNEZ-BELEMONTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 265.

No. 18–9111. NOSAIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–9116. COTTO *v.* LASHBROOK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 18–9120. FREY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2018 IL App (2d) 150868–U.

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No. 18–9121. GATER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–9124. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 886.

No. 18–9131. CANFIELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 51.

No. 18–9132. DICKERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 3d 118.

No. 18–9133. BANGURA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 765 Fed. Appx. 928.

No. 18–9149. BROOKINS *v.* FERGUSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PHOENIX, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–9150. AYIKA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–9151. SANDLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–929. MARCUS & MILLICHAP REAL ESTATE INVESTMENT SERVICES, INC., ET AL. *v.* WEILER. Ct. App. Cal., 4th App. Dist., Div. 3. Motion of California Building Industry Association et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 22 Cal. App. 5th 970, 232 Cal. Rptr. 3d 155.

No. 18–976. ASSOCIATION OF AMERICAN RAILROADS *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 896 F. 3d 539.

No. 18–6949. KLEIN *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. 18–9016. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 754 Fed. Appx. 229.

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Rehearing Denied

No. 16–7300. HARRIS *v.* HARDEMAN COUNTY, TENNESSEE, ET AL., 580 U. S. 1132;

No. 16–9755. NAVARRO *v.* UNITED STATES, 583 U. S. 866;

No. 18–1135. SHAKARI *v.* ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION ET AL., 587 U. S. 940;

No. 18–7136. HANNA *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL., 586 U. S. 1197;

No. 18–7347. FREER *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL., 586 U. S. 1210;

No. 18–7383. FELDMAN *v.* ADOPTION STAR AGENCY ET AL., 586 U. S. 1231;

No. 18–7505. PINA *v.* UNITED STATES, 586 U. S. 1210;

No. 18–7558. HAWKINS *v.* FLORIDA, 586 U. S. 1233;

No. 18–7562. ISAIAH *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 586 U. S. 1201;

No. 18–7635. HALL *v.* ALABAMA, 586 U. S. 1234;

No. 18–7791. SMITH *v.* CITY OF PRINCETON, TEXAS, ET AL., 587 U. S. 942;

No. 18–7807. YOUNG *v.* KRAUS ET AL., 587 U. S. 924;

No. 18–7885. VANGUILDER *v.* MARTUSCELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY, 587 U. S. 944;

No. 18–8184. SHARP *v.* DOLAN, 587 U. S. 975; and

No. 18–8194. HENDERSON *v.* COLLINS, WARDEN, 587 U. S. 949. Petitions for rehearing denied.

No. 18–7408. LEONARD *v.* GEORGE WASHINGTON UNIVERSITY HOSPITAL ET AL., 586 U. S. 1244. Petition for rehearing denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

JUNE 4, 2019

Dismissal Under Rule 46

No. 18–1131. UNITED STATES *v.* FRANKLIN. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 904 F. 3d 793.

JUNE 10, 2019

Dismissal Under Rule 46

No. 18–911. INTERMOUNTAIN HEALTH CARE, INC., ET AL. *v.* UNITED STATES EX REL. POLUKOFF ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 895 F. 3d 730.

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Certiorari Granted—Vacated and Remanded

No. 18–1070. VILLAGE OF LINCOLNSHIRE, ILLINOIS, ET AL. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399 ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded with instructions to direct the District Court to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 905 F. 3d 995.

Miscellaneous Orders

No. 18M165. DAVIS *v.* KANSAS. Motion for leave to proceed as a veteran denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 18M166. DOE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 18M167. BAOUCH ET AL. *v.* WERNER ENTERPRISES, INC., DBA WERNER TRUCKING, ET AL. Motion of respondents to file petition for writ of certiorari under seal with redacted copies for the public record denied.

No. 18–8377. BOOKER *v.* JOHNSON ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [587 U. S. 936] denied.

No. 18–8804. RAYMOND *v.* ROY ET AL. Ct. App. Tex., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 1, 2019, 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. 18–8541. IN RE JONES;
No. 18–9288. IN RE FIELDS; and
No. 18–9289. IN RE HALEY. Petitions for writs of habeas corpus denied.

No. 18–9278. IN RE MCCLINTON. 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. 18–8722. IN RE SHEPPARD. Petition for writ of mandamus denied.

Certiorari Granted

No. 17–1498. ATLANTIC RICHFIELD CO. *v.* CHRISTIAN ET AL. Sup. Ct. Mont. Certiorari granted. Reported below: 390 Mont. 76, 408 P. 3d 515.

No. 18–1109. MCKINNEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari granted. Reported below: 245 Ariz. 225, 426 P. 3d 1204.

No. 18–1116. INTEL CORPORATION INVESTMENT POLICY COMMITTEE ET AL. *v.* SULYMA. C. A. 9th Cir. Certiorari granted. Reported below: 909 F. 3d 1069.

No. 18–935. MONASKY *v.* TAGLIERI. C. A. 6th Cir. Motion of Sanctuary for Families et al. for leave to file brief as *amici curiae* granted. Certiorari granted. Reported below: 907 F. 3d 404.

No. 18–1171. COMCAST CORP. *v.* NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 743 Fed. Appx. 106.

Certiorari Denied

No. 18–928. MIDWEST MACHINING, INC. *v.* MCCLELLAN. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 3d 297.

No. 18–936. KETTLER *v.* UNITED STATES; and
No. 18–7451. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 3d 1170.

No. 18–953. FAWZER *v.* BARR, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 755 Fed. Appx. 72.

No. 18–970. MITCHELL ET AL. *v.* TULALIP TRIBES OF WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 600.

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No. 18–984. KING MOUNTAIN TOBACCO CO., INC. *v.* UNITED STATES (two judgments). C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 3d 954 (first judgment); 745 Fed. Appx. 700 (second judgment).

No. 18–1132. SMITH *v.* MAYS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–1137. LES SCHWAB TIRE CENTERS OF PORTLAND, INC., ET AL. *v.* WILCOX, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF WILCOX. Ct. App. Ore. Certiorari denied. Reported below: 293 Ore. App. 452, 428 P. 3d 900.

No. 18–1156. MORGENTHAU VENTURE PARTNERS, LLC, ET AL. *v.* KIMMEL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 254 So. 3d 958.

No. 18–1160. TECK METALS LTD., FKA TECK COMINCO METALS, LTD. *v.* CONFEDERATED TRIBES OF THE COLVILLE RESERVATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 3d 565.

No. 18–1223. VILLENA ET AL. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 745 Fed. Appx. 374.

No. 18–1266. O'LEARY *v.* AETNA LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 896.

No. 18–1281. MILLIMAN *v.* RANDALL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 18–1288. COULTER *v.* ADT SECURITY SERVICES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 615.

No. 18–1295. DE STENO ET AL. *v.* KELLY SERVICES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 379.

No. 18–1296. SURIANO-LAINE *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 563.

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No. 18–1297. NEW DOE CHILD ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 901 F. 3d 1015.

No. 18–1301. BAUTISTA-DELACRUZ *v.* BARR, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 294.

No. 18–1311. CARDILLO *v.* NEARY, CLERK, SUPREME COURT OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 150.

No. 18–1330. DAVIS *v.* O'CONNOR. C. A. 9th Cir. Certiorari denied.

No. 18–1345. KINNEY *v.* CUELLAR ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–1379. GODWIN *v.* DAVEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–1397. PRISM TECHNOLOGIES LLC *v.* SPRINT SPECTRUM L. P., DBA SPRINT PCS. C. A. Fed. Cir. Certiorari denied. Reported below: 757 Fed. Appx. 980.

No. 18–1402. STANLEY ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 18–1405. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 757 Fed. Appx. 194.

No. 18–7693. DRESSNER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2018–0828 (La. 10/29/18), 255 So. 3d 537.

No. 18–7857. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–8003. DANNOLFO *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 18–8214. RABY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 3d 880.

No. 18–8669. ARLOTTA *v.* HERATY ET AL. C. A. 2d Cir. Certiorari denied.

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No. 18–8683. DUCKETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 260 So. 3d 230.

No. 18–8687. OGLE *v.* OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. C. A. 6th Cir. Certiorari denied.

No. 18–8689. MUIR *v.* FERGUSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PHOENIX, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8693. LARSON *v.* HOENIG, GENERAL COUNSEL, NATIONAL INDIAN GAMING COMMISSION, ET AL. C. A. 7th Cir. Certiorari denied.

No. 18–8697. BANKS *v.* PENNYMAC HOLDINGS, LLC, FKA PENNYMAC MORTGAGE INVESTMENT TRUST HOLDINGS I, LLC. Sup. Ct. Pa. Certiorari denied.

No. 18–8702. CARTER *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 18–8704. ALEXANDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8706. MARTIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8707. CARLYLE *v.* CAMPBELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8709. ADEYINKA *v.* HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8727. WIGGINS *v.* PAYNE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8728. THORESEN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 921 N. W. 2d 547.

No. 18–8733. MCELVAIN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8734. PHILLIPS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 160557, 92 N. E. 3d 544.

No. 18–8736. ESPINOZA ET AL. *v.* SAN BENITO CONSOLIDATED INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 216.

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No. 18–8744. MIESEGAES *v.* DEPARTMENT OF HOMELAND SECRETARY ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–8746. DREVALEVA *v.* CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT. Ct. App. Cal., 1st App. Dist., Div. 4. Certiorari denied.

No. 18–8751. RAINEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8754. POMEROY *v.* MUNICIPALITY OF ANCHORAGE, ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 18–8756. WILLIAMS *v.* KURK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 Fed. Appx. 516.

No. 18–8757. TINCHER *v.* BERNERS-LEE. Ct. App. Colo. Certiorari denied.

No. 18–8765. YOUNG *v.* DUNCAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8770. RUGAMBA *v.* CUOMO, GOVERNOR OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 18–8774. TURNER *v.* NEVADA ET AL. Ct. App. Nev. Certiorari denied. Reported below: 134 Nev. 1022.

No. 18–8780. HIGGINS *v.* MASSACHUSETTS DEPARTMENT OF TRANSITIONAL ASSISTANCE. C. A. 1st Cir. Certiorari denied.

No. 18–8788. MOORE *v.* NAGY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–8809. B. C. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Sup. Ct. Fla. Certiorari denied.

No. 18–8813. BULTMAN *v.* CIGNA GROUP INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–8823. AL OBAIDY *v.* MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–8836. WOODSON *v.* UNITED STATES;
No. 18–8837. WOODSON *v.* UNITED STATES;
No. 18–8838. WOODSON *v.* UNITED STATES;
No. 18–8839. WOODSON *v.* UNITED STATES; and
No. 18–8840. WOODSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 749.

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No. 18–8841. WOODSON *v.* BRENNAN, POSTMASTER GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 755.

No. 18–8864. JOSEPH B. *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 26 Neb. App. xiii.

No. 18–8871. RAMBO *v.* NOGAN, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 762 Fed. Appx. 105.

No. 18–8877. KNOX *v.* UNKNOWN PARTIES. C. A. 6th Cir. Certiorari denied.

No. 18–8881. COLEMAN *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8936. McIntosh *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 18–8937. Johnson *v.* Hooks, Warden. C. A. 6th Cir. Certiorari denied.

No. 18–8972. Joiner *v.* Sutton, Warden. C. A. 9th Cir. Certiorari denied.

No. 18–9000. Sterling *v.* Pash, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–9022. Carter *v.* Parris, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 910 F. 3d 835.

No. 18–9036. Brown *v.* Virginia et al. Sup. Ct. Va. Certiorari denied.

No. 18–9052. Grenning *v.* Key, Superintendent, Airway Heights Corrections Center, et al. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 546.

No. 18–9089. Gayle *v.* Home Box Office, Inc., et al. C. A. 2d Cir. Certiorari denied.

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No. 18–9097. Morris *v.* Inch, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 18–9103. Thomas *v.* City of Philadelphia, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 759 Fed. Appx. 110.

No. 18–9139. Gaddy *v.* United States District Court for the District of South Carolina et al. C. A. 4th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 507.

No. 18–9143. Fuller *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 18–9155. Strecker *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 18–9168. Owens *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 761 Fed. Appx. 578.

No. 18–9169. McDaniels *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 3d 366.

No. 18–9172. PITTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–9180. ARCE-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–9181. ASKIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 3d 1110.

No. 18–9183. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–9188. VON HALL *v.* CAIN, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 741 Fed. Appx. 528.

No. 18–9193. BREWER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 3d 408.

No. 18–9196. MEDINA, AKA BELL, AKA BRYANT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 3d 774.

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No. 18–9197. MOORE *v.* KALLIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 244.

No. 18–9200. COX *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 118.

No. 18–9202. MASO DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 378.

No. 18–9205. BALLESTEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 579.

No. 18–9208. TRINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 18–9218. GERANDINO-ARACENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 279.

No. 18–9221. HAMILTON, AKA AMUN RE EL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 Fed. Appx. 953.

No. 18–9228. EWING *v.* PASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–740. AL-ALWI *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 901 F. 3d 294.

Statement of JUSTICE BREYER respecting the denial of certiorari.

In the immediate aftermath of the terrorist attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), 115 Stat. 224. The AUMF states that the President may "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" those attacks. §2(a), *ibid.* In *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), a majority of this Court understood the AUMF to permit the President to detain certain enemy combatants for the duration of the relevant conflict. *Id.*, at 517–518 (plurality opinion); *id.*, at 587 (THOMAS, J., dissenting).

Justice O'Connor's plurality opinion cautioned that "[i]f the practical circumstances" of that conflict became "entirely unlike those of the conflicts that informed the development of the law of war," the Court's "understanding" of what the AUMF authorized "may unravel." *Id.*, at 521. Indeed, in light of the "unconventional nature" of the "war on terror," there was a "substantial prospect" that detention for the "duration of the relevant conflict" could amount to "perpetual detention." *Id.*, at 519–521. But as this was "not the situation we face[d] as of th[at] date," the plurality reserved the question whether the AUMF or the Constitution would permit such a result. *Id.*, at 521.

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In my judgment, it is past time to confront the difficult question left open by *Hamdi*. See *Boumediene* v. *Bush*, 553 U. S. 723, 797–798 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury"); *Hussain* v. *Obama*, 572 U. S. 1079 (2014) (statement of BREYER, J., respecting denial of certiorari).

Some 17 years have elapsed since petitioner Moath Hamza Ahmed al-Alwi, a Yemeni national, was first held at the United States Naval Base at Guantanamo Bay, Cuba. In the decision below, the District of Columbia Circuit agreed with the Govern-

ment that it may continue to detain him so long as "armed hostilities between United States forces and [the Taliban and al Qaeda] persist." 901 F. 3d 294, 298–299 (2018). The Government represents that such hostilities are ongoing, but does not state that any end is in sight. Brief in Opposition 4–5. As a consequence, al-Alwi faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today's conflict may differ substantially from the one Congress anticipated when it passed the AUMF, as well as those "conflicts that informed the development of the law of war." *Hamdi*, 542 U. S., at 521 (plurality opinion).

"The denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U. S. 482, 490 (1923). I would, in an appropriate case, grant certiorari to address whether, in light of the duration and other aspects of the relevant conflict, Congress has authorized and the Constitution permits continued detention.

No. 18–854. ALVAREZ *v.* CITY OF BROWNSVILLE, TEXAS. C. A. 5th Cir. Motion of Law Professors for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 904 F. 3d 382.

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No. 18–9161. WOOD *v.* UNITED STATES (two judgments). C. A. 9th Cir. Certiorari denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

No. 18–9215. GILES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 18–9217. GRUMMITT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 519.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

I dissent for the reasons set out in *Brown* v. *United States*, 586 U. S. 953 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

Rehearing Denied

No. 18–968. NAJDA *v.* PATERAKIS, 587 U. S. 918;

No. 18–1008. IN RE HOLLOWELL ET AL., 587 U. S. 937;

No. 18–1041. KONIECZKO ET AL. *v.* ADVENTIST HEALTH SYSTEM/SUNBELT, INC., ET AL., 587 U. S. 939;

No. 18–1050. WU ET UX. *v.* PRUDENTIAL FINANCIAL, INC., ET AL., 587 U. S. 939;

No. 18–7677. GEETER *v.* LESATZ, WARDEN, 587 U. S. 923;

No. 18–7774. BOYETT *v.* SANTISTEVAN, WARDEN, ET AL., 587 U. S. 942;

No. 18–7897. OWENS *v.* ZUCKER ET AL., 587 U. S. 944;

No. 18–7899. DEWBERRY *v.* THIRD CIRCUIT COURT OF MICHIGAN, 587 U. S. 944;

No. 18–7985. BAHRAMPOUR *v.* UNITED STATES, 587 U. S. 946;

No. 18–8008. DRAPER *v.* MUY PIZZA SOUTHEAST LLC, DBA PIZZA HUT, 587 U. S. 947;

No. 18–8035. ADIGUN *v.* EXPRESS SCRIPTS, INC., 587 U. S. 962;

No. 18–8118. DAVIS *v.* LOUISIANA, 587 U. S. 948; and

No. 18–8223. YOUNG *v.* OLIVER, JUDGE, SUPERIOR COURT OF CONNECTICUT, TOLLAND JUDICIAL DISTRICT, ET AL., 587 U. S. 976. Petitions for rehearing denied.

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Appeal Dismissed

No. 18–1134. VIRGINIA HOUSE OF DELEGATES ET AL. *v.* BETHUNE-HILL ET AL. Appeal from D. C. E. D. Va. dismissed for want of jurisdiction. See *Virginia House of Delegates* v. *Bethune-Hill*, 587 U. S. 658 (2019). Reported below: 368 F. Supp. 3d 872.

Certiorari Granted—Vacated and Remanded

No. 17–1445. UNITED STATES *v.* HERROLD. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Quarles* v. *United States*, 587 U. S. 645 (2019). Reported below: 883 F. 3d 517.

No. 18–547. KLEIN ET VIR *v.* OREGON BUREAU OF LABOR AND INDUSTRIES. Ct. App. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*,

584 U. S. 617 (2018). Reported below: 289 Ore. App. 507, 410 P. 3d 1051.

No. 18–7036. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for the court to consider the First Step Act of 2018, Pub. L. 115–391. Reported below: 906 F. 3d 417.

Certiorari Dismissed

No. 18–8789. EASTERWOOD *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 18M168. EKWUNIFE *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 18M169. STREETER *v.* WALDEN UNIVERSITY, LLC, 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.

Fane Lozman Barred Publication

No. 18M170. BUTLER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;

No. 18M171. BAGWELL *v.* BANK OF AMERICA, N. A.; and

No. 18M172. CHARLES *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. Motion of Nathan Boyd Estate et al. for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 584 U. S. 975.]

No. 17–1672. UNITED STATES *v.* HAYMOND. C. A. 10th Cir. [Certiorari granted, 586 U. S. 960.] Motion of respondent for appointment of counsel granted, and William D. Lunn, Esq., of Tulsa, Okla., is appointed to serve as counsel for respondent in this case.

No. 18–1291. THURMAN ET AL. *v.* JUDICIAL CORRECTION SERVICES, INC., ET AL., 587 U. S. 1026. Motion of Fane Lozman for leave to file brief as *amicus curiae* granted.

No. 18–1293. EVERGREEN FREEDOM FOUNDATION, DBA FREEDOM FOUNDATION *v.* WASHINGTON, 587 U. S. 1026. Motion of National Right to Work Legal Defense Foundation, Inc., for leave to file brief as *amicus curiae* granted.

No. 18–8006. IN RE EVANS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [586 U. S. 1221] denied.

No. 18–9388. IN RE RANDALL;
No. 18–9403. IN RE JOHNSON; and
No. 18–9437. IN RE WESTE. Petitions for writs of habeas corpus denied.

No. 18–9378. IN RE TAE HON CHON. 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. 18–8790. IN RE BACKSTROM. Petition for writ of mandamus denied.

No. 18–8805. IN RE SCOTT; and
No. 18–8919. IN RE DREVALEVA. Petitions for writs of mandamus and/or prohibition denied.

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No. 18–9276. IN RE AVILA. Petition for writ of prohibition denied.

Certiorari Denied

No. 17–1189. AVILA TORREZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 3d 291.

No. 17–1455. JORDAN *v.* CITY OF DARIEN, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 576.

No. 17–1686. RPX CORP. *v.* CHANBOND LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 780 Fed. Appx. 866.

No. 17–7224. SECORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7496. FERGUSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 3d 514.

No. 17–8153. Moore *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–9127. Herrold *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 3d 517.

No. 18–750. JTEKT Corp. *v.* GKN Automotive Ltd. C. A. Fed. Cir. Certiorari denied. Reported below: 898 F. 3d 1217.

No. 18–781. Baltimore County, Maryland *v.* Equal Employment Opportunity Commission. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 3d 330.

No. 18–940. Hancock *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 3d 387.

No. 18–1052. Renteria *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 3d 326.

No. 18–1053. Ashland Specialty Co., Inc. *v.* Steager, West Virginia State Tax Commissioner. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 241 W. Va. 1, 818 S. E. 2d 827.

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No. 18–1157. Vega *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 569, 2018-Ohio-4002, 116 N. E. 3d 1262.

No. 18–1177. Peters, as Executor of the Estate of McKelvey, Deceased *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 3d 26.

No. 18–1192. Little Sisters of the Poor Jeanne Jugan Residence *v.* California et al. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 3d 558.

No. 18–1197. Brookhart, Acting Warden *v.* Lee. C. A. 7th Cir. Certiorari denied. Reported below: 922 F. 3d 772.

No. 18–1303. Colbert *v.* Mitchell. Ct. App. Cal., 1st App. Dist., Div. 2. Certiorari denied.

No. 18–1315. Hmong et al. *v.* Lao People's Democratic Republic et al. C. A. 9th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 136.

No. 18–1316. NETTLES *v.* BULLINGTON ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–1319. THOMAS *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 748 Fed. Appx. 328.

No. 18–1333. JONES ET AL. *v.* KEITZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 503.

No. 18–1339. FORNESA ET AL. *v.* FIFTH THIRD MORTGAGE CO. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 3d 624.

No. 18–1356. ADETU ET AL. *v.* SIDWELL FRIENDS SCHOOL. Ct. App. D. C. Certiorari denied. Reported below: 201 A. 3d 580.

No. 18–1359. GRESHAM *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–1381. SUPPLY PRO SORBENTS, LLC *v.* RINGCENTRAL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 124.

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No. 18–1390. TALLEY *v.* OCWEN LOAN SERVICING, LLC, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 162.

No. 18–1392. BARONE *v.* WELLS FARGO BANK, N. A. C. A. 11th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 877.

No. 18–1423. COOPER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 78 M. J. 283.

No. 18–1425. CHAGANTI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 259.

No. 18–1433. BALKANY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 Fed. Appx. 104.

No. 18–1436. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 937.

No. 18–8016. GOFF *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 154 Ohio St. 3d 218, 2018-Ohio-3763, 113 N. E. 3d 490.

No. 18–8050. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 3d 155.

No. 18–8125. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 3d 1012.

No. 18–8386. APELT *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 3d 800.

No. 18–8393. OVALLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 3d 1300.

No. 18–8415. LOTTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 301 Neb. 125, 917 N. W. 2d 850.

No. 18–8417. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 757 Fed. Appx. 547.

No. 18–8426. LYNCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 1061.

No. 18–8731. NOGUERA *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 756 Fed. Appx. 685.

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No. 18–8768. ROBINSON *v.* MAWER ET AL. C. A. 6th Cir. Certiorari denied.

No. 18–8787. DOUCE AL-DEY *v.* CITY OF NEW YORK, NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 3d 1136, 106 N. E. 3d 743.

No. 18–8800. WINN *v.* METZGER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8802. VERNON, AKA MIMS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8806. DUTTON *v.* MCCREA. Super. Ct. Pa. Certiorari denied. Reported below: 179 A. 3d 617.

No. 18–8812. BARR *v.* SHAPIRO, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–8815. REICH *v.* SLAGLE, CORRECTIONAL ADMINISTRATOR, MOUNTAIN VIEW CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 803.

No. 18–8820. DECK *v.* JENNINGS, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 18–8835. DAVIS *v.* KIA MOTORS AMERICA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 516.

No. 18–8848. ROBINSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 651 Pa. 190, 204 A. 3d 326.

No. 18–8849. ROBINSON *v.* WHITE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 214.

No. 18–8850. SHAW *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 18–8851. SMITH *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 18–8853. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 18–8858. WARREN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

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No. 18–8859. BORDEN *v.* CHEAHA REGIONAL MENTAL HEALTH CENTER, INC. C. A. 11th Cir. Certiorari denied. Reported below: 760 Fed. Appx. 828.

No. 18–8863. TURNBULL *v.* JOHNSON, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–8867. BROWN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 18–8875. BROWN *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–8876. LOGAN *v.* DISTRICT ATTORNEY OF ALLEGHENY COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 752 Fed. Appx. 119.

No. 18–8878. JARA *v.* STANDARD PARKING ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 558.

No. 18–8883. JESSUP *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 286.

No. 18–8884. BROWN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 18–8906. WILSON *v.* RUSSELL ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–8908. DEMOUCHET *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–8942. AKARD *v.* CARTER, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION. C. A. 7th Cir. Certiorari denied.

No. 18–8958. DAVALLOO *v.* LAMANNA, ACTING SUPERINTENDENT, BEDFORD HILLS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 18–8990. REEDER *v.* WHELDON ET AL. C. A. 2d Cir. Certiorari denied.

No. 18–8991. ROJAS-VEGA *v.* IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL. C. A. D. C. Cir. Certiorari denied.

No. 18–8992. LORRAINE *v.* OHIO. Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2018-Ohio-3325, 120 N. E. 3d 33.

Not Subject to Pending Publication

No. 18–8994. WOLF *v.* OSHEROW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 747 Fed. Appx. 264.

No. 18–9038. PETERS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2018 IL App (2d) 150650, 99 N. E. 3d 489.

No. 18–9074. FRANCOIS *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 18–9101. MONTANEZ *v.* WALOWSKI. Sup. Ct. Ill. Certiorari denied.

No. 18–9123. MCCLENTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 18–9154. SMITH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 539.

No. 18–9163. HORRELL *v.* DOWNEY, SHERIFF, KANKAKEE COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 18–9192. BALICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 18–9212. MCCRUDDEN *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 763 Fed. Appx. 142.

No. 18–9213. PAINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 489.

No. 18–9219. THOMAS *v.* MEKO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 3d 1071.

No. 18–9224. ILLARRAMENDI *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 Fed. Appx. 10.

No. 18–9231. LEACHMAN *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 554 S. W. 3d 730.

No. 18–9233. PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 752 Fed. Appx. 179.

No. 18–9236. GONZALEZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 3d 165.

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No. 18–9240. CORDOBA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 18–9241. SEALED APPELLANT *v.* SEALED APPELLEE. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 3d 663.

No. 18–9242. HAYDEN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 18–9243. ALIGWEKWE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 970.

No. 18–9245. DE-LA-ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 Fed. Appx. 597.

No. 18–9248. PHILLIPS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 763 Fed. Appx. 589.

No. 18–9255. RAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 18–9256. SYED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–9258. SHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–9259. EJIOFOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 611.

No. 18–9264. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–9275. TROIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 3d 1082.

No. 18–9284. ROGERS *v.* COMPASS AIRLINES, INC., ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 920 N. W. 2d 835.

No. 18–9291. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 943.

No. 18–9292. FREDRICKSON *v.* UNITED STATES (two judgments). C. A. 7th Cir. Certiorari denied.

No. 18–9293. COOPER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 265 So. 3d 614.

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No. 18–9300. WATERS, AKA JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 18–9301. LOMAX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 910 F. 3d 1068.

No. 18–9303. LINCKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 18–9304. DE LEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 3d 386.

No. 18–9305. CHAPMAN-SEXTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 437.

No. 18–9306. SAYER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 916 F. 3d 32.

No. 18–9312. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 290.

No. 18–9313. WATSON *v.* KILLOUGH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 773.

No. 18–9315. PEEBLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 759 Fed. Appx. 559.

No. 18–543. STATE CORRECTIONAL INSTITUTION AT FAYETTE ET AL. *v.* REEVES. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 897 F. 3d 154.

No. 18–918. COPELAND ET AL. *v.* VANCE ET AL. C. A. 2d Cir. Motions of Legal Aid Society, Criminal Law Professors et al., and Constitutional Law Scholars for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 893 F. 3d 101.

No. 18–1279. LEWIS ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 912 F. 3d 605.

No. 18–8434. HALVORSEN *v.* HART, WARDEN. C. A. 6th 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. Reported below: 746 Fed. Appx. 489.

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No. 18–8664. LOWE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 259 So. 3d 23.

JUSTICE SOTOMAYOR, dissenting.

I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. 1004, 1011 (2018) (SOTOMAYOR, J., dissenting from denial of certiorari).

Rehearing Denied

No. 18–1147. BRUNSON *v.* HOGAN ET AL., 587 U. S. 986;

No. 18–1216. LUSSY *v.* FLORIDA ELECTIONS COMMISSION ET AL., 587 U. S. 971;

No. 18–7966. SMITH *v.* TERRIS, WARDEN, 586 U. S. 1254;

No. 18–8022. ARIAS COREAS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 587 U. S. 925;

No. 18–8175. GUNCHICK *v.* BANK OF AMERICA, N. A., 587 U. S. 949;

No. 18–8244. CORNELL *v.* VIRGINIA, 587 U. S. 949; and

No. 18–8507. JENNETTE *v.* COMMISSIONER OF INTERNAL REVENUE, 587 U. S. 977. Petitions for rehearing denied.

REVISIONS TO RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 18, 2019

EFFECTIVE JULY 1, 2019

Page Proof Pending Publication

The following are revisions to the Rules of the Supreme Court of the United States as adopted on April 18, 2019. See *post*, p. 1072. The revised Rules became effective July 1, 2019, as provided in Rule 48, *post*, p. 1076.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, 493 U. S. 1099, 515 U. S. 1197, 519 U. S. 1161, 525 U. S. 1191, 537 U. S. 1249, 544 U. S. 1073, 551 U. S. 1195, 558 U. S. 1161, 569 U. S. 1041, and 582 U. S. 969.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 18, 2019

IT IS ORDERED that the revised Rules of this Court, approved by the Court and lodged with the Clerk, shall be effective July 1, 2019, and that the amended provisions shall be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated September 27, 2017, see 582 U. S. 969, shall be rescinded as of June 30, 2019, and that the revised Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending.

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REVISIONS TO RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 18, 2019—EFFECTIVE JULY 1, 2019*

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

. . . . .

(b) (i) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties);

(ii) a corporate disclosure statement as required by Rule 29.6; and

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(iii) a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court. For each such proceeding, the list should include the court in question, the docket number and case caption for the proceeding, and the date of entry of the judgment. For the purposes of this rule, a proceeding is "directly related" if it arises from the same trial court case as the case in this Court (including the proceedings directly on review in this case), or if it challenges the same criminal conviction or sentence as is challenged in this Court, whether on direct appeal or through state or federal collateral proceedings.

*In addition to the revisions set forth below, references to "18 U. S. C. § 3006A(d)(6)" in Rules 9.1, 29.5(b) and (c), and 33.2(a) are changed to "18 U. S. C. § 3006A(d)(7)." Subsection (d)(6) was redesignated as subsection (d)(7), and these Rules are now updated to conform to this change.

. . . . .

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

. . . . .

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition. A brief in opposition should identify any directly related cases that were not identified in the petition under Rule 14.1(b)(iii), including for each such case the information called for by Rule 14.1(b)(iii).

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Rule 25. Briefs on the Merits: Number of Copies and Time to File

. . . . .

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. 10 days before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

. . . . .

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk in paper form.

2. A document is timely filed if it is received by the Clerk in paper form within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

Parts From Federal Publication

. . . . .

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* . . . .

. . . . .

(g) Word limits and color covers for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
. . . . .		
(v) Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	13,000	light blue
(vi) Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party		

	Type of Document	Word Limits	Color of Cover
	Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	6,000	yellow
(viii)	Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	13,000	orange
(ix)	Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	yellow
(x)	Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi)	Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii)	Brief for any Other Amicus Curiae in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	8,000	light green
(xiii)	Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiv)	Brief for any Other *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	8,000	dark green
(xv)	Petition for Rehearing	3,000	tan

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Rule 48. Effective Date of Rules

1. These Rules, adopted April 18, 2019, will be effective July 1, 2019.

2. The Rules govern all proceedings after their effective date except that the amendments to Rules 25.3 and 33.1(g) will apply only to cases in which certiorari was granted, or a direct appeal or original action was set for argument, after the effective date.

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 25, 2019, 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.

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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, 581 U. S. 1029, and 584 U. S. 1043.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2019

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 24, 2018; a redline version of the rules with committee notes; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report of the Advisory Committee on Appellate Rules.

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Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2019

ORDERED:

1. The Federal Rules of Appellate Procedure are amended to include amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39.

[See *infra*, pp. 1081–1085.]

2. The foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2019, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE 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.

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AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of right—how taken.

. . . . .

(*d*) *Serving the notice of appeal.*

(1) The district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

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(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk sends copies, with the date of sending. Service is sufficient despite the death of a party or the party's counsel.

. . . . .

Rule 5. Appeal by permission.

(*a*) *Petition for permission to appeal.*

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition with the circuit clerk and serve it on all other parties to the district-court action.

. . . . .

Rule 13. Appeals from the tax court.

(*a*) *Appeal as of right.*

. . . . .

(*2*) *Notice of appeal; how filed.*—The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

. . . . .

Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

(*a*) *Mandamus or prohibition to a court: petition, filing, service, and docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file the petition with the circuit clerk and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

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. . . . .

(*c*) *Other extraordinary writs.*—An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

. . . . .

Rule 25. Filing and service.

. . . . .

(*d*) *Proof of service.*

(1) A paper 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) 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.

. . . . .

Rule 26. Computing and extending time.

. . . . .

(*c*) *Additional time after certain kinds of service.*—When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).

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Rule 26.1. Disclosure statement.

(*a*) *Nongovernmental corporations.*—Any nongovernmental corporation that is a party to a proceeding in a court of appeals 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. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(*b*) *Organizational victims in criminal cases.*—In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the informa-

tion required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(*c*) *Bankruptcy cases.*—In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that:

(1) identifies each debtor not named in the caption; and

(2) for each debtor that is a corporation, discloses the information required by Rule 26.1(a).

(*d*) *Time for filing; supplemental filing.*—The Rule 26.1 statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing;

(2) be included before the table of contents in the principal brief; and

(3) be supplemented whenever the information required under Rule 26.1 changes.

(*e*) *Number of copies.*—If the Rule 26.1 statement is filed before the principal brief, or if a supplemental statement is filed, an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

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Rule 28. Briefs.

(*a*) *Appellant's brief.*—The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a disclosure statement if required by Rule 26.1;

. . . . .

Rule 32. Form of briefs, appendices, and other papers.

. . . . .

(*f*) *Items excluded from length.*—In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- cover page;
- disclosure statement;
- table of contents;
- table of citations;

- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificate of counsel;
- signature block;
- proof of service; and
- any item specifically excluded by these rules or by local rule.

. . . . .

Rule 39. Costs.

. . . . .

(*d*) *Bill of costs: objections; insertion in mandate.*

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs.

. . . . .

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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 25, 2019, 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. 1088. The Judicial Conference report referred to in that letter is not reproduced herein.

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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, 581 U. S. 1035, and 584 U. S. 1057.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2019

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.

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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 24, 2018; a redline version of the rules with committee notes; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report 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 25, 2019

ORDERED:

1. The Federal Rules of Bankruptcy Procedure are amended to include amendments to Rules 4001, 6007, 9036, and 9037.

[See *infra*, pp. 1091–1093.]

2. The foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2019, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE 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.

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AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

. . . . .

(*c*) *Obtaining credit.*

. . . . .

(*4*) *Inapplicability in a Chapter 13 Case.*—This subdivision (c) does not apply in a chapter 13 case.

. . . . .

Rule 6007. Abandonment or disposition of property.

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. . . . .

(*b*) *Motion by party in interest.*—A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. Unless otherwise directed by the court, the party filing the motion shall serve the motion and any notice of the motion on the trustee or debtor in possession, the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of service, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. If the court grants the motion, the order effects the trustee's or debtor in possession's abandonment without further notice, unless otherwise directed by the court.

Rule 9036. Notice and service generally.

Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.

Rule 9037. Privacy protection for filings made with the court.

. . . . .

(*h*) *Motion to redact a previously filed document.*

(*1*) *Content of the motion; service.*—Unless the court orders otherwise, if an entity seeks to redact from a previously filed document information that is protected under subdivision (a), the entity must:

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(A) file a motion to redact identifying the proposed redactions;

(B) attach to the motion the proposed redacted document;

(C) include in the motion the docket or proof-of-claim number of the previously filed document; and

(D) serve the motion and attachment on the debtor, debtor's attorney, trustee (if any), United States trustee, filer of the unredacted document, and any individual whose personal identifying information is to be redacted.

(*2*) *Restricting public access to the unredacted document; docketing the redacted document.*—The court must promptly restrict public access to the motion and the unredacted document pending its ruling on the motion. If the court grants it, the court must docket the redacted docu-

ment. The restrictions on public access to the motion and unredacted document remain in effect until a further court order. If the court denies it, the restrictions must be lifted, unless the court orders otherwise.

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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 25, 2019, 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. 1096. 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.

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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, 578 U. S. 1067, and 584 U. S. 1087.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2019

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, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

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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 24, 2018; a redline version of the rules with committee notes; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 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 25, 2019

ORDERED:

1. The Federal Rules of Criminal Procedure are amended to include new Rule 16.1.

2. The Rules Governing Section 2254 Cases in the United States District Courts are amended to include an amendment to Rule 5.

3. The Rules Governing Section 2255 Proceedings for the United States District Courts are amended to include an amendment to Rule 5.

[See *infra*, p. 1099.]

4. The foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts shall take effect on December 1, 2019, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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5. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16.1. Pretrial discovery conference; request for court action.

(*a*) *Discovery conference.*—No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(*b*) *Request for court action.*—After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

RULES GOVERNING 28 U. S. C. §2254 CASES IN THE UNITED STATES DISTRICT COURTS

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Rule 5. The answer and the reply.

. . . . .

(*e*) *Reply.*—The petitioner may file a reply to the respondent's answer or other pleading. The judge must set the time to file unless the time is already set by local rule.

RULES GOVERNING 28 U. S. C. §2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 5. The answer and the reply.

. . . . .

(*d*) *Reply.*—The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file unless the time is already set by local rule.

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AMENDMENT TO FEDERAL RULES OF EVIDENCE

The following amendment to the Federal Rules of Evidence was prescribed by the Supreme Court of the United States on April 25, 2019, 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. 1102. 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.

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For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, 547 U. S. 1281, 559 U. S. 1157, 563 U. S. 1075, 569 U. S. 1167, 572 U. S. 1233, and 581 U. S. 1055.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2019

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 amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule 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 24, 2018; a redline version of the rule with committee note; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report of the Advisory Committee on Evidence Rules.

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Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2019

ORDERED:

1. The Federal Rules of Evidence are amended to include an amendment to Rule 807.

[See *infra*, p. 1105.]

2. The foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2019, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

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AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 807. Residual exception.

(*a*) *In general.*—Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

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(*b*) *Notice.*—The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

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Discretionary function exception in Federal Tort Claims Act—Waiver of sovereign immunity.—Title 16 U. S. C. § 831c(b), which serves to waive Tennessee Valley Authority's sovereign immunity from suit, is not subject to a discretionary function exception of the kind in Federal Tort Claims Act. Thacker v. TVA, p. 218.

WORDS AND PHRASES.

1. "[F]inal decision . . . made after a hearing." 42 U. S. C. § 405(g). Smith v. Berryhill, p. 471.

2. "[P]erson." Leahy-Smith America Invents Act. Return Mail, Inc. v. Postal Service, p. 618.

3. "[S]ubstantial evidence." Social Security Act, 42 U. S. C. § 405(g). Biestek v. Berryhill, p. 97.

4. "[O]fficial of the United States" whose knowledge triggers 31 U. S. C. § 3731(b)(2)'s limitations period. False Claims Act, 31 U. S. C. § 3731(b)(2). Cochise Consultancy, Inc. v. United States ex rel. Hunt, p. 262.

5. "[U]noccupied lands of the United States." Treaty Between the United States of America and the Crow Tribe of Indians, Art. IV, 15 Stat. 650. Herrera v. Wyoming, p. 329.

WYOMING. See **Indians.**

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