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OFFICIAL REPORTS

OF

THE SUPREME COURT

MARCH 3 THROUGH APRIL 29, 2015

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

RETIRED

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

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PAMELA TALKIN, Marshal.
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*For notes, see p. II.

NOTES

[1] Attorney General Holder resigned effective April 27, 2015.

[2] The Honorable Loretta E. Lynch, of New York, was nominated by President Obama on November 8, 2014, to be Attorney General; the nomination was confirmed by the Senate on April 23, 2015; she was commissioned and took the oath of office on April 27, 2015.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 28, 2010, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2014

DIRECT MARKETING ASSOCIATION *v.* BROHL, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE

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

No. 13–1032. Argued December 8, 2014—Decided March 3, 2015

Colorado requires residents who purchase tangible personal property from a retailer that does not collect sales or use taxes to file a return and remit those taxes directly to the State Department of Revenue. To improve compliance, Colorado enacted legislation requiring noncollecting retailers to notify any Colorado customer of the State's sales and use tax requirement and to report tax-related information to those customers and the Colorado Department of Revenue.

Petitioner, a trade association of retailers, many of which sell to Colorado residents but do not collect taxes, sued respondent, the Director of the Colorado Department of Revenue, in Federal District Court, alleging that Colorado's law violates the United States and Colorado Constitutions. The District Court granted petitioner partial summary judgment and permanently enjoined enforcement of the notice and reporting requirements, but the Tenth Circuit reversed. That court held that the Tax Injunction Act (TIA), which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," 28 U. S. C. § 1341, deprived the District Court of jurisdiction over the suit.

Held: Petitioner's suit is not barred by the TIA. Pp. 7–16.

(a) The relief sought by petitioner would not "enjoin, suspend or restrain the assessment, levy or collection" of Colorado's sales and use taxes. Pp. 7–14.

(1) The terms "assessment," "levy," and "collection" do not encompass Colorado's enforcement of its notice and reporting requirements. These terms, read in light of the Federal Tax Code, refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability. Information gathering has long been treated as a phase of tax administration that occurs before assessment, levy, or collection. See, *e. g.*, 26 U. S. C. § 6041 *et seq.* Respondent portrays the notice and reporting requirements as part of the State's assessment and collection process, but the State's assessment and collection procedures are triggered after the State has received the returns and made the deficiency determinations that the notice and reporting requirements are meant to facilitate. Enforcement of the requirements may improve the State's ability to assess and ultimately collect its sales and use taxes, but the TIA is not keyed to all such activities. Such a rule would be inconsistent with the statute's text and this Court's rule favoring clear boundaries in the interpretation of jurisdictional statutes. See *Hertz Corp.* v. *Friend*, 559 U. S. 77, 94. Pp. 7–12.

(2) Petitioner's suit cannot be understood to "restrain" the "assessment, levy or collection" of Colorado's sales and use taxes merely because it may inhibit those activities. While the word "restrain" can be defined as broadly as the Tenth Circuit defined it, it also has a narrower meaning used in equity, which captures only those orders that stop acts of assessment, levy, or collection. The context in which the TIA uses the word "restrain" resolves this ambiguity in favor of this narrower meaning. First, the verbs accompanying "restrain"—"enjoin" and "suspend"—are terms of art in equity and refer to different equitable remedies that restrict or stop official action, strongly suggesting that "restrain" does the same. Additionally, "restrain" acts on "assessment," "levy," and "collection," a carefully selected list of technical terms. The Tenth Circuit's broad meaning would defeat the precision of that list and render many of those terms surplusage. Assigning "restrain" its meaning in equity is also consistent with this Court's recognition that the TIA "has its roots in equity practice," *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73, and with the principle that "[j]urisdictional rules should be clear," *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 321 (THOMAS, J., concurring). Pp. 12–14.

(b) The Court takes no position on whether a suit such as this might be barred under the "comity doctrine," which "counsels lower federal

courts to resist engagement in certain cases falling within their jurisdiction," *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 421. The Court leaves it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado. P. 15.

735 F. 3d 904, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 16. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, and in which SOTOMAYOR, J., joined in part, *post*, p. 19.

George S. Isaacson argued the cause for petitioner. With him on the briefs was *Matthew P. Schaefer*.

Daniel D. Domenico, Solicitor General of Colorado, argued the cause for respondent. With him on the brief were *John W. Suthers*, Attorney General, *Melanie J. Snyder*, Deputy Attorney General, and *Grant T. Sullivan* and *Michael Francisco*, Assistant Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Pratik A. Shah*, *Hyland Hunt*, *John B. Capehart*, *Kathryn Comerford Todd*, and *Warren Postman*; for the Council on State Taxation by *Frederick Nicely*, *Karl Frieden*, *Douglas Lindholm*, and *Wm. Gregory Turner*; for the Institute for Professionals in Taxation by *Mary T. Benton*, *Clark R. Calhoun*, *Cass D. Vickers*, and *Keith G. Landry*; for NFIB Small Business Legal Center et al. by *Thomas M. Christina* and *Jeffrey P. Dunlaevy*; and for the Tax Foundation by *Joseph D. Henchman*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E. Shapiro*, Solicitor General, *Brett E. Legner*, Deputy Solicitor General, and *Richard S. Huszagh*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Thomas J. Miller* of Iowa, *Douglas F. Gansler* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Greg Abbott* of Texas, *Sean D. Reyes* of Utah, *William H. Sorrell* of Ver-

JUSTICE THOMAS delivered the opinion of the Court.

In an effort to improve the collection of sales and use taxes for items purchased online, the State of Colorado passed a law requiring retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use-tax liability and to report tax-related information to customers and the Colorado Department of Revenue. We must decide whether the Tax Injunction Act, which provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U. S. C. § 1341, bars a suit to enjoin the enforcement of this law. We hold that it does not.

I

A

Like many States, Colorado has a complementary sales-and-use tax regime. Colorado imposes both a 2.9 percent tax on the sale of tangible personal property within the State, Colo. Rev. Stat. §§ 39–26–104(1)(a), 39–26–106(1)(a)(II) (2014), and an equivalent use tax for any property stored, used, or consumed in Colorado on which a sales tax was not paid to a retailer, §§ 39–26–202(1)(b), 39–26–204(1). Retailers with a physical presence in Colorado must collect the sales or use tax from consumers at the point of sale and remit the proceeds to the Colorado Department of Revenue (Department). §§ 39–26–105(1), 39–26–106(2)(a). But under our negative Commerce Clause precedents, Colorado may not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department. See *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 315–318 (1992). Thus, Colorado requires its consumers who pur-

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mont, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for Interested Law Professors by *Alan B. Morrison*, *pro se*; for the Multistate Tax Commission by *Joe Huddleston*, *Helen Hecht*, *Sheldon Laskin*, and *Thomas Shimkin*; and for the National Governors Association et al. by *Ronald A. Parsons, Jr.*, and *Lisa Soronen*.

chase tangible personal property from a retailer that does not collect these taxes (a "noncollecting retailer") to fill out a return and remit the taxes to the Department directly. § 39–26–204(1).

Voluntary compliance with the latter requirement is relatively low, leading to a significant loss of tax revenue, especially as Internet retailers have increasingly displaced their brick-and-mortar kin. In the decade before this suit was filed in 2010, e-commerce more than tripled. App. 28. With approximately 25 percent of taxes unpaid on Internet sales, Colorado estimated in 2010 that its revenue loss attributable to noncompliance would grow by more than $20 million each year. App. 30–31.

In hopes of stopping this trend, Colorado enacted legislation in 2010 imposing notice and reporting obligations on noncollecting retailers whose gross sales in Colorado exceed $100,000. Three provisions of that Act, along with their implementing regulations, are at issue here.

First, noncollecting retailers must "notify Colorado purchasers that sales or use tax is due on certain purchases . . . and that the state of Colorado requires the purchaser to file a sales or use tax return." § 39–21–112(3.5)(c)(I); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(2) (2014), online at http://www.sos.co.us/CRR (as visited Feb. 27, 2015, and available in the Clerk of Court's case file). The retailer must provide this notice during each transaction with a Colorado purchaser, *ibid.*, and is subject to a penalty of $5 for each transaction in which it fails to do so, Colo. Rev. Stat. § 39–21–112(3.5)(c)(II).

Second, by January 31 of each year, each noncollecting retailer must send a report to all Colorado purchasers who bought more than $500 worth of goods from the retailer in the previous year. § 39–21–112(3.5)(d)(I); 1 Colo. Code Regs. §§ 201–1:39–21–112.3.5(3)(a), (c). That report must list the dates, categories, and amounts of those purchases. Colo. Rev. Stat. § 39–21–112(3.5)(d)(I); see also 1 Colo. Code Regs.

§§ 201–1:39–21–112.3.5(3)(a), (c). It must also contain a notice stating that Colorado "requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer." Colo. Rev. Stat. § 39–21–112(3.5)(d)(I)(A). The retailer is subject to a penalty of $10 for each report it fails to send. § 39–21–112(3.5)(d)(III)(A); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(3)(d).

Finally, by March 1 of each year, noncollecting retailers must send a statement to the Department listing the names of their Colorado customers, their known addresses, and the total amount each Colorado customer paid for Colorado purchases in the prior calendar year. Colo. Rev. Stat. § 39–21–112(3.5)(d)(II)(A); 1 Colo. Code Regs. § 201–1:39–21–112.3.5(4). A noncollecting retailer that fails to make this report is subject to a penalty of $10 for each customer that it should have listed in the report. Colo. Rev. Stat. § 39–21–112(3.5)(d)(III)(B); see also 1 Colo. Code Regs. § 201–1:39–21–112.3.5(4)(f).

B

Petitioner Direct Marketing Association is a trade association of businesses and organizations that market products directly to consumers, including those in Colorado, via catalogs, print advertisements, broadcast media, and the Internet. Many of its members have no physical presence in Colorado and choose not to collect Colorado sales and use taxes on Colorado purchases. As a result, they are subject to Colorado's notice and reporting requirements.

In 2010, Direct Marketing Association brought suit in the United States District Court for the District of Colorado against the Executive Director of the Department, alleging that the notice and reporting requirements violate provisions of the United States and Colorado Constitutions. As relevant here, Direct Marketing Association alleged that the provisions (1) discriminate against interstate commerce and (2) impose undue burdens on interstate commerce, all in vio-

lation of this Court's negative Commerce Clause precedents. At the request of both parties, the District Court stayed all challenges except these two, in order to facilitate expedited consideration. It then granted partial summary judgment to Direct Marketing Association and permanently enjoined enforcement of the notice and reporting requirements. App. to Pet. for Cert. B–1 to B–25.

Exercising appellate jurisdiction under 28 U. S. C. § 1292(a)(1), the United States Court of Appeals for the Tenth Circuit reversed. Without reaching the merits, the Court of Appeals held that the District Court lacked jurisdiction over the suit because of the Tax Injunction Act (TIA), 28 U. S. C. § 1341. Acknowledging that the suit "differs from the prototypical TIA case," the Court of Appeals nevertheless found it barred by the TIA because, if successful, it "would limit, restrict, or hold back the state's chosen method of enforcing its tax laws and generating revenue." 735 F. 3d 904, 913 (2013).

We granted certiorari, 573 U. S. 957 (2014), and now reverse.

II

Enacted in 1937, the TIA provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." § 1341. The question before us is whether the relief sought here would "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." Because we conclude that it would not, we need not consider whether "a plain, speedy and efficient remedy may be had in the courts of" Colorado.

A

The District Court enjoined state officials from enforcing the notice and reporting requirements. Because an injunction is clearly a form of equitable relief barred by the TIA,

the question becomes whether the enforcement of the notice and reporting requirements is an act of "assessment, levy or collection." We need not comprehensively define these terms to conclude that they do not encompass enforcement of the notice and reporting requirements at issue.

In defining the terms of the TIA, we have looked to federal tax law as a guide. See, *e. g.*, *Hibbs* v. *Winn*, 542 U. S. 88, 100 (2004). Although the TIA does not concern federal taxes, it was modeled on the Anti-Injunction Act (AIA), which does. See *Jefferson County* v. *Acker*, 527 U. S. 423, 434–435 (1999). The AIA provides in relevant part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U. S. C. § 7421(a). We assume that words used in both Acts are generally used in the same way, and we discern the meaning of the terms in the AIA by reference to the broader Tax Code. *Hibbs*, 542 U. S., at 102–105; *id.*, at 115 (KENNEDY, J., dissenting). Read in light of the Federal Tax Code at the time the TIA was enacted (as well as today), these three terms refer to discrete phases of the taxation process that do not include informational notices or private reports of information relevant to tax liability.

To begin, the Federal Tax Code has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection. See §§ 6001–6117; §§ 1500–1524 (1934 ed.); see also § 1533 ("All provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply . . . "). This step includes private reporting of information used to determine tax liability, see, *e. g.*, § 1511(a), including reports by third parties who do not owe the tax, see, *e. g.*, § 6041 *et seq.* (2012 ed.); see also §§ 1512(a)–(b) (1934 ed.) (authorizing a collector or the Commissioner of Internal Revenue, when a taxpayer fails to file a return, to make a return "from his own knowledge and from such information as he can obtain through testimony or otherwise").

"Assessment" is the next step in the process, and it refers to the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority. See § 1530. In *Hibbs*, the Court noted that "assessment," as used in the Internal Revenue Code, "involves a 'recording' of the amount the taxpayer owes the Government." 542 U. S., at 100 (quoting § 6203 (2000 ed.)). It might also be understood more broadly to encompass the process by which that amount is calculated. See *United States* v. *Galletti*, 541 U. S. 114, 122 (2004); see also *Hibbs*, *supra*, at 100, n. 3. But even understood more broadly, "assessment" has long been treated in the Tax Code as an official action taken based on information already reported to the taxing authority. For example, not many years before it passed the TIA, Congress passed a law providing that the filing of a return would start the running of the clock for a timely assessment. See, *e. g.*, Revenue Act of 1924, Pub. L. 68–176, § 277(a), 43 Stat. 299. Thus, assessment was understood as a step in the taxation process that occurred after, and was distinct from, the step of reporting information pertaining to tax liability.

"Levy," at least as it is defined in the Federal Tax Code, refers to a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer's property. See 26 U. S. C. § 6331 (2012 ed.); § 1582 (1934 ed.). Because the word "levy" does not appear in the AIA, however, one could argue that its meaning in the TIA is not tied to the meaning of the term as used in federal tax law. If that were the case, one might look to contemporaneous dictionaries, which defined "levy" as the legislative function of laying or imposing a tax and the executive functions of assessing, recording, and collecting the amount a taxpayer owes. See Black's Law Dictionary 1093 (3d ed. 1933) (Black's); see also Webster's New International Dictionary 1423 (2d ed. 1939) ("To raise or collect, as by assessment, execution or other legal process, etc.; to exact or impose by

authority . . . "); §§ 1540, 1544 (using "levying" and "levied" in the more general sense of an executive imposition of a tax liability). But under any of these definitions, "levy" would be limited to an official governmental action imposing, determining the amount of, or securing payment on a tax.

Finally, "collection" is the act of obtaining payment of taxes due. See Black's 349 (defining "collect" as "to obtain payment or liquidation" of a debt or claim). It might be understood narrowly as a step in the taxation process that occurs after a formal assessment. Consistent with this understanding, we have previously described it as part of the "enforcement process . . . that 'assessment' sets in motion." *Hibbs*, *supra*, at 102, n. 4. The Federal Tax Code at the time the TIA was enacted provided for the Commissioner of Internal Revenue to certify a list of assessments "to the proper collectors . . . who [would] proceed to collect and account for the taxes and penalties so certified." § 1531. That collection process began with the collector "giv[ing] notice to each person liable to pay any taxes stated [in the list] . . . stating the amount of such taxes and demanding payment thereof." § 1545(a). When a person failed to pay, the Government had various means to collect the amount due, including liens, § 1560, distraint, § 1580, forfeiture, and other legal proceedings, § 1640. Today's Tax Code continues to authorize collection of taxes by these methods. § 6302 (2012 ed.). "Collection" might also be understood more broadly to encompass the receipt of a tax payment before a formal assessment occurs. For example, at the time the TIA was enacted, the Tax Code provided for the assessment of money already received by a person "required to *collect* or withhold any internal-revenue tax from any other person," suggesting that at least some act of collection might occur before a formal assessment. § 1551 (1934 ed.) (emphasis added). Either way, "collection" is a separate step in the taxation process from assessment and the reporting on which assessment is based.

So defined, these terms do not encompass Colorado's enforcement of its notice and reporting requirements. The Executive Director does not seriously contend that the provisions at issue here involve a "levy"; instead she portrays them as part of the process of assessment and collection. But the notice and reporting requirements precede the steps of "assessment" and "collection." The notice given to Colorado consumers, for example, informs them of their use-tax liability and prompts them to keep a record of taxable purchases that they will report to the State at some future point. The annual summary that the retailers send to consumers provides them with a reminder of that use-tax liability and the information they need to fill out their annual returns. And the report the retailers file with the Department facilitates audits to determine tax deficiencies. After each of these notices or reports is filed, the State still needs to take further action to assess the taxpayer's use-tax liability and to collect payment from him. See Colo. Rev. Stat. § 39–26–204(3) (describing the procedure for "assessing and collecting [use] taxes" on the basis of returns filed by consumers and collecting retailers). Colorado law provides for specific assessment and collection procedures that are triggered after the State has received the returns and made the deficiency determinations that the notice and reporting requirements are meant to facilitate. See § 39–26–210; 1 Colo. Code Regs. § 201–1:39–21–107(1) ("The statute of limitations on assessments of . . . sales [and] use . . . tax . . . shall be three years from the date the return was filed . . . ").

Enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes. See *Hertz Corp.* v. *Friend*, 559 U. S. 77,

94 (2010). The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these.[1]

B

Apparently concluding that enforcement of the notice and reporting requirements was not itself an act of "assessment, levy or collection," the Court of Appeals did not rely on those terms to hold that the TIA barred the suit. Instead, it adopted a broad definition of the word "restrain" in the TIA, which bars not only suits to "enjoin . . . assessment, levy or collection" of a state tax but also suits to "suspend or restrain" those activities. Specifically, the Court of Appeals concluded that the TIA bars any suit that would "limit, restrict, or hold back" the assessment, levy, or collection of state taxes. 735 F. 3d, at 913. Because the notice and reporting requirements are intended to facilitate collection of taxes, the Court of Appeals reasoned that the relief Direct Marketing Association sought and received would "limit, restrict, or hold back" the Department's collection efforts. That was error.

"Restrain," standing alone, can have several meanings. One is the broad meaning given by the Court of Appeals,

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[1] Our decision in *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982), is not to the contrary. In that case, California churches and religious schools sought "to enjoin the State from collecting both tax information and the state [unemployment] tax," based, in part, on the argument that "recordkeeping, registration, and reporting requirements" violate the Establishment Clause by creating the potential for excessive entanglement with religion. *Id.*, at 398, 415. We held that the TIA barred that suit. *Id.*, at 396. But nowhere in their brief to this Court did the plaintiffs in *Grace Brethren Church* separate out their request to enjoin the tax from their request for relief from the recordkeeping and reporting requirements. See Brief for Grace Brethren Church et al. in *California* v. *Grace Brethren Church*, O. T. 1981, No. 81–31 etc., pp. 34–38. *Grace Brethren Church* thus cannot fairly be read as resolving, or even considering, the question presented in this case.

which captures orders that merely *inhibit* acts of "assessment, levy or collection." See Black's 1548. Another, narrower meaning, however, is "[t]o prohibit from action; to put compulsion upon . . . to enjoin," *ibid.*, which captures only those orders that stop (or perhaps compel) acts of "assessment, levy or collection."

To resolve this ambiguity, we look to the context in which the word is used. *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). The statutory context provides several clues that lead us to conclude that the TIA uses the word "restrain" in its narrower sense. Looking to the company "restrain" keeps, *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961), we first note that the words "enjoin" and "suspend" are terms of art in equity, see *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 126, and n. 13 (1981) (Brennan, J., concurring). They refer to different equitable remedies that restrict or stop official action to varying degrees, strongly suggesting that "restrain" does the same. See *Hibbs*, 524 U. S., at 118 (KENNEDY, J., dissenting); see also *Jefferson County*, 572 U. S., at 433.

Additionally, as used in the TIA, "restrain" acts on a carefully selected list of technical terms—"assessment, levy, collection"—not on an all-encompassing term, like "taxation." To give "restrain" the broad meaning selected by the Court of Appeals would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to "hold back" "collection." Such a broad construction would thus render "assessment [and] levy"—not to mention "enjoin [and] suspend"—mere surplusage, a result we try to avoid. See *Hibbs*, *supra*, at 101 (interpreting the terms of the TIA to avoid superfluity).

Assigning the word "restrain" its meaning in equity is also consistent with our recognition that the TIA "has its roots in equity practice." *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976). Under the comity doctrine that the TIA partially codifies, *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 431–

432 (2010), courts of equity exercised their "sound discretion" to withhold certain forms of extraordinary relief, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297 (1943); see also *Dows* v. *Chicago*, 11 Wall. 108, 110 (1871). Even while refusing to grant certain forms of equitable relief, those courts did not refuse to hear every suit that would have a negative impact on States' revenues. See, *e. g.*, *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 127 (1930); see also 5 R. Paul & J. Mertens, Law of Federal Income Taxation § 42.139 (1934) (discussing the word "restraining" in the AIA in its equitable sense). The Court of Appeals' definition of "restrain," however, leads the TIA to bar every suit with such a negative impact. This history thus further supports the conclusion that Congress used "restrain" in its narrower, equitable sense, rather than in the broad sense chosen by the Court of Appeals.

Finally, adopting a narrower definition is consistent with the rule that "[j]urisdictional rules should be clear." *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 321 (2005) (THOMAS, J., concurring); see also *Hertz Corp.*, *supra*, at 94. The question—at least for negative injunctions—is whether the relief to some degree stops "assessment, levy or collection," not whether it merely inhibits them. The Court of Appeals' definition of "restrain," by contrast, produces a "'vague and obscure'" boundary that would result in both needless litigation and uncalled-for dismissal, *Sisson* v. *Ruby*, 497 U. S. 358, 375 (1990) (SCALIA, J., concurring in judgment), all in the name of a jurisdictional statute meant to protect state resources.

Applying the correct definition, a suit cannot be understood to "restrain" the "assessment, levy or collection" of a state tax if it merely inhibits those activities.[2]

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[2] Because the text of the TIA resolves this case, we decline the parties' invitation to derive various *per se* rules from our decision in *Hibbs* v. *Winn*, 542 U. S. 88 (2004). In *Hibbs*, the Court held that the TIA did not bar an Establishment Clause challenge to a state tax credit for charitable

III

We take no position on whether a suit such as this one might nevertheless be barred under the "comity doctrine," which "counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." *Levin*, 560 U. S., at 421. Under this doctrine, federal courts refrain from "interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. " *Id.*, at 422 (internal quotation marks omitted).

Unlike the TIA, the comity doctrine is nonjurisdictional. And here, Colorado did not seek comity from either of the courts below. Moreover, we do not understand the Court of Appeals' footnote concerning comity to be a holding that comity compels dismissal. See 735 F. 3d, at 920, n. 11 ("Although we remand to dismiss [petitioner's] claims pursuant to the TIA, we note that the doctrine of comity also militates in favor of dismissal"). Accordingly, we leave it to the Tenth Circuit to decide on remand whether the comity argument remains available to Colorado.

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donations to organizations that provided scholarships for children to attend parochial schools. *Id.*, at 94–96. Direct Marketing Association argues that *Hibbs* stands for the proposition that the TIA has no application to third-party suits by nontaxpayers who do not challenge their own liability. Brief for Petitioner 18–21. The Executive Director acknowledges that *Hibbs* created an exception to the TIA, but argues that the exception does not apply to suits that restrain activities that have a collection-propelling function. Brief for Respondent 25–33.

In *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413 (2010), we emphasized the narrow reach of *Hibbs*, explaining that it was not "a run-of-the-mine tax case," 560 U. S., at 430. As we explained, *Hibbs* held only "that the TIA did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision." 560 U. S., at 430; accord, *id.*, at 434 (THOMAS, J., concurring in judgment). Because we have already concluded that the TIA does not preclude this challenge, it is unnecessary to consider whether and how the narrow rule announced in *Hibbs* would apply to suits like this one.

* * *

Because the TIA does not bar petitioner's suit, we reverse the judgment of the Court of Appeals. Like the Court of Appeals, we express no view on the merits of those claims, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

The opinion of the Court has my unqualified join and assent, for in my view it is complete and correct. It does seem appropriate, and indeed necessary, to add this separate statement concerning what may well be a serious, continuing injustice faced by Colorado and many other States.

Almost half a century ago, this Court determined that, under its Commerce Clause jurisprudence, States cannot require a business to collect use taxes—which are the equivalent of sales taxes for out-of-state purchases—if the business does not have a physical presence in the State. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967). Use taxes are still due, but under *Bellas Hess* they must be collected from and paid by the customer, not the out-of-state seller. *Id.*, at 758.

Twenty-five years later, the Court relied on *stare decisis* to reaffirm the physical presence requirement and to reject attempts to require a mail-order business to collect and pay use taxes. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 311 (1992). This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), "contemporary Commerce Clause jurisprudence might not dictate the same result" as the Court had reached in *Bellas Hess*. *Quill Corp.*, 504 U. S., at 311. In other words, the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided. Still, the Court determined vendors who had no physical presence in a State did not have the "sub-

stantial nexus with the taxing state" necessary to impose tax-collection duties under the Commerce Clause. *Id.*, at 311–313. Three Justices concurred in the judgment, stating their votes to uphold the rule of *Bellas Hess* were based on *stare decisis* alone. 504 U. S., at 319 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment). This further underscores the tenuous nature of that holding—a holding now inflicting extreme harm and unfairness on the States.

In *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy. There is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently "substantial nexus" to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet. After all, "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988). This argument has grown stronger, and the cause more urgent, with time. When the Court decided *Quill*, mail-order sales in the United States totaled $180 billion. 504 U. S., at 329 (White, J., concurring in part and dissenting in part). But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States. App. 28.

Because of *Quill* and *Bellas Hess*, States have been unable to collect many of the taxes due on these purchases. California, for example, has estimated that it is able to collect only about 4% of the use taxes due on sales from out-of-state vendors. See California State Board of Equalization, Revenue Estimate: Electronic Commerce and Mail Order Sales, Rev. 8/13, p. 7 (2013) (Table 3). The result has been a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay

taxes at the register. The facts of this case exemplify that trend: Colorado's losses in 2012 are estimated to be around $170 million. See D. Bruce, W. Fox, & L. Luna, State and Local Government Sales Tax Revenue Losses From Electronic Commerce 11 (2009) (Table 5). States' education systems, healthcare services, and infrastructure are weakened as a result.

The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. See PricewaterhouseCoopers, Understanding How U. S. Online Shoppers Are Reshaping the Retail Experience 3 (Mar. 2012) (nearly 70% of American consumers shopped online in 2011). Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier. See *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (*stare decisis* weakened where "experience has pointed up the precedent's shortcomings"). It should be left in place only if a powerful showing can be made that its rationale is still correct.

The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appro-

priate case for this Court to reexamine *Quill* and *Bellas Hess*.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.*

I write separately to make two observations.

First, as the Court has observed, Congress designed the Tax Injunction Act not "to prevent federal-court interference with all aspects of state tax administration," *Hibbs* v. *Winn*, 542 U. S. 88, 105 (2004) (internal quotation marks omitted), but more modestly to stop litigants from using federal courts to circumvent States' "pay without delay, then sue for a refund" regimes. See *id.*, at 104–105 ("[I]n enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority."). This suit does not implicate that congressional objective. The Direct Marketing Association is not challenging its own or anyone else's tax liability or tax collection responsibilities. And the claim is not one likely to be pursued in a state refund action. A different question would be posed, however, by a suit to enjoin reporting obligations imposed on a taxpayer or tax collector, *e. g.*, an employer or an in-state retailer, litigation in lieu of a direct challenge to an "assessment," "levy," or "collection." The Court does not reach today the question whether the claims in such a suit, *i. e.*, claims suitable for a refund action, are barred by the Tax Injunction Act. On that understanding, I join the Court's opinion.

Second, the Court's decision in this case, I emphasize, is entirely consistent with our decision in *Hibbs*. The plaintiffs in *Hibbs* sought to enjoin certain state tax credits. That suit, like the action here, did not directly challenge

*JUSTICE SOTOMAYOR joins this opinion with respect to the first observation.

"acts of assessment, levy, and collection themselves," *ante*, at 12. See *Hibbs*, 542 U. S., at 96, 99–102. Moreover, far from threatening to deplete the State's coffers, "the relief requested [in *Hibbs*] would [have] result[ed] in the state's receiving *more* funds that could be used for the public benefit." *Id.*, at 96 (internal quotation marks omitted; emphasis added). Even a suit that somewhat "inhibits" "assessment, levy, or collection," the Court holds today, falls outside the scope of the Tax Injunction Act. *Ante*, at 14. That holding casts no shadow on *Hibbs*' conclusion that a suit further removed from the Act's "state-revenue-protective moorings," 542 U. S., at 106, remains outside the Act's scope.

ALABAMA DEPARTMENT OF REVENUE ET AL. *v.* CSX TRANSPORTATION, INC.

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

No. 13–553. Argued December 9, 2014—Decided March 4, 2015

Alabama imposes sales and use taxes on railroads when they purchase or consume diesel fuel, but exempts from those taxes trucking transport companies (motor carriers) and companies that transport goods interstate through navigable waters (water carriers), both railroad competitors. Motor carriers pay an alternative fuel-excise tax on diesel, but water carriers pay neither the sales tax nor the excise tax. Respondent (CSX), an interstate rail carrier that operates in Alabama, sought to enjoin state officers from collecting sales tax on its diesel fuel purchases, claiming that the State's asymmetrical tax treatment "discriminates against a rail carrier" in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, or 4–R Act, 49 U. S. C. § 11501(b)(4). This Court held that a tax "discriminates" under subsection (b)(4) when it treats "groups [that] are similarly situated" differently without sufficient "justification for the difference in treatment," *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 287 (*CSX I*). On remand, the District Court rejected CSX's claim. Reversing, the Eleventh Circuit held that CSX could establish discrimination by showing that Alabama taxed rail carriers differently than their competitors, but rejected Alabama's argument that imposing a fuel-excise tax on motor carriers, but not rail carriers, justified imposing the sales tax on rail carriers, but not motor carriers.

Held:

1. The Eleventh Circuit properly concluded that CSX's competitors are an appropriate comparison class for its subsection (b)(4) claim.

All general and commercial taxpayers may be *an* appropriate comparison class for a subsection (b)(4) claim, but it is not the only one. Nothing in the ordinary meaning of the word "discrimination" suggests that it occurs only when the victim is singled out relative to the population at large. Context confirms this reading. The 4–R Act is an "asymmetrical statute." *CSX I*, *supra*, at 296. In subsections (b)(1) to (b)(3)—which specify prohibitions directed toward property taxes—the comparison class is limited to commercial and industrial property in the same assessment jurisdiction. But subsection (b)(4) contains no such limitation, so the comparison class is to be determined based on the theory of discrimination alleged in the claim. Thus, when a railroad alleges that a tax disadvan-

tages it compared to its transportation industry competitors, its competitors in that jurisdiction are the comparison class. Because subsection (b)(4) requires a showing of *discrimination*, however, the comparison class must consist of individuals similarly situated to the claimant.

Subsection (b)(4) would be deprived of all real-world effect if "similarly situated" were given the same narrow construction the concept has in the Equal Protection Clause context, where it would be permissible for a State to tax a rail carrier more than a motor carrier, despite their seemingly similar lines of business. The category of "similarly situated" (b)(4) comparison classes must at least include the commercial and industrial taxpayers specified in the other subsections. But it also can include a railroad's competitors. Discrimination in favor of that class both falls within the ordinary meaning of "discrimination" and frustrates the 4–R Act's purpose of "restor[ing] the financial stability of the [Nation's] railway system" while "foster[ing] competition among all carriers by railroad and other modes of transportation," 90 Stat. 33. Contrary to Alabama's argument, normal rules of interpretation would say that the explicit limitation to "commercial and industrial" in the first three provisions, and its absence in the fourth, suggests that no such limitation applies to the fourth. Alabama's additional arguments are also unavailing. Pp. 26–30.

2. The Eleventh Circuit erred in refusing to consider whether Alabama could justify its decision to exempt motor carriers from its sales and use taxes through its decision to subject motor carriers to a fuel-excise tax. It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt, since *both* competitors could then claim to be discriminated against relative to each other. The Court's negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479–480. Similarly, an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory. CSX's counterarguments are rejected. On remand, the Eleventh Circuit is to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption. Although the State cannot offer a similar defense with respect to its water carrier exemption, the court should also examine whether any of the State's alternative rationales justify that exemption. Pp. 30–32.

720 F. 3d 863, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Sotomayor, and Kagan, JJ., joined.

THOMAS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 32.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for petitioners. With him on the briefs were *Luther Strange*, Attorney General, *Megan A. Kirkpatrick*, Assistant Solicitor General, *Mark Griffin*, Chief Legal Counsel, and *Margaret Johnson McNeill* and *Keith Maddox*, Assistant Attorneys General.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Stewart*, *Anthony J. Steinmeyer*, *Mark W. Pennak*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, *Joy K. Park*, and *Melissa Porter*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Jacqueline G. Cooper*, *Paul J. Sampson*, *James W. McBride*, *Stephen D. Goodwin*, *Ellen M. Fitzsimmons*, *Joel W. Pangborn*, and *Peter J. Schudtz*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Tennessee et al. by *Robert E. Cooper, Jr.*, Attorney General of Tennessee, *Joseph F. Whalen*, Acting Solicitor General, *Charles L. Lewis*, Deputy Attorney General, and *Talmage M. Watts*, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Lori Swanson* of Minnesota, *Catherine Cortez Masto* of Nevada, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, *Marty J. Jackley* of South Dakota, *Sean D. Reyes* of Utah, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for Alabama Cities et al. by *Florence A. Kessler*, *E. Erich Bergdolt*, *Frank C. Ellis, Jr.*, *J. Bentley Owens III*, *C. McDowell Crook, Jr.*, *Kimberly O. Fehl*, *Brian Kilgore*, and *Robert M. Spence*; for the American Trucking Associations, Inc., by *Richard Pianka* and *Prasad Sharma*; for the Multistate Tax Commission by *Joe Huddleston* and *Helen Hecht*; and for State & Local Government Organizations by *Sarah M. Shalf* and *Lisa Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Betty Jo Christian*, *Timothy M. Walsh*, *Jessica I. Rothschild*, *Louis P. Warchot*, and *Janet L. Bartelmay*; for the Council

JUSTICE SCALIA delivered the opinion of the Court.

Federal law prohibits States from imposing taxes that "discriminat[e] against a rail carrier." 49 U. S. C. § 11501(b)(4). We are asked to decide whether a State violates this prohibition by taxing diesel fuel purchases made by a rail carrier while exempting similar purchases made by its competitors; and if so, whether the violation is eliminated when other tax provisions offset the challenged treatment of railroads.

I

Alabama taxes businesses and individuals for the purchase or use of personal property. Ala. Code §§ 40–23–2(1), 40–23–61(a) (2011). Alabama law sets the general tax rate at 4% of the value of the property purchased or used. *Ibid.*

The State applies the tax, at the usual 4% rate, to railroads' purchase or use of diesel fuel for their rail operations. But it exempts from the tax purchases and uses of diesel fuel made by trucking transport companies (whom we will call motor carriers) and companies that transport goods interstate through navigable waters (water carriers). Motor carriers instead pay a 19-cent-per-gallon fuel-excise tax on diesel; water carriers pay neither the sales nor fuel-excise tax on their diesel. § 40–17–325(a)(2) and (b); § 40–23–4(a)(10) (2014 Cum. Supp.). The parties stipulate that rail carriers, motor carriers, and water carriers compete.

Respondent CSX Transportation, a rail carrier operating in Alabama and other States, believes this asymmetrical tax treatment "discriminates against a rail carrier" in violation of the alliterative Railroad Revitalization and Regulatory Reform Act of 1976, or 4–R Act. 49 U. S. C. § 11501(b)(4). It sought to enjoin petitioners, the Alabama Department of

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on State Taxation by *Karl Frieden*, *Frederick Nicely*, and *Douglas Lindholm*; and for the Tax Foundation by *Walter Hellerstein*, *Eric S. Tresh*, *Maria M. Todorova*, *Jonathan A. Feldman*, and *Joseph D. Henchman*.

Revenue and its Commissioner (Alabama or State), from collecting sales tax on its diesel fuel purchases.

At first, the District Court and Eleventh Circuit both rejected CSX's complaint. *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 350 Fed. Appx. 318 (2009). On this lawsuit's first trip here, we reversed. We rejected the State's argument that sales-and-use tax exemptions cannot "discriminate" within the meaning of subsection (b)(4), and remanded the case for further proceedings. *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 296–297 (2011) (*CSX I*).

On remand, the District Court rejected CSX's claim after a trial. 892 F. Supp. 2d 1300 (ND Ala. 2012). The Eleventh Circuit reversed. 720 F. 3d 863 (2013). It held that, on CSX's challenge, CSX could establish discrimination by showing the State taxed rail carriers differently than their competitors—which, by stipulation, included motor carriers and water carriers. But it rejected Alabama's argument that the fuel-excise taxes offset the sales taxes—in other words, that because it imposed its fuel-excise tax on motor carriers, but not rail carriers, it was justified in imposing the sales tax on rail carriers, but not motor carriers. *Ibid.*

We granted certiorari to resolve whether the Eleventh Circuit properly regarded CSX's competitors as an appropriate comparison class for its subsection (b)(4) claim. 573 U. S. 957 (2014). We also directed the parties to address whether, when resolving a claim of unlawful tax discrimination, a court should consider aspects of a State's tax scheme apart from the challenged provision. *Ibid.*

II

The 4–R Act provides:

> "(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

> "(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> "(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> "(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> "(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." § 11501(b)(1)–(4).

In our last opinion in this case, we held that "discriminates" in subsection (b)(4) carries its ordinary meaning, and that a tax discriminates under subsection (b)(4) when it treats "groups [that] are similarly situated" differently without sufficient "justification for the difference in treatment." *CSX I*, *supra*, at 287. Here, we address the meaning of these two quoted phrases.

A

The first question in this case is who is the "comparison class" for purposes of a subsection (b)(4) claim. Alabama argues that the only appropriate comparison class for a subsection (b)(4) claim is all general commercial and industrial taxpayers. We disagree. While all general and commercial taxpayers is *an* appropriate comparison class, it is not the only one.

Nothing in the ordinary meaning of the word "discrimination" suggests that it occurs only when the victim is singled out relative to the population at large. If, for example, a State offers free college education to all returning combat veterans, but arbitrarily excepts those who served in the

Marines, we would say that Marines have experienced discrimination. That would remain the case even though the Marines are treated the same way as members of the general public, who have to pay for their education.

Context confirms that the comparison class for subsection (b)(4) is not limited as Alabama suggests. The 4–R Act is an "asymmetrical statute." *Id.*, at 296. Subsections (b)(1) to (b)(3) contain three specific prohibitions directed towards property taxes. Each requires comparison of railroad property to commercial and industrial property in the same assessment jurisdiction. The Act therefore limits the comparison class for challenges under those provisions. Even if the jurisdiction treats railroads less favorably than residential property, no violation of these subsections has occurred. Subsection (b)(4) contains no such limitation, leaving the comparison class to be determined as it is normally determined with respect to discrimination claims. And we think that depends on the theory of discrimination alleged in the claim. When a railroad alleges that a tax targets it for worse treatment than local businesses, all other commercial and industrial taxpayers are the comparison class. When a railroad alleges that a tax disadvantages it compared to its competitors in the transportation industry, the railroad's competitors in that jurisdiction are the comparison class.

So, picking a comparison class is extraordinarily easy. Unlike under subsections (b)(1)–(3), the railroad is not limited to all commercial and industrial taxpayers; all the world, or at least all the world within the taxing jurisdiction, is its comparison-class oyster. But that is not as generous a concession as might seem. What subsection (b)(4) requires, and subsections (b)(1)–(3) do not, is a showing of *discrimination*—of a failure to treat similarly situated persons alike. A comparison class will thus support a discrimination claim only if it consists of individuals similarly situated to the claimant.

That raises the question of when a proposed comparison class qualifies as similarly situated. In the Equal Protection Clause context, very few taxpayers are regarded as similarly

situated and thus entitled to equal treatment. There, a State may tax different lines of businesses differently with near-impunity, even if they are apparently similar. We have upheld or approved of distinctions between utilities—including a railroad—and other corporations, *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 579 (1938), between wholesalers and retailers in goods, *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117, 120–121 (1941), between chain retail stores and independent retail stores, *State Bd. of Tax Comm'rs of Ind.* v. *Jackson*, 283 U. S. 527, 535, 541–542 (1931), between anthracite coal mines and bituminous coal mines, *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 254, 257 (1922), and between sellers of coal oil and sellers of coal, *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121 (1910). As one treatise has observed, we recognize a "wide latitude state legislatures enjoy in drawing tax classifications under the Equal Protection Clause." 1 J. Hellerstein & W. Hellerstein, State Taxation ¶3.03[1], p. 3–5 (3d ed. 2001–2005). This includes the power to impose "widely differing taxes on various trades or professions." *Id.*, at 3–5 to 3–6. It would be permissible—as far as the Equal Protection Clause is concerned—for a State to tax a rail carrier more than a motor carrier, despite the seeming similarity in their lines of business.

The concept of "similarly situated" individuals cannot be so narrow here. That would deprive subsection (b)(4) of all real-world effect, providing protection that the Equal Protection Clause already provides. Moreover, the category of "similarly situated" (b)(4) comparison classes must include commercial and industrial taxpayers. There is no conceivable reason why the statute would forbid property taxes higher than what that class enjoys (or suffers), but permit other taxes that discriminate in favor of that class vis-à-vis railroads. And we think the competitors of railroads can be another "similarly situated" comparison class, since discrimination in favor of that class most obviously frustrates the

purpose of the 4–R Act, which was to "restore the financial stability of the railway system of the United States," § 101(a), 90 Stat. 33, while "foster[ing] competition among all carriers by railroad and other modes of transportation," § 101(b)(2). We need not, and thus do not, express any opinion on what other comparison classes may qualify. Sufficient unto the day is the evil thereof.

Alabama claims that because subsections (b)(1) and (b)(3) (and (b)(2) through reference to (b)(1)) establish a comparison class of "commercial and industrial property," subsection (b)(4) must establish a comparison class of "general commercial and industrial taxpayers." This inverts normal rules of interpretation, which would say that the explicit limitation to "commercial and industrial" in the first three provisions, and the absence of such a limitation in the fourth, suggests that no such limitation applies to the fourth. Moreover, Alabama's interpretation would require us to dragoon the modifier "commercial and industrial"—but not the noun "property"—from the first three provisions, append "general" in front of it and "taxpayers" after, both words foreign to the preceding subsections. We might also have to strip away the restrictions in the definition of "commercial and industrial property," which excludes land primarily used for agricultural purposes and timber growing. 49 U. S. C. § 11501(a)(4). This is not our concept of fidelity to a statute's text.

Alabama responds that the introductory clause of § 11501(b)—which declares that the "following acts unreasonably burden and discriminate against interstate commerce"—"binds its four subsections together," Brief for Petitioners 23 (emphasis deleted), and gives them a common object and scope. The last time this case appeared before us, Alabama made a similar argument in support of the claim that, because subsections (b)(1)–(3) cover only property taxes, so too does subsection (b)(4). See Brief for Respondents in *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, O. T.

2010, No. 09–520, pp. 25–26. We rejected this argument then, and we reject it again now.

Alabama persists that a case-specific inquiry allows a railroad to "hand-pick [its] comparison class," Brief for Petitioners 41, which would be unfair—a "windfall" to railroads. *Ibid.* As we have described above, picking a class is easy, but it is not easy to establish that the selected class is "similarly situated" for purposes of discrimination in taxation. The Eleventh Circuit properly concluded that, in light of CSX Transportation's complaint and the parties' stipulation, a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination. We therefore turn to the court's refusal to consider Alabama's alternative tax justifications.

B

A State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers. As we have discussed above, a rail carrier and its competitors can be considered similarly situated for purposes of this provision. But what about the claim that those competitors are subject to *other* taxes that the railroads avoid? We think Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax.

It does not accord with ordinary English usage to say that a tax discriminates against a rail carrier if a rival who is exempt from that tax must pay *another* comparable tax from which the rail carrier is exempt. If that were true, *both* competitors could claim to be disfavored—discriminated against—relative to each other. Our negative Commerce Clause cases endorse the proposition that an additional tax on third parties may justify an otherwise discriminatory tax. *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 479–480 (1932). We think that an alternative, roughly equivalent tax

is one possible justification that renders a tax disparity nondiscriminatory.

CSX claims that because the statutory prohibition forbids "[i]mpos[ing] another tax that discriminates against a rail carrier," 49 U. S. C. § 11501(b)(4)—"tax" in the singular—the appropriate inquiry is whether the challenged *tax* discriminates, not whether the tax code as a whole does so. It is undoubtedly correct that the "tax" (singular) must discriminate—but it does not discriminate unless it treats railroads differently from other *similarly situated* taxpayers *without sufficient justification*. A comparable tax levied on a competitor may justify not extending that competitor's exemption from a general tax to a railroad. It is easy to display the error of CSX's single-tax-provision approach. Under that model, the following tax would violate the 4–R Act: "(1) All railroads shall pay a 4% sales tax. (2) All other individuals shall also pay a 4% sales tax."

CSX would undoubtedly object that not every case will be so easy, and that federal courts are ill qualified to explore the vagaries of state tax law. We are inclined to agree, but that cannot carry the day. Congress assigned this task to the courts by drafting an antidiscrimination command in such sweeping terms. There is simply no discrimination when there are roughly comparable taxes. If the task of determining when that is so is "Sisyphean," as the Eleventh Circuit called it, 720 F. 3d, at 871, it is a Sisyphean task that the statute imposes. We therefore cannot approve of the Eleventh Circuit's refusal to consider Alabama's tax-based justification, and remand for that court to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption.

C

While the State argues that the existence of a fuel-excise tax justifies its decision to exempt motor carriers from the sales and use tax, it cannot offer a similar defense with re-

spect to its exemption for water carriers. Water carriers pay neither tax.

The State, however, offers other justifications for the water carrier exemption—for example, that such an exemption is compelled by federal law. The Eleventh Circuit failed to examine these justifications, asserting that the water carriers were the beneficiaries of a discriminatory tax regime. We do not consider whether Alabama's alternative rationales justify its exemption, but leave that question for the Eleventh Circuit on remand.

* * *

The judgment of the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GINSBURG joins, dissenting.

In order to violate 49 U. S. C. § 11501(b)(4), "a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers." *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 297–298 (2011) (*CSX I*) (THOMAS, J., dissenting). Because CSX cannot prove facts that would satisfy that standard, I would reverse the judgment below and remand for the entry of judgment in favor of the Alabama Department of Revenue.

I

A

Last time this case was before the Court, I explained in detail my reasons for interpreting "another tax that discriminates against a rail carrier" in § 11501(b)(4) to refer to a tax "that targets or singles out railroads as compared to other commercial and industrial taxpayers." *Id.*, at 298. I briefly summarize that reasoning here.

Because the meaning of "discriminates" is ambiguous at first glance, I look to the term's context to resolve this uncertainty. *Id.*, at 298–299. Both the structure and background of the statute indicate that subsection (b)(4) prohibits only taxes that single out railroads as compared to other commercial and industrial taxpayers.

Subsection (b)(4) is a residual clause, the meaning of which is best understood by reference to the provisions that precede it. Subsection (b) begins by announcing that "[t]he following acts . . . discriminate against interstate commerce" and are prohibited. § 11501(b). Subsections (b)(1) through (b)(3) then list three tax-related actions that single out rail carriers by treating rail property differently from all other commercial and industrial property. §§ 11501(b)(1)–(3); *id.*, at 300. Subsections (b)(1) and (b)(3) explicitly identify "commercial and industrial property" as the comparison class, and subsection (b)(2) incorporates that comparison class by reference. § 11501(b); *id.*, at 300. Subsection (b)(4) refers back to these provisions when it forbids "[i]mpos[ing] *another* tax that discriminates against a rail carrier." § 11501(b)(4) (emphasis added); *id.*, at 300. The statutory structure therefore supports the conclusion that a tax "discriminates against a rail carrier" within the meaning of subsection (b)(4) if it singles out railroads for unfavorable treatment as compared to the general class of commercial and industrial taxpayers. *Id.*, at 300–301.

The statutory background supports the same conclusion. When Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, it was apparent that railroads were "easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove themselves from the locality." *Id.*, at 301 (internal quotation marks omitted). Subsections (b)(1) through (b)(3) thus "establish a political check" by preventing States from imposing excessive property taxes on railroads "without imposing the same taxes

more generally on voting, resident local businesses." *Ibid.* Subsection (b)(4) is best understood as addressing the same problem in the same way. *Id.*, at 301–302.

B

Alabama's tax scheme cannot be said to "discriminat[e] against a rail carrier." *Id.*, at 302. To begin, the scheme does not single out rail carriers. Although one would not know it from the majority opinion, the tax is not directed at rail carriers, their property, their activity, or goods uniquely consumed by them. It is instead a generally applicable sales tax. It applies (with other exemptions not at issue here) to all goods purchased, used, or stored in the State of Alabama. Ala. Code §§ 40–23–2(1), 40–23–61(a) (2011). The only relevant good exempted from the tax is diesel on which the motor fuel tax has been paid, § 40–17–325(b), and no provision of law prevents rail carriers from buying such diesel. See Brief for Respondent 46, n. 13 (acknowledging that CSX pays the motor fuel tax on the diesel fuel it uses in trucks and other on-road vehicles). Water carriers, it is true, enjoy a special carveout from this sales tax, § 40–23–4(a)(10) (2014 Cum. Supp.), but that exemption singles out *water* carriers, not *rail* carriers.

Even if this constellation of exemptions to Alabama's sales tax could be said to single out rail carriers from the general class of their interstate competitors, the tax surely does not single out rail carriers as compared to commercial and industrial taxpayers. Those taxpayers are subject to exactly the same generally applicable sales and use tax regime as are rail carriers.

II

A

The Court started off on the wrong track in *CSX I* when it relied on a generic dictionary definition of "discriminates" in the face of a statutory context suggesting a more specific

definition. See 562 U. S., at 304. Today's decision continues that error.

The Court uncritically accepts the conclusion that the "discriminat[ion]" addressed by the statute encompasses *any* distinction between rail carriers and their comparison class, *ante*, at 26, as opposed to mere "singling out" or something in between, even though the word "discriminates" is ambiguous in that way. *CSX I*, *supra*, at 299. The Court's usual practice has not been to treat the meaning of "discriminates" so casually. See generally *Guardians Assn.* v. *Civil Serv. Comm'n of New York City*, 463 U. S. 582, 590–593 (1983) (opinion of White, J.) (discussing the Court's shifting definition of the ambiguous term "discrimination").

Today's decision compounds this error by holding that a rail carrier may make out a claim of discrimination using any comparison class so long as that class consists of "individuals similarly situated to the claimant" rail carrier. *Ante*, at 27. The majority purports to derive this limitation from the dictionary, but then finds itself unable to proceed: After all, Black's Law Dictionary contains no entry defining what it means to be "similarly situated" for the purpose of subsection (b)(4). Forced finally to turn to the statutory context, the majority rejects the statutorily defined competitor class of commercial and industrial taxpayers in favor of a shifting comparison class of its own creation.

B

The majority disregards the commercial and industrial property comparison class identified in subsections (b)(1) through (b)(3) because subsection (b)(4) does not explicitly include language from those provisions. See *ante*, at 27, 29. It asserts that defining the comparison class for the purpose of subsection (b)(4) by reference to the comparison class identified in subsections (b)(1) through (b)(3) "would require us to dragoon the modifier 'commercial and industrial'—but not the noun 'property'—from the first three

provisions, append 'general' in front of it and 'taxpayers' after, both words foreign to the preceding subsections." *Ante,* at 29.

The majority's accusation of grammatical conscription misses the point. Subsection (b)(4) is a residual clause, explicitly marked as such by the use of the word "another." See *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003). Like other residual clauses, it need not use the same language as the clauses it follows to derive meaning from those clauses. See, *e. g.*, *Sossamon* v. *Texas*, 563 U. S. 277, 292 (2011); *James* v. *United States*, 550 U. S. 192, 217–218 (2007) (SCALIA, J., dissenting). Where, as here, a residual clause includes an ambiguous word like "discriminates," we must look to the clauses that precede it to guide our understanding of its scope.

In some sense, my task in giving meaning to the statutory term "discriminates" is no different from the majority's: to determine what type of differential treatment the statute forbids. The first three clauses provide important clues that the statute forbids singling out rail carriers from other commercial and industrial taxpayers because commercial and industrial taxpayers are the ones who pay taxes on "commercial and industrial property." The majority pursues the same logical train of thought when it opines that "the category of 'similarly situated' (b)(4) comparison classes must include commercial and industrial taxpayers" because "[t]here is no conceivable reason why the statute would forbid property taxes higher than what that class enjoys (or suffers), but permit other taxes that discriminate in favor of that class vis-à-vis railroads." *Ante,* at 28. Where we part ways is in the inferences we draw from the statutory context.

Treating subsection (b)(4) as a residual clause does not require the grammatical distortions that the majority alleges. The word "discriminates" in subsection (b)(4) is not a referential phrase whose antecedent is uncertain. If it were,

then it would be necessary to select an antecedent that would fit grammatically in place of "discriminates." Instead, I look to (b)(1) to (b)(3) merely to clarify an ambiguity in the *meaning* of "discriminates," a task that does not require me to "dragoon" the language of the prior clauses into subsection (b)(4).

Nor does my approach rely on the first three clauses of § 11501(b) to supply a general limitation on the independent prohibition that appears in subsection (b)(4). See *United States* v. *Aguilar*, 515 U. S. 593, 615 (1995) (SCALIA, J., concurring in part and dissenting in part) (criticizing this type of argument). That is what Alabama sought to do in *CSX I* when it argued that subsection (b)(4) is limited to property taxes (or their equivalent "in lieu" taxes). *Ante*, at 29–30; *CSX I*, 562 U. S., at 285 (majority opinion). I joined the majority in rejecting that argument. *Id.*, at 297 (dissenting opinion). But whereas there is no uncertainty about the meaning of "taxes" in subsection (b)(4) that would justify importing the property tax limitation from the three preceding subsections, *id.*, at 284–285 (majority opinion), there is a good deal of uncertainty about the meaning of "discriminates." This uncertainty justifies looking to the three previous clauses to understand the type of differential treatment § 11501(b) is meant to prohibit. *Id.*, at 298–299 (dissenting opinion); see *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588–589 (1980). And those three previous clauses easily supply the answer to the comparison class question.

C

Unwilling to so limit the range of available comparison classes, the majority takes an approach to determining which individuals are "similarly situated" for purposes of the statute that "is almost entirely ad hoc." *James*, *supra*, at 215 (SCALIA, J., dissenting). It asserts that the comparison class will "depen[d] on the theory of discrimination alleged in the claim." *Ante*, at 27. Sometimes the comparison class will

be "all other commercial and industrial taxpayers," sometimes it will be "the railroad's competitors" in a particular jurisdiction, and sometimes it may be some other comparison class entirely. *Ibid.*

The sole evidence on which the majority relies to conclude that competitors are similarly situated, and therefore qualify as a comparison class, is the professed purposes of the Act: "to 'restore the financial stability of the railway system of the United States,' while 'foster[ing] competition among all carriers by railroad and other modes of transportation.'" *Ante*, at 29 (quoting 90 Stat. 33, §§ 101(a), (b)(2)). Interpreting statutory text solely in light of purpose, absent any reliance on text or structure, is dangerous business because it places courts in peril of substituting their policy judgment for that of Congress. In considering statutory purpose, therefore, we should be careful that any inferences of purpose are tied to text rather than instinct.

The majority throws such caution to the wind. Its two-sentence argument is a perfect illustration of the dangers of a purely purpose-based approach. The majority cherry-picks two of a number of stated goals of a complex piece of legislation over 100 pages long and assumes that this specific provision was assigned to those specific purposes. And then it interprets the statute to perform in the manner the majority believes is best designed to "restore . . . financial stability" and "foster . . . competition." *Ante*, at 29 (alteration omitted).

I have no reason to doubt the economic soundness of the majority's conclusion that discrimination between rail carriers and their competitors threatens their financial stability and impedes competition, but I lack the majority's certitude that § 11501(b)(4) is designed to further *those goals* by combating *that evil*, at least in *the way* the majority asserts. Instead, the first three subsections provide strong textual evidence that § 11501(b) was designed to stabilize rail carriers by protecting them from discrimination against inter-

state commerce. And they provide evidence of Congress' chosen mechanism for accomplishing that goal: tying the fate of interstate rail carriers to the broader class of commercial and industrial taxpayers. See *supra*, at 33.

The introductory clause of § 11501(b) provides further evidence that the evil at which subsection (b)(4) is targeted is not discrimination between rail carriers and their competitors, but "acts [that] unreasonably burden and discriminate against interstate commerce." The majority's response to this evidence—that the Court rejected a similar argument when it refused to limit subsection (b)(4) to property taxes or their kin, *ante*, at 30—is a non sequitur. The introductory clause contains no reference to property taxes that " 'binds its four subsections together' " as prohibitions on discriminatory property taxes. *Ante*, at 29 (internal quotation marks omitted). But it *does* have a reference to discrimination against interstate commerce, which *does* tie the sections together to serve *that* common statutory purpose. This, in turn, weighs against the majority's inferences about how § 11501(b) relates to the stated purposes of the Act.

The majority's conclusion that competitors are a permissible comparison class completely ignores these contextual clues, permitting subsection (b)(4) to serve different statutory goals by a different mechanism than its three predecessor clauses. And it leads to odd inconsistencies. If we were to understand the provision as prohibiting *only* discrimination between rail carriers and their competitors, then it might well further the goal of promoting competition between interstate carriers. But the majority instead selects a shifting-comparison-class approach, requiring rail carriers to be treated at least as well as their competitors and *any other* similarly situated taxpayers. See *ante*, at 27. This most-favored taxpayer status is a position the competitors do not enjoy, so the majority's position could result in tax schemes that *impede* competition between interstate carriers rather than promote it.

Identifying "similarly situated" taxpayers by the undisciplined approach the majority endorses could well lead to other unanticipated consequences. This is why the policy judgments needed to link statutory mechanisms to statutory purposes are best left to Congress. If this Court is going to adopt a shifting-comparison-class approach to § 11501(b)(4), then it should at least demand a stronger textual link between the comparison class a claimant seeks to import into subsection (b)(4) and any purpose that the claimant argues it serves.

III

Because the majority adopts an interpretation of § 11501(b)(4) that is not grounded in the text, it should come as no surprise that this interpretation is difficult to apply, as this case demonstrates. It is easy to see how, accepting water carriers as a comparison class, the scheme treats water carriers and rail carriers differently when it grants water carriers, but not rail carriers, an exemption from the sales tax. Ala. Code § 40–23–4(a)(10). Identifying the difference in treatment between rail and motor carriers, by contrast, requires a good deal more imagination.

The majority's approach exhibits that imagination. It glosses over the general applicability of the provisions that apply to rail and motor carriers, stating that "[t]he State applies the [sales or use] tax, at the usual 4% rate, to railroads' purchase or use of diesel fuel for their rail operations," but "exempts from the tax purchases and uses of diesel fuel made by [motor carriers]." *Ante,* at 24. A quick glimpse at the code reveals that this is not quite the case. The applicability of the sales and use taxes does not depend on the identity of the purchaser, but on whether the purchaser pays another excise tax, § 40–17–325(b), which in turn depends on the nature of the product purchased and its use, §§ 40–17–328, 40–17–329, which in turn merely correlates to the carriers' operations.

As far as I can tell, the rail carriers use dyed diesel that is exempt from the motor fuel tax—and therefore subject to the sales and use taxes—as a matter of choice rather than necessity. Dyed diesel has no special properties that make it more suitable for use in a train engine; the dye merely identifies it as exempt from the federal excise tax, § 40–17–322(21). And no law prohibits rail carriers from using undyed diesel. To the contrary, it is the motor carriers who are prohibited from using the dyed variant for on-road use.

Assuming, *arguendo*, that state law provides that only dyed diesel may be used in rail operations, it becomes a little easier to make an argument that the State treats rail carriers differently *in this case*. But the majority still faces a line-drawing problem. Is it necessary that the good subject to the challenged tax be the same as the good on which the competitor enjoys an exemption? Could a rail carrier that relies on natural gas rather than diesel for motive power make the same claim of discrimination if natural gas is not entitled to the same sales-tax exemption as diesel? Is it necessary that the rail carrier and its competitor rely on the good for the same purpose? Could a rail carrier that uses diesel for motive power challenge a hypothetical provision that exempted from the sales and use taxes diesel that motor carriers use for refrigeration in refrigerated trailers?

The majority never answers these questions. "Sufficient unto the day is the evil thereof," it intones. *Ante*, at 29. "That gets this case off our docket, sure enough. But it utterly fails to do what this Court is supposed to do: provide guidance concrete enough to ensure that the" statute is applied consistently. *James*, 550 U. S., at 215 (SCALIA, J., dissenting). We have demanded clarity from Congress when it comes to statutes that "se[t] limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 344–345 (1994). We should demand the same of ourselves when we interpret

those statutes. Yet after today's decision, lower courts, soon to be met with an oyster's shellful of comparison classes, *ante*, at 27, will have no idea how to determine when a tax exemption that is not tied to the taxpayer's status constitutes differential treatment of two taxpayers.

* * *

The majority's interpretation of § 11501(b)(1) derails ambiguous text from clarifying context. The result it reaches is predictably unworkable. And it prolongs Alabama's burden of litigating a baseless claim of discrimination that should have been dismissed long ago. I respectfully dissent.

DEPARTMENT OF TRANSPORTATION ET AL. *v.* ASSOCIATION OF AMERICAN RAILROADS

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

No. 13–1080. Argued December 8, 2014—Decided March 9, 2015

In 1970, Congress created the National Railroad Passenger Corporation (Amtrak). Congress has given Amtrak priority to use track systems owned by the freight railroads for passenger rail travel, at rates agreed to by the parties or, in case of a dispute, set by the Surface Transportation Board. And in 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" addressing the performance and scheduling of passenger railroad services, see § 207(a), 122 Stat. 4907, including Amtrak's on-time performance and train delays caused by host railroads. Respondent, the Association of American Railroads, sued petitioners—the Department of Transportation, the FRA, and two officials—claiming that the metrics and standards must be invalidated because it is unconstitutional for Congress to allow and direct a private entity like Amtrak to exercise joint authority in their issuance. Its argument rested on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected respondent's claims, but the District of Columbia Circuit reversed as to the separation of powers claim, reasoning in central part that Amtrak is a private corporation and thus cannot constitutionally be granted regulatory power under § 207.

Held: For purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Pp. 50–56.

(a) In concluding otherwise, the Court of Appeals relied on the statutory command that Amtrak "is not a department, agency, or instrumentality of the United States Government," 49 U. S. C. § 24301(a)(3), and the pronouncement that Amtrak "shall be operated and managed as a for profit corporation," § 24301(a)(2). But congressional pronouncements are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution, and an independent inquiry reveals the Court of Appeals' premise that Amtrak is a private entity was flawed. As Amtrak's ownership and corporate structure show, the political branches control most of Amtrak's stock and its Board of Directors, most of whom are appointed by the President, § 24302(a)(1), confirmed by the Senate, *ibid.*, and under-

stood by the Executive Branch to be removable by the President at will. The political branches also exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. See, *e. g.*, § 24315. Also of significance, Amtrak is required by statute to pursue broad public objectives, see, *e. g.*, §§ 24101(b), 24307(a); certain aspects of Amtrak's day-to-day operations are mandated by Congress, see, *e. g.*, §§ 24101(c)(6), 24902(b); and Amtrak has been dependent on federal financial support during every year of its existence. Given the combination of these unique features and Amtrak's significant ties to the Government, Amtrak is not an autonomous private enterprise. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in jointly issuing the metrics and standards with the FRA, Amtrak acted as a governmental entity for separation of powers purposes. And that exercise of governmental power must be consistent with the Constitution, including those provisions relating to the separation of powers. Pp. 50–54.

(b) Respondent's reliance on congressional statements about Amtrak's status is misplaced. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor, for the political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Pp. 54–55.

(c) The Court of Appeals may address in the first instance any properly preserved issues respecting the lawfulness of the metrics and standards that may remain in this case, including questions implicating the Constitution's structural separation of powers and the Appointments Clause. Pp. 55–56.

721 F. 3d 666, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 56. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 66.

Curtis E. Gannon argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Assistant*

Attorney General Delery, *Deputy Solicitor General Kneedler*, *Mark B. Stein*, *Michael S. Raab*, *Daniel Tenny*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, *Joy K. Park*, and *Melissa Porter*.

Thomas H. Dupree, *Jr.*, argued the cause for respondent. With him on the brief were *Amir C. Tayrani*, *Lucas C. Townsend*, *Louis P. Warchot*, and *Daniel Saphire*.*

JUSTICE KENNEDY delivered the opinion of the Court.

In 1970, Congress created the National Railroad Passenger Corporation, most often known as Amtrak. Later, Congress granted Amtrak and the Federal Railroad Administration (FRA) joint authority to issue "metrics and standards" that address the performance and scheduling of passenger railroad services. Alleging that the metrics and standards have substantial and adverse effects upon its members' freight services, respondent—the Association of American Railroads—filed this suit to challenge their validity. The defendants below, petitioners here, are the Department of Transportation, the FRA, and two individuals sued in their official capacity.

Respondent alleges the metrics and standards must be invalidated on the ground that Amtrak is a private entity and

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**Karen E. Torrent* filed a brief for the Environmental Law and Policy Center et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of Trustees and Alumni et al. by *Shannen W. Coffin* and *Jill C. Maguire*; for the Association of Independent Passenger Rail Operators by *Richard B. Katskee* and *Craig W. Canetti*; for the Cato Institute by *Jeffrey S. Bucholtz*, *Ilya Shapiro*, *Karen Harned*, and *Elizabeth Milito*; for the Center for the Rule of Law by *C. Boyden Gray*, *Adam J. White*, and *Ronald A. Cass*; for the Chamber of Commerce of the United States of America by *C. Frederick Beckner III*, *Jonathan F. Cohn*, *Joshua J. Fougere*, and *Kate Comerford Todd*; for Resolute Forest Products Inc. by *David B. Rivkin, Jr.*, and *Andrew M. Grossman*; and for Alexander Volokh by *Sarah M. Shalf*.

John C. Eastman and *Anthony T. Caso* filed a brief for the Center for Constitutional Jurisprudence as *amicus curiae*.

it was therefore unconstitutional for Congress to allow and direct it to exercise joint authority in their issuance. This argument rests on the Fifth Amendment Due Process Clause and the constitutional provisions regarding separation of powers. The District Court rejected both of respondent's claims. The Court of Appeals for the District of Columbia Circuit reversed, finding that, for purposes of this dispute, Amtrak is a private entity and that Congress violated non-delegation principles in its grant of joint authority to Amtrak and the FRA. On that premise the Court of Appeals invalidated the metrics and standards.

Having granted the petition for writ of certiorari, 573 U. S. 930 (2014), this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak's actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

I

A

Amtrak is a corporation established and authorized by a detailed federal statute enacted by Congress for no less a purpose than to preserve passenger services and routes on our Nation's railroads. See *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 383–384 (1995); *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451, 453–457 (1985); see also Rail Passenger Service Act of 1970, 84 Stat. 1328. Congress recognized that Amtrak, of necessity, must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their common-carrier duties,

Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or in the event of disagreement to be set by the Interstate Commerce Commission (ICC). See 45 U. S. C. §§ 561, 562 (1970 ed.). The Surface Transportation Board (STB) now occupies the dispute-resolution role originally assigned to the ICC. See 49 U. S. C. § 24308(a) (2012 ed.). Since 1973, Amtrak has received a statutory preference over freight transportation in using rail lines, junctions, and crossings. See § 24308(c).

The metrics and standards at issue here are the result of a further and more recent enactment. Concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress passed the Passenger Rail Investment and Improvement Act (PRIIA) in 2008. See 122 Stat. 4907. Section 207(a) of the PRIIA provides for the creation of the metrics and standards:

> "Within 180 days after the date of enactment of this Act, the Federal Railroad Administration and Amtrak shall jointly, in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate, develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." *Id.*, at 4916.

Section 207(d) of the PRIIA further provides:

> "If the development of the metrics and standards is not completed within the 180-day period required by subsection (a), any party involved in the development of those standards may petition the Surface Transporta-

> tion Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." *Id.*, at 4917.

The PRIIA specifies that the metrics and standards created under § 207(a) are to be used for a variety of purposes. Section 207(b) requires the FRA to "publish a quarterly report on the performance and service quality of intercity passenger train operations" addressing the specific elements to be measured by the metrics and standards. *Id.*, at 4916–4917. Section 207(c) provides that, "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate the metrics and standards developed under subsection (a) into their access and service agreements." *Id.*, at 4917. And § 222(a) obliges Amtrak, within one year after the metrics and standards are established, to "develop and implement a plan to improve on-board service pursuant to the metrics and standards for such service developed under [§ 207(a)]." *Id.*, at 4932.

Under § 213(a) of the PRIIA, the metrics and standards also may play a role in prompting investigations by the STB and in subsequent enforcement actions. For instance, "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters," the STB may initiate an investigation "to determine whether and to what extent delays . . . are due to causes that could reasonably be addressed . . . by Amtrak or other intercity passenger rail operators." *Id.*, at 4925–4926. While conducting an investigation under § 213(a), the STB "has authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays" and shall "obtain information from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train." *Id.*, at 4926. Following an investigation, the STB may award damages if it "determines that delays or failures to achieve minimum standards . . . are

attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation." *Ibid.* The STB is further empowered to "order the host rail carrier to remit" damages "to Amtrak or to an entity for which Amtrak operates intercity passenger rail service." *Ibid.*

B

In March 2009, Amtrak and the FRA published a notice in the Federal Register inviting comments on a draft version of the metrics and standards. App. 75–76. The final version of the metrics and standards was issued jointly by Amtrak and the FRA in May 2010. *Id.*, at 129–144. The metrics and standards address, among other matters, Amtrak's financial performance, its scores on consumer satisfaction surveys, and the percentage of passenger trips to and from underserved communities.

Of most importance for this case, the metrics and standards also address Amtrak's on-time performance and train delays caused by host railroads. The standards associated with the on-time performance metrics require on-time performance by Amtrak trains at least 80% to 95% of the time for each route, depending on the route and year. *Id.*, at 133–135. With respect to "host-responsible delays"—that is to say, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that "[d]elays must not be more than 900 minutes per 10,000 Train-Miles." *Id.*, at 138. Amtrak conductors determine responsibility for particular delays. *Ibid.*, n. 23.

In the District Court for the District of Columbia, respondent alleged injury to its members from being required to modify their rail operations, which mostly involve freight traffic, to satisfy the metrics and standards. Respondent claimed that § 207 "violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to

regulate." *Id.*, at 176–177, Complaint ¶51. Respondent also asserted that § 207 violates the Fifth Amendment Due Process Clause by "[v]esting the coercive power of the government" in Amtrak, an "interested private part[y]." *Id.*, at 177, ¶¶53–54. In its prayer for relief respondent sought, among other remedies, a declaration of § 207's unconstitutionality and invalidation of the metrics and standards. *Id.*, at 177.

The District Court granted summary judgment to petitioners on both claims. See 865 F. Supp. 2d 22 (DC 2012). Without deciding whether Amtrak must be deemed private or governmental, it rejected respondent's nondelegation argument on the ground that the FRA, the STB, and the political branches exercised sufficient control over promulgation and enforcement of the metrics and standards so that § 207 is constitutional. See *id.*, at 35.

The Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court as to the nondelegation and separation of powers claim, reasoning in central part that because "Amtrak is a private corporation with respect to Congress's power to delegate . . . authority," it cannot constitutionally be granted the "regulatory power prescribed in § 207." 721 F. 3d 666, 677 (2013). The Court of Appeals did not reach respondent's due process claim. See *ibid.*

II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as "regulatory power," *ibid.*—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court's analysis treated as controlling Congress' statutory command that Amtrak "'is not a department, agency, or instrumentality of the United States Government.'" *Id.*, at 675 (quoting 49 U. S. C. § 24301(a)(3)). The Court of Appeals also relied on Congress' pronouncement that Amtrak "'shall be operated

and managed as a for-profit corporation.' " 721 F. 3d, at 675 (quoting § 24301(a)(2)); see also *id.*, at 677 ("Though the federal government's involvement in Amtrak is considerable, Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit. In deciding Amtrak's status for purposes of congressional delegations, these declarations are dispositive"). Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to "delegate regulatory authority to a private entity." *Id.*, at 670; see also *ibid.* (holding *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress' authority to address, see, *e. g.*, *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F. 3d 488, 491–492 (CADC 2004) (Roberts, J.), are not dispositive of Amtrak's status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak's status under the Constitution reveals the Court of Appeals' premise was flawed.

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. § 24302(a)(1). These eight Board members, in turn, select Amtrak's president. § 24302(a)(1)(B); § 24303(a). Amtrak's Board members are subject to salary limits set by Congress, § 24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, see 27 Op. Atty. Gen. 163 (2003).

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an

individual's prior experience in the transportation industry, § 24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, § 24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." § 24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. § 24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. § 552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a "'designated Federal entity,'" 5 U. S. C. App. § 8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices. See, *e. g.*, Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak).

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U. S. C. § 24101(b); "minimize Government subsidies," § 24101(d); provide reduced fares to the disabled and elderly, § 24307(a); and ensure mobility in times of national disaster, § 24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. 122 Stat. 4934. When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. § 24902(b). And when Amtrak purchases materials worth more than $1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. § 24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually. See Brief for Petitioners 5, and n. 2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with

the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§ 24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by § 207(a).

On that point this Court's decision in *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station. The artist sued Amtrak, alleging a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that "its charter's disclaimer of agency status prevent[ed] it from being considered a Government entity." *Id.*, at 392. The Court rejected this contention, holding "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Ibid.* To hold otherwise would allow the Government "to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.*, at 397. Noting that Amtrak "is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," *id.*, at 398, and that the Government exerts its control over Amtrak "not as a creditor but as a policymaker," the Court held Amtrak "is

an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." *Id.*, at 394, 399.

Lebron teaches that, for purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status. *Lebron* involved a First Amendment question, while in this case the challenge is to Amtrak's joint authority to issue the metrics and standards. But "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond* v. *United States*, 564 U. S. 211, 222 (2011). Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

III

Because the Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, that opinion is now vacated. On remand, the Court of Appeals, after identifying the issues that are properly preserved and before it, will then have the instruction of the analysis set forth here. Respondent argues that the selection of Amtrak's president, who is appointed "not by the President . . . but by the other eight Board Members," "call[s] into question Amtrak's structure under the Appointments Clause," Brief for Respondent 42; that § 207(d)'s arbitrator provision "is a plain violation of the nondelegation principle" and the Appointments Clause requiring invalidation of § 207(a), *id.*, at 26; and that Congress violated the Due Proc-

ess Clause by "giv[ing] a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry," *id.*, at 43. Petitioners, in turn, contend that "the metrics and standards do not reflect the exercise of 'rulemaking' authority or permit Amtrak to 'regulate other private entities,'" and thus do not raise nondelegation concerns. Reply Brief 5 (citation omitted). Because "[o]urs is a court of final review and not first view," *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012) (internal quotation marks omitted), those issues—to the extent they are properly before the Court of Appeals—should be addressed in the first instance on remand.

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

It is so ordered.

JUSTICE ALITO, concurring.

I entirely agree with the Court that Amtrak is "a federal actor or instrumentality," as far as the Constitution is concerned. *Ante*, at 55. "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Ante*, at 53. The Government even "specif[ies] many of its day-to-day operations" and "for all practical purposes, set[s] and supervise[s] its annual budget." *Ante*, at 55. The District of Columbia Circuit understandably heeded 49 U. S. C. § 24301(a)(3), which proclaims that Amtrak "is *not* a department, agency, or instrumentality of the United States Government," but this statutory label cannot control for constitutional purposes. (Emphasis added.) I therefore join the Court's opinion in full. I write separately to discuss what follows from our judgment.

I

This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a

vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995).

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

II

I begin with something that may seem mundane on its face but that has a significant relationship to the principle of accountability. Under the Constitution, all officers of the United States must take an oath or affirmation to support the Constitution and must receive a commission. See Art. VI, cl. 3 ("[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution"); Art. II, § 3, cl. 6 (The President "shall Commission all the Officers of the United States"). There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States. See 14 Op. Atty. Gen. 406, 408 (1874) ("[A] Representative . . . does not become a member of the House until he takes the oath of office"); 15 Op. Atty. Gen. 280, 281 (1877) (similar).* And this Court certainly has never treated a commission from the President as a mere wall ornament. See, *e. g.*, *Marbury* v. *Madison*, 1

*It is noteworthy that the first statute enacted by Congress was "An Act to regulate the Time and Manner of administering certain Oaths." Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23.

Cranch 137, 156 (1803); see also *id.*, at 179 (noting the importance of an oath).

Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.

Here, respondent tells the Court that "Amtrak's board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority." Brief for Respondent 47. The Government says not a word in response. Perhaps there is an answer. The rule, however, is clear. Because Amtrak is the Government, *ante*, at 55, those who run it need to satisfy basic constitutional requirements.

III

I turn next to the Passenger Rail Investment and Improvement Act of 2008's (PRIIA) arbitration provision. 122 Stat. 4907. Section 207(a) of the PRIIA provides that "the Federal Railroad Administration [(FRA)] and Amtrak shall jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." *Id.*, at 4916. In addition, § 207(c) commands that "[t]o the extent practicable, Amtrak and its host rail carriers shall incorporate [those] metrics and standards . . . into their access and service agreements." Under § 213(a) of the PRIIA, moreover, "the metrics and standards also may play a role in prompting investigations by the [Surface Transportation Board (STB)] and in subsequent enforcement actions." *Ante*, at 48.

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA "shall jointly" create new standards, cf., *e. g.*, 12 U. S. C. § 1831m(g)(4)(B) ("The appro-

priate Federal banking agencies shall jointly issue rules of practice to implement this paragraph"), and that Amtrak and *private rail carriers* "shall incorporate" those standards into their agreements whenever "practicable," cf., *e. g.*, *BP America Production Co.* v. *Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to "'audit and reconcile, to the extent practicable, all current and past lease accounts'" as creating "duties" for the Secretary of the Interior (quoting 30 U. S. C. § 1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

"As is often the case in administrative law," moreover, "the metrics and standards lend definite regulatory force to an otherwise broad statutory mandate." 721 F. 3d 666, 672 (CADC 2013). Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, see Brief for Petitioners 31–32 (citing 49 U. S. C. §§ 24308(c), (f)), the metrics and standards inherently have a "coercive effect," *Bennett* v. *Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is "perhaps some incentivizing effect associated with the metrics and standards." Brief for Petitioners 30. Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. See *Bennett*, *supra*, at 169–171. That is regulatory power.

The language from § 207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an "agency." 49 U. S. C. § 24301(a)(3). But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did.

The oddity continues, however. Section 207(d) of the PRIIA also provides that if the FRA and Amtrak cannot

agree about what the regulatory standards should say, then "any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration." 122 Stat. 4917. The statute says nothing more about this "binding arbitration," including who the arbitrator should be.

Looking to Congress' use of the word "arbitrator," respondent argues that because the arbitrator can be a private person, this provision by itself violates the private nondelegation doctrine. The United States, for its part, urges the Court to read the term "arbitrator" to mean "public arbitrator" in the interests of constitutional avoidance.

No one disputes, however, that the arbitration provision is fair game for challenge, even though no arbitration occurred. The obvious purpose of the arbitration provision was to force Amtrak and the FRA to compromise, or else a third party would make the decision for them. The D. C. Circuit is correct that when Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised. See 721 F. 3d, at 674. "[S]tack[ing] the deck in favor of compromise" was the whole point. *Ibid.* Unsurprisingly, this Court has upheld standing to bring a separation-of-powers challenge in comparable circumstances. See *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 264–265 (1991) ("[T]his 'personal injury' to respondents is 'fairly traceable' to the Board of Review's veto power *because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors*" (emphasis added)); see also *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 512, n. 12 (2010) ("We cannot assume . . . that the Chairman would have made the same appointments acting alone").

As to the merits of this arbitration provision, I agree with the parties: If the arbitrator can be a private person, this

law is unconstitutional. Even the United States accepts that Congress "cannot delegate regulatory authority to a private entity." 721 F. 3d, at 670. Indeed, Congress, vested with enumerated "legislative Powers," Art. I, § 1, cannot delegate its "exclusively legislative" authority at all. *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825) (Marshall, C. J.). The Court has invalidated statutes for that very reason. See *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); see also *Mistretta* v. *United States*, 488 U. S. 361, 373, n. 7 (1989) (citing, *inter alia*, *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 646 (1980)).

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. See *INS* v. *Chadha*, 462 U. S. 919, 959 (1983). It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, see, *e. g.*, Manning, Lawmaking Made Easy, 10 Green Bag 2d 202 (2007) ("[B]icameralism and presentment make lawmaking difficult *by design*" (citing, *inter alia*, The Federalist No. 62, p. 378 (J. Madison), and No. 63, at 443–444 (A. Hamilton))), not something to be lamented and evaded.

Of course, this Court has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 474–475 (2001) (quoting *Mistretta*, *supra*, at 416 (SCALIA, J., dissenting)). But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution. Rather, the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking.

See, *e. g.*, *Arlington* v. *FCC*, 569 U. S. 290, 304–305, n. 4 (2013) (explaining that agency rulemakings "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, § 1, cl. 1)). Even so, "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." 569 U. S., at 315 (ROBERTS, C. J., dissenting).

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, § 1. Nor are they vested with the "executive Power," Art. II, § 1, cl. 1, which belongs to the President. Indeed, it raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating "binding" tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term "arbitrator" refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. See 721 F. 3d, at 674 ("[T]hat the recipients of illicitly delegated authority opted not to make use of it is no antidote. It is *Congress's* decision to delegate that is unconstitutional" (citing *Whitman*, *supra*, at 473)).

As I read the Government's briefing, it does not dispute any of this (other than my characterization of the PRIIA as

regulatory, which it surely is). Rather than trying to defend a private arbitrator, the Government argues that the Court, for reasons of constitutional avoidance, should read the word "arbitrator" to mean "public arbitrator." The Government's argument, however, lurches into a new problem: Constitutional avoidance works only if the statute is susceptible to an alternative reading and that such an alternative reading would itself be constitutional.

Here, the Government's argument that the word "arbitrator" does not mean "private arbitrator" is in some tension with the ordinary meaning of the word. Although Government arbitrators are not unheard of, we usually think of arbitration as a form of "private dispute resolution." See, *e. g.*, *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

Likewise, the appointment of a public arbitrator here would raise serious questions under the Appointments Clause. Unless an "inferior Office[r]" is at issue, Article II of the Constitution demands that the President appoint all "Officers of the United States" with the Senate's advice and consent. Art. II, § 2, cl. 2. This provision ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people. See *Free Enterprise Fund*, 561 U. S., at 497–498 (citing The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)). The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*), and further that an officer who acts without supervision must be a principal officer, see *Edmond* v. *United States*, 520 U. S. 651, 663 (1997) ("[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"). While some officers may be principal even if they have a supervisor, it is common ground that an

officer without a supervisor must be principal. See *id.*, at 667 (Souter, J., concurring in part and concurring in judgment).

Here, even under the Government's public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is "binding arbitration." Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that "shall" become part of a private railroad's contracts with Amtrak whenever "practicable." As to that "binding" decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it. See 75 Fed. Reg. 26839 (2010) (placing the metrics and standards in the Federal Register); *Edmond*, *supra*, at 665.

IV

Finally, the Board of Amtrak, and, in particular, Amtrak's president, also poses difficult constitutional problems. As the Court observes, "Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. These eight Board members, in turn, select Amtrak's president." *Ante*, at 51 (citation omitted). In other words, unlike everyone else on the Board, Amtrak's president has not been appointed by the President and confirmed by the Senate.

As explained above, accountability demands that principal officers be appointed by the President. See Art. II, § 2, cl. 2. The President, after all, must have "the general administrative control of those executing the laws," *Myers* v. *United States*, 272 U. S. 52, 164 (1926), and this principle applies with special force to those who can "exercis[e] significant authority" without direct supervision, *Buckley*, *supra*, at 126; see also *Edmond*, *supra*, at 663. Unsurprisingly then, the United States defends the non-Presidential appointment of

Amtrak's president on the ground that the Amtrak president is merely an inferior officer. Given Article II, for the Government to argue anything else would be surrender.

This argument, however, is problematic. Granted, a multimember body may head an agency. See *Free Enterprise Fund*, *supra*, at 512–513. But those who head agencies must be principal officers. See *Edmond*, *supra*, at 663. It would seem to follow that because agency heads must be principal officers, every member of a multimember body heading an agency must also be a principal officer. After all, every member of a multimember body could cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer.

The Government's response is tucked away in a footnote. It contends that because Amtrak's president serves at the pleasure of the other Board members, he is only an inferior officer. See Reply Brief for Petitioners 14, n. 6. But the Government does not argue that the president of Amtrak cannot cast tie-breaking votes. Assuming he can vote when the Board of Directors is divided, it makes no sense to think that the side with which the president *agrees* will demand his removal.

In any event, even assuming that Amtrak's president could be an inferior officer, there would still be another problem: Amtrak's Board may lack constitutional authority to appoint inferior officers. The Appointments Clause provides an exception from the ordinary rule of Presidential appointment for "inferior Officers," but that exception has accountability limits of its own, namely, that Congress may only vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Although a multimember body like Amtrak's Board *can* head a department, here it is not at all clear that Amtrak *is* a department.

A "Department" may not be "subordinate to or contained within any other such component" of the Executive Branch. *Free Enterprise Fund*, 561 U. S., at 511. As explained above, however, in jointly creating metrics and standards, Amtrak may have to give way to an arbitrator appointed by the STB. Does that mean that Amtrak is "subordinate to" the STB? See also 49 U. S. C. § 24308 (explaining the STB's role in disputes between Amtrak and rail carriers). At the same time, the Secretary of Transportation sits on Amtrak's Board and controls some aspects of Amtrak's relationship with rail carriers. See, *e. g.*, §§ 24302(a)(1), 24309(d)(2). The Secretary of Transportation also has authority to exempt Amtrak from certain statutory requirements. See § 24305(f)(4). Does that mean that Amtrak is "subordinate to or contained within" the Department of Transportation? (The STB, of course, also may be "subordinate to or contained within" the Department of Transportation. If so, this may further suggest that Amtrak is not a department, and also further undermine the STB's ability to appoint an arbitrator.) All of these are difficult questions.

* * *

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded.

JUSTICE THOMAS, concurring in the judgment.

We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand in hand with an executive agency to craft rules that

have the force and effect of law, our primary question—indeed, the primary question the parties ask us to answer—is whether that market participant is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom.

I agree with the Court that the proper disposition in this case is to vacate the decision below and to remand for further consideration of respondent's constitutional challenge to the metrics and standards. I cannot join the majority's analysis, however, because it fails to fully correct the errors that require us to vacate the Court of Appeals' decision. I write separately to describe the framework that I believe should guide our resolution of delegation challenges and to highlight serious constitutional defects in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) that are properly presented for the lower courts' review on remand.

I

The Constitution does not vest the Federal Government with an undifferentiated "governmental power." Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. Those Clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," Art. I, § 1, "[t]he executive Power shall be vested in a President of the United States," Art. II, § 1, cl. 1, and "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1.

These grants are exclusive. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001) (legislative power); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010) (executive power); *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011) (ju-

dicial power). When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.

In addition to allocating power among the different branches, the Constitution identifies certain restrictions on the *manner* in which those powers are to be exercised. Article I requires, among other things, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . ." Art. I, § 7, cl. 2. And although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates. *Myers* v. *United States*, 272 U. S. 52, 117 (1926), overruled in part on unrelated grounds in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935).

When the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly "delegates" legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power. See *Whitman*, *supra*, at 472. It also improperly "delegates" legislative power to itself when it authorizes itself to act without bicameralism and presentment. See, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919 (1983). And Congress improperly "delegates"—or, more precisely, authorizes the exercise of, see *Perez* v. *Mortgage Bankers Assn.*, *post*, at 131, 132 (THOMAS, J., concurring in judgment) (noting that Congress may not "delegate" power it does not possess)—executive power when it authorizes individuals or groups outside of the President's control to perform a function that requires the exercise of that power. See, *e. g.*, *Free Enterprise Fund*, *supra*.

In order to be able to adhere to the provisions of the Constitution that allocate and constrain the exercise of these powers, we must first understand their boundaries. Here, I do not purport to offer a comprehensive description of these powers. My purpose is to identify principles relevant to today's dispute, with an eye to offering guidance to the lower courts on remand. At issue in this case is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution.

II

The allocation of powers in the Constitution is absolute, *Perez*, *post*, at 115–119 (opinion of THOMAS, J.), but it does not follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. Resolution of claims against the Government is the classic example. At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. See *ibid.* Or Congress may resolve the claims itself, legislating by special Act. See *ibid.* The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it. For example, although this Court has long recognized that it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself, there are certain core functions that require the exercise of legislative power and that only Congress can perform. *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825) (distinguishing between those functions

Congress must perform itself and those it may leave to another branch).

The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

A

The idea that the Executive may not formulate generally applicable rules of private conduct emerged even before the theory of the separation of powers on which our Constitution was founded.

The idea has ancient roots in the concept of the "rule of law," which has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone. M. Vile, Constitutionalism and the Separation of Powers 25 (2d ed. 1998); 2 Bracton, De Legibus et Consuetudinibus Angliae 33 (G. Woodbine ed., S. Thorne transl. 1968). The principle that a ruler must govern according to law "presupposes at least two distinct operations, the making of law, and putting it into effect." Vile, *supra*, at 24. Although it was originally thought "that the rule of law was satisfied if a king made good laws and always acted according to them," it became increasingly apparent over time that the rule of law demanded that the operations of "making" law and of "putting it into effect" be kept separate. W. Gwyn, The Meaning of the Separation of Powers 35 (1965); see also *id.*, at 8–9. But when the King's power was at its height, it was still accepted that his "principal duty . . . [was] to govern *his people* according to *law*." 1 W. Blackstone, Commentaries on the Laws of England 226 (1765) (Commentaries) (emphasis added).

An early expression of this idea in England is seen in the "constitutional" law concerning crown proclamations. Even before a more formal separation of powers came about during the English Civil War, it was generally thought that the King could not use his proclamation power to alter the rights and duties of his subjects. P. Hamburger, Is Administrative Law Unlawful? 33–34 (2014) (Hamburger). This power could be exercised by the King only in conjunction with Parliament and was exercised through statutes. *Ibid.*; see also M. Hale, The Prerogatives of the King 141, 171–172 (D. Yale ed. 1976). The King might participate in "the legislative power" by giving his "assent" to laws created by the "concurrence" of "lords and commons assembled in parliament," but he could not of his own accord "make a law or impose a charge." *Id.*, at 141.

In 1539, King Henry VIII secured what might be called a "delegation" of the legislative power by prevailing on Parliament to pass the Act of Proclamations. Hamburger 35–36. That Act declared that the King's proclamations would have the force and effect of an Act of Parliament. *Id.*, at 37. But the Act did not permit the King to deprive his subjects of their property, privileges and franchises, or their lives, except as provided by statutory or common law. *Id.*, at 37–38. Nor did the Act permit him to invalidate "'any acts, [or] common laws standing at [that] time in strength and force.'" *Id.*, at 38 (quoting An Act that Proclamations Made by the King Shall be Obeyed, 31 Hen. VIII, ch. 8, in Eng. Stat. at Large 263 (1539)).

Even this limited delegation of lawmaking power to the King was repudiated by Parliament less than a decade later. Hamburger 38. Reflecting on this period in history, David Hume would observe that, when Parliament "gave to the king's proclamation the same force as to a statute enacted by parliament," it "made by one act a total subversion of the English constitution." 3 D. Hume, The History of England from the Invasion of Julius Caesar to the Revolution in 1688,

p. 266 (1983). By the 17th century, when English scholars and jurists began to articulate a more formal theory of the separation of powers, delegations of the type afforded to King Henry VIII were all but unheard of. Hale, *supra*, at 172–173.

This is not to say that the Crown did not endeavor to exercise the power to make rules governing private conduct. King James I made a famous attempt, see *Perez*, *post*, at 124–125 (opinion of THOMAS, J.), prompting the influential jurist Chief Justice Edward Coke to write that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611). Coke associated this principle with Chapter 39 of the Magna Carta,[1] which he understood to guarantee that no subject would be deprived of a private right—that is, a right of life, liberty, or property—except in accordance with "the law of the land," which consisted only of statutory and common law. Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1688 (2012). When the King attempted to fashion rules of private conduct unilaterally, as he did in the *Case of Proclamations*, the resulting enforcement action could not be said to accord with "the law of the land."

John Locke echoed this view. "[F]reedom of men under government," he wrote, "is to have a standing rule to live by, common to every one of that society, and made by the *legislative power* erected in it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another

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[1] Chapter 39 of the 1215 Magna Carta declared that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A. Howard, Magna Carta: Text and Commentary 43 (1964).

man." J. Locke, Second Treatise of Civil Government § 22, p. 13 (J. Gough ed. 1947) (Locke) (emphasis added). It followed that this freedom required that the power to make the standing rules and the power to enforce them not lie in the same hands. See *id.*, § 143, at 72. He further concluded that "[t]he legislative c[ould not] transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it [could not] pass it over to others." *Id.*, § 141, at 71.[2]

William Blackstone, in his Commentaries, likewise maintained that the English Constitution required that no subject be deprived of core private rights except in accordance with the law of the land. See 1 Commentaries 129, 134, 137–138. He defined a "law" as a generally applicable "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.*, at 44 (internal quotation marks omitted). And he defined a tyrannical government as one in which "the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men," for "wherever these two powers are united together, there can be no public liberty." *Id.*, at 142. Thus, although Blackstone viewed Parliament as sovereign and capable of changing the constitution, *id.*, at 156, he thought a delegation of lawmaking

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[2] Locke and his contemporaries also believed that requiring laws to be made in Parliament secured the common interest. W. Gwyn, The Meaning of the Separation of Powers 75 (1965). Parliament would assemble to do the business of legislation, but then its members would disperse to live as private citizens under the laws they had created, providing them an incentive to legislate in the common interest. During Parliament's absence, the King might meet certain emergencies through the exercise of prerogative power, but in order to make new, permanent laws, he would be required to call Parliament into session. Locke §§ 143–144, at 72–73. If the King were not dependent on Parliament to legislate, then this beneficial cycle of periodic lawmaking interspersed with representatives' living as private citizens would be broken.

power to be "disgrace[ful]," 4 *id.*, at 424; see also Hamburger 39, n. 17.

B

These principles about the relationship between private rights and governmental power profoundly influenced the men who crafted, debated, and ratified the Constitution. The document itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct.

The Framers' dedication to the separation of powers has been well documented, if only half-heartedly honored. See, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 380–381 (1989). Most famously, in The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." *Ibid.*; see also *Perez*, *post*, at 117–119 (opinion of THOMAS, J.).

This devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it. The Framers were concerned not just with the starting allocation, but with the "gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (J. Madison). It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis. *Ibid.*; see also *Perez*, *post*, at 117–119 (opinion of THOMAS, J.).

In this sense, the founding generation did not subscribe to Blackstone's view of parliamentary supremacy. Parliament's violations of the law of the land had been a significant

complaint of the American Revolution, Chapman & McConnell, *supra*, at 1699–1703. And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law. *Perez*, *post*, at 117 (opinion of THOMAS, J.). James Wilson explained the Constitution's break with the legislative supremacy model at the Pennsylvania ratification convention:

> "Sir William Blackstone will tell you, that in Britain . . . the Parliament may alter the form of the government; and that its power is absolute, without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. . . .
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> "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states." 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1863).

See also 4 *id.*, at 63 (A. Maclaine) (contrasting Congress, which "is to be guided by the Constitution" and "cannot travel beyond its bounds," with the Parliament described in Blackstone's Commentaries). As an illustration of Blackstone's contrasting model of sovereignty, Wilson cited the Act of Proclamations, by which Parliament had delegated legislative power to King Henry VIII. 2 *id.*, at 432 (J. Wilson); see *supra*, at 72.

At the center of the Framers' dedication to the separation of powers was individual liberty. The Federalist No. 47, at 302 (J. Madison) (quoting Baron de Montesquieu for the proposition that "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'"). This was not liberty in the sense of freedom from all constraint, but liberty as described by Locke: "to have a standing rule to live by . . . made by the *legislative power*," and to be free from "the inconstant, uncertain,

unknown, arbitrary will of another man." Locke § 22, at 13. At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free. See D. Currie, The Constitution in the Supreme Court: The First One Hundred Years, 1789–1888, p. 272, and n. 268 (1985).[3]

This history confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make "law" in the Blackstonian sense of generally applicable rules of private conduct.

III

Even with these sound historical principles in mind, classifying governmental power is an elusive venture. *Wayman*, 10 Wheat., at 43; The Federalist No. 37, at 228 (J. Madison). But it is no less important for its difficulty. The "check" the Judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review. *Perez*, *post*, at 124 (opinion of THOMAS, J.). We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law. *Perez*, *post*, at 124–126.

We have been willing to check the improper allocation of executive power, see, *e. g.*, *Free Enterprise Fund*, 561 U. S. 477; *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252 (1991), although probably not as often as we should, see, *e. g.*,

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[3] I do not mean to suggest here that the Framers believed an Act of the Legislature was *sufficient* to deprive a person of private rights; only that it was necessary. See generally Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1715, 1721–1726 (2012) (discussing historical evidence that the Framers believed the Due Process Clause limited Congress' power to provide by law for the deprivation of private rights without judicial process).

Morrison v. *Olson*, 487 U. S. 654 (1988). Our record with regard to legislative power has been far worse.

We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, *Whitman*, 531 U. S., at 472, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out "an intelligible principle" to guide the rulemaker's discretion. *Ibid.* Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.

A

The Court first announced the intelligible-principle test in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928). That case involved a challenge to a tariff assessed on a shipment of barium dioxide. *Id.*, at 400. The rate of the tariff had been set by proclamation of the President, pursuant to the so-called flexible tariff provision of the Tariff Act of 1922. *Ibid.* That provision authorized the President to increase or decrease a duty set by the statute if he determined that the duty did not "'equalize . . . differences in costs of production [of the item to which the duty applied] in the United States and the principal competing country.'" *Id.*, at 401 (quoting 19 U. S. C. § 154 (1925 ed.)). The importer of the barium dioxide challenged the provision as an unconstitutional delegation of legislative power to the Presi-

dent. 276 U. S., at 404. Agreeing that Congress could not delegate legislative power, the Court nevertheless upheld the Act as constitutional, setting forth the now-famous formulation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409.

Though worded broadly, the test rested on a narrow foundation. At the time *J. W. Hampton* was decided, most "delegations" by Congress to the Executive, including the delegation at issue in that case, had taken the form of conditional legislation. See *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 683–689 (1892). That form of legislation "makes the suspension of certain provisions and the going into operation of other provisions of an act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation." *Id.*, at 683.

The practice of conditional legislation dates back at least to the Third Congress in 1794. *Id.*, at 683–689 (collecting statutes). It first came before the Court in *Cargo of Brig Aurora* v. *United States*, 7 Cranch 382 (1813). There, the Court considered whether a Presidential proclamation could, by declaring that France had ceased to violate the neutral commerce of the United States, reinstate a legislative Act embargoing British goods. *Id.*, at 384, 388. The Court concluded that the proclamation was effective, seeing "no sufficient reaso[n] why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct." *Id.*, at 388.

At least as defined by the Court in *Field*, the practice of conditional legislation does not seem to call on the President to exercise a core function that demands an exercise of legislative power. Congress creates the rule of private conduct, and the President makes the *factual* determination that causes that rule to go into effect. That type of factual de-

termination seems similar to the type of factual determination on which an enforcement action is conditioned: Neither involves an exercise of policy discretion, and both are subject to review by a court. See *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386 (1907) (explaining that, when the Secretary of War determined whether bridges unreasonably obstruct navigation, he "could not be said to exercise strictly legislative . . . power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under general rules prescribed by Congress, are entitled to pensions").

As it happens, however, conditional statutes sometimes did call for the President to make at least an implicit policy determination. For example, a 1794 provision entitled "An Act to authorize the President of the United States to lay, regulate and revoke Embargoes," ch. 41, 1 Stat. 372, called on the President to impose an embargo on shipping "whenever, in his opinion, the public safety shall so require . . . ." *Ibid.* The statutes at issue in *Field* and *J. W. Hampton* could similarly be viewed as calling for built-in policy judgments. See Schoenbrod, The Delegation Doctrine: Could The Court Give It Substance? 83 Mich. L. Rev. 1223, 1263–1264 (1985).[4]

[4] The statute at issue in *Field* authorized the President to reimpose statutory duties on exports from a particular country if he found that the country had imposed "reciprocally unequal and unreasonable" duties on U. S. exports. 143 U. S., at 692. At least insofar as the terms "unequal" and "unreasonable" did not have settled common-law definitions that could be applied mechanically to the facts, they could be said to call for the President to exercise policy judgment about which duties qualified. See *id.*, at 699 (Lamar, J., dissenting but concurring in judgment) (The statute "does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deputes to the President the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation . . . to be 'reciprocally unequal and unreasonable . . . ' "). Similarly, the statute at issue in *J. W. Hampton* called on the President, with the aid of a commission, to determine the " 'costs of production' " for various goods—a calculation that

Such delegations of policy determinations pose a constitutional problem because they effectively permit the President to define some or all of the content of that rule of conduct. He may do so expressly—by setting out regulations specifying what conduct jeopardizes "the public safety," for example—or implicitly—by drawing distinctions on an ad hoc basis. In either event, he does so based on a policy judgment that is not reviewable by the courts, at least to the extent that the judgment falls within the range of discretion permitted him by the law. See *id.*, at 1255–1260.

The existence of these statutes should not be taken to suggest that the Constitution, as originally understood, would permit such delegations. The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power. See *id.*, at 1260–1263 (distinguishing the tariff statute at issue in *Field* and *J. W. Hampton* on these grounds).[5] Moreover, the

could entail an exercise of policy judgment about the appropriate wage and profit rates in the relevant industries. 276 U. S., at 401.

[5] The definition of "law" in England at the time of the ratification did not necessarily include rules—even rules of private conduct—dealing with external relations. For example, while "every Englishman [could] claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law," the King "by his royal prerogative, [could] issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence." 1 Commentaries 133. It is thus likely the Constitution grants the President a greater measure of discretion in the realm of foreign relations, and the conditional tariff Acts must be understood accordingly. See *Clinton* v. *City of New York*, 524 U. S. 417, 445 (1998) (distinguishing *Field* on the ground that the statute at issue in *Field* regulated foreign trade); see also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936) ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). This Court has at least once expressly relied on this rationale to sanction a delegation of power to make rules

statute was never subjected to constitutional scrutiny. And when a statute of its kind—that is, a tariff statute calling for an exercise of policy judgment—finally came before this Court for consideration in *Field*, the Court appeared to understand the statute as calling for no more than a *factual* determination. 143 U. S., at 693. The Court thus did not in that case endorse the principle that the Executive may fashion generally applicable rules of private conduct and appears not to have done so until the 20th century.

More to the point, *J. W. Hampton* can be read to adhere to the "factual determination" rationale from *Field*. The Court concluded its delegation analysis in *J. W. Hampton not* with the "intelligible principle" language, but by citing to *Field* for the proposition that the "Act did not in any real sense invest the President with the power of legislation, *because nothing involving the expediency or just operation* of such legislation was left to the determination of the President." 276 U. S., at 410 (emphasis added); *Field*, 143 U. S., at 692 (explaining that an Act did not "in any real sense, invest the President with the power of legislation"). Congress had created a "named contingency," and the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *J. W. Hampton*, *supra*, at 410–411.[6]

The analysis in *Field* and *J. W. Hampton* may have been premised on an incorrect assessment of the statutes before

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governing private conduct in the area of foreign trade. See *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904).

[6] Contemporary perceptions of the statute were less sanguine. One editorial deemed it "the most dangerous advance in bureaucratic government ever attempted in America." D. Schoenbrod, Power Without Responsibility 36 (1993) (quoting Letter from J. Cotton (Feb. 7, 1929), in With Our Readers, 13 Constitutional Review 98, 101 (1929)). President-elect Hoover stirred the public with promises of a repeal: "There is only one commission to which delegation of [the] authority [to set tariffs] can be made. That is the great commission of [the people's] own choosing, the Congress of the United States and the President." Public Papers of the Presidents, Herbert Hoover, 1929, p. 565 (1974); see also Schoenbrod, *supra*, at 36.

the Court, see n. 4, *supra*, but neither purported to define executive power as including the discretion to make generally applicable rules governing private conduct. To the extent that our modern jurisprudence treats them as sanctioning the "delegation" of such power, it misunderstands their historical foundations and expands the Court's holdings.

B

It is nevertheless true that, at the time *J. W. Hampton* was decided, there was a growing trend of cases upholding statutes pursuant to which the Executive exercised the power of "making . . . subordinate rules within prescribed limits." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421 (1935); see also *id.*, at 429 (collecting cases). These cases involved executive power to make "binding rules of conduct," and they were found valid "as subordinate rules . . . [when] within the framework of the policy which the legislature ha[d] sufficiently defined." *Id.*, at 428–429. To the extent that these cases endorsed authorizing the Executive to craft generally applicable rules of private conduct, they departed from the precedents on which they purported to rely.

The key decision to which these cases purport to trace their origin is *Wayman*, 10 Wheat. 1, but that decision does not stand for the proposition those cases suggest. Although it upheld a statute authorizing courts to set rules governing the execution of their own judgments, *id.*, at 50, its reasoning strongly suggests that rules of private conduct were not the proper subject of rulemaking by the courts. Writing for the Court, Chief Justice Marshall surveyed a number of choices that could be left to rulemaking by the courts, explaining that they concerned only "the regulation of the conduct of the officer of the Court in giving effect to its judgments." *Id.*, at 45. When it came to specifying "the mode of obeying the mandate of a writ," however, he lamented that "so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which

the legislature must expressly and directly provide." *Id.*, at 46.

This important passage reflects two premises that Chief Justice Marshall took for granted, but which are disregarded in later decisions relying on this precedent: First, reflected in his discussion of "blending" permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules is the premise that the rules "for which the legislature must expressly and directly provide" are those regulating private conduct rather than those regulating the conduct of court officers.

Thus, when Chief Justice Marshall spoke about the "difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts," *ibid.*, he did not refer to the difficulty in discerning whether the Legislature's policy guidance is "sufficiently defined," see *Panama Refining*, *supra*, at 429, but instead the difficulty in discerning which rules affected substantive private rights and duties and which did not. We continue to wrestle with this same distinction today in our decisions distinguishing between substantive and procedural rules both in diversity cases and under the Rules Enabling Act. See, *e. g.*, *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 406–407 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U. S. C. § 2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' § 2072(b)").[7]

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[7] Another early precedent on which the errant "subordinate rulemaking" line of cases relies involves rules governing mining claims on public land. *Jackson* v. *Roby*, 109 U. S. 440, 441 (1883); see also *United States* v. *Grimaud*, 220 U. S. 506 (1911) (sustaining an Act authorizing the Secretary of Agriculture to make rules and regulations governing the use

C

Today, the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power. To the extent that the "intelligible principle" test was ever an adequate means of enforcing that distinction, it has been decoupled from the historical understanding of the legislative and executive powers and thus does not keep executive "lawmaking" within the bounds of inherent executive discretion. See *Whitman*, 531 U. S., at 487 (THOMAS, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power"). Perhaps we were led astray by the optical illusion caused by different branches carrying out the same functions, believing that the separation of powers would be substantially honored so long as the encroachment were not too great. See, *e. g.*, *Loving* v. *United States*, 517 U. S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between two political branches of the Government, each contributing to a lawful objective through its own processes"). Or perhaps we deliberately departed from the separation, bowing to the exigencies of modern Government that were so often cited in cases upholding challenged delegations of rulemaking authority.[8] See, *e. g.*, *Mistretta*, 488 U. S., at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and

and occupancy of public forest reservations). Although perhaps questionable on its own terms, *Jackson* is distinguishable because it did not involve the Government's reaching out to regulate private conduct, but instead involved the Government's setting rules by which individuals might enter onto public land to avail themselves of resources belonging to the Government.

[8] Much of the upheaval in our delegation jurisprudence occurred during the Progressive Era, a time marked by an increased faith in the technical expertise of agencies and a commensurate cynicism about principles of popular sovereignty. See *Perez* v. *Mortgage Bankers Assn.*, *post*, at 129–130, n. 6 (THOMAS, J., concurring in judgment).

more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

For whatever reason, the intelligible-principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law. And because the Court has " 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,' " *Whitman*, *supra*, at 474–475 (majority opinion) (quoting *Mistretta*, *supra*, at 416 (SCALIA, J., dissenting)), the level of specificity it has required has been very minimal indeed, see 531 U. S., at 474 (collecting cases upholding delegations to regulate in the "public interest"). Under the guise of the intelligible-principle test, the Court has allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is "unfair" or "unnecessary." See, *e. g.*, *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946). It has permitted the Executive to make tradeoffs between competing policy goals. See, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414, 420, 423–426 (1944) (approving authorization for agency to set prices of commodities at levels that "will effectuate the [sometimes conflicting] purposes of th[e] Act"); see also *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 686–687 (1980) (Rehnquist, J., concurring in judgment) ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge"). It has even permitted the Executive to decide which policy goals it wants to pursue. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218–223 (2009) (concluding that Congress gave the Environmental Protection Agency

(EPA) discretion to decide whether it should consider costs in making certain rules). And it has given sanction to the Executive to craft significant rules of private conduct. See, *e. g.*, *Whitman*, 531 U. S., at 472–476 (approving delegation to EPA to set national standards for air quality); see also *id.*, at 488–489 (Stevens, J., concurring in part and concurring in judgment) (arguing that the Clean Air Act effects a delegation of legislative power because it authorizes EPA to make prospective, generally applicable rules of conduct).

Our reluctance to second-guess Congress on the *degree* of policy judgment is understandable; our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct. To understand the "intelligible principle" test as permitting Congress to delegate policy judgment in this context is to divorce that test from its history. It may never be possible perfectly to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not enacted by Congress pursuant to Article I.

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable. In anticipating that result and accepting it, I am in good company. John Locke, for example, acknowledged that a legislative body "is usually too numerous, and so too slow for the dispatch requisite to execution." Locke § 160, at 80. But he saw that as a benefit for legislation, for he believed that the creation of rules of private conduct should be an irregular and infrequent occurrence. See *id.*, § 143, at 72. The Framers, it appears, were inclined to agree. As Alexander Hamilton explained in another context, "It may perhaps be said that the power

of preventing bad laws includes that of preventing good ones . . . . But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments." The Federalist No. 73, at 443–444. I am comfortable joining his conclusion that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." *Id.*, at 444.

IV

Although the majority corrects an undoubted error in the framing of the delegation dispute below, it does so without placing that error in the context of the constitutional provisions that govern respondent's challenge to § 207 of the PRIIA.

A

Until the case arrived in this Court, the parties proceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control.[9] The Court of Appeals agreed. 721 F. 3d 666, 674–677 (CADC 2013). Because it also concluded that Congress delegated regulatory power to Amtrak, *id.*, at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677.

Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically

[9] See Brief for Appellees in No. 12–5204 (DC), pp. 23–29 (defending § 207 under cases upholding statutes "assign[ing] an important role to a private party"); *id.*, at 29 ("Amtrak . . . is not a private entity comparable to the [private parties in a relevant precedent]. Although the government does not control Amtrak's day-to-day operations, the government exercises significant structural control").

from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit," *ante*, at 53 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegatee of that power than is a purely private one. To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for "delegation" purposes.

B

The first step in the Court of Appeals' analysis on remand should be to classify the power that § 207 purports to authorize Amtrak to exercise. The second step should be to determine whether the Constitution's requirements for the exercise of that power have been satisfied.

1

Under the original understanding of the legislative and executive power, Amtrak's role in the creation of metrics and

standards requires an exercise of legislative power because it allows Amtrak to decide the applicability of standards that provide content to generally applicable rules of private conduct.

Specifically, the metrics and standards alter the railroads' common-carrier obligations under 49 U. S. C. § 11101. Host railroads may enter into contracts with Amtrak under §§ 10908 and 24308 to fulfill their common-carrier obligations. The metrics and standards shape the types of contracts that satisfy the common-carrier obligations because § 207 provides that "Amtrak and its host rail carriers *shall*" include the metrics and standards in their contracts "[t]o the extent practicable." PRIIA § 207(c), 49 U. S. C. § 24101 (note) (emphasis added). As JUSTICE ALITO explains, it matters little that the railroads may avoid incorporating the metrics and standards by arguing that incorporation is impracticable; the point is that they have a legal duty to try—a duty the substance of which is defined by the metrics and standards. See *ante*, at 58–59 (concurring opinion). And that duty is backed up by the Surface Transportation Board's coercive power to impose "reasonable terms" on host railroads when they fail to come to an agreement with Amtrak. § 24308(a)(2)(A)(ii). Presumably, when it is "practicable" to incorporate the metrics and standards, the Board is better positioned to deem such terms "reasonable" and to force them upon the railroads.

Although the Government's argument to the contrary will presumably change now that the Court has held that Amtrak is a governmental entity, it argued before this Court that Amtrak did not exercise meaningful power because other "governmental entities had sufficient control over the development and adoption of the metrics and standards." Brief for Petitioners 19–26. For support, the Government relied on two questionable precedents in which this Court held that Congress may grant private actors the power to determine whether a government regulation will go into effect: *Currin*

v. *Wallace*, 306 U. S. 1 (1939), and *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939). Those precedents reason that it does not require an exercise of legislative power to decide whether and when legally binding rules of private conduct will go into effect. *Currin*, *supra*, at 16–18; *Rock Royal*, *supra*, at 574–577. But as I have explained above, to the extent that this decision involves an exercise of policy discretion, it requires an exercise of legislative power. *Supra*, at 85–87. In any event, these precedents are directly contrary to our more recent holding that a discretionary "veto" necessarily involves an exercise of legislative power. See *INS* v. *Chadha*, 462 U. S., at 952–953; see also *id.*, at 987 (White, J., dissenting) (noting that the power Congress reserved to itself was virtually identical to the power it conferred on private parties in *Currin* and *Rock Royal*). As such, *Currin* and *Rock Royal* have been discredited and lack any force as precedents.

Section 207 therefore violates the Constitution. Article I, § 1, vests the legislative power in Congress, and Amtrak is not Congress. The procedures that § 207 sets forth for enacting the metrics and standards also do not comply with bicameralism and presentment. Art. I, § 7. For these reasons, the metrics and standards promulgated under this provision are invalid.

2

I recognize, of course, that the courts below will be bound to apply our "intelligible principle" test. I recognize, too, that that test means so little that the courts are likely to conclude that § 207 calls for nothing more than the exercise of executive power. Having made that determination, the Court of Appeals must then determine whether Amtrak is constitutionally eligible to exercise executive power.

As noted, Article II of the Constitution vests the executive power in a "President of the United States of America." Art. II, § 1. Amtrak, of course, is not the President of the United States, but this fact does not immediately disqualify

it from the exercise of executive power. Congress may authorize subordinates of the President to exercise such power, so long as they remain subject to Presidential control.

The critical question, then, is whether Amtrak is adequately subject to Presidential control. See *Myers*, 272 U. S., at 117. Our precedents treat appointment and removal powers as the primary devices of executive control, *Free Enterprise Fund*, 561 U. S., at 492, and that should be the starting point of the Court of Appeals' analysis. As JUSTICE ALITO's concurrence demonstrates, however, there are other constitutional requirements that the Court of Appeals should also scrutinize in deciding whether Amtrak is constitutionally eligible to exercise the power § 207 confers on it.

* * *

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Syllabus

PEREZ, SECRETARY OF LABOR, ET AL. *v.* MORTGAGE BANKERS ASSOCIATION ET AL.

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

No. 13–1041. Argued December 1, 2014—Decided March 9, 2015*

The Administrative Procedure Act (APA) establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U. S. C. § 551(5). The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, see §§ 553(b), (c), and have the "force and effect of law," *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303. "Interpretive rules," by contrast, are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99, do not require notice-and-comment rulemaking, and "do not have the force and effect of law," *ibid.*

In 1999 and 2001, the Department of Labor's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938. In 2004, the Department issued new regulations regarding the exemption. Respondent Mortgage Bankers Association (MBA) requested a new interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006 opinion letter and issued an Administrator's Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending, as relevant here, that the Administrator's Interpretation was procedurally invalid under the D. C. Circuit's decision in *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579. The *Paralyzed Veterans* doctrine holds that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The District Court granted summary

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*Together with No. 13–1052, *Nickols et al.* v. *Mortgage Bankers Association*, also on certiorari to the same court.

judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

Held: The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements. Pp. 100–107.

(a) The APA's categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit's reading of the APA conflates the differing purposes of §§ 2 and 4 of the Act. Section 2 requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, see 5 U. S. C. § 551(5), but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of § 4. And § 4 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule. Pp. 100–101.

(b) This straightforward reading of the APA harmonizes with longstanding principles of this Court's administrative law jurisprudence, which has consistently held that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513. The APA's rulemaking provisions are no exception: Section 4 establishes "the maximum procedural requirements" that courts may impose upon agencies engaged in rulemaking. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress' standards. Pp. 101–103.

(c) MBA's reasons for upholding the *Paralyzed Veterans* doctrine are unpersuasive. Pp. 103–107.

(1) MBA asserts that an agency interpretation of a regulation that significantly alters the agency's prior interpretation effectively amends the underlying regulation. That assertion conflicts with the ordinary meaning of the words "amend" and "interpret," and it is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. MBA's theory is particularly odd in light of the limitations of the *Paralyzed Veterans* doctrine, which applies only when an agency has previously adopted an interpretation of its regulation. MBA fails to explain why its argument regarding revised interpretations should not also extend to the agency's first interpretation. *Christensen* v. *Harris County*, 529 U. S. 576, and *Sha-*

lala v. *Guernsey Memorial Hospital*, 514 U. S. 87, distinguished. Pp. 103–105.

(2) MBA also contends that the *Paralyzed Veterans* doctrine reinforces the APA's goal of procedural fairness. But the APA already provides recourse to regulated entities from agency decisions that skirt notice-and-comment provisions by placing a variety of constraints on agency decisionmaking, *e. g.*, the arbitrary and capricious standard. In addition, Congress may include safe-harbor provisions in legislation to shelter regulated entities from liability when they rely on previous agency interpretations. See, *e. g.*, 29 U. S. C. §§ 259(a), (b)(1). Pp. 105–106.

(3) MBA has waived its argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. From the beginning, this suit has been litigated on the understanding that the Administrator's Interpretation is an interpretive rule. Neither the District Court nor the Court of Appeals addressed this argument below, and MBA did not raise it here in opposing certiorari. P. 107.

720 F. 3d 966, reversed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined except for Part III–B. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 107. SCALIA, J., *post*, p. 108, and THOMAS, J., *post*, p. 112, filed opinions concurring in the judgment.

Deputy Solicitor General Kneedler argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 13–1041 were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Anthony A. Yang*, *Douglas N. Letter*, *Anthony J. Steinmeyer*, and *M. Patricia Smith*. *Adam W. Hansen* filed briefs for petitioners in No. 13–1052. With him on the briefs were *Paul J. Lukas*, *Rachhana T. Srey*, and *Sundeep Hora*.

Allyson Ho argued the cause for respondent Mortgage Bankers Association in both cases. With her on the brief were *John C. Sullivan*, *Sam S. Shaulson*, and *Michael W. Steinberg*.†

†Briefs of *amici curiae* urging affirmance in both cases were filed for the American Hospital Association et al. by *Beth Heifetz*, *Catherine E. Livingston*, and *Frank Trinity*; for the Cato Institute et al. by *C. Boyden*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

When a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act). See 5 U. S. C. § 553(b)(A). The United States Court of Appeals for the District of Columbia Circuit has nevertheless held, in a line of cases beginning with *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (1997), that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted. The question in these cases is whether the rule announced in *Paralyzed Veterans* is consistent with the APA. We hold that it is not.

I

A

The APA establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." § 551(5). "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are

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Gray, Adam J. White, and *Ilya Shapiro*; by the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Chamber of Commerce of United States of America et al. by *Shay Dvoretzsky*, *Jeffrey Johnson*, *Richard Moskowitz*, and *Kate Comerford Todd*; for the National Federation of Independent Business et al. by *Evan A. Young*; for the National Mining Association by *Michael S. Giannotto* and *William M. Jay*; for Quicken Loans Inc. by *Robert J. Muchnick*, *William D. Sargent*, and *Jeffrey B. Morganroth*; for State and Local Government Associations by *James C. Ho*, *Ashley E. Johnson*, and *Lisa E. Soronen*; for the Thomas Jefferson Institute for Public Policy by *M. Miller Baker*; for the Utility Air Regulatory Group et al. by *F. William Brownell*, *William L. Wehrum*, and *Makram B. Jaber*; and for the Washington Legal Foundation et al. by *Richard A. Samp* and *Cory L. Andrews*.

designed to "implement, interpret, or prescribe law or policy." § 551(4).

Section 4 of the APA, 5 U. S. C. § 553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. § 553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." § 553(c). An agency must consider and respond to significant comments received during the period for public comment. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971); *Thompson* v. *Clark*, 741 F. 2d 401, 408 (CADC 1984). Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." § 553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302–303 (1979) (internal quotation marks omitted).

Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U. S. C. § 553(b)(A). The term "interpretative rule," or "interpretive rule,"[1] is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate. See generally Pierce, Distinguishing Legislative Rules From Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004). We need not, and do not, wade into that debate here. For our pur-

[1] The latter is the more common phrasing today, and the one we use throughout this opinion.

poses, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.*

B

These cases began as a dispute over efforts by the Department of Labor to determine whether mortgage-loan officers are covered by the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* The FLSA "establishe[s] a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek" for many employees. *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. 27, 31 (2014). Certain classes of employees, however, are exempt from these provisions. Among these exempt individuals are those "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . ." § 213(a)(1). The exemption for such employees is known as the "administrative" exemption.

The FLSA grants the Secretary of Labor authority to "defin[e]" and "delimi[t]" the categories of exempt administrative employees. *Ibid.* The Secretary's current regulations regarding the administrative exemption were promulgated in 2004 through a notice-and-comment rulemaking. As relevant here, the 2004 regulations differed from the previous regulations in that they contained a new section providing several examples of exempt administrative employees. See 29 CFR § 541.203. One of the examples is "[e]mployees in

the financial services industry," who, depending on the nature of their day-to-day work, "generally meet the duties requirements for the administrative exception." § 541.203(b). The financial services example ends with a caveat, noting that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." *Ibid.*

In 1999 and again in 2001, the Department's Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the administrative exemption. See Opinion Letter, Loan Officers/Exempt Status, 6A LRR, Wages and Hours Manual 99:8351 (Feb. 16, 2001); Opinion Letter, Mortgage Loan Officers/Exempt Status, *id.*, at 99:8249. (May 17, 1999). In other words, the Department concluded that the FLSA's minimum wage and maximum hour requirements applied to mortgage-loan officers. When the Department promulgated its current FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA), a national trade association representing real estate finance companies, requested a new opinion interpreting the revised regulations. In 2006, the Department issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. See App. to Pet. for Cert. in No. 13–1041, pp. 70a–84a. Four years later, however, the Wage and Hour Division again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage-loan officers. *Id.*, at 49a–69a. Reviewing the provisions of the 2004 regulations and judicial decisions addressing the administrative exemption, the Department's 2010 Administrator's Interpretation concluded that mortgage-loan officers "have a primary duty of making sales for their employers, and, therefore, do not qualify" for the administrative exemption. *Id.*, at 49a, 69a. The Department accordingly withdrew its 2006 opinion letter, which it now viewed as relying on "misleading assumption[s] and selective and narrow analysis" of the exemption example in § 541.203(b). *Id.*, at 68a. Like the 1999, 2001, and 2006

opinion letters, the 2010 Administrator's Interpretation was issued without notice or an opportunity for comment.

C

MBA filed a complaint in Federal District Court challenging the Administrator's Interpretation. MBA contended that the document was inconsistent with the 2004 regulation it purported to interpret, and thus arbitrary and capricious in violation of § 10 of the APA, 5 U. S. C. § 706. More pertinent to these cases, MBA also argued that the Administrator's Interpretation was procedurally invalid in light of the D. C. Circuit's decision in *Paralyzed Veterans*, 117 F. 3d 579. Under the *Paralyzed Veterans* doctrine, if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." *Alaska Professional Hunters Assn., Inc.* v. *FAA*, 177 F. 3d 1030, 1034 (CADC 1999). Three former mortgage-loan officers—Beverly Buck, Ryan Henry, and Jerome Nickols—subsequently intervened in the case to defend the Administrator's Interpretation.[2]

The District Court granted summary judgment to the Department. *Mortgage Bankers Assn.* v. *Solis*, 864 F. Supp. 2d 193 (DC 2012). Though it accepted the parties' characterization of the Administrator's Interpretation as an interpretive rule, *id.*, at 203, n. 7, the District Court determined that the *Paralyzed Veterans* doctrine was inapplicable because MBA had failed to establish its reliance on the contrary interpretation expressed in the Department's 2006 opinion letter. The Administrator's Interpretation, the District Court further determined, was fully supported by the text of the 2004 FLSA regulations. The court accordingly held that the 2010 interpretation was not arbitrary or capricious.[3]

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[2] Buck, Henry, and Nickols are petitioners in No. 13–1052 and respondents in No. 13–1041.

[3] MBA did not challenge this aspect of the District Court's decision on appeal.

The D. C. Circuit reversed. *Mortgage Bankers Assn.* v. *Harris*, 720 F. 3d 966 (2013). Bound to the rule of *Paralyzed Veterans* by precedent, the Court of Appeals rejected the Government's call to abandon the doctrine. 720 F. 3d, at 967, n. 1. In the court's view, "[t]he only question" properly before it was whether the District Court had erred in requiring MBA to prove that it relied on the Department's prior interpretation. *Id.*, at 967. Explaining that reliance was not a required element of the *Paralyzed Veterans* doctrine, and noting the Department's concession that a prior, conflicting interpretation of the 2004 regulations existed, the D. C. Circuit concluded that the 2010 Administrator's Interpretation had to be vacated.

We granted certiorari, 573 U. S. 916 (2014), and now reverse.

II

The *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978).

A

The text of the APA answers the question presented. Section 4 of the APA provides that "notice of proposed rule making shall be published in the Federal Register." 5 U. S. C. § 553(b). When such notice is required by the APA, "the agency shall give interested persons an opportunity to participate in the rule making." § 553(c). But § 4 further states that unless "notice or hearing is required by statute," the Act's notice-and-comment requirement "does not apply . . . to interpretative rules." § 553(b)(A). This exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*.

Rather than examining the exemption for interpretive rules contained in § 4(b)(A) of the APA, the D. C. Circuit in *Paralyzed Veterans* focused its attention on § 2 of the Act. That section defines "rule making" to include not only the initial issuance of new rules, but also "repeal[s]" or "amend-[ments]" of existing rules. See § 551(5). Because notice-and-comment requirements may apply even to these later agency actions, the court reasoned, "allow[ing] an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment" would undermine the APA's procedural framework. 117 F. 3d, at 586.

This reading of the APA conflates the differing purposes of §§ 2 and 4 of the Act. Section 2 defines what a rulemaking is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of § 4. And § 4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D. C. Circuit correctly read § 2 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Where the court went wrong was in failing to apply that accurate understanding of § 2 to the exemption for interpretive rules contained in § 4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

B

The straightforward reading of the APA we now adopt harmonizes with longstanding principles of our administrative law jurisprudence. Time and again, we have reiterated

that the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *Id.*, at 513. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee*, 435 U. S., at 549. To do otherwise would violate "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Id.*, at 544.

These foundational principles apply with equal force to the APA's procedures for rulemaking. We explained in *Vermont Yankee* that § 4 of the Act "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.*, at 524. "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Ibid.*

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts. We trust that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules. See *Vermont Yankee*, 435 U. S., at 523 (when Congress enacted the APA, it "settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest" (internal quotation marks omitted)). In the end, Congress decided to adopt standards that permit agencies to promulgate freely such rules—whether or not they are consistent with earlier interpretations. That the D. C. Circuit would have struck the balance differently does not permit that court or

this one to overturn Congress' contrary judgment. Cf. *Law* v. *Siegel*, 571 U. S. 415, 427 (2014).

III

MBA offers several reasons why the *Paralyzed Veterans* doctrine should be upheld. They are not persuasive.

A

MBA begins its defense of the *Paralyzed Veterans* doctrine by attempting to bolster the D. C. Circuit's reading of the APA. "*Paralyzed Veterans*," MBA contends, "simply acknowledges the reality that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself," something that under the APA requires use of notice-and-comment procedures. Brief for Respondent MBA 20–21.

The act of "amending," however, in both ordinary parlance and legal usage, has its own meaning separate and apart from the act of "interpreting." Compare Black's Law Dictionary 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of" or "formally alter . . . by striking out, inserting, or substituting words") with *id.*, at 943 (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"). One would not normally say that a court "amends" a statute when it interprets its text. So too can an agency "interpret" a regulation without "effectively amend[ing]" the underlying source of law. MBA does not explain *how*, precisely, an interpretive rule changes the regulation it interprets, and its assertion is impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law. See *Chrysler Corp.*, 441 U. S., at 302, n. 31 (citing Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

MBA's "interpretation-as-amendment" theory is particularly odd in light of the limitations of the *Paralyzed Veterans*

doctrine. Recall that the rule of *Paralyzed Veterans* applies only when an agency has previously adopted an interpretation of its regulation. Yet in that initial interpretation as much as all that come after, the agency is giving a definite meaning to an ambiguous text—the very act MBA insists requires notice and comment. MBA is unable to say why its arguments regarding revised interpretations should not also extend to the agency's first interpretation.[4]

Next, MBA argues that the *Paralyzed Veterans* doctrine is more consistent with this Court's "functional" approach to interpreting the APA. Relying on *Christensen* v. *Harris County*, 529 U. S. 576 (2000), and *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, MBA contends that we have already recognized that an agency may not "avoid notice-and-comment procedures by cloaking its actions in the mantle of mere 'interpretation.'" Brief for Respondent MBA 23–24.

Neither of the cases MBA cites supports its argument. Our decision in *Christensen* did not address a change in agency interpretation. Instead, we there refused to give deference to an agency's interpretation of an unambiguous regulation, observing that to defer in such a case would allow the agency "to create *de facto* a new regulation." 529 U. S., at 588. Put differently, *Christensen* held that the agency

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[4] MBA alternatively suggests that interpretive rules have the force of law because an agency's interpretation of its own regulations may be entitled to deference under *Auer* v. *Robbins*, 519 U. S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (*Auer* deference is inappropriate "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment" (internal quotation marks omitted)); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 515 (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)).

interpretation at issue was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret. That holding is irrelevant to this suit and to the *Paralyzed Veterans* rule, which assesses whether an agency interpretation is *procedurally* invalid.

As for *Guernsey*, that case is fully consistent with—indeed, confirms—what the text of the APA makes plain: "Interpretive rules do not require notice and comment." 514 U. S., at 99. Sidestepping this inconvenient language, MBA instead quotes a portion of the Court's opinion stating that "APA rulemaking would still be required if [an agency] adopted a new position inconsistent with . . . existing regulations." *Id.*, at 100. But the statement on which MBA relies is dictum. Worse, it is dictum taken out of context. The "regulations" to which the Court referred were two provisions of the Medicare reimbursement scheme. And it is apparent from the Court's description of these regulations in Part II of the opinion that they were legislative rules, issued through the notice-and-comment process. See *id.*, at 91–92 (noting that the disputed regulations were codified in the Code of Federal Regulations). Read properly, then, the cited passage from *Guernsey* merely means that "an agency may only change its interpretation if the revised interpretation is consistent with the underlying regulations." Brief for Petitioners in No. 13–1052, p. 44.

B

In the main, MBA attempts to justify the *Paralyzed Veterans* doctrine on practical and policy grounds. MBA contends that the doctrine reinforces the APA's goal of "procedural fairness" by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. Brief for Respondent MBA 16.

There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions. But regulated entities are not without recourse in

such situations. Quite the opposite. The APA contains a variety of constraints on agency decisionmaking—the arbitrary and capricious standard being among the most notable. As we held in *Fox Television Stations*, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters." 556 U. S., at 515 (citation omitted); see also *id.*, at 535 (KENNEDY, J., concurring in part and concurring in judgment).

In addition, Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests. For that reason, Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations. The FLSA includes one such provision: As amended by the Portal-to-Portal Act of 1947, 29 U. S. C. § 251 *et seq.*, the FLSA provides that "no employer shall be subject to any liability" for failing "to pay minimum wages or overtime compensation" if it demonstrates that the "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Department's Wage and Hour Division, even when the guidance is later "modified or rescinded." §§ 259(a), (b)(1). These safe harbors will often protect parties from liability when an agency adopts an interpretation that conflicts with its previous position.[5]

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[5] The United States acknowledged at argument that even in situations where a statute does not contain a safe-harbor provision similar to the one included in the FLSA, an agency's ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactivity. See Tr. of Oral Arg. 44–45. We have no occasion to consider how such principles might apply here.

C

MBA changes direction in the second half of its brief, contending that if the Court overturns the *Paralyzed Veterans* rule, the D. C. Circuit's judgment should nonetheless be affirmed. That is so, MBA says, because the agency interpretation at issue—the 2010 Administrator's Interpretation—should in fact be classified as a legislative rule.

We will not address this argument. From the beginning, the parties litigated this suit on the understanding that the Administrator's Interpretation was—as its name suggests—an interpretive rule. Indeed, if MBA did not think the Administrator's Interpretation was an interpretive rule, then its decision to invoke the *Paralyzed Veterans* doctrine in attacking the rule is passing strange. After all, *Paralyzed Veterans* applied only to interpretive rules. Consequently, neither the District Court nor the D. C. Circuit considered MBA's current claim that the Administrator's Interpretation is actually a legislative rule. Beyond that, and more important still, MBA's brief in opposition to certiorari did not dispute petitioners' assertions—in their framing of the question presented and in the substance of their petitions—that the Administrator's Interpretation is an interpretive rule. Thus, even assuming MBA did not waive the argument below, it has done so in this Court. See this Court's Rule 15.2; *Carcieri* v. *Salazar*, 555 U. S. 379, 395–396 (2009).

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit is reversed.

It is so ordered.

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

I join the opinion of the Court except for Part III–B. I agree that the doctrine of *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997), is incompatible

with the Administrative Procedure Act. The creation of that doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). I do not dismiss these concerns, but the *Paralyzed Veterans* doctrine is not a viable cure for these problems. At least one of the three factors noted above, however, concerns a matter that can be addressed by this Court. The opinions of JUSTICE SCALIA and JUSTICE THOMAS offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. See also *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158–159 (2012) (citing, *inter alia*, Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996)). I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's decision, and all of its reasoning demonstrating the incompatibility of the D. C. Circuit's *Paralyzed Veterans* holding with the Administrative Procedure Act. *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997). I do not agree, however, with the Court's portrayal of the result it produces as a vindication of the balance Congress struck when it "weighed the costs and benefits of placing more rigorous . . . restrictions on the issuance of interpretive rules." *Ante*, at 102. That depiction is accurate enough if one looks at this case in isolation. Considered alongside our law of deference to administrative determinations, however, today's decision produces a balance

between power and procedure quite different from the one Congress chose when it enacted the APA.

"The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 644 (1950). The Act guards against excesses in rulemaking by requiring notice and comment. Before an agency makes a rule, it normally must notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision in a statement of the rule's basis and purpose. 5 U. S. C. § 553(b)–(c); *ante*, at 96.

The APA exempts interpretive rules from these requirements. § 553(b)(A). But this concession to agencies was meant to be more modest in its effects than it is today. For despite exempting interpretive rules from notice and comment, the Act provides that "the *reviewing court* shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." § 706 (emphasis added). The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. In such a regime, the exemption for interpretive rules does not add much to agency power. An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means.

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court . . . interpret . . . statutory provisions," we have held that *agencies* may authorita-

tively resolve ambiguities in statutes. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). And never mentioning § 706's directive that the "reviewing court . . . determine the meaning or applicability of the terms of an agency action," we have—relying on a case decided before the APA, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945)—held that *agencies* may authoritatively resolve ambiguities in regulations. *Auer* v. *Robbins*, 519 U. S. 452, 461 (1997).

By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

The Court's reasons for resisting this obvious point would not withstand a gentle breeze. Even when an agency's interpretation gets deference, the Court argues, "it is the court that ultimately decides whether [the text] means what the agency says." *Ante*, at 104, n. 4. That is not quite so. So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to "decide" that the text means what the agency says. The Court continues that "deference is not an inexorable command in all cases," because (for example) it does not apply to plainly erroneous interpretations. *Ibid.* True, but beside the point. Saying *all* interpretive rules lack force of law because plainly erroneous interpretations do not bind courts is like saying *all* substantive rules lack force of law because arbitrary and capricious rules do not bind courts. Of course an interpretive rule must meet certain conditions before it gets deference—the interpretation

must, for instance, be reasonable—but once it does so it is every bit as binding as a substantive rule. So the point stands: By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.

The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes. But an agency's interpretation of its own regulations is another matter. By giving that category of interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

Still and all, what are we to do about the problem? The *Paralyzed Veterans* doctrine is a courageous (indeed, brazen) attempt to limit the mischief by requiring an interpretive rule to go through notice and comment if it revises an earlier definitive interpretation of a regulation. That solution is unlawful for the reasons set forth in the Court's opinion: It contradicts the APA's unqualified exemption of interpretive rules from notice-and-comment rulemaking.

But I think there is another solution—one unavailable to the D. C. Circuit since it involves the overruling of one of this Court's decisions (that being even a greater fault than merely ignoring the APA). As I have described elsewhere, the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where "[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive."

United States v. *Mead Corp.*, 533 U. S. 218, 243 (2001) (SCALIA, J., dissenting). I am unaware of any such history justifying deference to agency interpretations of its own regulations. And there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means. See *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 616–621 (2013) (SCALIA, J., concurring in part and dissenting in part). I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.

JUSTICE THOMAS, concurring in the judgment.

I concur in the Court's holding that the doctrine first announced in *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579 (CADC 1997), is inconsistent with the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, and must be rejected. An agency's substantial revision of its interpretation of a regulation does not amount to an "amendment" of the regulation as that word is used in the statute.

I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations. That line of precedents, beginning with *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other

branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.

I

The doctrine of deference to an agency's interpretation of regulations is usually traced back to this Court's decision in *Seminole Rock*, *supra*, which involved the interpretation of a wartime price control regulation, *id.*, at 411. Along with a general price freeze, the Administrator of the Office of Price Administration had promulgated specialized regulations governing the maximum price for different commodities. *Id.*, at 413. When the Administrator brought an enforcement action against a manufacturer of crushed stone, the manufacturer challenged the Administrator's interpretation of his regulations.

The lower courts agreed with the manufacturer's interpretation, *id.*, at 412–413, but this Court reversed. In setting out the approach it would apply to the case, the Court announced—without citation or explanation—that an administrative interpretation of an ambiguous regulation was entitled to "controlling weight":

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*, at 413–414.

The Court then concluded that the rule "clearly" favored the Administrator's interpretation, rendering this discussion dictum. *Id.*, at 415–417.

From this unsupported rule developed a doctrine of deference that has taken on a life of its own.[1] It has been broadly applied to regulations issued by agencies across a broad spectrum of subjects. See, *e. g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 358–359 (1989) (forests); *Ehlert* v. *United States*, 402 U. S. 99, 104–105 (1971) (Selective Service); *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969) (deportation); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965) (oil and gas leases). It has even been applied to an agency's interpretation of another agency's regulations. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696–699 (1991). And, it has been applied to an agency interpretation that was inconsistent with a previous interpretation of the same regulation. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170–171 (2007). It has been applied to formal and informal interpretations alike, including those taken during litigation. See *Auer* v. *Robbins*, 519 U. S. 452, 462 (1997). Its reasoning has also been extended outside the context of traditional agency regulations into the realm of criminal sentencing. See *Stinson* v. *United States*, 508 U. S. 36, 44–45 (1993) (concluding that the Sentencing Commission's commentary on its Guidelines is analogous to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference).

The Court has even applied the doctrine to an agency interpretation of a regulation cast in such vague aspirational terms as to have no substantive content. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512–513 (1994); see also *id.*, at 518 (THOMAS, J., dissenting).

On this steady march toward deference, the Court only once expressly declined to apply *Seminole Rock* deference

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[1] Although the Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect, some scholars have noted that they might instead be classified as interpretive tools. See, *e. g.*, C. Nelson, Statutory Interpretation 701 (2011). Such tools might not be entitled to such effect. Because resolution of that issue is not necessary to my conclusion here, I leave it for another day.

on the ground that the agency's interpretation was plainly erroneous.[2] In that case, we were faced with the predictable consequence of this line of precedents: An agency sought deference to an opinion letter that interpreted a permissive regulation as mandatory. See *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000). We rejected that request for deference as an effort, "under the guise of interpreting a regulation, to create *de facto* a new regulation." *Ibid.* This narrow limit on the broad deference given the agency interpretations, though sound, could not save a doctrine that was constitutionally infirm from the start. *Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns.

II

We have not always been vigilant about protecting the structure of our Constitution. Although this Court has repeatedly invoked the "separation of powers" and "the constitutional system of checks and balances" as core principles

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[2] The Court has also twice expressly found *Seminole Rock* deference inapplicable for other reasons. *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158–159 (2012) ("[W]here, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. . . . [W]hatever the general merits of *Auer* deference, it is unwarranted here"); *Gonzales* v. *Oregon*, 546 U. S. 243, 256–257 (2006) ("In our view *Auer* and the standard of deference it accords to an agency are inapplicable here. . . . The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference").

Occasionally, Members of this Court have argued in separate writings that the Court failed appropriately to apply *Seminole Rock* deference, but in none of those cases did the majority opinions of the Court expressly refuse to do so. See *Ballard* v. *Commissioner*, 544 U. S. 40 (2005); *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U. S. 359 (1998); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267 (1994); *United States* v. *Swank*, 451 U. S. 571 (1981); *Peters* v. *Hobby*, 349 U. S. 331 (1955).

of our constitutional design, essential to the protection of individual liberty, see, *e. g.*, *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011) (internal quotation marks omitted), it has also endorsed a "more pragmatic, flexible approach" to that design when it has seemed more convenient to permit the powers to be mixed, see, *e. g.*, *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 442 (1977). As the history shows, that approach runs the risk of compromising our constitutional structure.

A

The Constitution's particular blend of separated powers and checks and balances was informed by centuries of political thought and experiences. See M. Vile, Constitutionalism and the Separation of Powers 38, 168–169 (2d ed. 1998) (Vile). Though the theories of the separation of powers and checks and balances have roots in the ancient world, events of the 17th and 18th centuries played a crucial role in their development and informed the men who crafted and ratified the Constitution.

Over a century before our War of Independence, the English Civil War catapulted the theory of the separation of powers to prominence. As political theorists of the day witnessed the conflict between the King and Parliament, and the dangers of tyrannical government posed by each, they began to call for a clear division of authority between the two. *Id.*, at 44–45, 48–49. A 1648 work titled The Royalist's Defence offered perhaps the first extended account of the theory of the separation of powers: "[W]hilst the *Supreamacy*, the *Power* to Judge the Law, and *Authority* to make new Lawes, are kept in *severall hands*, the known Law is *preserved*, but *united*, it is *vanished*, instantly thereupon, and *Arbytrary* and *Tyrannicall* power is introduced." The Royalist's Defence 80 (1648) (italics in original).

John Locke and Baron de Montesquieu endorsed and expanded on this concept. See Vile 63–64. They agreed with the general theory set forth in The Royalist's Defence, em-

phasizing the need for a separation of powers to protect individual liberty. J. Locke, Second Treatise of Civil Government §§ 143–144, p. 72 (J. Gough ed. 1947); Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949). But they also advocated a system of checks and balances to reinforce that separation. Vile 72–73, 102. For instance, they agreed that the executive should have the power to assemble and dismiss the legislature and to consent to laws passed by it. See Locke, *supra*, §§ 151, 156, at 75, 77–78; Montesquieu, Spirit of the Laws, at 157, 159. Montesquieu warned that "power should be a check to power" lest the legislature "arrogate to itself what authority it pleased . . . [and] soon destroy all the other powers." *Id.*, at 150, 157.

The experience of the States during the period between the War of Independence and the ratification of the Constitution confirmed the wisdom of combining these theories. Although many State Constitutions of the time included language unequivocally endorsing the separation of powers, they did not secure that separation with checks and balances, Vile 147, and actively placed traditional executive and judicial functions in the legislature, G. Wood, The Creation of the American Republic 1776–1787, pp. 155–156 (1969). Under these arrangements, state legislatures arrogated power to themselves and began to confiscate property, approve the printing of paper money, and suspend the ordinary means for the recovery of debts. *Id.*, at 403–409.[3]

When the Framers met for the Constitutional Convention, they understood the need for greater checks and balances to reinforce the separation of powers. As Madison remarked, "experience has taught us a distrust" of the separation of

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[3] The practices of the time can perhaps best be summarized by the following commentary from a contemporaneous magazine: "[S]o many *legal infractions* of sacred right—so many public invasions of private property—so many wanton abuses of legislative powers!" Hickory (Noah Webster), Government, The American Magazine, Mar. 1788, p. 206.

powers alone as "a sufficient security to each [branch] [against] encroachments of the others." 2 Records of the Federal Convention of 1787, p. 77 (M. Farrand rev. 1966). "[I]t is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper." *Ibid.* The Framers thus separated the three main powers of Government—legislative, executive, and judicial—into the three branches created by Articles I, II, and III. But they also created checks and balances to reinforce that separation. For example, they gave Congress specific enumerated powers to enact legislation, Art. I, § 8, but gave the President the power to veto that legislation, subject to congressional override by a supermajority vote, Art. I, § 7, cls. 2, 3. They gave the President the power to appoint principal officers of the United States, but gave the Senate the power to give advice and consent to those appointments. Art. II, § 2, cl. 2. They gave the House and Senate the power to agree to adjourn for more than three days, Art. I, § 5, cl. 4, but gave the President the power, "in Case of Disagreement between them," to adjourn the Congress "to such Time as he shall think proper." Art. II, § 3, cl. 3. During the ratification debates, Madison argued that this structure represented "the great security" for liberty in the Constitution. The Federalist No. 51, p. 321 (C. Rossiter ed. 1961).

To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution. See *Mistretta* v. *United States*, 488 U. S. 361, 426 (1989) (SCALIA, J., dissenting) ("[The Constitution] is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling [of governmental powers] was, in the generality of things, acceptable, and set forth their conclusions in the document"). The Judiciary—no less than the other two branches—has an obligation to guard

against deviations from those principles. The *Seminole Rock* line of precedent is one such deviation.

B

Seminole Rock raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a "check" on the political branches.

1

When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the "judicial Power of the United States." Art. III, § 1. For the reasons I explain in this section, the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.

Those who ratified the Constitution knew that legal texts would often contain ambiguities. See generally Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 20–21, and n. 66 (2000); Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 525–526 (2003). As James Madison explained, "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . . ." The Federalist No. 37, at 229.

The judicial power was understood to include the power to resolve these ambiguities over time. See *ibid.* Alexander Hamilton lauded this power, arguing that "[t]he interpretation of the laws is the proper and peculiar province of the courts." *Id.*, No. 78, at 467. It is undoubtedly true that the other branches of Government have the authority and obligation to interpret the law, but only the judicial interpre-

tation would be considered authoritative in a judicial proceeding. Vile 360.

Although the Federalists and Anti-Federalists engaged in a public debate about this interpretive power, that debate centered on the dangers inherent in the power, not on its allocation under the Constitution. See, *e. g.*, Letters from The Federal Farmer XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315–316 (H. Storing ed. 1981) (arguing that the interpretive power made the Judiciary the most dangerous branch). Writing as "Brutus," one leading Anti-Federalist argued that judges "w[ould] not confine themselves to any fixed or established rules, but w[ould] determine, according to what appears to them, the reason and spirit of the constitution." Essays of Brutus (Jan. 31, 1788), in 2 *id.*, at 420. The Federalists rejected these arguments, assuring the public that judges would be guided "by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, at 471 (A. Hamilton). Those rules included principles of interpretation that had been set out by jurists for centuries. See, *e. g.*, 2 S. von Pufendorf, De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo 83–86 (1682) (F. Moore transl. 1927); see also 1 W. Blackstone, Commentaries on the Laws of England 59–61 (1765).

One of the key elements of the Federalists' arguments in support of the allocation of power to make binding interpretations of the law was that Article III judges would exercise independent judgment. Although "judicial independence" is often discussed in terms of independence from external threats, the Framers understood the concept to also require independence from the "internal threat" of "human will." P. Hamburger, Law and Judicial Duty 507, 508 (2008); see also The Federalist No. 78, at 465 (A. Hamilton) ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . . "). Independent judgment required judges to decide cases in accordance with the law

of the land, not in accordance with pressures placed upon them through either internal or external sources. Internal sources might include personal biases, while external sources might include pressure from the political branches, the public, or other interested parties. See Hamburger, *supra*, at 508–521.

The Framers made several key decisions at the Convention with these pressures in mind. For example, they rejected proposals to include a federal council of revision after several participants at the Convention expressed concern that judicial involvement in such a council would foster internal biases. Rufus King of Maryland, for example, asserted that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." 1 Records of the Federal Convention of 1787, at 98. Alexander Hamilton repeated these concerns in The Federalist, arguing that "the judges, who are to be interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities" or "be induced to embark too far in the political views of [the Executive]" from too much association with him. The Federalist No. 73, at 446; see also Hamburger, *supra*, at 508–512.

The Framers also created structural protections in the Constitution to free judges from external influences. They provided, for example, that judges should "hold their Offices during good Behaviour" and receive "a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1. Hamilton noted that such unequivocal language had been shown necessary by the experience of the States, where similar state constitutional protections for judges had not been "sufficiently definite to preclude legislative evasions" of the separation of the judicial power. The Federalist No. 79, at 472. Because "power over a man's subsistence amounts to a power over his will," he argued that Article III's structural protections would help ensure that

judges fulfilled their constitutional role. *Ibid.* (emphasis deleted).

The Framers made the opposite choice for legislators and the Executive. Instead of insulating them from external pressures, the Constitution tied them to those pressures. It provided for election of Members of the House of Representatives every two years, Art. I, § 2, cl. 1; and selection of Members of the Senate every six years, Art. I, § 3, cl. 1. It also provided for the President to be subject to election every four years. Art. II, § 1, cl. 1. "The President is [thus] directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . . ." See *Morrison* v. *Olson*, 487 U. S. 654, 729 (1988) (SCALIA, J., dissenting). To preserve that accountability, we have held that executive officers *must* be subject to removal by the President to ensure accountability within the Executive Branch. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 495 (2010); see also *Morrison*, *supra*, at 709 (opinion of SCALIA, J.) ("It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are").

Given these structural distinctions between the branches, it is no surprise that judicial interpretations are definitive in cases and controversies before the courts. Courts act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Federalist No. 78, at 467 (A. Hamilton). The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is dutybound to exercise independent judgment in applying the law.

Interpreting agency regulations calls for that exercise of independent judgment. Substantive regulations have the

force and effect of law. See, *e. g.*, *United States* v. *Mead Corp.*, 533 U. S. 218, 231–232 (2001).[4] Agencies and private parties alike can use these regulations in proceedings against regulated parties. See, *e. g.*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 152–153 (2012) (private party relying on Department of Labor regulations); *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. 239, 248 (2012) (agency issuing notices of liability under regulations). Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties. Defining the legal meaning of the regulation is one aspect of that determination.

Seminole Rock deference, however, precludes judges from independently determining that meaning. Rather than judges' applying recognized tools of interpretation to determine the best meaning of a regulation, this doctrine demands

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[4] These cases also raise constitutional questions about the distinction in administrative law between "substantive" (or "legislative") and interpretative rules. The United States Court of Appeals for the D. C. Circuit has defined a legislative rule as "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties" and an interpretative rule as "[a]n agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *National Mining Assn.* v. *McCarthy*, 758 F. 3d 243, 251–252 (2014). And our precedents make clear that administrative agencies must exercise only executive power in promulgating these rules. *Arlington* v. *FCC*, 569 U. S. 290, 304, n. 4 (2013). But while it is easy to see the promulgation of interpretative rules as an "executive" function—executive officials necessarily interpret the laws they enforce—it is difficult to see what authority the President has "to impose legally binding obligations or prohibitions on regulated parties." That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner. Because these troubling questions are not directly implicated here, I leave them for another case. See *Department of Transportation* v. *Association of American Railroads*, *ante*, at 84–87 (THOMAS, J., concurring in judgment).

that courts accord "controlling weight" to the agency interpretation of a regulation, subject only to the narrow exception for interpretations that are plainly erroneous or inconsistent with the regulation. That deference amounts to a transfer of the judge's exercise of interpretive judgment to the agency. See 1 S. Johnson, Dictionary of the English Language 499 (4th ed. 1773) (defining "[d]efer" as "to leave to another's judgment"). But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.

2

Seminole Rock is constitutionally questionable for an additional reason: It undermines the judicial "check" on the political branches. Unlike the Legislative and Executive Branches, each of which possesses several political checks on the other, the Judiciary has one primary check on the excesses of political branches. That check is the enforcement of the rule of law through the exercise of judicial power.

Judges have long recognized their responsibility to apply the law, even if they did not conceive of it as a "check" on political power. During the 17th century, for example, King James I sought to pressure Chief Justice Coke to affirm the lawfulness of his efforts to raise revenue without the participation of Parliament. Hamburger, Law and Judicial Duty, at 200–201. Coke sought time to confer with his fellow jurists to "make an advised answer according to law and reason." *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611). But the King's representative, Lord Chancellor Ellesmere, responded that "he would advise the Judges to maintain the power and prerogative of the King" and suggested that, "in cases in which there is no authority and precedent," the judiciary should "leave it to the

King to order in it according to his wisdom." *Ibid.* Coke famously responded, "[T]he King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ibid.* When James I later attempted to do just that, Coke declared the proclamations "'utterly against Law and reason, and for that void.'" Hamburger, *supra*, at 202.

The Framers expected Article III judges to engage in similar efforts, by applying the law as a "check" on the excesses of both the Legislative and Executive Branches. See, *e. g.*, 3 J. Elliot, Debates in the Several Conventions on the Adoption of the Federal Constitution 553 (1863) (J. Marshall) ("If [the Government of the United States] make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void"); see also Vile 174. The Framers "contemplated [the Constitution], as a rule for the government of *courts*, as well as of the legislature." *Marbury* v. *Madison*, 1 Cranch 137, 179–180 (1803). Thus, if a case involved a conflict between a law and the Constitution, judges would have a duty "to adhere to the latter and disregard the former." The Federalist No. 78, at 468 (A. Hamilton); see also *Marbury*, 1 Cranch, at 178. Similarly, if a case involved an executive effort to extend a law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution. Cf. *id.*, at 157–158 (considering the scope of the President's constitutional power of appointment). As this Court said long ago, "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument." *Id.*, at 180.

Article III judges cannot opt out of exercising their check. As we have long recognized, "the Judiciary has a responsibility to decide cases properly before it, even those it 'would

gladly avoid.'" *Zivotofsky* v. *Clinton*, 566 U. S. 189, 194 (2012) (quoting *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821)). This responsibility applies not only to constitutional challenges to particular statutes, see, *e. g.*, *Shelby County* v. *Holder*, 570 U. S. 529, 536 (2013), including those based on the separation of powers, *Free Enterprise Fund*, 561 U. S., at 501–502, but also to more routine questions about the best interpretation of statutes, see, *e. g.*, *Whitfield* v. *United States*, 574 U. S. 265, 267–268 (2015), or the compatibility of agency actions with enabling statutes, *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 315 (2014). In each case, the Judiciary is called upon to exercise its independent judgment and apply the law.

But we have not consistently exercised the judicial check with respect to administrative agencies. Even though regulated parties have repeatedly challenged agency interpretations as inconsistent with existing regulations, we have just as repeatedly declined to exercise independent judgment as to those claims. Instead, we have deferred to the executive agency that both promulgated the regulations and enforced them. Although an agency's interpretation of a regulation might be the best interpretation, it also might not. When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against. See The Federalist No. 47, at 302 (J. Madison).

C

This accumulation of governmental powers allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties. It is precisely this problem that the United States Court of Appeals for the D. C. Circuit attempted to address by requiring agencies to undertake notice-and-comment procedures before

substantially revising definitive interpretations of regulations. *Paralyzed Veterans*, 117 F. 3d 579. Though legally erroneous, the Court of Appeals' reasoning was practically sound. When courts give "controlling weight" to an administrative interpretation of a regulation—instead of to the *best* interpretation of it—they effectively give the interpretation—and not the regulation—the force and effect of law. To regulated parties, the new interpretation might as well be a new regulation.

These cases provide a classic example of the problem. The Fair Labor Standards Act of 1938 establishes federal minimum wage and overtime requirements, but exempts from these requirements "any employee engaged in a bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)." 29 U. S. C. § 213(a)(1). The Department of Labor has accordingly promulgated regulations providing that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 CFR § 541.203(b) (2015).

Unsure whether certain mortgage-loan officers qualified as employees whose primary duty is selling financial products, the Mortgage Bankers Association asked the Department of Labor for advice. In 2006, the Department concluded that the officers are not employees whose primary duty is selling financial products. But in 2010, the Department reversed course, concluding exactly the opposite. If courts accord "controlling weight" to both the 2006 and 2010 interpretations, the regulated entities are subject to two opposite legal rules imposed under the same regulation.

This practice turns on its head the principle that the United States is "a government of laws, and not of men." *Marbury*, 1 Cranch, at 163. Regulations provide notice to regulated parties in only a limited sense because their mean-

ing will ultimately be determined by agencies rather than by the "strict rules and precedents" to which Alexander Hamilton once referred.[5]

III

Although this Court offered no theoretical justification for *Seminole Rock* deference when announcing it, several justifications have been proposed since. None is persuasive.

A

Probably the most oft-recited justification for *Seminole Rock* deference is that of agency expertise in administering technical statutory schemes. Under this justification, deference to administrative agencies is necessary when a "regulation concerns 'a complex and highly technical regulatory program' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' " *Thomas Jefferson Univ.*, 512 U. S., at 512.

This defense of *Seminole Rock* deference misidentifies the relevant inquiry. The proper question faced by courts in in-

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[5] The notice problem is exacerbated by agency departures from the procedures established for rulemaking in the APA. Although almost all rulemaking is today accomplished through informal notice and comment, the APA actually contemplated a much more formal process for most rulemaking. To that end, it provided for elaborate trial-like hearings in which proponents of particular rules would introduce evidence and bear the burden of proof in support of those proposed rules. See 5 U. S. C. § 556.

Today, however, formal rulemaking is the Yeti of administrative law. There are isolated sightings of it in the ratemaking context, but elsewhere it proves elusive. It is somewhat ironic for the Court so adamantly to insist that agencies be subject to no greater procedures than those required by the APA when we have not been adamant in requiring agencies to comply with even those baseline procedures. See *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224, 237–238 (1973) (concluding that the APA's formal procedures, which were to apply "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing," § 553(c), were not triggered by a statute that permitted an agency to engage in rulemaking only " 'after [a] hearing' ").

terpreting a regulation is not what the best policy choice might be, but what the regulation means. Because this Court has concluded that "substantive agency regulations have the 'force and effect of law,'" *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295 (1979), such regulations should be interpreted like any other law. Thus, we should "assum[e] that the ordinary meaning of the regulation's language expresses" its purpose and enforce it "according to its terms." See *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010) (internal quotation marks omitted). Judges are at least as well suited as administrative agencies to engage in this task. Cf. *Marbury*, *supra*, at 177 ("It is emphatically the province and duty of the judicial department to say what the law is"). Indeed, judges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language. See, *e. g.*, *Barber* v. *Gonzales*, 347 U. S. 637, 640–643 (1954) (interpreting deportation statute according to technical meaning).

Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.[6] "But policy argu-

[6] Many decisions of this Court invoke agency expertise as a justification for deference. This argument has its root in the support for administrative agencies that developed during the Progressive Era in this country. The era was marked by a move from the individualism that had long characterized American society to the concept of a society organized for collective action. See A. Link, Woodrow Wilson and the Progressive Era 1910–1917, p. 1 (1954). That move also reflected a deep disdain for the theory of popular sovereignty. As Woodrow Wilson wrote before he attained the Presidency: "Our peculiar American difficulty in organizing administration is not the danger of losing liberty, but the danger of not being able or willing to separate its essentials from its accidents. Our success is made doubtful by that besetting error of ours, the error of trying to do too much by vote." Wilson, The Study of Administration, 2 Pol. Sci. Q. 197, 214 (1887). In President Wilson's view, public criticism would be beneficial in the formation of overall policy, but "a clumsy nuisance" in the daily life of Government—"a rustic handling delicate machinery." *Id.*, at 215. Re-

ments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised." *INS* v. *Chadha*, 462 U. S. 919, 945 (1983). Even in the face of a perceived necessity, the Constitution protects us from ourselves. *New York* v. *United States*, 505 U. S. 144, 187–188 (1992).

B

Another oft-recited justification for *Seminole Rock* deference is that agencies are better situated to define the original intent behind their regulations. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 152–153 (1991). Under this justification, "[b]ecause the Secretary [of Labor] promulgates th[e] standards, the Secretary is in a better position . . . to reconstruct the purpose of the regulations in question." *Id.*, at 152.

This justification rings hollow. This Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter. See *Pauley*, 501 U. S., at 696–698 (applying *Seminole Rock* deference to one agency's interpretation of another agency's regulations because Congress had delegated authority to both to administer the program). It has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations. See, *e. g.*, *Long Island Care at Home*, 551 U. S., at 170–171.

Even if the scope of *Seminole Rock* deference more closely matched the original-drafter justification, it would still fail. It is the text of the regulations that have the force and effect of law, not the agency's intent. "Citizens arrange their

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flecting this belief that bureaucrats might more effectively govern the country than the American people, the Progressives ushered in significant expansions of the administrative state, ultimately culminating in the New Deal. See generally M. Keller, Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933 (1990).

affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated." *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S. 81, 119 (2007) (SCALIA, J., dissenting). Cf. *Wyeth* v. *Levine*, 555 U. S. 555, 586–587 (2009) (THOMAS, J., concurring in judgment) (noting that only "federal standards . . . that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures"—not Congress' "purposes and objectives"—can become the "law of the land"). "To be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.' " *Zuni Public School Dist. No. 89*, *supra*, at 119 (SCALIA, J., dissenting). Only the text of a regulation goes through the procedures established by Congress for agency rulemaking. And it is that text on which the public is entitled to rely. For the same reasons that we should not accord controlling weight to postenactment expressions of intent by individual Members of Congress, see *Sullivan* v. *Finkelstein*, 496 U. S. 617, 631–632 (1990) (SCALIA, J., concurring in part), we should not accord controlling weight to expressions of intent by administrators of agencies.

C

A third asserted justification for *Seminole Rock* deference is that Congress has delegated to agencies the authority to interpret their own regulations. See, *e. g.*, *Martin*, 499 U. S., at 151. The theory is that, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, . . . the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Ibid.*

This justification fails because Congress lacks authority to delegate the power. As we have explained in an analogous context, "[t]he structure of the Constitution does not permit

Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher* v. *Synar*, 478 U. S. 714, 726 (1986). Similarly, the Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency.

To hold otherwise would be to vitiate the separation of powers and ignore the "sense of a sharp necessity to separate the legislative from the judicial power . . . [that] triumphed among the Framers of the new Federal Constitution." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 221 (1995). As this Court has explained, the "essential balance" of the Constitution is that the Legislature is "possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' [is] 'the proper and peculiar province of the courts.'" *Id.*, at 222 (third brackets added). Although the Constitution imposes a duty on all three branches to interpret the laws within their own spheres, the power to create legally binding interpretations rests with the Judiciary. See *Marbury*, 1 Cranch, at 177, 179–180.

D

A final proposed justification for *Seminole Rock* deference is that too much oversight of administrative matters would imperil the "independence and esteem" of judges. See, *e. g.*, Hughes, Speech before the Elmira Chamber of Commerce, May 3, 1907, in Addresses of Charles Evans Hughes, 1906–1916, p. 185 (2d ed. 1916). The argument goes that questions of administration are those which "lie close to the public impatience," *id.*, at 186, and thus the courts' resolution of such questions could "expose them to the fire of public criticism," *id.*, at 187.

But this argument, which boils down to a policy judgment of questionable validity, cannot vitiate the constitutional allo-

cation of powers. The Judicial Branch is separate from the political branches for a reason: It has the obligation to apply the law to cases and controversies that come before it, and concerns about the popular esteem of individual judges—or even the Judiciary as a whole—have no place in that analysis. Our system of Government could not long survive absent adherence to the written Constitution that formed it.

* * *

Although on the surface these cases require only a straightforward application of the APA, closer scrutiny reveals serious constitutional questions lurking beneath. I have "acknowledge[d] the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means." *McDonald* v. *Chicago*, 561 U. S. 742, 812 (2010) (THOMAS, J., concurring in part and concurring in judgment). By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.

KANSAS *v.* NEBRASKA ET AL.

ON BILL OF COMPLAINT

No. 126, Orig. Argued May 19, 2003—Decided February 24, 2015—Decree entered March 9, 2015

Decree entered.

Decree reported: 538 U. S. 720; opinion reported 574 U. S. 445.

DECREE

The Court having exercised original jurisdiction over this controversy between three sovereign States; the issues having been tried before the Special Master appointed by the Court; the Court having received briefs and heard oral argument on the parties' exceptions to the Report of the Special Master; and the Court having issued its opinion on all issues announced in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED AS FOLLOWS:

1. The RRCA Accounting Procedures are hereby reformed as shown on the attached Appendix to be effective for the accounting of Compact Year 2007 and thereafter.

2. Nebraska is not liable for evaporative losses from Harlan County Lake during 2006.

3. Evaporation from the Non-Federal Reservoirs located in Nebraska is a Beneficial Consumptive Use under the Compact and must be accounted for as such.

4. Nebraska's consumption in 2005 and 2006 exceeded its Compact allocation by 70,869 acre feet, said amount equaling the combined rather than average exceedences for those two years.

5. Nebraska must pay Kansas within sixty (60) days of the date of this Order, Five Million Five Hundred Thousand Dollars ($5,500,000.00).

6. Except as herein provided, the claims of all parties in this action are denied and their prayers for relief dismissed with prejudice.

7. The parties' respective responsibilities for the fees and costs awarded to the Special Master are as follows: Kansas (40%); Nebraska (40%); and Colorado (20%).

8. The parties' previous payments made to the Special Master and the printer of the Report of the Special Master discharge in full their respective obligations to pay for or share among themselves fees and costs awarded to the Special Master together with any costs that might have otherwise been assessed in this action.

9. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.

APPENDIX

Changes to the Accounting Procedures

III A 3. Imported Water Supply Credit Calculation: The amount of Imported Water Supply Credit shall be determined by the RRCA Groundwater Model. The Imported Water Supply Credit of a State shall not be included in the Virgin Water Supply and shall be counted as a credit/offset against the Computed Beneficial Consumptive Use of water allocated to that State. Currently, the Imported Water Supply Credits shall be determined using two runs of the RRCA Groundwater Model:

a. The "base" run shall be the run with all groundwater pumping, groundwater pumping recharge, and surface water recharge within the model study boundary for the current accounting year turned "on." ~~This will be the same "base" run used to determine groundwater Computed Beneficial Consumptive Uses.~~

b. The "no NE import" run shall be the run with the same model inputs as the base run with the exception that surface water recharge associated with Nebraska's Imported Water Supply shall be turned "off." <u>This will be the same "no NE</u>

import" run used to determine groundwater Computed Beneficial Consumptive Uses.

The Imported Water Supply Credit shall be the difference in stream flows between these two model runs. Differences in stream flows shall be determined at the same locations as identified in Subsection III.D.1 for the "no pumping" runs.

Should another State import water into the Basin in the future, the RRCA will develop a similar procedure to determine Imported Water Supply Credits.

III D. Calculation of Annual Computed Beneficial Consumptive Use

1. Groundwater

Computed Beneficial Consumptive Use of groundwater shall be determined by use of the RRCA Groundwater Model. The Computed Beneficial Consumptive Use of groundwater for each State shall be determined as the difference in streamflows using two runs of the model:

The "~~base~~ no NE import" run shall be the run with all groundwater pumping, groundwater pumping recharge, and surface water recharge within the model study boundary for the current accounting year "on", with the exception that surface water recharge associated with Nebraska's Imported Water Supply shall be turned "off."

The "no State pumping" run shall be the run with the same model inputs as the "~~base~~ no NE import" run with the exception that all groundwater pumping and pumping recharge of that State shall be turned "off."

An output of the model is baseflows at selected stream cells. Changes in the baseflows predicted by the model between the "~~base~~ no NE import" run and the "no-State-pumping" model run is assumed to be the depletions to streamflows, *i. e.*, groundwater computed beneficial consumptive use, due to State groundwater pumping at that location. The values

for each Sub-basin will include all depletions and accretions upstream of the confluence with the Main Stem. The values for the Main Stem will include all depletions and accretions in stream reaches not otherwise accounted for in a Sub-basin. The values for the Main Stem will be computed separately for the reach above Guide Rock, and the reach below Guide Rock.

*Taken from the August 12, 2010, Accounting Procedures.

Syllabus

B&B HARDWARE, INC. *v.* HARGIS INDUSTRIES, INC., DBA SEALTITE BUILDING FASTENERS ET AL., ET AL.

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

No. 13–352. Argued December 2, 2014—Decided March 24, 2015

Respondent Hargis Industries, Inc. (Hargis), tried to register its trademark for SEALTITE with the United States Patent and Trademark Office pursuant to the Lanham Act. Petitioner, B&B Hardware, Inc. (B&B), however, opposed registration, claiming that SEALTITE is too similar to B&B's own SEALTIGHT trademark. The Trademark Trial and Appeal Board (TTAB) concluded that SEALTITE should not be registered because of the likelihood of confusion. Hargis did not seek judicial review of that decision.

Later, in an infringement suit before the District Court, B&B argued that Hargis was precluded from contesting the likelihood of confusion because of the TTAB's decision. The District Court disagreed. The Eighth Circuit affirmed, holding that preclusion was unwarranted because the TTAB and the court used different factors to evaluate likelihood of confusion, the TTAB placed too much emphasis on the appearance and sound of the two marks, and Hargis bore the burden of persuasion before the TTAB while B&B bore it before the District Court.

Held: So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before a district court, issue preclusion should apply. Pp. 147–160.

(a) An agency decision can ground issue preclusion. The Court's cases establish that when Congress authorizes agencies to resolve disputes, "courts may take it as given that Congress has legislated with the expectation that [issue preclusion] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108. Constitutional avoidance does not compel a different conclusion. Pp. 147–151.

(b) Neither the Lanham Act's text nor its structure rebuts the "presumption" in favor of giving preclusive effect to TTAB decisions where the ordinary elements of issue preclusion are met. *Astoria*, 501 U. S., at 108. This case is unlike *Astoria*. There, where exhausting the administrative process was a prerequisite to suit in court, giving preclusive effect to the agency's determination in that very administrative process could have rendered the judicial suit "strictly *pro forma*." *Id.*,

at 111. By contrast, registration involves a separate proceeding to decide separate rights. Pp. 151–153.

(c) There is no categorical reason why registration decisions can never meet the ordinary elements of issue preclusion. That many registrations will not satisfy those ordinary elements does not mean that none will. Pp. 153–160.

(1) Contrary to the Eighth Circuit's conclusion, the same likelihood-of-confusion standard applies to both registration and infringement. The factors that the TTAB and the Eighth Circuit use to assess likelihood of confusion are not fundamentally different, and, more important, the operative language of each statute is essentially the same.

Hargis claims that the standards are different, noting that the registration provision asks whether the marks "resemble" each other, 15 U. S. C. § 1052(d), while the infringement provision is directed toward the "use in commerce" of the marks, § 1114(1). That the TTAB and a district court do not always consider the *same usages*, however, does not mean that the TTAB applies a *different standard* to the usages it does consider. If a mark owner uses its mark in materially the same ways as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation. For a similar reason, the Eighth Circuit erred in holding that issue preclusion could not apply because the TTAB relied too heavily on "appearance and sound." Pp. 154–158.

(2) The fact that the TTAB and district courts use different procedures suggests only that sometimes issue preclusion might be inappropriate, not that it always is. Here, there is no categorical "reason to doubt the quality, extensiveness, or fairness," *Montana* v. *United States*, 440 U. S. 147, 164, n. 11, of the agency's procedures. In large part they are exactly the same as in federal court. Also contrary to the Eighth Circuit's conclusion, B&B, the party opposing registration, not Hargis, bore the burden of persuasion before the TTAB, just as it did in the infringement suit. Pp. 158–159.

(3) Hargis is also wrong that the stakes for registration are always too low for issue preclusion in later infringement litigation. When registration is opposed, there is good reason to think that both sides will take the matter seriously. Congress' creation of an elaborate registration scheme, with many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion. Pp. 159–160.

716 F. 3d 1020, reversed and remanded.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined.

GINSBURG, J., filed a concurring opinion, *post*, p. 160. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 161.

William M. Jay argued the cause for petitioner. With him on the briefs were *Jacob R. Osborn*, *Robert D. Carroll*, *Ira J. Levy*, and *Tim Cullen*.

John F. Bash argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Mark K. Freeman*, *Sydney Foster*, and *Scott C. Weidenfeller*.

Neal Kumar Katyal argued the cause for respondent Hargis Industries, Inc. With him on the brief for Hargis Industries, Inc., were *Catherine E. Stetson*, *Mary Helen Wimberly*, *James C. Martin*, and *Colin E. Wrabley*.*

JUSTICE ALITO delivered the opinion of the Court.

Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.

This case concerns the application of issue preclusion in the context of trademark law. Petitioner, B&B Hardware,

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*Briefs of *amici curiae* urging affirmance were filed for the Intellectual Property Law Section of the State Bar of Texas by *Richard L. Stanley* and *Jack C. Goldstein*; and for the New York Intellectual Property Law Association by *Dyan Finguerra-DuCharme*, *Anthony F. Lo Cicero*, and *Charles R. Macedo*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Nancy J. Merztel*; for the Intellectual Property Law Association of Chicago by *Charles W. Shifley* and *Donald W. Rupert*; and for the International Trademark Association by *David H. Bernstein* and *Michael Potenza*.

Inc. (B&B), and respondent Hargis Industries, Inc. (Hargis or respondent), both use similar trademarks; B&B owns SEALTIGHT while Hargis owns SEALTITE. Under the Lanham Act, 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, an applicant can seek to register a trademark through an administrative process within the United States Patent and Trademark Office (PTO). But if another party believes that the PTO should not register a mark because it is too similar to its own, that party can oppose registration before the Trademark Trial and Appeal Board (TTAB or Board). Here, Hargis tried to register the mark SEALTITE, but B&B opposed SEALTITE's registration. After a lengthy proceeding, the TTAB agreed with B&B that SEALTITE should not be registered.

In addition to permitting a party to object to the registration of a mark, the Lanham Act allows a mark owner to sue for trademark infringement. Both a registration proceeding and a suit for trademark infringement, moreover, can occur at the same time. In this case, while the TTAB was deciding whether SEALTITE should be registered, B&B and Hargis were also litigating the SEALTIGHT versus SEALTITE dispute in federal court. In both registration proceedings and infringement litigation, the tribunal asks whether a likelihood of confusion exists between the mark sought to be protected (here, SEALTIGHT) and the other mark (SEALTITE).

The question before this Court is whether the District Court in this case should have applied issue preclusion to the TTAB's decision that SEALTITE is confusingly similar to SEALTIGHT. Here, the Eighth Circuit rejected issue preclusion for reasons that would make it difficult for the doctrine ever to apply in trademark disputes. We disagree with that narrow understanding of issue preclusion. Instead, consistent with principles of law that apply in innumerable contexts, we hold that a court should give preclusive effect to TTAB decisions if the ordinary elements of issue

preclusion are met. We therefore reverse the judgment of the Eighth Circuit and remand for further proceedings.

I

A

Trademark law has a long history, going back at least to Roman times. See Restatement (Third) of Unfair Competition § 9, Comment *b* (1993). The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others. *Ibid.* One who first uses a distinct mark in commerce thus acquires rights to that mark. See 2 J. McCarthy, Trademarks and Unfair Competition § 16:1 (4th ed. 2014) (hereinafter McCarthy). Those rights include preventing others from using the mark. See 1 A. LaLonde, Gilson on Trademarks § 3.02[8] (2014) (hereinafter Gilson).

Though federal law does not create trademarks, see, *e. g.*, *Trade-Mark Cases*, 100 U. S. 82, 92 (1879), Congress has long played a role in protecting them. In 1946, Congress enacted the Lanham Act, the current federal trademark scheme. As relevant here, the Lanham Act creates at least two adjudicative mechanisms to help protect marks. First, a trademark owner can register its mark with the PTO. Second, a mark owner can bring a suit for infringement in federal court.

Registration is significant. The Lanham Act confers "important legal rights and benefits" on trademark owners who register their marks. 3 McCarthy § 19:3, at 19–21; see also *id.*, § 19:9, at 19–34 (listing seven of the "procedural and substantive legal advantages" of registration). Registration, for instance, serves as "constructive notice of the registrant's claim of ownership" of the mark. 15 U. S. C. § 1072. It also is "prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with

the goods or services specified in the certificate." § 1057(b). And once a mark has been registered for five years, it can become "incontestable." §§ 1065, 1115(b)

To obtain the benefits of registration, a mark owner files an application with the PTO. § 1051. The application must include, among other things, "the date of the applicant's first use of the mark, the date of the applicant's first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark." § 1051(a)(2). The usages listed in the application—*i. e.*, those goods on which the mark appears along with, if applicable, their channels of distribution—are critical. See, *e. g.*, 3 McCarthy § 20:24, at 20–83 ("[T]he applicant's right to register must be made on the basis of the goods described in the application"); *id.*, § 20:15, at 20–45 (explaining that if an "application does not delimit any specific trade channels of distribution, no limitation will be" applied). The PTO generally cannot register a mark which "so resembles" another mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U. S. C. § 1052(d).

If a trademark examiner believes that registration is warranted, the mark is published in the Official Gazette of the PTO. § 1062. At that point, "[a]ny person who believes that he would be damaged by the registration" may "file an opposition." § 1063(a). Opposition proceedings occur before the TTAB (or panels thereof). § 1067(a). The TTAB consists of administrative trademark judges and high-ranking PTO officials, including the Director of the PTO and the Commissioner of Trademarks. § 1067(b).

Opposition proceedings before the TTAB are in many ways "similar to a civil action in a federal district court." TTAB Manual of Procedure § 102.03 (2014) (hereinafter TTAB Manual), online at http://www.uspto.gov (as visited Mar. 20, 2015, and available in Clerk of Court's case file). These proceedings, for instance, are largely governed by the Federal Rules

of Civil Procedure and Evidence. See 37 CFR §§ 2.116(a), 2.122(a) (2014). The TTAB also allows discovery and depositions. See §§ 2.120, 2.123(a). The party opposing registration bears the burden of proof, see § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U. S. C. § 1063(b).

The primary way in which TTAB proceedings differ from ordinary civil litigation is that "proceedings before the Board are conducted in writing, and the Board's actions in a particular case are based upon the written record therein." TTAB Manual § 102.03. In other words, there is no live testimony. Even so, the TTAB allows parties to submit transcribed testimony, taken under oath and subject to cross-examination, and to request oral argument. See 37 CFR §§ 2.123, 2.129.

When a party opposes registration because it believes the mark proposed to be registered is too similar to its own, the TTAB evaluates likelihood of confusion by applying some or all of the 13 factors set out in *In re E. I. DuPont DeNemours & Co.*, 476 F. 2d 1357 (CCPA 1973). After the TTAB decides whether to register the mark, a party can seek review in the U. S. Court of Appeals for the Federal Circuit, or it can file a new action in district court. See 15 U. S. C. § 1071. In district court, the parties can conduct additional discovery and the judge resolves registration *de novo*. § 1071(b); see also 3 McCarthy § 21:20 (explaining differences between the forums); cf. *Kappos* v. *Hyatt*, 566 U. S. 431 (2012) (*de novo* review for analogous scheme in patent law).

The Lanham Act, of course, also creates a federal cause of action for trademark infringement. The owner of a mark, whether registered or not, can bring suit in federal court if another is using a mark that too closely resembles the plaintiff's. The court must decide whether the defendant's use of a mark in commerce "is likely to cause confusion, or to cause mistake, or to deceive" with regard to the plaintiff's mark. See 15 U. S. C. § 1114(1)(a) (registered marks);

§ 1125(a)(1)(A) (unregistered marks). In infringement litigation, the district court considers the full range of a mark's usages, not just those in the application.

B

Petitioner B&B and respondent Hargis both manufacture metal fasteners. B&B manufactures fasteners for the aerospace industry, while Hargis manufactures fasteners for use in the construction trade. Although there are obvious differences between space shuttles and A-frame buildings, both aerospace and construction engineers prefer fasteners that seal things tightly. Accordingly, both B&B and Hargis want their wares associated with tight seals. A feud of nearly two decades has sprung from this seemingly commonplace set of facts.

In 1993, B&B registered SEALTIGHT for "threaded or unthreaded metal fasteners and other related hardwar[e]; namely, self-sealing nuts, bolts, screws, rivets and washers, all having a captive o-ring, for use in the aerospace industry." App. 223a (capitalization omitted). In 1996, Hargis sought to register SEALTITE for "self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings." App. 70a (capitalization omitted). B&B opposed Hargis' registration because, although the two companies sell different products, it believes that SEALTITE is confusingly similar to SEALTIGHT.

The twists and turns in the SEALTIGHT versus SEALTITE controversy are labyrinthine. The question whether either of these marks should be registered, and if so, which one, has bounced around within the PTO for about two decades; related infringement litigation has been before the Eighth Circuit three times; and two separate juries have been empaneled and returned verdicts. The full story could fill a long, unhappy book.

For purposes here, we pick up the story in 2002, when the PTO published SEALTITE in the Official Gazette. This

prompted opposition proceedings before the TTAB, complete with discovery, including depositions. B&B argued that SEALTITE could not be registered because it is confusingly similar to SEALTIGHT. B&B explained, for instance, that both companies have an online presence, the largest distributor of fasteners sells both companies' products, and consumers sometimes call the wrong company to place orders. Hargis rejoined that the companies sell different products, for different uses, to different types of consumers, through different channels of trade.

Invoking a number of the *DuPont* factors, the TTAB sided with B&B. The Board considered, for instance, whether SEALTIGHT is famous (it's not, said the Board), how the two products are used (differently), how much the marks resemble each other (very much), and whether customers are actually confused (perhaps sometimes). See App. to Pet. for Cert. 55a–71a. Concluding that "the most critical factors in [its] likelihood of confusion analysis are the similarities of the marks and the similarity of the goods," *id.*, at 70a, the TTAB determined that SEALTITE—when "used in connection with 'self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings' "—could not be registered because it "so resembles" SEALTIGHT when "used in connection with fasteners that provide leakproof protection from liquids and gases, fasteners that have a captive o-ring, and 'threaded or unthreaded metal fasteners and other related hardware . . . for use in the aerospace industry' as to be likely to cause confusion," *id.*, at 71a. Despite a right to do so, Hargis did not seek judicial review in either the Federal Circuit or District Court.

All the while, B&B had sued Hargis for infringement. Before the District Court ruled on likelihood of confusion, however, the TTAB announced its decision. After a series of proceedings not relevant here, B&B argued to the District Court that Hargis could not contest likelihood of confusion because of the preclusive effect of the TTAB decision. The

District Court disagreed, reasoning that the TTAB is not an Article III court. The jury returned a verdict for Hargis, finding no likelihood of confusion.

B&B appealed to the Eighth Circuit. Though accepting for the sake of argument that agency decisions can ground issue preclusion, the panel majority affirmed for three reasons: first, because the TTAB uses different factors than the Eighth Circuit to evaluate likelihood of confusion; second, because the TTAB placed too much emphasis on the appearance and sound of the two marks; and third, because Hargis bore the burden of persuasion before the TTAB, while B&B bore it before the District Court. 716 F. 3d 1020 (2013). Judge Colloton dissented, concluding that issue preclusion should apply. After calling for the views of the Solicitor General, we granted certiorari. 573 U. S. 957 (2014).

II

The first question that we must address is whether an agency decision can ever ground issue preclusion. The District Court rejected issue preclusion because agencies are not Article III courts. The Eighth Circuit did not adopt that view, and, given this Court's cases, it was right to take that course.

This Court has long recognized that "the determination of a question directly involved in one action is conclusive as to that question in a second suit." *Cromwell* v. *County of Sac*, 94 U. S. 351, 354 (1877). The idea is straightforward: Once a court has decided an issue, it is "forever settled as between the parties," *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931), thereby "protect[ing]" against "the expense and vexation attending multiple lawsuits, conserv-[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent verdicts," *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979). In short, "a losing litigant deserves no rematch after a defeat fairly suffered." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

Although the idea of issue preclusion is straightforward, it can be challenging to implement. The Court, therefore, regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion. See, *e. g.*, *Bobby* v. *Bies*, 556 U. S. 825, 834 (2009); *New Hampshire* v. *Maine*, 532 U. S. 742, 748–749 (2001); *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233, n. 5 (1998). The Restatement explains that subject to certain well-known exceptions, the general rule is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27, p. 250 (1980); see also *id.*, § 28, at 273 (listing exceptions such as whether appellate review was available or whether there were "differences in the quality or extensiveness of the procedures followed").

Both this Court's cases and the Restatement make clear that issue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies. Indeed, this Court has explained that because the principle of issue preclusion was so "well established" at common law, in those situations in which Congress has authorized agencies to resolve disputes, "courts may take it as given that Congress has legislated with the expectation that the principle [of issue preclusion] will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria*, *supra*, at 108. This reflects the Court's longstanding view that "'[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.'" *University of Tenn.* v. *Elliott*, 478 U. S. 788, 797–798 (1986) (quoting

United States v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966)); see also *Hayfield Northern R. Co.* v. *Chicago & North Western Transp. Co.*, 467 U. S. 622, 636, n. 15 (1984) (noting *Utah Construction*); *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 484–485, n. 26 (1982) (characterizing *Utah Construction*'s discussion of administrative preclusion as a holding); Restatement (Second) of Judgments § 83(1), at 266 (explaining that, with some limits, "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court").

Although apparently accepting *Astoria* and *Utah Construction*,[1] Hargis argues that we should not read the Lanham Act (or, presumably, many other federal statutes) as authorizing issue preclusion. Otherwise, Hargis warns, the Court would have to confront "'grave and doubtful questions' as to the Lanham Act's consistency with the Seventh Amendment and Article III of the Constitution." Brief for Respondent 38 (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)). We are not persuaded.

At the outset, we note that Hargis does not argue that giving issue-preclusive effect to the TTAB's decision would be unconstitutional. Instead, Hargis contends only that we should read the Lanham Act narrowly because a broad reading *might* be unconstitutional. See, *e. g.*, Brief for Respondent 37, 39, 40, 41–42. The likely reason that Hargis has not directly advanced a constitutional argument is that, at least

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[1] See Brief for Respondent 28 (acknowledging that administrative "[p]reclusion's status as part of the common-law backdrop means that courts may presume its application" absent contrary indication from Congress) (citing *Astoria*, 501 U. S., at 110); Brief for Respondent 34 (explaining that *Utah Construction* determined that "an administrative board's factfinding . . . could . . . have preclusive effect in an Article III suit raising damages claims over which the board had no jurisdiction").

as to a jury trial right, Hargis did not even list the Seventh Amendment as an authority in its appellee brief to the Eighth Circuit. Moreover, although Hargis pressed an Article III argument below, in its opposition to certiorari in this Court, Hargis seemingly conceded that TTAB decisions *can sometimes* ground issue preclusion, though it now protests otherwise. See Supplemental Brief in Opposition 2. To the extent, if any, that there could be a meritorious constitutional objection, it is not before us. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 231–232 (1995).

We reject Hargis' statutory argument that we should jettison administrative preclusion in whole or in part to avoid potential constitutional concerns. As to the Seventh Amendment, for instance, the Court has already held that the right to a jury trial does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 337 (1979). It would seem to follow naturally that although the Seventh Amendment creates a jury trial right in suits for trademark damages, see *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 477, 479–480 (1962), TTAB decisions still can have preclusive effect in such suits. Hargis disputes this reasoning even though it admits that in 1791 "'a party was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity.'" Brief for Respondent 39 (quoting *Parklane Hosiery*, *supra*, at 333). Instead, Hargis contends that issue preclusion should not apply to TTAB registration decisions because there were no agencies at common law. But our precedent holds that the Seventh Amendment does not strip competent tribunals of the power to issue judgments with preclusive effect; that logic would not seem to turn on the nature of the competent tribunal. And at the same time, adopting Hargis' view would dramatically undercut agency preclusion, despite what the Court has already said to the contrary. Nothing in Hargis' avoidance argument is weighty enough to overcome these weaknesses.

The claim that we should read the Lanham Act narrowly to avoid Article III concerns is equally unavailing—and for similar reasons. Hargis argues that because it might violate Article III if an agency could make a decision with preclusive effect in a later proceeding before a federal court, we should conclude, as a statutory matter, that issue preclusion is unavailable. Such a holding would not fit with our precedent. For instance, in *Elliott*, the Court, relying on *Utah Construction*, explained that absent a contrary indication, Congress presumptively intends that an agency's determination (there, a state agency) has preclusive effect. 478 U. S., at 796–799; see also *Astoria*, 501 U. S., at 110 (recognizing the "presumption"). To be sure, the Court has never addressed whether such preclusion offends Article III. But because this Court's cases are so clear, there is no ambiguity for this Court to sidestep through constitutional avoidance.[2]

III

The next question is whether there is an "evident" reason why Congress would not want TTAB decisions to receive preclusive effect, even in those cases in which the ordinary elements of issue preclusion are met. *Id.*, at 108. We conclude that nothing in the Lanham Act bars the application of issue preclusion in such cases.

The Lanham Act's text certainly does not forbid issue preclusion. Nor does the Act's structure. Granted, one can seek judicial review of a TTAB registration decision in a *de novo* district court action, and some courts have concluded from this that Congress does not want unreviewed TTAB

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[2] Our dissenting colleagues argue that *Utah Construction*'s conclusion that courts "have not hesitated" to apply administrative preclusion, 384 U. S., at 422, was mistaken and certainly should not be applied to statutes—such as the Lanham Act—enacted prior to 1966. We do not decide who reads the history better. The Court has repeatedly endorsed *Utah Construction* and, importantly, neither party challenges its historical accuracy. For the same reason, we do not decide whether such preclusion is unconstitutional because the issue is not before us.

decisions to ground issue preclusion. See, *e. g.*, *American Heritage Life Ins. Co.* v. *Heritage Life Ins. Co.*, 494 F. 2d 3, 9–10 (CA5 1974). But that conclusion does not follow. Ordinary preclusion law teaches that if a party to a court proceeding does not challenge an adverse decision, that decision can have preclusive effect in other cases, even if it would have been reviewed *de novo*. See Restatement (Second) of Judgments § 28, Comment *a* and Illustration 1 (explaining that the failure to pursue an appeal does not undermine issue preclusion and including an example of an apparently unappealed district court's dismissal for failure to state a claim); cf. *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 398 (1981) (noting "the res judicata consequences of a final, unappealed judgment on the merits").

This case is also unlike *Astoria*, where a plaintiff claiming discrimination first went to an agency and then sued in court about the same alleged conduct. See 501 U. S., at 111. The Court concluded, quite sensibly, that the structure of that scheme indicated that the agency decision could not ground issue preclusion. When exhausting an administrative process is a prerequisite to suit in court, giving preclusive effect to the agency's determination in that very administrative process could render the judicial suit "strictly *pro forma*." *Ibid.*; see also *Elliott*, *supra*, at 795–796 (similar analysis). Here, if a party urged a district court reviewing a TTAB registration decision to give preclusive effect to the very TTAB decision under review, *Astoria* would apply. But that is not this case.

What matters here is that registration is not a prerequisite to an infringement action. Rather, it is a separate proceeding to decide separate rights. Neither is issue preclusion a one-way street. When a district court, as part of its judgment, decides an issue that overlaps with part of the TTAB's analysis, the TTAB gives preclusive effect to the court's judgment. See App. to Pet. for Cert. 54a–55a (giving preclusive effect to the District Court's earlier decision regard-

ing SEALTIGHT's distinctiveness because the issue "was actually litigated and necessarily determined").

Hargis also argues that allowing TTAB decisions to have issue-preclusive effect will adversely affect the registration process. Because of the TTAB's " 'limited jurisdiction' " and " 'the narrowness of the issues' " before it, Hargis contends, the Court should infer that TTAB proceedings are supposed to be more streamlined than infringement litigation. Brief for Respondent 30 (quoting TTAB Manual § 402.01). But, the argument goes, if TTAB decisions can have issue-preclusive effect in infringement litigation, parties may spend more time and energy before the TTAB, thus bogging down the registration process. This concern does not change our conclusion. Issue preclusion is available unless it is "evident," *Astoria*, *supra*, at 108, that Congress does not want it. Here, if a streamlined process in all registration matters was particularly dear to Congress, it would not have authorized *de novo* challenges for those "dissatisfied" with TTAB decisions. 15 U. S. C. § 1071(b). Plenary review serves many functions, but ensuring a streamlined process is not one of them. Moreover, as explained below, for a great many registration decisions issue preclusion obviously will not apply because the ordinary elements will not be met. For those registrations, nothing we say today is relevant.

IV

At last we turn to whether there is a categorical reason why registration decisions can never meet the ordinary elements of issue preclusion, *e. g.*, those elements set out in § 27 of the Restatement (Second) of Judgments. Although many registrations will not satisfy those ordinary elements, that does not mean that none will. We agree with Professor McCarthy that issue preclusion applies where "the issues in the two cases are indeed identical and the other rules of collateral estoppel are carefully observed." 6 McCarthy § 32:99, at 32–244; see also 3 Gilson § 11.08[4][i][iii][B], at 11–319 ("Ul-

timately, Board decisions on likelihood of confusion . . . should be given preclusive effect on a case-by-case basis").

A

The Eighth Circuit's primary objection to issue preclusion was that the TTAB considers different factors than it does. Whereas the TTAB employs some or all of the *DuPont* factors to assess likelihood of confusion, the Eighth Circuit looks to similar, but not identical, factors identified in *SquirtCo* v. *Seven-Up Co.*, 628 F. 2d 1086, 1091 (CA8 1980). The court's instinct was sound: "[I]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4417, p. 449 (2d ed. 2002) (hereinafter Wright & Miller). Here, however, the same likelihood-of-confusion standard applies to both registration and infringement.

To begin with, it does not matter that registration and infringement are governed by different statutory provisions. Often a single standard is placed in different statutes; that does not foreclose issue preclusion. See, *e. g.*, *Smith* v. *Bayer Corp.*, 564 U. S. 299, 307–308 (2011). Neither does it matter that the TTAB and the Eighth Circuit use different factors to assess likelihood of confusion. For one thing, the factors are not fundamentally different, and "[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion." *Id.*, at 312, n. 9. More important, if federal law provides a single standard, parties cannot escape preclusion simply by litigating anew in tribunals that apply that one standard differently. A contrary rule would encourage the very evils that issue preclusion helps to prevent.

The real question, therefore, is whether likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement. We conclude it is, for at least three reasons. First, the operative

language is essentially the same; the fact that the registration provision separates "likely" from "to cause confusion, or to cause mistake, or to deceive" does not change that reality.[3] See 2 Gilson § 5.01[2][a], at 5–17 (explaining that "[t]he same statutory test" applies). Second, the likelihood-of-confusion language that Congress used in these Lanham Act provisions has been central to trademark registration since at least 1881. See Act of Mar. 3, 1881, ch. 138, § 3, 21 Stat. 503 (using a "likely to cause confusion" standard for registration). That could hardly have been by accident. And third, district courts can cancel registrations during infringement litigation, just as they can adjudicate infringement in suits seeking judicial review of registration decisions. See 15 U. S. C. § 1119; 3 McCarthy § 21:20. There is no reason to think that the same district judge in the same case should apply two separate standards of likelihood of confusion.

Hargis responds that the text is not actually the same because the registration provision asks whether the marks "resemble" each other, 15 U. S. C. § 1052(d), while the infringement provision is directed toward the "use in commerce" of the marks, § 1114(1). Indeed, according to Hargis, the distinction between "resembl[ance]" and "use" has been key to trademark law for over a century. There is some force to this argument. It is true that "a party opposing an application to register a mark before the Board often relies only on its federal registration, not on any common-law rights in us-

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[3] Compare 15 U. S. C. § 1114(1) ("Any person who shall . . . use in commerce any . . . mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is *likely to cause confusion, or to cause mistake, or to deceive* . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided" (emphasis added)) with § 1052(d) ("No trademark . . . shall be refused registration . . . unless it . . . [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office . . . as to be *likely*, when used on or in connection with the goods of the applicant, *to cause confusion, or to cause mistake, or to deceive* . . . " (emphasis added)).

ages not encompassed by its registration," and "the Board typically analyzes the marks, goods, and channels of trade only as set forth in the application and in the opposer's registration, regardless of whether the actual usage of the marks by either party differs." Brief for United States as *Amicus Curiae* 23; see also *id.*, at 5 (explaining that "the Board typically reviews only the usages encompassed by the registration" (citing 3 Gilson § 9.03[2][a][ii])); 3 McCarthy § 20:15, at 20–45 (explaining that for registration "it is the mark as shown in the application and as used on the goods described in the application which must be considered, not the mark as actually used"). This means that unlike in infringement litigation, "[t]he Board's determination that a likelihood of confusion does or does not exist will not resolve the confusion issue with respect to non-disclosed usages." Brief for United States as *Amicus Curiae* 23.

Hargis' argument falls short, however, because it mistakes a reason not to apply issue preclusion in some or even many cases as a reason never to apply issue preclusion. Just because the TTAB does not always consider the *same usages* as a district court does, it does not follow that the Board applies a *different standard* to the usages it does consider.[4] If a mark owner uses its mark in ways that are materially the same as the usages included in its registration application, then the TTAB is deciding the same likelihood-of-confusion issue as a district court in infringement litigation. By contrast, if a mark owner uses its mark in ways that are materially unlike the usages in its application, then the TTAB is not deciding the same issue. Thus, if the TTAB does not consider the marketplace usage of the parties' marks, the TTAB's decision should "have no later preclusive

[4] The parties dispute whether and how often the TTAB considers usages beyond those listed in the application and registration. We do not resolve that dispute here. Suffice it to say that when the TTAB adjudicates a usage *within its authority*, that adjudication can ground issue preclusion. See Restatement (Second) of Judgments § 11 (1980).

effect in a suit where actual usage in the marketplace is the paramount issue." 6 McCarthy § 32:101, at 32–246.

Materiality, of course, is essential—trivial variations between the usages set out in an application and the use of a mark in the marketplace do not create different "issues," just as trivial variations do not create different "marks." See generally 4 *id.*, § 23:50, at 23–265 (explaining that "adding descriptive or non-distinctive" elements to another's mark generally will not negate confusion). Otherwise, a party could escape the preclusive effect of an adverse judgment simply by adding an immaterial feature to its mark. That is not the law. See, *e. g.*, Restatement (Second) of Judgments § 27, Comment *c*, at 252–253 (explaining that "issue" must be understood broadly enough "to prevent repetitious litigation of what is essentially the same dispute"); *United States* v. *Stauffer Chemical Co.*, 464 U. S. 165, 172 (1984) (applying issue preclusion where a party sought to "litigate twice . . . an issue arising . . . from virtually identical facts" because the "factual differences" were "of no legal significance").

A fortiori, if the TTAB considers a different mark altogether, issue preclusion would not apply. Needless to say, moreover, if the TTAB has not decided the same issue as that before the district court, there is no reason why any deference would be warranted.

For a similar reason, the Eighth Circuit erred in holding that issue preclusion could not apply here because the TTAB relied too heavily on "appearance and sound." App. to Pet. for Cert. 10a. Undoubtedly there are cases in which the TTAB places more weight on certain factors than it should. When that happens, an aggrieved party should seek judicial review. The fact that the TTAB may have erred, however, does not prevent preclusion. As Judge Colloton observed in dissent, "'issue preclusion prevent[s] relitigation of wrong decisions just as much as right ones.'" 716 F. 3d, at 1029 (quoting *Clark* v. *Clark*, 984 F. 2d 272, 273 (CA8 1993)); see

also Restatement (Second) of Judgments § 28, Comment *j*, at 284 (explaining that "refusal to give the first judgment preclusive effect should not . . . be based simply on a conclusion that [it] was patently erroneous").

B

Hargis also argues that registration is categorically incompatible with issue preclusion because the TTAB uses procedures that differ from those used by district courts. Granted, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana*, 440 U. S., at 164, n. 11; see also *Parklane Hosiery*, 439 U. S., at 331, and n. 15 (similar). But again, this only suggests that sometimes issue preclusion might be inappropriate, not that it always is.

No one disputes that the TTAB and district courts use different procedures. Most notably, district courts feature live witnesses. Procedural differences, by themselves, however, do not defeat issue preclusion. Equity courts used different procedures than did law courts, but that did not bar issue preclusion. See *id.*, at 333. Nor is there reason to think that the state agency in *Elliott* used procedures identical to those in federal court; nonetheless, the Court held that preclusion could apply. See 478 U. S., at 796–799. Rather than focusing on whether procedural differences exist—they often will—the correct inquiry is whether the procedures used in the first proceeding were fundamentally poor, cursory, or unfair. See *Montana*, 440 U. S., at 164, n. 11.

Here, there is no categorical "reason to doubt the quality, extensiveness, or fairness," *ibid.*, of the agency's procedures. In large part they are exactly the same as in federal court. See 37 CFR §§ 2.116(a), 2.122(a). For instance, although "[t]he scope of discovery in Board proceedings . . . is generally narrower than in court proceedings"—reflecting the fact that there are often fewer usages at issue—the TTAB has

adopted almost the whole of Federal Rule of Civil Procedure 26. TTAB Manual § 402.01; see also *id.*, § 401. It is conceivable, of course, that the TTAB's procedures may prove ill suited for a particular issue in a particular case, *e. g.*, a party may have tried to introduce material evidence but was prevented by the TTAB from doing so, or the TTAB's bar on live testimony may materially prejudice a party's ability to present its case. The ordinary law of issue preclusion, however, already accounts for those "rare" cases where a "compelling showing of unfairness" can be made. Restatement (Second) of Judgments § 28, Comments *g* and *j*, at 283–284.

The Eighth Circuit likewise erred by concluding that Hargis bore the burden of persuasion before the TTAB. B&B, the party opposing registration, bore the burden, see 37 CFR § 2.116(b); TTAB Manual § 702.04(a), just as it did in the infringement action. Hargis does not defend the decision below on this ground.

C

Hargis also contends that the stakes for registration are so much lower than for infringement that issue preclusion should never apply to TTAB decisions. Issue preclusion may be inapt if "the amount in controversy in the first action [was] so small in relation to the amount in controversy in the second that preclusion would be plainly unfair." Restatement (Second) of Judgments § 28, Comment *j*, at 283–284. After all, "[f]ew . . . litigants would spend $50,000 to defend a $5,000 claim." Wright & Miller § 4423, at 612. Hargis is wrong, however, that this exception to issue preclusion applies to every registration. To the contrary: When registration is opposed, there is good reason to think that both sides will take the matter seriously.

The benefits of registration are substantial. Registration is "prima facie evidence of the validity of the registered mark," 15 U. S. C. § 1057(b), and is a precondition for a mark to become "incontestable," § 1065. Incontestability is a powerful protection. See, *e. g.*, *Park 'N Fly, Inc.* v. *Dollar*

Park & Fly, Inc., 469 U. S. 189, 194 (1985) (holding that an incontestable mark cannot be challenged as merely descriptive); see also *id.*, at 193 (explaining that "Congress determined that . . . 'trademarks should receive nationally the greatest protection that can be given them'" and that "[a]mong the new protections created by the Lanham Act were the statutory provisions that allow a federally registered mark to become incontestable" (quoting S. Rep. No. 1333, 79th Cong., 2d Sess., 6 (1946))).

The importance of registration is undoubtedly why Congress provided for *de novo* review of TTAB decisions in district court. It is incredible to think that a district court's adjudication of particular usages would not have preclusive effect in another district court. Why would unchallenged TTAB decisions be different? Congress' creation of this elaborate registration scheme, with so many important rights attached and backed up by plenary review, confirms that registration decisions can be weighty enough to ground issue preclusion.

V

For these reasons, the Eighth Circuit erred in this case. On remand, the court should apply the following rule: So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before the district court, issue preclusion should apply.

The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

The Court rightly recognizes that "for a great many registration decisions issue preclusion obviously will not apply." *Ante*, at 153. That is so because contested registrations

are often decided upon "a comparison of the marks in the abstract and apart from their marketplace usage." 6 J. McCarthy, Trademarks and Unfair Competition § 32:101, p. 32–247 (4th ed. 2014). When the registration proceeding is of that character, "there will be no [preclusion] of the likel[ihood of] confusion issue . . . in a later infringement suit." *Ibid.* On that understanding, I join the Court's opinion.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today applies a presumption that when Congress enacts statutes authorizing administrative agencies to resolve disputes in an adjudicatory setting, it intends those agency decisions to have preclusive effect in Article III courts. That presumption was first announced in poorly supported dictum in a 1991 decision of this Court, and we have not applied it since. Whatever the validity of that presumption with respect to statutes enacted after its creation, there is no justification for applying it to the Lanham Act, passed in 1946. Seeing no other reason to conclude that Congress implicitly authorized the decisions of the Trademark Trial and Appeal Board (TTAB) to have preclusive effect in a subsequent trademark infringement suit, I would affirm the decision of the Court of Appeals.

I

A

The presumption in favor of administrative preclusion the Court applies today was first announced in *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). In that case, the Court confronted the question "whether claimants under the Age Discrimination in Employment Act of 1967 [(ADEA)] . . . are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency made with respect to an age-discrimination claim." *Id.*, at 106. It answered that ques-

tion in the negative, concluding that the availability of administrative preclusion was an issue of statutory construction and that the particular statute at issue "carrie[d] an implication that the federal courts should recognize no [such] preclusion." *Id.*, at 108, 110.

Despite rejecting the availability of preclusion, the Court nevertheless, in dictum, announced a presumption in favor of giving preclusive effect to administrative determinations "where Congress has failed expressly or impliedly to evince any intention on the issue." *Id.*, at 110. That dictum rested on two premises. First, that "Congress is understood to legislate against a background of common-law adjudicatory principles." *Id.*, at 108. And, second, that the Court had "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Id.*, at 107.

I do not quarrel with the first premise, but I have serious doubts about the second. The Court in *Astoria* offered only one decision predating the enactment of the ADEA to shore up its assertion that Congress had legislated against a background principle in favor of administrative preclusion—*United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966). See *Astoria*, *supra*, at 107.[1] And that decision cannot be read for the broad proposition asserted by the Court.

Like *Astoria* itself, *Utah Construction* discussed administrative preclusion only in dictum. The case arose out of a contract dispute between the United States and a private contractor. 384 U. S., at 400. The contract at issue contained a disputes clause providing for an administrative proc-

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[1] The Court also cited *University of Tenn.* v. *Elliott*, 478 U. S. 788, 798 (1986), but because that decision postdated the enactment of the ADEA by almost two decades and itself primarily relied on *Utah Construction* it cannot be evidence of any background principle existing at the relevant time.

ess by which "'disputes concerning questions of fact arising under th[e] contract'" would be decided by the contracting officer, subject to written appeal to the head of the department. *Id.*, at 397–398. The Wunderlich Act of 1954 likewise provided that such administrative factfinding would be "final and conclusive" in a later breach-of-contract action "'unless the same is fra[u]dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.'" *Id.*, at 399. Because both "the disputes clause [of the contract] and the Wunderlich Act categorically state[d] that administrative findings on factual issues relevant to questions arising under the contract [would] be final and conclusive on the parties," the Court required the lower courts to accept those findings. *Id.*, at 419. Only after acknowledging that its decision "rest[ed] upon the agreement of the parties as modified by the Wunderlich Act" did the Court go on to comment that the decision was "harmonious with general principles of collateral estoppel." *Id.*, at 421.

To create a presumption based solely on dictum would be bad enough, but the principles *Utah Construction* referred to were far too equivocal to constitute "long-established and familiar" background principles of the common law of the sort on which we base our statutory inferences. *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952). Although *Utah Construction* asserted that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose," it admitted that "courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings." 384 U. S., at 421–422. These contradictory signals are not typically the stuff of which background rules of common law are made. Cf. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 538 (2013) (presuming that Congress intended to retain

the "first sale" doctrine in copyright statutes based on that common-law doctrine's "impeccable historic pedigree").

B

If the occasion had arisen in *Astoria* for the Court to examine the history of administrative preclusion, it would have discovered that the issue was far from settled.

At common law, principles of res judicata and collateral estoppel applied only to a decision by a "court of competent jurisdiction." *Aurora City* v. *West*, 7 Wall. 82, 102 (1869); accord, *Hopkins* v. *Lee*, 6 Wheat. 109, 113 (1821); Restatement of Judgments §§ 4, 7, and Comment *f*, pp. 20, 41, 45 (1942). That rule came with the corollary requirement that the court be "legally constituted"—that is, a court "known to and recognized by the law." 2 H. Black, Law of Judgments § 516, p. 614 (1891). A court not "legally constituted" lacked jurisdiction to enter a legally binding judgment, and thus any such judgment could have no preclusive effect. *Ibid.*

Nineteenth century courts generally understood the term "court of competent jurisdiction" to include all courts with authority and jurisdiction conclusively to resolve a dispute. See J. Wells, A Treatise on the Doctrines of Res Judicata and Stare Decisis §§ 422–423, pp. 336–338 (1878); 2 Black, *supra*, § 516, at 613–614. Thus, courts of law, courts of equity, admiralty courts, and foreign courts could all satisfy the requirement of a "[c]ourt of competent jurisdiction." *Hopkins*, 6 Wheat., at 113. This broad definition served the interest in finality that supports preclusion doctrines, without which "an end could never be put to litigation." *Id.*, at 114.

But however broadly "[c]ourt of competent jurisdiction" was defined, it would require quite a leap to say that the concept encompasses administrative agencies, which were recognized as categorically different from courts. *E. g.*, *Pearson* v. *Williams*, 202 U. S. 281 (1906); F. Cooper, Admin-

istrative Agencies and the Courts 241–242 (1951) (taking the position that agencies "are not courts, and their determinations are not judgments"). This distinction stems from the Constitution itself, which vests the "judicial Power" not in administrative agencies, but in federal courts, whose independence is safeguarded by certain constitutional requirements. Art. III, § 1. One of the consequences of this allocation of judicial power is that agencies possess limited ability to act in a judicial capacity in cases resolving traditional disputes between private parties. See *infra*, at 171.

It is therefore unsurprising that federal courts—including this Court—have been far more hesitant than today's majority to extend common-law preclusion principles to decisions of administrative tribunals. In *Pearson*, for example, this Court declined to recognize any preclusive effect of a decision of an immigration board. 202 U. S., at 284–285. Writing for the Court, Justice Holmes explained that "[t]he board is an instrument of the executive power, not a court"; that it consisted of officials "whose duties are declared to be administrative by" statute; and that "[d]ecisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense." *Ibid.*

Other courts likewise declined to apply general preclusion principles to decisions of administrative agencies. For example, as late as 1947, the D. C. Circuit would rely on the "well settled doctrine that *res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals." *Churchill Tabernacle* v. *FCC*, 160 F. 2d 244, 246 (1947).

The Restatement of Judgments also reflected this practice: It contained no provision for administrative preclusion and explained that it would not address "the effect of the decisions of administrative tribunals." Scope Note, at 2. It rejected the idea of any consistent practice in favor of adminis-

trative preclusion, noting that "the question whether the decisions of a particular tribunal are binding in subsequent controversies depends upon the character of the tribunal and the nature of its procedure and the construction of the statute creating the tribunal and conferring powers upon it." *Ibid.*

Consistent with that comment, federal courts approved of administrative preclusion in narrow circumstances arguably involving only claims against the Government, over which Congress exercises a broader measure of control.[2] In the 19th century, for instance, this Court effectively gave preclusive effect to the decisions of the U. S. Land Department with respect to land patents when it held such patents unreviewable in federal court "for mere errors of judgment." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646 (1882) ("A patent, in a court of law, is conclusive as to all matters properly determined by the Land Department"). Commentators explained that these cases could not truly be understood to involve an application of res judicata or collateral estoppel—for, after all, administrative agencies are not courts—but rather a "species of equitable estoppel." Cooper, *supra*, at 242; see also 2 A. Freeman, Law of Judgments § 633, p. 1335 (5th ed. rev. 1925) (explaining that "the immunity from judicial review" for certain administrative decisions was "not based upon the doctrine of res judicata nor . . . governed by exactly the same rules"). As one commentator put it, res judicata could "not apply, in any strict or technical sense,

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[2] This distinction reaches at least as far back as 17th-century England. See Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 413 (1958) (explaining that, since the 17th century in England, courts have been "identified with the enforcement of private right, and administrative agencies with the execution of public policy"); see also *Hetley* v. *Boyer*, Cro. Jac. 336, 79 Eng. Rep. 287 (K. B. 1614) (reviewing the actions of the "commissioners of [the] sewers," who had exceeded the bounds of their traditional jurisdiction and had imposed on citizens' core private rights).

to the decisions of administrative agencies." Cooper, *supra*, at 241.

This history undercuts any suggestion in *Utah Construction* that administrative preclusion was widely accepted at common law. Accordingly, at least for statutes passed before *Astoria*, I would reject the presumption of administrative preclusion.[3]

II

In light of this history, I cannot agree with the majority's decision to apply administrative preclusion in the context of the Lanham Act.[4] To start, the Lanham Act was enacted in 1946, 20 years before this Court said—even in dictum—that administrative preclusion was an established common-law

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[3] I have no occasion to consider whether the discussion in *Astoria*, *Elliott*, or *Utah Construction* could be understood to create a background principle in favor of administrative preclusion that would apply, as a matter of statutory interpretation, to statutes passed after those decisions.

[4] The majority insists that we must apply the presumption of administrative preclusion because the Court has "repeatedly endorsed *Utah Construction*" and the parties do not challenge "its historical accuracy." *Ante*, at 151, n. 2. But regardless of whether the Court has endorsed *Utah Construction*'s dictum, the Court has never applied the presumption of administrative preclusion to the Lanham Act. Even if the Court's description of the presumption were not dictum, no principle of *stare decisis* requires us to extend a tool of statutory interpretation from one statute to another without first considering whether it is appropriate for that statute. Cf. *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 469–470 (2008) (THOMAS, J., dissenting) ("*[S]tare decisis*, designed to be a principle of stability or repose, [should not] become a vehicle of change whereby an error in one area metastasizes into others, thereby distorting the law"). As for the parties' lack of argument, I would not treat tools of statutory interpretation as claims that can be forfeited. If, for example, one party peppered its brief with legislative history, and the opposing party did not challenge the propriety of using legislative history, I still would not consider myself bound to rely upon it. The same is true here: Although the Court has commented in the past that the presumption of administrative preclusion would apply to other statutes, we are not bound to apply it now to the Lanham Act, even if the parties have assumed we would.

principle. Thus, even if one thought that the dictum in *Utah Construction* were sufficient to establish a common-law principle in favor of preclusion, that conclusion would not warrant applying *Astoria*'s presumption to this enactment from the 1940's. And, construing the Act on its own terms, I see no reason to conclude that Congress intended administrative preclusion to apply to TTAB findings of fact in a subsequent trademark infringement suit. The Act says nothing to indicate such an intent, and several features of the Act support the contrary inference.

The first feature indicating that Congress did not intend preclusion to apply is the limited authority the Act gives the TTAB. The Act authorizes the TTAB only to "determine and decide the respective rights of [trademark] registration," 15 U. S. C. § 1067(a), thereby withholding any authority from the TTAB to "determine the right to use" a trademark or to "decide broader questions of infringement or unfair competition," TTAB Manual of Procedure § 102.01 (2014). This limited job description indicates that TTAB's conclusions regarding registration were never meant to become decisive—through application of administrative preclusion—in subsequent infringement suits. See 15 U. S. C. § 1115(a) (providing that registration of a mark "shall be prima facie evidence of the validity of the registered mark" but "shall not preclude another person from proving any legal or equitable defense or defect"). Giving preclusive effect to the TTAB's decision on likelihood of confusion would be an end-run around the statutory limitation on its authority, as all parties agree that likelihood of confusion is the central issue in a subsequent infringement suit.

A second indication that Congress did not intend administrative preclusion to apply is the Lanham Act's provision for judicial review. After the TTAB issues a registration decision, a party "who is dissatisfied with the decision" may either appeal to the Federal Circuit or file a civil action in

district court seeking review. §§ 1071(a)(1), (b)(1).[5] And it is undisputed that a civil action in district court would entail *de novo* review of the TTAB's decision. *Ante*, at 144. Although under ordinary preclusion principles "the failure to pursue an appeal does not undermine issue preclusion," *ante*, at 152, the availability of *de novo* judicial review of an administrative decision does. That is true both because the judicial review afforded by the Act marks the first opportunity for consideration of the issue by an Article III court and because Congress has deviated from the usual practice of affording deference to the factfindings of an initial tribunal in affording *de novo* review of the TTAB's decisions.

The decision to provide this *de novo* review is even more striking in light of the historical background of the choice: Congress passed the Lanham Act the same year it passed the Administrative Procedure Act, following a lengthy period of disagreement in the courts about what deference administrative findings of fact were entitled to receive on direct review. The issue had been the subject of debate for over 50 years, with varying results. See generally 2 J. Dickinson, Administrative Justice and the Supremacy of Law 39–75 (1927). Sometimes this Court refused to review factual determinations of administrative agencies at all, *Smelting Co.*, 104 U. S., at 640, 646, and sometimes it allowed lower courts to engage in essentially *de novo* review of factual determinations, see *ICC* v. *Alabama Midland R. Co.*, 168 U. S. 144, 174 (1897); *Reckendorfer* v. *Faber*, 92 U. S. 347, 351–355 (1876).

In the early 20th century, the Court began to move toward substantial-evidence review of administrative determinations involving mixed questions of law and fact, *ICC* v. *Union Pacific R. Co.*, 222 U. S. 541, 546–548 (1912), but reserved the authority to review *de novo* any so-called "jurisdictional facts," *Crowell* v. *Benson*, 285 U. S. 22, 62–63

[5] The original 1946 Lanham Act provided for appeal to the Court of Customs and Patent Appeals. See § 21, 60 Stat. 435.

(1932). Courts then struggled to determine the boundary between jurisdictional and nonjurisdictional facts, and thus to determine the appropriate standard of review for administrative decisions. See, *e. g.*, *Estep* v. *United States*, 327 U. S. 114, 142 (1946) (Frankfurter, J., concurring in result) (noting the "casuistic difficulties spawned" in *Crowell* and the "attritions of that case through later decisions"). Although Congress provided for substantial-evidence review in the Administrative Procedure Act, 5 U. S. C. § 706(2)(E), it required *de novo* review in the Lanham Act.

I need not take a side in this historical debate about the proper level of review for administrative findings of fact to conclude that its existence provides yet another reason to doubt that Congress intended administrative preclusion to apply to the Lanham Act.

III

In addition to being unsupported by our precedents or historical evidence, the majority's application of administrative preclusion raises serious constitutional concerns.

A

Executive agencies derive their authority from Article II of the Constitution, which vests "[t]he executive Power" in "a President of the United States," Art. II, § 1, cl. 1. Executive agencies are thus part of the political branches of Government and make decisions "not by fixed rules of law, but by the application of governmental discretion or policy." Dickinson, *supra*, at 35–36; see, *e. g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (An agency "is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration"). They are not constituted to exercise "independent judgment," but to be responsive to the pressures of the political branches. *Perez* v.

Mortgage Bankers Assn., *ante*, at 119 (THOMAS, J., concurring in judgment).

Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights. Under our Constitution, the "judicial power" belongs to Article III courts and cannot be shared with the Legislature or the Executive. *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011); see also *Perez*, *ante*, at 119–122 (opinion of THOMAS, J.). And some historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts, at least absent the consent of the parties to adjudication in another forum. See Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 561–574 (2007) (hereinafter Nelson); see also *Department of Transportation* v. *Association of American Railroads*, *ante*, at 69 (THOMAS, J., concurring in judgment) (explaining that "there are certain core functions" that require the exercise of a particular constitutional power and that only one branch can constitutionally perform).

To the extent that administrative agencies could, consistent with the Constitution, function as courts, they might only be able to do so with respect to claims involving public or quasi-private rights. See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 68–70 (1982) (plurality opinion); see also Nelson 561–574; Dickinson, *supra*, at 6. Public rights are those belonging to the public as a whole, see Nelson 566, whereas quasi-private rights, or statutory entitlements, are those "'privileges'" or "'franchises'" that are bestowed by the government on individuals, *id.*, at 567; see, *e. g.*, *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929) (discussing claims "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it").

The historical treatment of administrative preclusion is consistent with this understanding. As discussed above,

most administrative adjudications that were given preclusive effect in Article III courts involved quasi-private rights like land grants. See *Smelting Co.*, 104 U. S., at 646. And in the context of land grants, this Court recognized that once "title had passed from the government," a more complete form of judicial review was available because "the question became one of private right." *Johnson* v. *Towsley*, 13 Wall. 72, 87 (1871).

It is true that, in the New Deal era, the Court sometimes gave preclusive effect to administrative findings of fact in tax cases, which could be construed to implicate private rights. See, *e. g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404 (1940); *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620, 622–624 (1933). But administrative tax determinations may simply have enjoyed a special historical status, in which case this practice might be best understood as a limited deviation from a general distinction between public and private rights. See Nelson 588–590.

B

Trademark registration under the Lanham Act has the characteristics of a quasi-private right. Registration is a creature of the Lanham Act, which "confers important legal rights and benefits on trademark owners who register their marks." *Ante*, at 142 (internal quotation marks omitted). Because registration is merely a statutory government entitlement, no one disputes that the TTAB may constitutionally adjudicate a registration claim. See *Stern*, *supra*, at 491; Nelson 568–569.

By contrast, the right to adopt and exclusively use a trademark appears to be a private property right that "has been long recognized by the common law and the chancery courts of England and of this country." *Trade-Mark Cases*, 100 U. S. 82, 92 (1879). As this Court explained when addressing Congress' first trademark statute, enacted in 1870, the exclusive right to use a trademark "was not created by the

act of Congress, and does not now depend upon it for its enforcement." *Ibid.* "The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." *Ibid.* Thus, it appears that the trademark infringement suit at issue in this case might be of a type that must be decided by "Article III judges in Article III courts." *Stern*, 564 U. S., at 484.

The majority, however, would have Article III courts decide infringement claims where the central issue—whether there is a likelihood of consumer confusion between two trademarks—has already been decided by an executive agency. This raises two potential constitutional concerns. First, it may deprive a trademark holder of the opportunity to have a core private right adjudicated in an Article III court. See *id.*, at 485–487. Second, it may effect a transfer of a core attribute of the judicial power to an executive agency. Cf. *Perez*, *ante*, at 120–122 (opinion of THOMAS, J.) (explaining that interpretation of regulations having the force and effect of law is likely a core attribute of the judicial power that cannot be transferred to an executive agency). Administrative preclusion thus threatens to "sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our own system, wherever fundamental rights depend . . . upon the facts, and finality as to facts becomes in effect finality in law." *Crowell*, 285 U. S., at 57.

At a minimum, this practice raises serious questions that the majority does not adequately confront. The majority does not address the distinction between private rights and public rights or the nature of the power exercised by an administrative agency when adjudicating facts in private-rights disputes. And it fails to consider whether applying administrative preclusion to a core factual determination in a private-rights dispute comports with the separation of powers.

* * *

I would hold that the TTAB's trademark-registration decisions are not entitled to preclusive effect in a subsequent infringement suit. The common law does not support a general presumption in favor of administrative preclusion for statutes passed before this Court's decision in *Astoria*, and the text, structure, and history of the Lanham Act provide no support for such preclusion. I disagree with the majority's willingness to endorse *Astoria*'s unfounded presumption and to apply it to an adjudication in a private-rights dispute, as that analysis raises serious constitutional questions. Because I can resolve this case on statutory grounds, however, I leave these questions for another day. I respectfully dissent.

Syllabus

OMNICARE, INC., ET AL. *v.* LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND ET AL.

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

No. 13–435. Argued November 3, 2014—Decided March 24, 2015

The Securities Act of 1933 requires that a company wishing to issue securities must first file a registration statement containing specified information about the issuing company and the securities offered. See 15 U. S. C. §§ 77g, 77aa. The registration statement may also include other representations of fact or opinion. To protect investors and promote compliance with these disclosure requirements, § 11 of the Act creates two ways to hold issuers liable for a registration statement's contents: A purchaser of securities may sue an issuer if the registration statement either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading." § 77k(a). In either case, the buyer need not prove that the issuer acted with any intent to deceive or defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381–382.

Petitioner Omnicare, a pharmacy services company, filed a registration statement in connection with a public offering of common stock. In addition to the required disclosures, the registration statement contained two statements expressing the company's opinion that it was in compliance with federal and state laws. After the Federal Government filed suit against Omnicare for allegedly receiving kickbacks from pharmaceutical manufacturers, respondents, pension funds that purchased Omnicare stock (hereinafter Funds), sued Omnicare under § 11. They claimed that Omnicare's legal compliance statements constituted "untrue statement[s] of . . . material fact" and that Omnicare "omitted to state [material] facts necessary" to make those statements not misleading.

The District Court granted Omnicare's motion to dismiss. Because the Funds had not alleged that Omnicare's officers knew they were violating the law, the court found that the Funds had failed to state a § 11 claim. The Sixth Circuit reversed. Acknowledging that the statements at issue expressed opinions, the court held that no showing of subjective disbelief was required. In the court's view, the Funds' allegations that Omnicare's legal compliance opinions were objectively false sufficed to support their claim.

Held:

1. A statement of opinion does not constitute an "untrue statement of . . . fact" simply because the stated opinion ultimately proves incorrect. The Sixth Circuit's contrary holding wrongly conflates facts and opinions. A statement of fact expresses certainty about a thing, whereas a statement of opinion conveys only an uncertain view as to that thing. Section 11 incorporates that distinction in its first clause by exposing issuers to liability only for "untrue statement[s] of . . . *fact.*" § 77k(a) (emphasis added). Because a statement of opinion admits the possibility of error, such a statement remains true—and thus is not an "untrue statement of . . . fact"—even if the opinion turns out to have been wrong.

But opinion statements are not wholly immune from liability under § 11's first clause. Every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. A statement of opinion thus qualifies as an "untrue statement of . . . fact" if *that fact* is untrue—*i. e.*, if the opinion expressed was not sincerely held. In addition, opinion statements can give rise to false-statement liability under § 11 if they contain embedded statements of untrue facts. Here, however, Omnicare's sincerity is not contested and the statements at issue are pure opinion statements. The Funds thus cannot establish liability under § 11's first clause. Pp. 182–186.

2. If a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself, then § 11's omissions clause creates liability. Pp. 186–197.

(a) For purposes of § 11's omissions clause, whether a statement is "misleading" is an objective inquiry that depends on a reasonable investor's perspective. Cf. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445. Omnicare goes too far by claiming that no reasonable person, in any context, can understand a statement of opinion to convey anything more than the speaker's own mindset. A reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about the speaker's basis for holding that view. Specifically, an issuer's statement of opinion may fairly imply facts about the inquiry the issuer conducted or the knowledge it had. And if the real facts are otherwise, but not provided, the opinion statement will mislead by omission.

An opinion statement, however, is not misleading simply because the issuer knows, but fails to disclose, some fact cutting the other way. A reasonable investor does not expect that every fact known to an issuer supports its opinion statement. Moreover, whether an omission makes an expression of opinion misleading always depends on context. Rea-

sonable investors understand opinion statements in light of the surrounding text, and § 11 creates liability only for the omission of material facts that cannot be squared with a fair reading of the registration statement as a whole. Omnicare's arguments to the contrary are unavailing. Pp. 186–195.

(b) Because neither court below considered the Funds' omissions theory under the right standard, this case is remanded for a determination of whether the Funds have stated a viable omissions claim. On remand, the court must review the Funds' complaint to determine whether it adequately alleges that Omnicare omitted from the registration statement some specific fact that would have been material to a reasonable investor. If so, the court must decide whether the alleged omission rendered Omnicare's opinion statements misleading in context. Pp. 195–197.

719 F. 3d 498, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 197. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 203.

Kannon K. Shanmugam argued the cause for petitioners. With him on the briefs were *Joseph M. Terry*, *John S. Williams*, *Linda T. Coberly*, *Harvey Kurzweil*, *Richard W. Reinthaler*, *John E. Schreiber*, *Sarah K. Campbell*, and *Andrew C. Nichols*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Kevin K. Russell*, *Darren J. Robbins*, *Eric Alan Isaacson*, *Henry Rosen*, *Joseph D. Daley*, *Steven F. Hubachek*, *Amanda M. Frame*, and *Susannah R. Conn*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging vacatur and remand. With her on the brief were *Solicitor General Verrilli*, *Deputy Solicitor Stewart*, *Anne K. Small*, *Michael A. Conley*, *John W. Avery*, *Dominick V. Freda*, and *Stephen G. Yoder*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center for Audit Quality by *Carter G. Phillips*, *Jonathan F. Cohn*, *Eric D. McArthur*, and *Joshua J. Fougere*; for the Chamber of Commerce of the United States

JUSTICE KAGAN delivered the opinion of the Court.

Before a company may sell securities in interstate commerce, it must file a registration statement with the Securities and Exchange Commission (SEC). If that document either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading," a purchaser of the stock may sue for damages. 15 U. S. C. § 77k(a). This case requires us to decide how each of those phrases applies to statements of opinion.

I

The Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*, protects investors by ensuring that companies issuing securities (known as "issuers") make a "full and fair disclosure of information" relevant to a public offering. *Pinter* v. *Dahl*, 486 U. S. 622, 646 (1988). The linchpin of the Act is its registration requirement. With limited exceptions not relevant here, an issuer may offer securities to the public only after filing a registration statement. See §§ 77d, 77e. That statement must contain specified information about both the company itself and the security for sale. See §§ 77g, 77aa. Beyond those required disclosures, the issuer may include additional representations of either fact or opinion.

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of America et al. by *George T. Conway III* and *Kate Comerford Todd*; for the Securities Industry and Financial Markets Association by *Richard D. Bernstein*, *James C. Dugan*, and *Kevin M. Carroll*; and for the Washington Legal Foundation by *Douglas W. Greene*, *Claire Loebs Davis*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Jay E. Shushelsky*; for Common Law Scholars by *Ernest A. Young*, *James J. Sabella*, and *Darren Check*; for Institutional Investors by *Jonathan S. Massey* and *Max W. Berger*; for Occupy the SEC by *Akshat Tewary*; for Professors at Law and Business Schools by *J. Robert Brown* and *Lyman Johnson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, and *Paul Alan Levy*; and for the Wyoming Retirement System et al. by *Erik S. Jaffe*.

Section 11 of the Act promotes compliance with these disclosure provisions by giving purchasers a right of action against an issuer or designated individuals (directors, partners, underwriters, and so forth) for material misstatements or omissions in registration statements. As relevant here, that section provides:

> "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue." § 77k(a).

Section 11 thus creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out. Either way, the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381–382 (1983).

This case arises out of a registration statement that petitioner Omnicare filed in connection with a public offering of common stock. Omnicare is the nation's largest provider of pharmacy services for residents of nursing homes. Its registration statement contained (along with all mandated disclosures) analysis of the effects of various federal and state laws on its business model, including its acceptance of rebates from pharmaceutical manufacturers. See, *e. g.*, App. 88–107, 132–140, 154–166. Of significance here, two sentences in the registration statement expressed Omnicare's view of its compliance with legal requirements:

- "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws." *Id.*, at 95.

- "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." *Id.*, at 137.

Accompanying those legal opinions were some caveats. On the same page as the first statement above, Omnicare mentioned several state-initiated "enforcement actions against pharmaceutical manufacturers" for offering payments to pharmacies that dispensed their products; it then cautioned that the laws relating to that practice might "be interpreted in the future in a manner inconsistent with our interpretation and application." *Id.*, at 96. And adjacent to the second statement, Omnicare noted that the Federal Government had expressed "significant concerns" about some manufacturers' rebates to pharmacies and warned that business might suffer "if these price concessions were no longer provided." *Id.*, at 136–137.

Respondents here, pension funds that purchased Omnicare stock in the public offering (hereinafter Funds), brought suit alleging that the company's two opinion statements about legal compliance give rise to liability under § 11. Citing lawsuits that the Federal Government later pressed against Omnicare, the Funds' complaint maintained that the company's receipt of payments from drug manufacturers violated anti-kickback laws. See *id.*, at 181–186, 203–226. Accordingly, the complaint asserted, Omnicare made "materially false" representations about legal compliance. *Id.*, at 274. And so too, the complaint continued, the company "omitted to state [material] facts necessary" to make its representations not misleading. *Id.*, at 273. The Funds claimed that none of Omnicare's officers and directors "possessed reasonable grounds" for thinking that the opinions offered were truthful and complete. *Id.*, at 274. Indeed, the complaint noted that one of Omnicare's attorneys had warned that a particular contract "carrie[d] a heightened risk" of liability under anti-kickback laws. *Id.*, at 225 (emphasis deleted). At the same

time, the Funds made clear that in light of § 11's strict liability standard, they chose to "exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct." *Id.*, at 273.

The District Court granted Omnicare's motion to dismiss. See Civ. No. 2006–26 (ED Ky., Feb. 13, 2012), App. to Pet. for Cert. 28a, 38a–40a, 2012 WL 462551, *4–*5. In the court's view, "statements regarding a company's belief as to its legal compliance are considered 'soft' information" and are actionable only if those who made them "knew [they] were untrue at the time." App. to Pet. for Cert. 38a. The court concluded that the Funds' complaint failed to meet that standard because it nowhere claimed that "the company's officers knew they were violating the law." *Id.*, at 39a. The Court of Appeals for the Sixth Circuit reversed. See 719 F. 3d 498 (2013). It acknowledged that the two statements highlighted in the Funds' complaint expressed Omnicare's "opinion" of legal compliance, rather than "hard facts." *Id.*, at 504 (quoting *In re Sofamor Danek Group Inc.*, 123 F. 3d 394, 401–402 (CA6 1997)). But even so, the court held, the Funds had to allege only that the stated belief was "objectively false"; they did not need to contend that anyone at Omnicare "disbelieved [the opinion] at the time it was expressed." 719 F. 3d, at 506 (quoting *Fait* v. *Regions Financial Corp.*, 655 F. 3d 105, 110 (CA2 2011)).

We granted certiorari, 571 U. S. 1236 (2014), to consider how § 11 pertains to statements of opinion. We do so in two steps, corresponding to the two parts of § 11 and the two theories in the Funds' complaint. We initially address the Funds' claim that Omnicare made "untrue statement[s] of . . . material fact" in offering its views on legal compliance. § 77k(a); see App. 273–274. We then take up the Funds' argument that Omnicare "omitted to state a material fact . . . necessary to make the statements [in its registration filing] not misleading." § 77k(a); see App. 273–274. Unlike both

courts below, we see those allegations as presenting different issues.[1] In resolving the first, we discuss when an opinion itself constitutes a factual misstatement. In analyzing the second, we address when an opinion may be rendered misleading by the omission of discrete factual representations. Because we find that the Court of Appeals applied the wrong standard, we vacate its decision.

II

The Sixth Circuit held, and the Funds now urge, that a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an "untrue statement of a material fact." 15 U. S. C. § 77k(a); see 719 F. 3d, at 505; Brief for Respondents 20–26. As the Funds put the point, a statement of belief may make an implicit assertion about the belief's "subject matter": To say "we believe X is

[1] In his concurrence, JUSTICE THOMAS contends that the lower courts' erroneous conflation of these two questions should limit the scope of our review: We should say nothing about omissions, he maintains, because that issue was not pressed or passed on below. We disagree. Although the Funds could have written a clearer complaint, they raised a discrete omissions claim. See, *e. g.*, App. 191 ("[T]he Company's 2005 Registration Statement . . . omitted material information that was . . . necessary to make the Registration Statement not misleading"); *id.*, at 273 ("The Registration Statement . . . omitted to state facts necessary to make the statements made not misleading, and failed to adequately disclose material facts as described above"). The lower courts chose not to address that claim separately, but understood that the complaint alleged not only misstatements but also omissions. See App. to Pet. for Cert. 38a (describing the Funds' claims as relating to "misstatements/omissions" and dismissing the lot as "not actionable"); 719 F. 3d, at 501 (giving a single rationale for reversing the District Court's dismissal of the Funds' claims "for material misstatements and omissions"). And the omissions issue was the crux of the parties' dispute before this Court. The question was fully briefed by both parties (plus the Solicitor General), and omissions played a starring role at oral argument. Neither in its briefs nor at argument did Omnicare ever object that the Funds' omissions theory had been forfeited or was not properly before this Court. We therefore see no reason to ignore the issue.

true" is often to indicate that "X is in fact true." *Id.*, at 23; see Tr. of Oral Arg. 36. In just that way, the Funds conclude, an issuer's statement that "we believe we are following the law" conveys that "we in fact are following the law"—which is "materially false," no matter what the issuer thinks, if instead it is violating an anti-kickback statute. Brief for Respondents 1.

But that argument wrongly conflates facts and opinions. A fact is "a thing done or existing" or "[a]n actual happening." Webster's New International Dictionary 782 (1927). An opinion is "a belief[,] a view," or a "sentiment which the mind forms of persons or things." *Id.*, at 1509. Most important, a statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. See *ibid.* ("An opinion, in ordinary usage . . . does not imply . . . definiteness . . . or certainty"); 7 Oxford English Dictionary 151 (1933) (an opinion "rest[s] on grounds insufficient for complete demonstration"). Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly. And Congress effectively incorporated just that distinction in § 11's first part by exposing issuers to liability not for "untrue statement[s]" full stop (which would have included ones of opinion), but only for "untrue statement[s] of . . . *fact*." § 77k(a) (emphasis added).

Consider that statutory phrase's application to two hypothetical statements, couched in ways the Funds claim are equivalent. A company's CEO states: "The TVs we manufacture have the highest resolution available on the market." Or, alternatively, the CEO transforms that factual statement into one of opinion: "I *believe*" (or "I think") "the TVs we manufacture have the highest resolution available on the market." The first version would be an untrue statement of fact if a competitor had introduced a higher resolution TV a month before—even assuming the CEO had not yet

learned of the new product. The CEO's assertion, after all, is not mere puffery, but a determinate, verifiable statement about her company's TVs; and the CEO, however innocently, got the facts wrong. But in the same set of circumstances, the second version would remain true. Just as she said, the CEO really did believe, when she made the statement, that her company's TVs had the sharpest picture around. And although a plaintiff could later prove that opinion erroneous, the words "I believe" themselves admitted that possibility, thus precluding liability for an untrue statement of fact. That remains the case if the CEO's opinion, as here, concerned legal compliance. If, for example, she said, "I believe our marketing practices are lawful," and actually did think that, she could not be liable for a false statement of fact—even if she afterward discovered a longtime violation of law. Once again, the statement would have been true, because all she expressed was a view, not a certainty, about legal compliance.

That still leaves some room for § 11's false-statement provision to apply to expressions of opinion. As even Omnicare acknowledges, every such statement explicitly affirms one fact: that the speaker actually holds the stated belief. See Brief for Petitioners 15–16; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 109, p. 755 (5th ed. 1984) (Prosser and Keeton) ("[A]n expression of opinion is itself always a statement of . . . the fact of the belief, the existing state of mind, of the one who asserts it"). For that reason, the CEO's statement about product quality ("I believe our TVs have the highest resolution available on the market") would be an untrue statement of fact—namely, the fact of her own belief—if she knew that her company's TVs only placed second. And so too the statement about legal compliance ("I believe our marketing practices are lawful") would falsely describe her own state of mind if she thought her company was breaking the law. In such cases, § 11's first part would subject

the issuer to liability (assuming the misrepresentation were material).[2]

In addition, some sentences that begin with opinion words like "I believe" contain embedded statements of fact—as, once again, Omnicare recognizes. See Reply Brief 6. Suppose the CEO in our running hypothetical said: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access." That statement may be read to affirm not only the speaker's state of mind, as described above, but also an underlying fact: that the company uses a patented technology. See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1109 (1991) (SCALIA, J., concurring in part and concurring in judgment) (showing that a statement can sometimes be "most fairly read as affirming separately both the fact of the [speaker's] opinion and the accuracy of the facts" given to support or explain it (emphasis deleted)). Accordingly, liability under § 11's false-statement provision would follow (once again, assuming materiality) not only if

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[2] Our decision in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083 (1991), qualifies this statement in one respect. There, the Court considered when corporate directors' statements of opinion in a proxy solicitation give rise to liability under § 14(a) of the Securities Exchange Act, 15 U. S. C. § 78n(a), which bars conduct similar to that described in § 11. In discussing that issue, the Court raised the hypothetical possibility that a director could think he was lying while actually (*i. e.*, accidentally) telling the truth about the matter addressed in his opinion. See *Virginia Bankshares*, 501 U. S., at 1095–1096. That rare set of facts, the Court decided, would not lead to liability under § 14(a). See *ibid.* The Court reasoned that such an inadvertently correct assessment is unlikely to cause anyone harm and that imposing liability merely for the "impurities" of a director's "unclean heart" might provoke vexatious litigation. *Id.*, at 1096 (quoting *Stedman* v. *Storer*, 308 F. Supp. 881, 887 (SDNY 1969)). We think the same is true (to the extent this scenario ever occurs in real life) under § 11. So if our CEO did not believe that her company's TVs had the highest resolution on the market, but (surprise!) they really did, § 11 would not impose liability for her statement.

the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue.

But the Funds cannot avail themselves of either of those ways of demonstrating liability. The two sentences to which the Funds object are pure statements of opinion: To simplify their content only a bit, Omnicare said in each that "we believe we are obeying the law." And the Funds do not contest that Omnicare's opinion was honestly held. Recall that their complaint explicitly "exclude[s] and disclaim[s]" any allegation sounding in fraud or deception. App. 273. What the Funds instead claim is that Omnicare's belief turned out to be wrong—that whatever the company thought, it was in fact violating anti-kickback laws. But that allegation alone will not give rise to liability under § 11's first clause because, as we have shown, a sincere statement of pure opinion is not an "untrue statement of material fact," regardless whether an investor can ultimately prove the belief wrong. That clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments. In other words, the provision is not, as the Court of Appeals and the Funds would have it, an invitation to Monday morning quarterback an issuer's opinions.

III

A

That conclusion, however, does not end this case because the Funds also rely on § 11's omissions provision, alleging that Omnicare "omitted to state facts necessary" to make its opinion on legal compliance "not misleading." App. 273; see § 77k(a).[3] As all parties accept, whether a statement is "misleading" depends on the perspective of a reasonable in-

[3] Section 11's omissions clause also applies when an issuer fails to make mandated disclosures—those "required to be stated"—in a registration statement. § 77k(a). But the Funds do not object to Omnicare's filing on that score.

vestor: The inquiry (like the one into materiality) is objective. Cf. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 445 (1976) (noting that the securities laws care only about the "significance of an omitted or misrepresented fact to a reasonable investor"). We therefore must consider when, if ever, the omission of a fact can make a statement of opinion like Omnicare's, even if literally accurate, misleading to an ordinary investor.

Omnicare claims that is just not possible. On its view, no reasonable person, in any context, can understand a pure statement of opinion to convey anything more than the speaker's own mindset. See Reply Brief 5–6. As long as an opinion is sincerely held, Omnicare argues, it cannot mislead as to any matter, regardless what related facts the speaker has omitted. Such statements of belief (concludes Omnicare) are thus immune from liability under § 11's second part, just as they are under its first.[4]

That claim has more than a kernel of truth. A reasonable person understands, and takes into account, the difference we have discussed above between a statement of fact and one of opinion. See *supra*, at 183–184. She recognizes the import of words like "I think" or "I believe," and grasps that they convey some lack of certainty as to the statement's content.

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[4] In a different argument that arrives at the same conclusion, Omnicare maintains that § 11, by its terms, bars only those omissions that make statements of *fact*—not opinion—misleading. See Reply Brief 3–5. The language of the omissions clause, however, is not so limited. It asks whether an omitted fact is necessary to make "statements" in "any part of the registration statement" not misleading; unlike in § 11's first clause, here the word "statements" is unmodified, thus including both fact and opinion. In any event, Omnicare's alternative interpretation succeeds merely in rephrasing the critical issue. Omnicare recognizes that every opinion statement is also a factual statement about the speaker's own belief. See *supra*, at 184. On Omnicare's view, the question thus becomes when, if ever, an omission can make a statement of *that fact* misleading to an ordinary investor. The following analysis applies just as well to that reformulation.

See, *e. g.*, Restatement (Second) of Contracts § 168, Comment *a*, p. 456 (1979) (noting that a statement of opinion "implies that [the speaker] . . . is not certain enough of what he says" to do without the qualifying language). And that may be especially so when the phrases appear in a registration statement, which the reasonable investor expects has been carefully wordsmithed to comply with the law. When reading such a document, the investor thus distinguishes between the sentences "we believe X is true" and "X is true." And because she does so, the omission of a fact that merely rebuts the latter statement fails to render the former misleading. In other words, a statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees, and § 11's omissions clause therefore does not treat them that way.

But Omnicare takes its point too far, because a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience. Consider an unadorned statement of opinion about legal compliance: "We believe our conduct is lawful." If the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete. In the context of the securities market, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry—rather than, say, on mere intuition, however sincere.[5] Similarly, if the issuer made the statement in the face of its lawyers' contrary advice, or with knowledge that the Federal Government was taking the opposite view, the investor again has cause to complain: He expects not just

[5] In some circumstances, however, reliance on advice from regulators or consistent industry practice might accord with a reasonable investor's expectations.

that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time.[6] Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability.[7]

An opinion statement, however, is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. Reasonable investors understand

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[6] The hypothetical used earlier could demonstrate the same points. Suppose the CEO, in claiming that her company's TV had the highest resolution available on the market, had failed to review any of her competitors' product specifications. Or suppose she had recently received information from industry analysts indicating that a new product had surpassed her company's on this metric. The CEO may still honestly believe in her TV's superiority. But under § 11's omissions provision, that subjective belief, in the absence of the expected inquiry or in the face of known contradictory evidence, would not insulate her from liability.

[7] Omnicare contends at length that *Virginia Bankshares* forecloses this result, see Brief for Petitioners 16–21, relying on the following sentence: "A statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says," 501 U. S., at 1095. But Omnicare's argument plucks that statement from its context and thereby transforms its meaning. *Virginia Bankshares* concerned an expression of opinion that the speaker did not honestly hold—*i. e.*, one making an "untrue statement of fact" about the speaker's own state of mind, § 77k(a). See *id.*, at 1090 ("[W]e interpret the jury verdict as finding that the . . . directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made"). The Court held that such a statement gives rise to liability under § 14(a) when it is also "false or misleading about its subject matter." *Id.*, at 1096. Having done so, the Court went on to consider the rare hypothetical case, described in this opinion's second footnote, in which a speaker expresses an opinion that she does not actually hold, but that turns out to be right. See *supra*, at 185, n. 2. The sentence Omnicare cites did no more than introduce that hypothetical; it was a way of saying "someone might object to a statement—even when the opinion it expressed proved correct—solely on the ground that it was disbelieved." And the Court then held, as noted above, that such an objection would fail. See *ibid.* The language thus provides no support for Omnicare's argument here.

that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty. See *supra*, at 183–184, 187–188. Suppose, for example, that in stating an opinion about legal compliance, the issuer did not disclose that a single junior attorney expressed doubts about a practice's legality, when six of his more senior colleagues gave a stamp of approval. That omission would not make the statement of opinion misleading, even if the minority position ultimately proved correct: A reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement.[8]

Moreover, whether an omission makes an expression of opinion misleading always depends on context. Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life. At the same time, an investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information. And the investor takes into account the customs and practices of the relevant industry. So an omission that renders misleading a statement of opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame. The reasonable investor understands a statement of opinion in its full context, and § 11 creates liabil-

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[8] We note, too, that a reasonable investor generally considers the specificity of an opinion statement in making inferences about its basis. Compare two new statements from our ever-voluble CEO. In the first, she says: "I believe we have 1.3 million TVs in our warehouse." In the second, she says: "I believe we have enough supply on hand to meet demand." All else equal, a reasonable person would think that a more detailed investigation lay behind the former statement.

ity only for the omission of material facts that cannot be squared with such a fair reading.

These principles are not unique to § 11: They inhere, too, in much common law respecting the tort of misrepresentation.[9] The Restatement of Torts, for example, recognizes that "[a] statement of opinion as to facts not disclosed and not otherwise known to the recipient may" in some circumstances reasonably "be interpreted by him as an implied statement" that the speaker "knows facts sufficient to justify him in forming" the opinion, or that he at least knows no facts "incompatible with [the] opinion." Restatement (Second) of Torts § 539, p. 85 (1976).[10] When that is so, the Restatement explains, liability may result from omission of facts—for example, the fact that the speaker failed to conduct any investigation—that rebut the recipient's predictable inference. See *id.*, Comment *a*, at 86; *id.*, Comment *b*, at 87. Similarly, the leading treatise in the area explains that "it has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it." Prosser and Keeton § 109, at 760. That is especially (and traditionally) the case, the treatise continues, where—as in a registration statement—a speaker "holds himself out or is understood as having special knowledge of the matter which is not available

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[9] Section 11 is, of course, "not coextensive with common-law doctrines of fraud"; in particular, it establishes "a stringent standard of liability," not dependent on proof of intent to defraud. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 381, 388–389 (1983); see *supra*, at 179; *infra*, at 192, n. 11. But we may still look to the common law for its insights into how a reasonable person understands statements of opinion.

[10] The Restatement of Contracts, discussing misrepresentations that can void an agreement, says much the same: "[T]he recipient of an assertion of a person's opinion as to facts not disclosed" may sometimes "properly interpret it as an assertion (a) that the facts known to that person are not incompatible with his opinion, or (b) that he knows facts sufficient to justify him in forming it." Restatement (Second) of Contracts § 168, p. 455 (1979).

to the plaintiff." *Id.*, at 760–761 (footnote omitted); see Restatement (Second) of Torts § 539, Comment *b*, at 86 (noting that omissions relating to an opinion's basis are "particularly" likely to give rise to liability when the speaker has "special knowledge of facts unknown to the recipient"); *Smith* v. *Land and House Property Corp.*, [1884] 28 Ch. D. 7, 15 (App. Cas.) (appeal taken from Eng.) (opinion of Bowen, L. J.) (When "the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best . . . impliedly states that [the speaker] knows facts which justify his opinion").[11]

And the purpose of § 11 supports this understanding of how the omissions clause maps onto opinion statements. Congress adopted § 11 to ensure that issuers "tell[ ] the whole truth" to investors. H. R. Rep. No. 85, 73d Cong., 1st Sess., 2 (1933) (quoting President Roosevelt's message to Congress). For that reason, literal accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another. Omnicare would

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[11] In invoking these principles, we disagree with JUSTICE SCALIA's common-law-based opinion in two crucial ways. First, we view the common law's emphasis on special knowledge and expertise as supporting, rather than contradicting, our view of what issuers' opinion statements fairly imply. That is because an issuer has special knowledge of its business—including the legal issues the company faces—not available to an ordinary investor. Second, we think JUSTICE SCALIA's reliance on the common law's requirement of an intent to deceive is inconsistent with § 11's standard of liability. As we understand him, JUSTICE SCALIA would limit liability for omissions under § 11 to cases in which a speaker "subjectively intend[s] the deception" arising from the omission, on the ground that the common law did the same. *Post*, at 202 (opinion concurring in part and concurring in judgment) (emphasis deleted). But § 11 discards the common law's intent requirement, making omissions unlawful—regardless of the issuer's state of mind—so long as they render statements misleading. See *Herman & MacLean*, 459 U. S., at 382 (emphasizing that § 11 imposes liability "even for innocent" misstatements or omissions). The common law can help illuminate when an omission has that effect, but cannot change § 11's insistence on strict liability. See *supra*, at 191, n. 9.

nullify that statutory requirement for all sentences starting with the phrases "we believe" or "we think." But those magic words can preface nearly any conclusion, and the resulting statements, as we have shown, remain perfectly capable of misleading investors. See *supra*, at 188–189. Thus, Omnicare's view would punch a hole in the statute for half-truths in the form of opinion statements. And the difficulty of showing that such statements are literally false—which requires proving an issuer did not believe them, see *supra*, at 184–185—would make that opening yet more consequential: Were Omnicare right, companies would have virtual *carte blanche* to assert opinions in registration statements free from worry about § 11. That outcome would ill-fit Congress's decision to establish a strict liability offense promoting "full and fair disclosure" of material information. *Pinter*, 486 U. S., at 646; see *supra*, at 178–179.

Omnicare argues, in response, that applying § 11's omissions clause in the way we have described would have "adverse policy consequences." Reply Brief 17 (capitalization omitted). According to Omnicare, any inquiry into the issuer's basis for holding an opinion is "hopelessly amorphous," threatening "unpredictable" and possibly "massive" liability. *Id.*, at 2; Brief for Petitioners 34, 36. And because that is so, Omnicare claims, many issuers will choose not to disclose opinions at all, thus "depriving [investors] of potentially helpful information." Reply Brief 19; see Tr. of Oral Arg. 59–61.

But first, that claim is, just as Omnicare labels it, one of "policy"; and Congress gets to make policy, not the courts. The decision Congress made, for the reasons we have indicated, was to extend § 11 liability to all statements rendered misleading by omission. In doing so, Congress no doubt made § 11 less cut-and-dry than a law prohibiting only false factual statements. Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would

naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation she would expect an issuer to have before making the statement. See *supra*, at 188–189. All that, however, is a feature, not a bug, of the omissions provision.

Moreover, Omnicare way overstates both the looseness of the inquiry Congress has mandated and the breadth of liability that approach threatens. As we have explained, an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion. See *supra*, at 188. And to do so, the investor cannot just say that the issuer failed to reveal its basis. Section 11's omissions clause, after all, is not a general disclosure requirement; it affords a cause of action only when an issuer's failure to include a material fact has rendered a published statement misleading. To press such a claim, an investor must allege that kind of omission—and not merely by means of conclusory assertions. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). To be specific: The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. See *supra*, at 188–189. That is no small task for an investor.

Nor does the inquiry such a complaint triggers ask anything unusual of courts. Numerous legal rules hinge on what a reasonable person would think or expect. In requiring courts to view statements of opinion from an ordinary investor's perspective, § 11's omissions clause demands nothing more complicated or unmanageable. Indeed, courts have for decades engaged in just that inquiry, with no

apparent trouble, in applying the common law of misrepresentation. See *supra*, at 191–192.

Finally, we see no reason to think that liability for misleading opinions will chill disclosures useful to investors. Nothing indicates that § 11's application to misleading factual assertions in registration statements has caused such a problem. And likewise, common-law doctrines of opinion liability have not, so far as anyone knows, deterred merchants in ordinary commercial transactions from asserting helpful opinions about their products. That absence of fallout is unsurprising. Sellers (whether of stock or other items) have strong economic incentives to . . . well, *sell* (*i. e.*, hawk or peddle). Those market-based forces push back against any inclination to underdisclose. And to avoid exposure for omissions under § 11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief. Such ways of conveying opinions so that they do not mislead will keep valuable information flowing. And that is the only kind of information investors need. To the extent our decision today chills *misleading* opinions, that is all to the good: In enacting § 11, Congress worked to ensure better, not just more, information.

B

Our analysis on this score counsels in favor of sending the case back to the lower courts for decision. Neither court below considered the Funds' omissions theory with the right standard in mind—or indeed, even recognized the distinct statutory questions that theory raises. See *supra*, at 181–182. We therefore follow our ordinary practice of remanding for a determination of whether the Funds have stated a viable omissions claim (or, if not, whether they should have a chance to replead).

In doing so, however, we reemphasize a few crucial points pertinent to the inquiry on remand. Initially, as we have said, the Funds cannot proceed without identifying one or more facts left out of Omnicare's registration statement.

See *supra*, at 194. The Funds' recitation of the statutory language—that Omnicare "omitted to state facts necessary to make the statements made not misleading"—is not sufficient; neither is the Funds' conclusory allegation that Omnicare lacked "reasonable grounds for the belief" it stated respecting legal compliance. App. 273–274. At oral argument, however, the Funds highlighted another, more specific allegation in their complaint: that an attorney had warned Omnicare that a particular contract "carrie[d] a heightened risk" of legal exposure under anti-kickback laws. *Id.*, at 225 (emphasis omitted); see Tr. of Oral Arg. 42, 49; *supra*, at 180. On remand, the court must review the Funds' complaint to determine whether it adequately alleged that Omnicare had omitted that (purported) fact, or any other like it, from the registration statement. And if so, the court must determine whether the omitted fact would have been material to a reasonable investor—*i. e.*, whether "there is a substantial likelihood that a reasonable [investor] would consider it important." *TSC Industries*, 426 U. S., at 449.

Assuming the Funds clear those hurdles, the court must ask whether the alleged omission rendered Omnicare's legal compliance opinions misleading in the way described earlier—*i. e.*, because the excluded fact shows that Omnicare lacked the basis for making those statements that a reasonable investor would expect. See *supra*, at 188–189. Insofar as the omitted fact at issue is the attorney's warning, that inquiry entails consideration of such matters as the attorney's status and expertise and other legal information available to Omnicare at the time. See *supra*, at 189–190. Further, the analysis of whether Omnicare's opinion is misleading must address the statement's context. See *supra*, at 190–191. That means the court must take account of whatever facts Omnicare *did* provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement. The court should consider, for example, the information Omnicare offered that States had ini-

tiated enforcement actions against drug manufacturers for giving rebates to pharmacies, that the Federal Government had expressed concerns about the practice, and that the relevant laws could "be interpreted in the future in a manner" that would harm Omnicare's business. See App. 95–96, 136–137; *supra*, at 180.

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With these instructions and for the reasons stated, we vacate the judgment below and remand the case for further proceedings.

It is so ordered.

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

Section 11 of the Securities Act of 1933 imposes liability where a registration statement "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact necessary to make the statements therein not misleading." 15 U. S. C. § 77k(a). I agree with the Court's discussion of what it means for an expression of opinion to state an untrue material fact. But an expression of opinion implies facts (beyond the fact that the speaker believes his opinion) only where a reasonable listener would understand it to do so. And it is only when expressions of opinion *do* imply these other facts that they can be "misleading" without the addition of other "material facts." The Court's view would count far more expressions of opinion to convey collateral facts than I—or the common law—would, and I therefore concur only in part.

The common law recognized that most listeners hear "I believe," "in my estimation," and other related phrases as *disclaiming* the assertion of a fact. Hence the (somewhat overbroad) common-law rule that a plaintiff cannot establish a misrepresentation claim "for misstatements of opinion, as distinguished from those of fact." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 109, p. 755

(5th ed. 1984) (Prosser & Keeton). A fraudulent misrepresentation claim based on an expression of opinion could lie for the one fact the opinion reliably conveyed: that the speaker in fact held the stated opinion. Restatement of Torts § 525, Comment *c*, p. 60 (1938). And, in some circumstances, the common law acknowledged that an expression of opinion reasonably implied "that the maker knows of no fact incompatible with his opinion." *Id.* § 539(1), at 91. The no-facts-incompatible-with-the-opinion standard was a demanding one; it meant that a speaker's judgment had to "var[y] so far from the truth that no reasonable man in his position could have such an opinion." Restatement of Contracts § 474(b), p. 902, and Comment *b* (1932). But without more, a listener could only reasonably interpret expressions of opinion as conveying this limited assurance of a speaker's understanding of facts.

In a few areas, the common law recognized the possibility that a listener could reasonably infer from an expression of opinion not only (1) that the speaker sincerely held it, and (2) that the speaker knew of no facts incompatible with the opinion, but also (3) that the speaker had a reasonable basis for holding the opinion. This exceptional recognition occurred only where it was "very reasonable or probable" that a listener should place special confidence in a speaker's opinion. Prosser & Keeton § 109, at 760–761. This included two main categories, both of which were carve-outs from the general rule that "the ordinary man has a reasonable competence to form his own opinion," and "is not justified in relying [on] the . . . opinion" of another. Restatement of Torts § 542, Comment *a*, at 95. First, expressions of opinion made in the context of a relationship of trust, such as between doctors and patients. Second, expressions of opinion made by an expert in his capacity as an expert (for example, a jeweler's statement of opinion about the value of a diamond). These exceptions allowed a listener to deal with those special expressions of opinion as though they were facts. As the

leading treatise put it, "the ordinary man is free to deal in reliance upon the opinion of an expert jeweler as to the value of a diamond [or] of an attorney upon a point of law." Prosser & Keeton § 109, at 761. But what reasonable person would assume that a lawyer's assessment of a diamond or a jeweler's opinion on a point of law implied an educated investigation?

The Court's expansive application of § 11's omissions clause to expressions of opinion produces a far broader field of misrepresentation; in fact, it produces almost the opposite of the common-law rule. The Court holds that a reasonable investor is right to expect a reasonable basis for *all* opinions in registration statements—for example, the conduct of a "meaningful . . . inquiry"—unless that is sufficiently disclaimed. *Ante*, at 188, 190–192, 194–195. Take the Court's hypothetical opinion regarding legal compliance. When a disclosure statement says "we believe our conduct is lawful," *ante*, at 188, the Court thinks this should be understood to suggest that a lawyer was consulted, since a reasonable investigation on this point would require consulting a lawyer. But this approach is incompatible with the common law, which had no "legal opinions are different" exception. See Restatement of Torts § 545, at 102.

It is also incompatible with common sense. It seems to me strange to suggest that a statement of opinion as generic as "we believe our conduct is lawful" conveys the implied assertion of fact "we have conducted a meaningful legal investigation before espousing this opinion." It is strange to ignore the reality that a director might rely on industry practice, prior experience, or advice from regulators—rather than a meaningful legal investigation—in concluding the firm's conduct is lawful. The effect of the Court's rule is to adopt a presumption of expertise on all topics volunteered within a registration statement.

It is reasonable enough to adopt such a presumption for those matters that are required to be set forth in a registra-

tion statement. Those are matters on which the management of a corporation *are* experts. If, for example, the registration statement said "we believe that the corporation has $5,000,000 cash on hand," or "we believe the corporation has 7,500 shares of common stock outstanding," the public is entitled to assume that the management has done the necessary research, so that the asserted "belief" is undoubtedly correct. But of course a registration statement would never preface such items, within the expertise of the management, with a "we believe that." Full compliance with the law, however, is another matter. It is not specifically required to be set forth in the statement, and when management prefaces *that* volunteered information with a "we believe that," it flags the fact that this is not within our area of expertise, but we think we are in compliance.

Moreover, even if one assumes that a corporation issuing a registration statement is (by operation of law) an "expert" with regard to all matters stated or opined about, I would still not agree with the Court's disposition. The Court says the following:

> "Section 11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning. And for expressions of opinion, that means considering the foundation *she would expect an issuer to have* before making the statement." *Ante*, at 193–194 (emphasis added).

The first sentence is true enough—but "what she [the reasonable (female) person, and even he, the reasonable (male) person] would naturally understand a statement [of opinion] to convey" is not that the statement has the foundation *she* (the reasonable female person) considers adequate. *She* is not an expert, and is relying on the advice of an expert—who ought to know how much "foundation" is needed. She would natu-

rally understand that the expert has conducted an investigation that *he* (or she or it) considered adequate. That is what relying upon the opinion of an expert means.

The common law understood this distinction. An action for fraudulent misrepresentation based on an opinion of an expert* was only allowed *when the expression of the opinion conveyed a fact*—the "fact" that summarized the expert's knowledge. Prosser & Keeton § 109, at 761. And a fact was actionable only if the speaker *knew* it was false, if he *knew* he did not know it, or if he *knew* the listener would understand the statement to have a basis *that the speaker knew was not true.* Restatement of Torts § 526, at 63–64. Ah!, the majority might say, so a speaker is liable for knowing he lacks *the listener's reasonable basis*! If the speaker *knows*—is actually aware—that the listener will understand an expression of opinion to have a specific basis that it does not have, then *of course* he satisfies this element of the tort.

But more often, when any basis is implied at all, both sides will understand that the speaker implied a "reasonable basis," but honestly disagree on what that means. And the common law supplied a solution for this: A speaker was liable for ambiguous statements—misunderstandings—as fraudulent misrepresentations *only* where he both knew of the ambiguity *and* intended that the listener fall prey to it. *Id.* § 527, at 66. In other words, even assuming both parties *knew* (a prerequisite to liability) that the expression of opinion implied a "reasonable investigation," if the speaker and listener honestly disagreed on the nature of that investiga-

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*At the time of the Act's passage, the common law did not permit suit for negligent misrepresentation under the circumstances here. An action for negligent misrepresentation resting upon a statement of opinion would lie only if the opinion—a professional opinion—was "given upon facts equally well known to both the supplier and the recipient." Restatement of Torts § 552, Comment *b*, at 123 (1938). That is of course not the situation here. The typical opinion "given upon facts equally known to both the supplier and the recipient" is a lawyer's legal advice on facts described by his client.

tion, the speaker was not liable for a fraudulent misrepresentation unless *he subjectively intended* the deception. And so in no circumstance would the listener's belief of a "reasonable basis" control: If the speaker subjectively believes he lacks a reasonable basis, then his statement is simply a knowing misrepresentation. *Id.* § 526(a), at 63. If he does not know of the ambiguity, or knows of it, but does not intend to deceive, he is not liable. *Id.* § 527, at 66. That his basis for belief was "objectively unreasonable" does not impart liability, so long as the belief was genuine.

This aligns with common sense. When a client receives advice from his lawyer, it is surely implicit in that advice that the lawyer has conducted a reasonable investigation—reasonable, that is, *in the lawyer's estimation.* The client is relying on the expert lawyer's judgment for the amount of investigation necessary, no less than for the legal conclusion. To be sure, if the lawyer conducts an investigation that he does not believe is adequate, he would be liable for misrepresentation. And if he conducts an investigation that he believes is adequate but is *objectively unreasonable* (and reaches an incorrect result), he may be liable for malpractice. But on the latter premise he is not liable for misrepresentation; all that was implicit in his advice was that he had conducted an investigation *he* deemed adequate. To rely on an expert's opinion is to rely on the expert's evaluation of *how much time to spend* on the question at hand.

The objective test proposed by the Court—inconsistent with the common law and common intuitions about statements of opinion—invites roundabout attacks upon expressions of opinion. Litigants seeking recompense for a corporation's expression of belief that turned out, after the fact, to be incorrect can always charge that even though the belief rested upon an investigation the corporation thought to be adequate, the investigation was not "objectively adequate."

Nor is this objective test justified by § 11's absence of a *mens rea* requirement, as the Court suggests. *Ante,*

at 191, n. 10. Some of my citation of the common law is meant to illustrate *when* a statement of opinion contains an implied warranty of reasonable basis. But when it does so, the question then becomes *whose* reasonable basis. My illustration of the common-law requirements for misrepresentation is meant to show that a typical listener assumes that *the speaker's* reasonable basis controls. That showing is not contradicted by § 11's absence of a *mens rea* requirement.

Not to worry, says the Court. Sellers of securities need "only divulge an opinion's basis, or else make clear the real tentativeness of [their] belief[s]." *Ante*, at 195. One wonders what the function of "in my estimation" is, then, except as divulging such hesitation. Or what would be sufficient for the Court. "In my highly tentative estimation?" "In my estimation that, consistent with *Omnicare*, should be understood as an opinion only?" Reasonable speakers do not speak this way, and reasonable listeners do not receive opinions this way. When an expert expresses an opinion instead of stating a fact, it implies (1) that he genuinely believes the opinion, (2) that he believes his basis for the opinion is sufficient, and (most important) (3) that he is not certain of his result. Nothing more. This approach would have given lower courts and investors far more guidance and would largely have avoided the Funds' attack upon Omnicare's opinions as though Omnicare held those opinions out to be facts.

I therefore concur only in part and in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the statements of opinion at issue in this case do not contain an untrue statement of a material fact. 15 U. S. C. § 77k(a); *ante*, at 182–186. I write separately because I do not think it advisable to opine, as the majority does, on an additional theory of liability that is not properly before us.

The question whether and under what circumstances an omission may make a statement of opinion misleading is one that we should have left to the lower courts to decide on remand. As the majority acknowledges, that question was never passed on below. See *ante*, at 195. With good reason: Apart from a few conclusory allegations in their complaint and some *pro forma* references to "misleading statements and omissions" in their briefs, respondents did not elaborate on the omissions theory of liability before either the District Court or the Court of Appeals. They certainly did not articulate the theory the majority now adopts until they filed their merits brief before this Court. And it was not until oral argument that they identified a factual allegation in their complaint that *might* serve to state a claim under that theory. See *ante*, at 196. This delay is unsurprising given that, although various Courts of Appeals have discussed the theory, they have been reluctant to commit to it. See *MHC Mut. Conversion Fund, L. P.* v. *Sandler O'Neill & Partners, L. P.*, 761 F. 3d 1109, 1116 (CA10 2014) ("[I]t is difficult to find many [courts] actually holding a security issuer liable on this basis, . . . and . . . the approach has been questioned by others on various grounds"); see also *ibid.*, n. 5.

We should exercise the same caution. This Court rarely prides itself on being a pioneer of novel legal claims, as "[o]urs is a court of final review and not first view." *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012) (internal quotation marks omitted). Thus, as a general rule, "we do not decide in the first instance issues not decided below." *Ibid.* (internal quotation marks omitted). This includes fashioning innovative theories of liability as much as it includes applying those theories to the circumstances of the case.

The Court has previously relied on a lower court's failure to address an issue below as a reason for declining to address it here, even when the question was fairly presented in the petition and fully vetted by other lower courts. See, *e. g.*,

CSX Transp., Inc. v. *Alabama Dept. of Revenue*, 562 U. S. 277, 284, n. 5 (2011); see also *id.*, at 303, n. 3 (THOMAS, J., dissenting). Surely the feature that distinguishes this case—a novel legal theory that is not fairly included in the question presented—counsels more strongly in favor of avoidance.

As JUSTICE SCALIA's concurrence reveals, the scope of this theory of liability is far from certain. And the highly fact-intensive nature of the omissions theory provides an additional reason not to address it at this time. The majority acknowledges that the facts a reasonable investor may infer from a statement of opinion depend on the context. And yet it opines about certain facts an investor may infer from an issuer's legal compliance opinion: that such an opinion is based on legal advice, for example, or that it is not contradicted by the Federal Government. See *ante*, at 188. These inferences may seem sensible enough in a vacuum, but lower courts would do well to heed the majority's admonition that every statement of opinion must be considered "in a broader frame," *ante*, at 190, taking into account all the facts of the statement and its context. Would that the majority had waited for the "broader frame" of an actual case before weighing in on the omissions theory.

Syllabus

YOUNG *v.* UNITED PARCEL SERVICE, INC.

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

No. 12–1226. Argued December 3, 2014—Decided March 25, 2015

The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C § 2000e(k). The Act's second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Ibid.* This case asks the Court to determine how the latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792. Under that framework, the plaintiff has "the initial burden" of "establishing a prima facie case" of discrimination. *Id.*, at 802. If she carries her burden, the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason[s] for" the difference in treatment. *Ibid.* If the employer articulates such reasons, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the reasons . . . were a pretext for discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who

were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons," but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all "other" relevant "persons."

The District Court granted UPS summary judgment, concluding, *inter alia*, that Young could not make out a prima facie case of discrimination under *McDonnell Douglas*. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator[s]." The Fourth Circuit affirmed.

Held:

1. An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Pp. 219–231.

(a) The parties' interpretations of the Pregnancy Discrimination Act's second clause are unpersuasive. Pp. 220–228.

(i) Young claims that as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Brief for Petitioner 28. Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional "most-favored-nation" status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to *all* pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" who are similar in their ability or inability to work, nor does it specify the particular "other persons" Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual

reason for doing so. See, *e. g.*, *Burdine*, *supra*, at 252–258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach. Pp. 220–223.

(ii) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission (EEOC) guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, "consistency," and "thoroughness" of "consideration" necessary to "give it power to persuade." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance. Pp. 223–225.

(iii) UPS claims that the Act's second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act's second clause as UPS proposes would thus render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy. Pp. 226–228.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work." The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a "legitimate, nondiscriminatory" reason, the plaintiff may show that it is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing

evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see *Burdine*, *supra*, at 255, n. 10, and with Congress' intent to overrule *Gilbert*. Pp. 228–231.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual. Pp. 231–232.

707 F. 3d 437, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 232. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 241. KENNEDY, J., filed a dissenting opinion, *post*, p. 251.

Samuel R. Bagenstos argued the cause for petitioner. With him on the briefs was *Sharon Fast Gustafson*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Assistant Attorney General Moran*, *Deputy Solicitor General Gershengorn*, *Sarah E. Harrington*, *Dennis J. Dimsey*, *Holly A. Thomas*, *Bonnie I. Robin-Vergeer*, *P. David Lopez*, *Carolyn L. Wheeler*, and *Julie L. Gantz*.

Caitlin J. Halligan argued the cause for respondent. With her on the brief were *Mark A. Perry*, *Emmett F. McGee, Jr.*, *Jill S. Distler*, and *Rachel S. Brass*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Lenora M. Lapidus*, *Steven R. Shapiro*, *Deborah A. Jeon*, and *Dina Bakst*; for Bipartisan State and Local Legislators by *Ellen Eardley*; for Black Women's Health Imperative et al. by

JUSTICE BREYER delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U. S. C. § 2000e(k). We must decide how this latter provision applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. See *McDonnell*

Jonathan M. Cohen; for Health Care Providers et al. by *Katherine M. Kimpel* and *Judith L. Lichtman*; for Law Professors et al. by *Joanna L. Grossman* and *Deborah L. Brake*; for the Leadership Conference on Civil and Human Rights by *Maria T. Vullo*, *Wade J. Henderson*, and *Lisa M. Bornstein*; for Members of Congress by *Andrew H. Bart* and *Emily Martin*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Judith A. Scott*, *Nicole G. Berner*, *Jennifer L. Hunter*, *William Lurye*, *David Strom*, and *Nicholas W. Clark*; for U. S. Women's Chamber of Commerce et al. by *David C. Frederick*; and for 23 Pro-Life Organizations et al. by *Carrie Severino*, *Jonathan Keim*, *Thomas C. Berg*, *Teresa S. Collett*, *Ovide M. Lamontagne*, and *Clarke D. Forsythe*.

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations, Inc., by *Thomas R. McCarthy*, *William S. Consovoy*, *Prasad Sharma*, and *Richard Pianka*; for the Eagle Forum Education & Legal Defense Fund, Inc., by *Lawrence J. Joseph*; for the Equal Employment Advisory Council et al. by *Rae T. Vann*, *Karen Harned*, and *Elizabeth Milito*; and for the Chamber of Commerce of the United States of America by *Lori Alvino McGill*, *Kathleen M. Sullivan*, *Lily Fu Claffee*, *Kate Comerford Todd*, and *Warren Postman*.

Douglas Corp. v. *Green*, 411 U. S. 792, 802 (1973). Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

I

A

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. App. 580. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). *Id.*, at 578. UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their . . . inability to work." She accordingly concluded that UPS must accommodate her as well. See Brief for Petitioner 30–31.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transpor-

tation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. § 12101 *et seq.* UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" relevant "persons." See Brief for Respondent 34.

B

Title VII of the Civil Rights Act of 1964 forbids a covered employer to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." 78 Stat. 253, 42 U. S. C. § 2000e–2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which added new language to Title VII's definitions subsection. The first clause of the 1978 Act specifies that Title VII's "ter[m] 'because of sex' . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e(k). The second clause says that

> "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." *Ibid.*

This case requires us to consider the application of the second clause to a "disparate-treatment" claim—a claim that an employer intentionally treated a complainant less favorably than employees with the "complainant's qualifications" but outside the complainant's protected class. *McDonnell Douglas*, *supra*, at 802. We have said that "[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." *Raytheon Co.* v. *Hernandez*, 540 U. S. 44, 52 (2003) (ellipsis and internal quotation marks omitted). We have also made clear

that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985).

In *McDonnell Douglas*, we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must "carry the initial burden" of "establishing a prima facie case" of discrimination by showing

> "(i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

If a plaintiff makes this showing, then the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class. *Ibid.* If the employer articulates such a reason, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i. e.*, the employer] were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253 (1981).

We note that employment discrimination law also creates what is called a "disparate-impact" claim. In evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are unlawful irrespective of motivation or intent. See *Raytheon*, *supra*, at 52–53; see also *Ricci* v. *DeStefano*, 557 U. S. 557, 578 (2009). But Young has not alleged a disparate-impact claim.

Nor has she asserted what we have called a "pattern-or-practice" claim. See *Teamsters* v. *United States*, 431 U. S. 324, 359–360 (1977) (explaining that Title VII plaintiffs who allege a "pattern or practice" of discrimination may establish a prima facie case by "another means"); see also *id.*, at 357 (rejecting contention that the "burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas*").

C

In July 2007, Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR § 1601.28 (2014). Young then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework. See App. 60–62.

After discovery, UPS filed a motion for summary judgment. See Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

1. Young worked as a UPS driver, picking up and delivering packages carried by air. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in No. 08–cv–02586 (D Md.), pp. 3–4 (hereinafter Memorandum).
2. Young was pregnant in the fall of 2006. *Id.*, at 15–16.
3. Young's doctor recommended that she "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." App. 580; see also Memorandum 17.

4. UPS required drivers such as Young to be able to "[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." App. 578; see also Memorandum 5.
5. UPS' occupational health manager, the official "responsible for most issues relating to employee health and ability to work" at Young's UPS facility, App. 568–569, told Young that she could not return to work during her pregnancy because she could not satisfy UPS' lifting requirements, see Memorandum 17–18; 2011 WL 665321, *5 (D Md., Feb. 14, 2011).
6. The manager also determined that Young did not qualify for a temporary alternative work assignment. *Ibid.*; see also Memorandum 19–20.
7. UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an *on-the-job* injury." App. 547 (emphasis added); see also Memorandum 8, 45–46.
8. The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply . . . with requests for a reasonable accommodation because of a permanent disability" under the ADA. App. 548; see also Memorandum 7.
9. The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. See App. 563–565; Memorandum 8.
10. When Young later asked UPS' Capital Division Manager to accommodate her disability, he replied that, while she was pregnant, she was "'too much of a liability'" and could "not come back" until she "was no longer pregnant." *Id.*, at 20.

11. Young remained on a leave of absence (without pay) for much of her pregnancy. *Id.*, at 49.
12. Young returned to work as a driver in June 2007, about two months after her baby was born. *Id.*, at 21, 61.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the Capital Division Manager (10 above). As evidence that she had made out a prima facie case under *McDonnell Douglas*, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job (7), those suffering from ADA disabilities (8), and those who had lost their DOT certifications (9). That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous "other persons," but not with respect to pregnant workers. See Memorandum 29.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS contests the correctness of some of these facts and the relevance of others. See Brief for Respondent 5, 6, 57. But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party, see *Scott* v. *Harris*, 550 U. S. 372, 380 (2007):

13. Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. See App. 400–401 (10-pound lifting limitation); *id.*, at 635 (foot injury); *id.*, at 637 (arm injury).
14. Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. See *id.*, at 381 (recurring knee injury); *id.*, at 655 (ankle injury); *id.*, at 655 (knee injury); *id.*, at 394–398 (stroke); *id.*, at 425, 636–637 (leg injury).

15. Several employees received "inside" jobs after losing their DOT certifications. See *id.*, at 372 (DOT certification suspended after conviction for driving under the influence); *id.*, at 636, 647 (failed DOT test due to high blood pressure); *id.*, at 640–641 (DOT certification lost due to sleep apnea diagnosis).
16. Some employees were accommodated despite the fact that their disabilities had been incurred off the job. See *id.*, at 446 (ankle injury); *id.*, at 433, 635–636 (cancer).
17. According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, *id.*, at 461, 463, "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant," *id.*, at 504.

The District Court granted UPS' motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. 2011 WL 665321, *10–*12. Nor could she make out a prima facie case of discrimination under *McDonnell Douglas*. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as "similarly situated comparator[s]." 2011 WL 665321, *14. The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine issue of material fact as to whether that reason was pretextual. *Id.*, at *15.

On appeal, the Fourth Circuit affirmed. It wrote that "UPS has crafted a pregnancy-blind policy" that is "at least facially a 'neutral and legitimate business practice,' and not evidence of UPS's discriminatory animus toward pregnant workers." 707 F. 3d 437, 446 (2013). It also agreed with the District Court that Young could not show that "similarly-situated employees outside the protected class received more favorable treatment than Young." *Id.*, at 450. Specifically,

it believed that Young was different from those workers who were "disabled under the ADA" (which then protected only those with permanent disabilities) because Young was "not disabled"; her lifting limitation was only "temporary and not a significant restriction on her ability to perform major life activities." *Ibid.* Young was also different from those workers who had lost their DOT certifications because "no legal obstacle stands between her and her work" and because many with lost DOT certifications retained physical (*i. e.*, lifting) capacity that Young lacked. *Ibid.* And Young was different from those "injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury." *Id.*, at 450–451. Rather, Young more closely resembled "an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom would have been eligible for accommodation under UPS' policies. *Id.*, at 448.

Young filed a petition for certiorari essentially asking us to review the Fourth Circuit's interpretation of the Pregnancy Discrimination Act. In light of lower court uncertainty about the interpretation of the Act, we granted the petition. Compare *Ensley-Gaines* v. *Runyon*, 100 F. 3d 1220, 1226 (CA6 1996), with *Urbano* v. *Continental Airlines, Inc.*, 138 F. 3d 204, 206–208 (CA5 1998); *Reeves* v. *Swift Transp. Co.*, 446 F. 3d 637, 640–643 (CA6 2006); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F. 3d 540, 547–552 (CA7 2011); *Spivey* v. *Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312–1314 (CA11 1999).

D

We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered

disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. §§ 12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

II

The parties disagree about the interpretation of the Pregnancy Discrimination Act's second clause. As we have said, see Part I–B, *supra*, the Act's first clause specifies that discrimination " 'because of sex' " includes discrimination "because of . . . pregnancy." But the meaning of the second clause is less clear; it adds: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*." 42 U. S. C. § 2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving "the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her [in]ability to work." Reply Brief 15. Suppose the employer would not give "*that [pregnant]employee*" the

"same accommodations" as another employee, but the employer's reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work." Brief for Petitioner 23. In other words, Young contends that the second clause means that whenever "an employer accommodates only a subset of workers with disabling conditions," a court should find a Title VII violation if "pregnant workers who are similar in the ability to work" do not "receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations." *Id.*, at 28.

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII. Cf. *post*, at 244 (SCALIA, J., dissenting) (hereinafter the dissent) (the clause "does not prohibit denying pregnant women accommodations . . . on the basis of an evenhanded policy").

A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as "an employer accommodates only a subset of workers with

disabling conditions," "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations." Brief for Petitioner 28. She adds that, because the record here contains "evidence that pregnant and nonpregnant workers were not treated the same," that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*. Brief for Petitioner 47.

The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have been Congress' intent in passing the Pregnancy Discrimination Act. See, *e. g.*, *Urbano*, 138 F. 3d, at 206–208; *Reeves*, 466 F. 3d, at 641; *Serednyj*, 656 F. 3d, at 548–549; *Spivey*, 196 F. 3d, at 1312–1313. And Young partially agrees, for she writes that "the statute does not require employers to give" to "pregnant workers all of the benefits and privileges it extends to other" similarly disabled "employees when those benefits and privileges are . . . based on the employee's tenure or position within the company." Reply Brief 15–16; see also Tr. of Oral Arg. 22 ("[S]eniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits").

Young's last-mentioned concession works well with respect to seniority, for Title VII itself contains a seniority

defense, see 42 U. S. C. § 2000e–2(h). Hence, seniority is not part of the problem. But otherwise the most-favored-nation problem remains, and Young's concession does not solve it. How, for example, should a court treat special benefits attached to injuries arising out of, say, extrahazardous duty? If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special "causes"—for example, benefits for those who drive (and are injured) in extrahazardous conditions?

We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term "other persons." It does not say that the employer must treat pregnant employees the "same" as "*any* other persons" (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind.

Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, *e. g.*, *Raytheon*, 540 U. S., at 51–55; *Burdine*, 450 U. S., at 252–258; *McDonnell Douglas*, 411 U. S., at 802. There is no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach. Indeed, the relevant House Report specifies that the Act "reflect[s] no new legislative mandate." H. R. Rep. No. 95–948, pp. 3–4 (1978). And the Senate Report states that the Act was designed to "reestablis[h] the law as it was understood prior to" this Court's decision in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976).

S. Rep. No. 95–331, p. 8 (1978). See *Gilbert*, *supra*, at 147 (Brennan, J., dissenting) (lower courts had held that a disability plan that compensates employees for temporary disabilities but not pregnancy violates Title VII); see also *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 717, n. 2 (2009) (GINSBURG, J., dissenting).

B

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that "[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities" and that "the availability of . . . benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided: "Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 37 Fed. Reg. 6837 (1972) (codified in 29 CFR § 1604.10(b) (1973)).

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: "Disabilities caused or contributed to by pregnancy . . . for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions." § 1604.10(b) (1979). Moreover, the EEOC stated that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." 29 CFR pt. 1604, App., p. 918.

This post-Act guidance, however, does not resolve the ambiguity of the term "other persons" in the Act's second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related dis-

abilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e. g., a policy of providing light duty only to workers injured on the job)." 2 EEOC Compliance Manual § 626–I(A)(5), p. 626:0009 (July 2014). The EEOC also provided an example of disparate treatment that would violate the Act:

> "An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request." *Id.*, at 626:0013, Example 10.

The EEOC further added that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries." *Id.*, at 626:0028.

The Solicitor General argues that we should give special, if not controlling, weight to this guideline. He points out that we have long held that "the rulings, interpretations and opinions" of an agency charged with the mission of enforcing a particular statute, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift &*

Co., 323 U. S. 134, 140 (1944). See Brief for United States as *Amicus Curiae* 26.

But we have also held that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, *supra*, at 140. These qualifications are relevant here and severely limit the EEOC's July 2014 guidance's special power to persuade.

We come to this conclusion not because of any agency lack of "experience" or "informed judgment." Rather, the difficulties are those of timing, "consistency," and "thoroughness" of "consideration." The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. See Brief for Defendant-Appellee in *Ensley-Gaines* v. *Runyon*, No. 95–1038 (CA6 1996), pp. 26–27 (explaining that a reading of the Act like Young's was "simply incorrect" and "runs counter" to this Court's precedents). See also Brief for United States as *Amicus Curiae* 16, n. 2 ("The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries"). Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

C

We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. But that cannot be so.

The first clause accomplishes that objective when it expressly amends Title VII's definitional provision to make clear that Title VII's words "because of sex" and "on the basis of sex" "include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U. S. C. § 2000e(k). We have long held that " 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause' " is rendered " 'superfluous, void, or insignificant.' " *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001)). But that is what UPS' interpretation of the second clause would do.

The dissent, basically accepting UPS' interpretation, says that the second clause is not "superfluous" because it adds "clarity." *Post*, at 245 (internal quotation marks omitted). It makes "plain," the dissent adds, that unlawful discrimination "includes disfavoring pregnant women relative to other workers of similar inability to work." *Ibid.* Perhaps we fail to understand. *McDonnell Douglas* itself makes clear that courts normally consider how a plaintiff was treated relative to other "persons of [the plaintiff's] qualifications" (which here include disabilities). 411 U. S., at 802. If the second clause of the Act did not exist, we would still say that an employer who disfavored pregnant women relative to other workers of similar ability or inability to work had engaged in pregnancy discrimination. In a word, there is no need for the "clarification" that the dissent suggests the second sentence provides.

Moreover, the interpretation espoused by UPS and the dissent would fail to carry out an important congressional

objective. As we have noted, Congress' "unambiguou[s]" intent in passing the Act was to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983); see also *post*, at 246 (recognizing that "the object of the Pregnancy Discrimination Act is to displace this Court's conclusion in [*Gilbert*]"). In *Gilbert*, the Court considered a company plan that provided "nonoccupational sickness and accident benefits to all employees" without providing "disability-benefit payments for any absence due to pregnancy." 429 U. S., at 128, 129. The Court held that the plan did not violate Title VII; it did not discriminate on the basis of sex because there was "no risk from which men are protected and women are not." *Id.*, at 138 (internal quotation marks omitted). Although pregnancy is "confined to women," the majority believed it was not "comparable in all other respects to [the] diseases or disabilities" that the plan covered. *Id.*, at 136. Specifically, the majority explained that pregnancy "is not a 'disease' at all," nor is it necessarily a result of accident. *Ibid.* Neither did the majority see the distinction the plan drew as "a subterfuge" or a "pretext" for engaging in gender-based discrimination. *Ibid.* In short, the *Gilbert* majority reasoned in part just as the dissent reasons here. The employer did "not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.*" *Post*, at 242. It distinguished between them on a neutral ground—*i. e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See 429 U. S., at 136.

Simply including pregnancy among Title VII's protected traits (*i. e.*, accepting UPS' interpretation) would not overturn *Gilbert* in full—in particular, it would not respond to *Gilbert*'s determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. As we explained in *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), "the

first clause of the [Act] reflects Congress' disapproval of the reasoning in *Gilbert*" by "adding pregnancy to the definition of sex discrimination prohibited by Title VII." *Id.*, at 284. But the second clause was intended to do more than that—it "was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *Id.*, at 285. The dissent's view, like that of UPS', ignores this precedent.

III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is "not intended to be an inflexible rule." *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 575 (1978). Rather, an individual plaintiff may establish a prima facie case by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under" Title VII. *Id.*, at 576 (internal quotation marks omitted). The burden of making this showing is "not onerous." *Burdine*, 450 U. S., at 253. In particular, making this showing is not as burdensome as succeeding on "an ultimate finding of fact as to" a discriminatory employment action. *Furnco*, *supra*, at 576. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See *McDonnell Douglas*, 411 U. S., at 802 (burden met where plaintiff showed that employer hired other "qualified" individuals outside the protected class); *Furnco*, *supra*, at 575–

577 (same); *Burdine*, *supra*, at 253 (same). Cf. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 142 (2000) (similar).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. 411 U. S., at 802. But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently "legitimate, nondiscriminatory" reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large per-

centage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine*, *supra*, at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, see *post*, at 248–249) that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. 411 U. S., at 804–805. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines, cf. *post*, at 247–249.

Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert*'s reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else." *Post*, at 242–243. This logic would have found no problem with the employer plan in *Gilbert*,

which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees—*i. e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. See *post*, at 246–247. But Congress' intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer's disability plan as denying coverage to pregnant employees on a neutral basis.

IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. See Part I–C, *supra*. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. See App. 504 (shop steward's testimony that "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant"). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS' justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

* * *

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

As originally enacted, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–2(a)(1), made it an unlawful employment practice to discriminate "because of [an] individual's . . . sex" but made no mention of discrimination because of pregnancy. In *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 135–140 (1976), this Court held that Title VII did not reach pregnancy discrimination. Congress responded by enacting the Pregnancy Discrimination Act (PDA), which added subsection (k) to a definitional provision, § 2000e. Subsection (k) contains two clauses. The first is straightforward; the second is not.

I

The first clause provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy."[1] This clause has the effect of adding pregnancy to the list of prohibited grounds (race,

[1] While § 2000e–2(a) uses the phrase "because of . . . sex," other provisions governed by the definitions in § 2000e use the phrase "on the basis of . . . sex." See, *e. g.*, §§ 2000e–2(b), (k)(1)(A). Therefore, subsection (k) covers this phrase as well.

sex, etc.) originally included in § 2000e–2(a)(1). Claims of discrimination under that provision require proof of discriminatory intent. See, *e. g.*, *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009); *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 985–986 (1988). Thus, as a result of the first clause, an employer engages in unlawful discrimination under § 2000e–2(a)(1) if (and only if) the employer's intent is to discriminate because of or on the basis of pregnancy.

If an employer treats a pregnant woman unfavorably for any other reason, the employer is not guilty of an unlawful employment practice under § 2000e–2(a), as defined by the first clause of the PDA. And under this first clause, it does not matter whether the employer's ground for the unfavorable treatment is reasonable; all that matters is the employer's actual intent. Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination. But if the factfinder is convinced that the employer acted for some reason other than pregnancy, the employer cannot be held liable under this clause.

II

The PDA, however, does not simply prohibit discrimination because of or on the basis of pregnancy. Instead, the second clause in § 2000e(k) goes on to say the following: "and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." This clause raises several difficult questions of interpretation that are pertinent to the case now before us.

A

First, does this clause simply explain what is meant by discrimination because of or on the basis of pregnancy? Or

does it impose an additional restriction on employer conduct? I believe that this clause does not merely explain but instead adds to the language that precedes it.

This is the interpretation that is most consistent with the statutory text. This clause begins with the word "and," which certainly suggests that what follows represents an addition to what came before.

It is also revealing that the second clause makes no reference to intent, which is the linchpin of liability under the first clause, and that the second clause is an affirmative command (an employer "shall" provide equal treatment), while the first clause is negative (it prohibits discrimination). If a careful drafter wanted to make it clear that the second clause does no more than explain what is meant by the first, the language of the second clause would have to be substantially modified.

Finally, if the second clause does not set out an additional restriction on employer conduct, it would appear to be largely, if not entirely, superfluous. See, *e. g.*, *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006) ("[I]t is generally presumed that statutes do not contain surplusage"). As noted, the first clause, by adding pregnancy to the list of prohibited grounds for adverse employment actions, mandates that discrimination because of pregnancy be treated like discrimination because of race, sex, etc. An employer commits an unlawful employment practice if it intentionally treats employees of a particular race or sex less favorably than other employees who are similar in their ability or inability to work. Accordingly, the first clause of the PDA is alone sufficient to make it clear that an employer is guilty of an unlawful employment practice if it intentionally treats pregnant employees less favorably than others who are similar in their ability or inability to work.[2] For these reasons, I conclude that the

[2] JUSTICE SCALIA's dissent argues, *post*, at 244–246, that the second clause serves the useful purpose of clarifying the meaning of discrimination because of pregnancy. Without the second clause, that dissent maintains,

second clause does not merely explain the first but adds a further requirement of equal treatment irrespective of intent.

B

This leads to the second question: In determining whether pregnant employees have been given the equal treatment that this provision demands, with whom must the pregnant employees be compared? I interpret the second clause to mean that pregnant employees must be compared with employees performing the same or very similar jobs. Pregnant employees, the second provision states, must be given the same treatment as other employees who are "similar in their ability or inability to work." An employee's ability to work—despite illness, injury, or pregnancy—often depends on the tasks that the employee's job includes. Different jobs have different tasks, and different tasks require different abilities. Suppose that an employer provides a period of leave with pay for employees whose jobs require tasks, *e. g.*, lifting heavy objects, that they cannot perform because of illness or injury. Must the employer provide the same benefits for pregnant employees who are unable to lift heavy objects but have desk jobs that do not entail heavy lifting? The answer is no. The treatment of pregnant employees must be compared with the treatment of nonpregnant employees whose jobs involve the performance of the same or very similar tasks.

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there might be uncertainty as to whether an employer would commit an unlawful employment practice if it excluded pregnancy from an otherwise complete disability benefits program. Contrary to the dissent, however, I think that the answer to this question would be quite obvious based on the first clause of the PDA alone. If an employer provided benefits for every employee who was temporarily unable to work due to any physical condition other than pregnancy, that employer would be in the same position as an employer who provided similar benefits for employees of every race but one. In both situations, the employer would clearly discriminate on a prohibited ground.

C

This conclusion leads to a third, even more difficult question: When comparing pregnant employees to nonpregnant employees in similar jobs, which characteristics of the pregnant and nonpregnant employees must be taken into account? The answer, I believe, must be found in the reference to "other employees who are similar in their ability or inability to work." I see two possible interpretations of this language. The first is that the capacity to perform the tasks required by a job is the only relevant characteristic, but like the Court, *ante*, at 220–223, I cannot accept this "most favored employee" interpretation.

This interpretation founders when, as in this case, an employer treats pregnant women less favorably than some but not all nonpregnant employees who have similar jobs and are similarly impaired in their ability to perform the tasks that these jobs require. In this case, as I will explain below, see Part III, United Parcel Service (UPS) drivers who were unable to perform the physical tasks required by that job fell into three groups: first, nonpregnant employees who received favorable treatment; second, nonpregnant employees who do not receive favorable treatment; and third, pregnant employees who, like the nonpregnant employees in the second category, did not receive favorable treatment. Under these circumstances, would the "most favored employee" interpretation require the employer to treat the pregnant women like the employees in the first, favored group? Or would it be sufficient if the employer treated them the same as the nonpregnant employees in the second group who did not receive favorable treatment?

Recall that the second clause of § 2000e(k) requires that pregnant women "be treated the same for all employment-related purposes . . . as *other persons* not so affected but similar in their ability or inability to work." (Emphasis added.) Therefore, UPS could say that its policy treated the pregnant employees the same as "other persons" who were

similar in their ability or inability to work, namely, those nonpregnant employees in the second category. But at the same time, the pregnant drivers like petitioner could say that UPS did not treat them the same as "other employees" who were similar in their ability or inability to work, namely, the nonpregnant employees in the first group. An interpretation that leads to such a problem cannot be correct.[3]

I therefore turn to the other possible interpretation of the phrase "similar in their ability or inability to work," namely, that "similar in the ability or inability to work" means "similar *in relation* to the ability or inability to work."[4] Under this interpretation, pregnant and nonpregnant employees are not similar in relation to the ability or inability to work if they are unable to work for different reasons. And this means that these two groups of employees are not similar in the relevant sense if the employer has a neutral business reason for treating them differently. I agree with the Court

[3] The "most favored employee" interpretation would also lead to wildly implausible results. Suppose, for example, that an employer had a policy of refusing to provide any accommodation for any employee who was unable to work due to any reason but that the employer wished to make an exception for several employees who were seriously injured while performing acts of extraordinary heroism on the job, for example, saving the lives of numerous fellow employees during a fire in the workplace. If the ability to perform job tasks was the only characteristic that could be considered, the employer would face the choice of either denying any special treatment for the heroic employees or providing all the same benefits to all pregnant employees. It is most unlikely that this is what Congress intended. Such a requirement would go beyond anything demanded by any other antidiscrimination law.

[4] Opinions have often used the phrase "similar in" to mean "similar in relation to" or "similar with respect to." See, *e. g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 127 (2013) (BREYER, J., concurring in judgment) ("similar in character and specificity to piracy"); *Williams* v. *Illinois*, 567 U. S. 50, 112 (2012) (THOMAS, J., concurring in judgment) ("similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent"); *Sykes* v. *United States*, 564 U. S. 1, 9 (2011) ("similar in degree of danger to that involved in arson").

that a sufficient reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates." *Ante*, at 229.[5] Otherwise, however, I do not think that the second clause of the PDA authorizes courts to evaluate the justification for a truly neutral rule. The language used in the second clause of the PDA is quite different from that used in other antidiscrimination provisions that require such an evaluation. Cf. § 12112(b)(5)(A) (discrimination against a person with a disability includes "not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose *an undue hardship* on the operation of [its] business" (emphasis added)); § 2000e(j) (employer must reasonably accommodate religious observance, practice, and belief unless that would impose an "undue hardship on the conduct of the employer's business"); § 2000e–2(k)(1)(A)(i) (business necessity defense in Title VII disparate-impact cases).

III

I understand petitioner in this case to assert claims under both the first and second clauses of § 2000e(k). With respect to her claim under the first clause, I agree with the Court that the information in the summary judgment record is sufficient (albeit barely) to take the question to the trier of fact.

I believe that the judgment of the Court of Appeals with respect to petitioner's claim under the second clause must

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[5] If cost alone could justify unequal treatment of pregnant employees, the plan at issue in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), would be lawful. Cf. *id.*, at 138. But this Court has repeatedly said that the PDA rejected "'both the holding and the reasoning'" in *Gilbert*. *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 720 (2009) (GINSBURG, J., dissenting) (quoting *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983)).

also be vacated. Petitioner sought to be excused during her pregnancy from the lifting requirements that were among her tasks as a driver. Under the policy that UPS claims to have had in force at the time in question, drivers who were physically unable to perform the tasks required by that position fell into three groups.

First, some drivers were reassigned to less physically demanding positions. Included in this group were (1) those who were unable to work as drivers due to an injury incurred on the job, (2) those drivers who were unable to work as drivers due to a disability as defined by the Americans with Disabilities Act of 1990 (ADA), and (3) those drivers who, as the result of a medical condition or injury, lost the Department of Transportation (DOT) certification needed to work in that capacity.

The second group of drivers consisted of those who were not pregnant and were denied transfer to a light-duty job. Drivers who were injured off the job fell into this category. The third group was made up of pregnant drivers like petitioner.

It is obvious that respondent had a neutral reason for providing an accommodation when that was required by the ADA. Respondent also had neutral grounds for providing special accommodations for employees who were injured on the job. If these employees had not been permitted to work at all, it appears that they would have been eligible for workers' compensation benefits. See Md. Lab. & Empl. Code Ann. § 9–614 (2008).

The accommodations that are provided to drivers who lost their DOT certifications, however, are another matter. A driver may lose DOT certification for a variety of reasons, including medical conditions or injuries incurred off the job that impair the driver's ability to operate a motor vehicle. Such drivers may then be transferred to jobs that do not require physical tasks incompatible with their illness or injury. It does not appear that respondent has provided any

plausible justification for treating these drivers more favorably than drivers who were pregnant.

The Court of Appeals provided two grounds for distinguishing petitioner's situation from that of the drivers who had lost their DOT certifications, see 707 F. 3d 437, 450 (CA4 2013), but neither is adequate. First, the Court of Appeals noted that "no legal obstacle [stood] between [petitioner] and her work." *Ibid.* But the legal obstacle faced by drivers who have lost DOT certification only explains why those drivers could not continue to perform all the tasks required by their ordinary jobs; it does not explain why respondent went further and *provided such drivers with a work accommodation.* Petitioner's pregnancy prevented her from continuing her normal work as a driver, just as is the case for a driver who loses DOT certification. But respondent had a policy of accommodating drivers who lost DOT certification but not accommodating pregnant women, like petitioner. The legal obstacle of lost certification cannot explain this difference in treatment.

Second, the Court of Appeals observed that "'those with DOT certification maintai[n] the ability to perform any number of demanding physical tasks,'" *ibid.*, but it is doubtful that this is true in all instances. A driver can lose DOT certification due to a great variety of medical conditions, including loss of a limb, 49 CFR § 391.41(b)(1) (2013); impairments of the arm, hand, finger, foot, or leg, §§ 391.41(b)(2)(i) and (ii); cardiovascular disease, § 391.41(b)(4); respiratory dysfunction, § 391.41(b)(5); high blood pressure, § 391.41(b)(6); arthritis, § 391.41(b)(7); and epilepsy § 391.41(b)(8). It is not evident—and as far as I am aware, the record does not show—that all drivers with these conditions are nevertheless able to perform a great many physically demanding tasks. Nevertheless, respondent says that it was its policy to transfer such drivers to so-called inside jobs when such positions were available. Presumably, respondent did not assign these drivers to jobs that they were physically unable

to perform. So in at least some instances, they must have been assigned to jobs that did not require them to perform tasks that they were incapable of performing due to the medical condition that caused the loss of DOT certification. Respondent has not explained why pregnant drivers could not have been given similar consideration.

For these reasons, it is not at all clear that respondent had any neutral business ground for treating pregnant drivers less favorably than at least some of its nonpregnant drivers who were reassigned to other jobs that they were physically capable of performing. I therefore agree with the Court that the decision of the Court of Appeals with respect to petitioner's claim under the second clause of the PDA must be vacated, and the case must be remanded for further proceedings with respect to that claim.

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

Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To "treat" pregnant workers "the same . . . as other persons," we are told, means refraining from adopting policies that impose "significant burden[s]" upon pregnant women without "sufficiently strong" justifications. *Ante*, at 229. Where do the "significant burden" and "sufficiently strong justification" requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice.

I

Title VII forbids employers to discriminate against employees "because of . . . sex." 42 U. S. C. § 2000e–2(a)(1). The Pregnancy Discrimination Act adds a provision to Title VII's definitions section:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." § 2000e(k).

Title VII's prohibition of discrimination creates liability for both disparate treatment (taking action with "discriminatory motive") and disparate impact (using a practice that "fall[s] more harshly on one group than another and cannot be justified by business necessity"). *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977). Peggy Young did not establish pregnancy discrimination under either theory. She argued that United Parcel Service's refusal to accommodate her inability to work amounted to disparate treatment, but the Court of Appeals concluded that she had not mustered evidence that UPS denied the accommodation with intent to disfavor pregnant women. 707 F. 3d 437, 449–451 (CA4 2013). And Young never brought a claim of disparate impact.

That is why Young and the Court leave behind the part of the law defining pregnancy discrimination as sex discrimination, and turn to the part requiring that "women affected by pregnancy . . . be treated the same . . . as other persons not so affected but similar in their ability or inability to work." § 2000e(k). The most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.* Here, that means pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions. If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been "treated

the same" as everyone else. UPS's accommodation for drivers who lose their certifications illustrates the point. A pregnant woman who loses her certification gets the benefit, just like any other worker who loses his. And a pregnant woman who keeps her certification does not get the benefit, again just like any other worker who keeps his. That certainly sounds like treating pregnant women and others the same.

There is, however, another way to understand "treated the same," at least looking at that phrase on its own. One could read it to mean that an employer may not distinguish *at all* between pregnant women and others of similar ability. Here, that would mean pregnant women are entitled, not to accommodations on the same terms as others, but to *the same accommodations* as others, no matter the differences (other than pregnancy) between them. UPS's accommodation for decertified drivers illustrates this usage too. There is a sense in which a pregnant woman denied an accommodation (because she kept her certification) has *not* been treated the same as an injured man granted an accommodation (because he lost his certification). He got the accommodation and she did not.

Of these two readings, only the first makes sense in the context of Title VII. The point of Title VII's bans on discrimination is to prohibit employers from treating one worker differently from another *because of a protected trait*. It is not to prohibit employers from treating workers differently for reasons that have nothing to do with protected traits. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 259 (1981). Against that backdrop, a requirement that pregnant women and other workers be treated the same is sensibly read to forbid distinctions that discriminate against pregnancy, not all distinctions whatsoever.

Prohibiting employers from making *any* distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If

Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of *equal* treatment, here alone creates a guarantee of *favored* treatment.

Let it not be overlooked, moreover, that the thrust of the Pregnancy Discrimination Act is that pregnancy discrimination is sex discrimination. Instead of creating a freestanding ban on pregnancy discrimination, the Act makes plain that the existing ban on sex discrimination reaches discrimination because of pregnancy. Reading the same-treatment clause to give pregnant women special protection unavailable to other women would clash with this central theme of the Act, because it would mean that pregnancy discrimination differs from sex discrimination after all.

All things considered, then, the right reading of the same-treatment clause prohibits practices that discriminate against pregnant women relative to workers of similar ability or inability. It does not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy.

II

The Court agrees that the same-treatment clause is not a most-favored-employee law, *ante*, at 221, but at the same time refuses to adopt the reading I propose—which is the only other reading the clause could conceivably bear. The Court's reasons for resisting this reading fail to persuade.

The Court starts by arguing that the same-treatment clause must do more than ban distinctions on the basis of pregnancy, lest it add nothing to the part of the Act defining pregnancy discrimination as sex discrimination. *Ante*, at 226. Even so read, however, the same-treatment clause *does*

add something: clarity. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678, n. 14 (1983) ("[T]he specific language in the second clause . . . explains the application of the [first clause]"). Just defining pregnancy discrimination as sex discrimination does not tell us what it means to discriminate because of pregnancy. Does pregnancy discrimination include, in addition to disfavoring pregnant women relative to the workplace in general, disfavoring them relative to disabled workers in particular? Concretely, does an employer engage in pregnancy discrimination by excluding pregnancy from an otherwise complete disability-benefits program? Without the same-treatment clause, the answers to these questions would not be obvious. An employer could argue that people do not necessarily think of pregnancy and childbirth as disabilities. Or that it would be anomalous to read a law defining pregnancy discrimination as sex discrimination to require him to treat *pregnancy* like a disability, when Title VII does not require him to treat *sex* like a disability. Or that even if pregnancy were a disability, it would be *sui generis*—categorically different from all other disabling conditions. Cf. *Geduldig* v. *Aiello*, 417 U. S. 484, 494–495 (1974) (holding that a State has a rational basis for excluding pregnancy-related disabilities from a disability-benefits program). With the same-treatment clause, these doubts disappear. By requiring that women affected by pregnancy "be treated the same . . . *as other persons not so affected but similar in their ability or inability to work*" (emphasis added), the clause makes plain that pregnancy discrimination includes disfavoring pregnant women relative to other workers of similar inability to work.

This clarifying function easily overcomes any charge that the reading I propose makes the same-treatment clause "'superfluous, void, or insignificant.'" *Ante*, at 226. Perhaps, as the Court suggests, even without the same-treatment clause the best reading of the Act would prohibit disfavoring pregnant women relative to disabled workers.

But laws often make explicit what might already have been implicit, "for greater caution" and in order "to leave nothing to construction." The Federalist No. 33, pp. 205–206 (J. Cooke ed. 1961) (A. Hamilton). That is why we have long acknowledged that a "sufficient" explanation for the inclusion of a clause can be "found in the desire to remove all doubts" about the meaning of the rest of the text. *McCulloch* v. *Maryland*, 4 Wheat. 316, 420 (1819). This explanation looks all the more sensible once one remembers that the object of the Pregnancy Discrimination Act is to displace this Court's conclusion in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), that pregnancy discrimination is not sex discrimination. What could be more natural than for a law whose object is superseding earlier judicial interpretation to include a clause whose object is leaving nothing to future judicial interpretation?

That brings me to the Court's remaining argument: the claim that the reading I have set forth would not suffice to overturn our decision in *Gilbert*. *Ante*, at 226–228. Wrong. *Gilbert* upheld an otherwise comprehensive disability-benefits plan that singled pregnancy out for disfavor. The most natural reading of the Act overturns that decision, because it prohibits singling pregnancy out for disfavor.

The Court goes astray here because it mistakenly assumes that the *Gilbert* plan excluded pregnancy on "a neutral ground"—covering sicknesses and accidents but nothing else. *Ante*, at 227. In reality, the plan in *Gilbert* was not neutral toward pregnancy. It "place[d] . . . pregnancy in a class by itself," treating it differently from "any other kind" of condition. 429 U. S., at 161 (Stevens, J., dissenting). At the same time that it denied coverage for pregnancy, it provided coverage for a comprehensive range of other conditions, including many that one would not necessarily call sicknesses or accidents—like "sport injuries, attempted suicides, . . . disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery," *id.*, at 151 (Brennan,

J., dissenting). What is more, the plan denied coverage even to sicknesses, if they were related to pregnancy or childbirth. *Ibid.* For that matter, the plan denied coverage to sicknesses that were *unrelated* to pregnancy or childbirth, if they were suffered during recovery from the birth of a child. *Ibid.* *Gilbert*, there can be no doubt, involved "the lone exclusion of pregnancy from [a] program." *Ibid.* The most natural interpretation of the Act easily suffices to make that unlawful.

III

Dissatisfied with the only two readings that the words of the same-treatment clause could possibly bear, the Court decides that the clause means something in-between. It takes only a couple of waves of the Supreme Wand to produce the desired result. Poof!: The same-treatment clause means that a neutral reason for refusing to accommodate a pregnant woman is pretextual if "the employer's policies impose a significant burden on pregnant workers." *Ante*, at 229. Poof!: This is so only when the employer's reasons "are not sufficiently strong to justify the burden." *Ibid.*

How we got here from the same-treatment clause is anyone's guess. There is no way to read "shall be treated the same"—or indeed anything else in the clause—to mean that courts must balance the significance of the burden on pregnant workers against the strength of the employer's justifications for the policy. That is presumably why the Court does not even *try* to connect the interpretation it adopts with the text it purports to interpret. The Court has forgotten that statutory purpose and the presumption against superfluity are tools for choosing among competing reasonable readings of a law, not authorizations for making up new readings that the law cannot reasonably bear.

The fun does not stop there. Having ignored the terms of the same-treatment clause, the Court proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact. Normally, liability for disparate

treatment arises when an employment policy has a "discriminatory motive," while liability for disparate impact arises when the effects of an employment policy "fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters*, 431 U. S., at 336, n. 15. In the topsy-turvy world created by today's decision, however, a pregnant woman can establish disparate *treatment* by showing that the *effects* of her employer's policy fall more harshly on pregnant women than on others (the policies "impose a significant burden on pregnant workers," *ante*, at 229) and are inadequately justified (the "reasons are not sufficiently strong to justify the burden," *ibid.*). The change in labels may be small, but the change in results assuredly is not. Disparate-treatment and disparate-impact claims come with different standards of liability, different defenses, and different remedies. *E. g.*, 42 U. S. C. §§ 1981a, 2000e–2(k). For example, plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate-impact cases can get equitable relief only. See §§ 1981a, 2000e–5(g). A sound reading of the same-treatment clause would preserve the distinctions so carefully made elsewhere in the Act; the Court's reading makes a muddle of them.

But (believe it or not) it gets worse. In order to make sense of its conflation of disparate impact with disparate treatment, the Court claims that its new test is somehow "limited to the Pregnancy Discrimination Act context," yet at the same time "consistent with" the traditional use of circumstantial evidence to show intent to discriminate in Title VII cases. *Ante*, at 230. A court in a Title VII case, true enough, may consider a policy's effects and even its justifications—along with " 'all of the [other] surrounding facts and circumstances' "—when trying to ferret out a policy's motive. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 312 (1977). The Court cannot possibly think, however, that its newfangled balancing test reflects this conventional inquiry. It has, after all, just marched up and down the hill telling us

that the same-treatment clause is not (no-no!) "'superfluous, void, or insignificant.'" *Ante*, at 226. If the clause merely instructed courts to consider a policy's effects and justifications the way it considers other circumstantial evidence of motive, it *would* be superfluous. So the Court's balancing test must mean something else. Even if the effects and justifications of policies are not enough to show intent to discriminate under ordinary Title VII principles, they could (Poof!) still show intent to discriminate for purposes of the pregnancy same-treatment clause. Deliciously incoherent.

And all of this to what end? The difference between a routine circumstantial-evidence inquiry into motive and today's grotesque effects-and-justifications inquiry into motive, it would seem, is that today's approach requires judges to concentrate on effects and justifications to the exclusion of other considerations. But Title VII *already* has a framework that allows judges to home in on a policy's effects and justifications—disparate impact. Under that framework, it is *already* unlawful for an employer to use a practice that has a disparate impact on the basis of a protected trait, unless (among other things) the employer can show that the practice "is job related . . . and consistent with business necessity." § 2000e–2(k)(1)(A)(i). The Court does not explain why we need (never mind how the Act could possibly be read to contain) today's ersatz disparate-impact test, under which the disparate-impact element gives way to the significant-burden criterion and the business-necessity defense gives way to the sufficiently-strong-justification standard. Today's decision can thus serve only one purpose: allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead.

IV

JUSTICE ALITO's concurrence agrees with the Court's rejection of both conceivable readings of the same-treatment clause, but fashions a different compromise between them.

Under its approach, an employer may deny a pregnant woman a benefit granted to workers who perform similar tasks only on the basis of a "neutral business ground." *Ante*, at 241 (opinion concurring in judgment). This requirement of a "business ground" shadows the Court's requirement of a "sufficiently strong" justification, and, like it, has no footing in the terms of the same-treatment clause. As the concurrence understands the words "shall be treated the same," an employer must give pregnant workers the same accommodations (not merely accommodations on the same terms) as other workers "who are similar in their ability or inability to work." *Ante*, at 234. But the concurrence realizes that requiring the same accommodations to all who are similar in ability or inability to work—the only characteristic mentioned in the same-treatment clause—would "lead to wildly implausible results." *Ante*, at 237, n. 3. To solve this problem, the concurrence broadens the category of characteristics that the employer may take into account. It allows an employer to find dissimilarity on the basis of traits *other* than ability to work so long as there is a "neutral business reason" for considering them—though it immediately adds that cost and inconvenience are not good enough reasons. *Ante*, at 237. The need to engage in this text-free broadening in order to make the concurrence's interpretation work is as good a sign as any that its interpretation is wrong from the start.

* * *

My disagreement with the Court is fundamental. I think our task is to choose the best possible reading of the law—that is, what text and context most strongly suggest it conveys. The Court seems to think our task is to craft a policy-driven compromise between the possible readings of the law, like a congressional conference committee reconciling House and Senate versions of a bill.

Because Young has not established that UPS's accommodations policy discriminates against pregnant women rela-

tive to others of similar ability or inability, see *supra*, at 242, she has not shown a violation of the Act's same-treatment requirement. I would therefore affirm the judgment of the Court of Appeals for the Fourth Circuit.

JUSTICE KENNEDY, dissenting.

It seems to me proper, in joining JUSTICE SCALIA's dissent, to add these additional remarks. The dissent is altogether correct to point out that petitioner here cannot point to a class of her co-workers that was accommodated and that would include her but for the particular limitations imposed by her pregnancy. Many other workers with health-related restrictions were not accommodated either. And, in addition, there is no showing here of animus or hostility to pregnant women.

But as a matter of societal concern, indifference is quite another matter. There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant. They may find it difficult to continue to work, at least in their regular assignment, while still taking necessary steps to avoid risks to their health and the health of their future children. This is why the difficulties pregnant women face in the workplace are and do remain an issue of national importance.

"'Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.'" *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such "attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman's place among

paid workers." *AT&T Corp.* v. *Hulteen*, 556 U. S. 701, 724 (2009) (GINSBURG, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, see Brief for U. S. Women's Chamber of Commerce et al. as *Amici Curiae* 10–14, pregnant employees continue to be disadvantaged—and often discriminated against—in the workplace, see Brief for Law Professors et al. as *Amici Curiae* 37–38.

Recognizing the financial and dignitary harm caused by these conditions, Congress and the States have enacted laws to combat or alleviate, at least to some extent, the difficulties faced by pregnant women in the work force. Most relevant here, Congress enacted the Pregnancy Discrimination Act (PDA), 42 U. S. C. § 2000e(k), which defines discrimination on the basis of pregnancy as sex discrimination for purposes of Title VII and clarifies that pregnant employees "shall be treated the same" as nonpregnant employees who are "similar in their ability or inability to work." The PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits "practices that are not intended to discriminate but in fact have a disproportionately adverse effect." *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009). Congress further enacted the parental-leave provision of the Family and Medical Leave Act of 1993, 29 U. S. C. § 2612(a)(1)(A), which requires certain employers to provide eligible employees with 12 workweeks of leave because of the birth of a child. And after the events giving rise to this litigation, Congress passed the ADA Amendments Act of 2008, 122 Stat. 3553, which expands protections for employees with temporary disabilities. As the parties note, Brief for Petitioner 37–43; Brief for Respondent 21–22; Brief for United States as *Amicus Curiae* 24–25, these amendments and their implementing regulations, 29 CFR § 1630 (2015), may require accommodations for many pregnant employees,

even though pregnancy itself is not expressly classified as a disability. Additionally, many States have enacted laws providing certain accommodations for pregnant employees. See, *e. g.*, Cal. Govt. Code Ann. § 12945 (West 2011); La. Rev. Stat. Ann. § 23:342(4) (West 2010); W. Va. Code Ann. § 5–11B–2 (Lexis Supp. 2014); see also *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987) (holding that the PDA does not pre-empt such statutes). These Acts honor and safeguard the important contributions women make to both the workplace and the American family.

Today the Court addresses only one of these legal protections: the PDA's prohibition of disparate treatment. For the reasons well stated in JUSTICE SCALIA's dissenting opinion, the Court interprets the PDA in a manner that risks "conflation of disparate impact with disparate treatment" by permitting a plaintiff to use a policy's disproportionate burden on pregnant employees as evidence of pretext. *Ante*, at 248; see *ante*, at 229–230 (opinion of the Court). In so doing, the Court injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

With these remarks, I join JUSTICE SCALIA's dissent.

Syllabus

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.* ALABAMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 13–895. Argued November 12, 2014—Decided March 25, 2015*

In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—*e. g.*, compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district's deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities' "ability . . . to elect their preferred candidates of choice" under § 5 of the Voting Rights Act of 1965, 52 U. S. C. § 10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama's new district boundaries create a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916, and the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw* v. *Hunt*, 517 U. S. 899, 902 (*Shaw II*).

In ruling against appellants, it made four critical determinations: (1) that both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants' claims must fail because race "was not the predominant motivating factor" in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was

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*Together with No. 13–1138, *Alabama Democratic Conference et al.* v. A*labama et al.*, also on appeal from the same court.

"narrowly tailored" to serve a "compelling state interest" in avoiding retrogression under § 5.

Held:

1. The District Court's analysis of the racial gerrymandering claim as referring to the State "as a whole," rather than district by district, was legally erroneous. Pp. 262–268.

(a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*, see, *e. g.*, *Shaw* v. *Reno*, 509 U. S. 630, 649 (*Shaw I*), and has described the plaintiff's evidentiary burden similarly, see *Miller*, *supra*, at 916. The Court's district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see *Bush* v. *Vera*, 517 U. S. 952, 957; *Shaw I*, *supra*, at 648. Pp. 262–263.

(b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. But a showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts. Thus, the District Court's undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 263–264.

(c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs' evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole." Pp. 264–268.

2. The District Court also erred in deciding, *sua sponte*, that the Conference lacked standing. It believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside." But the Conference's post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference's burden of establishing standing. At

the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in these circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte*, to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 268–271.

3. The District Court also did not properly calculate "predominance" in its alternative holding that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the "traditional" factors to be weighed against the use of race to determine whether race "predominates," see *Miller*, *supra*, at 916. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met. Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 271–275.

4. The District Court's final alternative holding—that "the [challenged] Districts would satisfy strict scrutiny"—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Pp. 275–279.

(a) The statute's language, 52 U. S. C. §§ 10304(b), (d), and Department of Justice Guidelines make clear that § 5 is satisfied if minority voters retain the ability to elect their preferred candidates. The history of § 5 further supports this view, as Congress adopted the language in § 5 to reject this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, and to accept the views of Justice Souter's dissent—that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances,

id., at 493, 498, 505, 509. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 275–278.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. A court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court's conclusion. Pp. 278–279.

989 F. Supp. 2d 1227, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 282. THOMAS, J., filed a dissenting opinion, *post*, p. 294.

Richard H. Pildes argued the cause for appellants in No. 13–1138. With him on the briefs were *John K. Tanner*, *Walter S. Turner*, *James H. Anderson*, *William F. Patty*, *Brannan W. Reaves*, *Paul M. Smith*, *Jessica Ring Amunson*, and *Kevin Russell*.

Eric Schnapper argued the cause for appellants in No. 13–895. With him on the briefs were *James U. Blacksher* and *Edward Still*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* in both cases. With him on the brief were *Acting Assistant Attorney General Moran*, *Deputy Solicitor General Gershengorn*, *Rachel P. Kovner*, *Diana K. Flynn*, *Tovah R. Calderon*, *April J. Anderson*, and *Bonnie I. Robin-Vergeer*.

Andrew L. Brasher, Solicitor General of Alabama, argued the cause for appellees in both cases. With him on the brief were *Luther Strange*, Attorney General, *Megan A. Kirkpat-*

rick, Assistant Solicitor General, and *John J. Park, Jr.*, and *Dorman Walker*, Deputy Attorneys General.†

JUSTICE BREYER delivered the opinion of the Court.

The Alabama Legislative Black Caucus and the Alabama Democratic Conference appeal a three-judge Federal District Court decision rejecting their challenges to the lawfulness of Alabama's 2012 redistricting of its State House of Representatives and State Senate. The appeals focus upon the appellants' claims that new district boundaries create "racial gerrymanders" in violation of the Fourteenth Amendment's Equal Protection Clause. See, *e. g.*, *Shaw* v. *Hunt*, 517 U. S. 899, 906–908 (1996) (*Shaw II*) (Fourteenth Amendment forbids use of race as "'predominant'" district boundary-drawing "'factor'" unless boundaries are "'narrowly tailored'" to achieve a "'compelling state interest'"). We find that the District Court applied incorrect legal standards in evaluating the claims. We consequently vacate its decision and remand the cases for further proceedings.

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Brennan Center for Justice at N. Y. U. School of Law by *Wendy Weiser*; for the NAACP Legal Defense & Educational Fund, Inc., by *Christina A. Swarns*, *Ryan P. Haygood*, *Natasha M. Korgaonkar*, *Leah C. Aden*, *Samuel Spital*, and *William J. Honan*; and for North Carolina Litigants by *Anita S. Earls*, *Allison J. Riggs*, *Irving Joyner*, *Walter Dellinger*, *Anton Metlitsky*, *Edwin M. Speas, Jr.*, *John W. O'Hale*, *Caroline Mackie*, and *Adam Stein*.

Steven M. Freeman filed a brief in No. 13–1138 for the Anti-Defamation League as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Alabama House of Representatives et al. by *Christopher W. Weller* and *Marc James Ayers*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard* and *Joshua P. Thompson*; and for Dalton J. Oldham by *Jason Torchinsky*.

Jon M. Greenbaum filed a brief in both cases for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae*.

John M. Devaney, *Marc E. Elias*, and *Kevin J. Hamilton* filed a brief in No. 13–1138 for Ronald Keith Gaddie et al. as *amici curiae*.

I

The Alabama Constitution requires the legislature to reapportion its State House and Senate electoral districts following each decennial census. Ala. Const., Art. IX, §§ 199–200. In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. 2012 Ala. Acts no. 602 (House plan); *id.*, at no. 603 (Senate plan) (Acts). In doing so, Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. But it placed yet greater importance on achieving two other goals. See Alabama Legislature Reapportionment Committee Guidelines in No. 12–cv–691, Doc. 30–4, pp. 3–5 (Committee Guidelines).

First, it sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population. In particular, it set as a goal creating a set of districts in which no district would deviate from the theoretical, precisely equal ideal by more than 1%—*i. e.*, a more rigorous deviation standard than our precedents have found necessary under the Constitution. See *Brown* v. *Thomson*, 462 U. S. 835, 842 (1983) (5% deviation from ideal generally permissible). No one here doubts the desirability of a State's efforts generally to come close to a one-person, one-vote ideal.

Second, it sought to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965. 79 Stat. 439, as amended, 52 U. S. C. § 10301 *et seq.* At the time of the redistricting Alabama was a covered jurisdiction under that Act. Accordingly § 5 of the Act required Alabama to demonstrate that an electoral change, such as redistricting, would not bring about retrogression in respect to racial minorities' "ability . . . to elect their preferred candidates of choice." 52 U. S. C. § 10304(b). Specifically, Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage

in existing majority-minority districts. See Appendix B, *infra*.

Compliance with these two goals posed particular difficulties with respect to many of the State's 35 majority-minority districts (8 in the Senate, 27 in the House). That is because many of these districts were (compared with the average district) underpopulated. In order for Senate District 26, for example, to meet the State's no-more-than-1% population-deviation objective, the State would have to add about 16,000 individuals to the district. And, prior to redistricting, 72.75% of District 26's population was black. Accordingly, Alabama's plan added 15,785 new individuals, and only 36 of those newly added individuals were white.

This suit, as it appears before us, focuses in large part upon Alabama's efforts to achieve these two goals. The Caucus and the Conference basically claim that the State, in adding so many new minority voters to majority-minority districts (and to others), went too far. They allege the State created a constitutionally forbidden "racial gerrymander"—a gerrymander that (*e. g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help.

After a bench trial, the Federal District Court held in favor of the State, *i. e.*, against the Caucus and the Conference, with respect to their racial gerrymandering claims as well as with respect to several other legal claims that the Caucus and the Conference had made. With respect to racial gerrymandering, the District Court recognized that electoral districting violates the Equal Protection Clause when (1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916 (1995), and (2) the use of race is not "narrowly tailored to serve a compelling state inter-

est," *Shaw II*, 517 U. S., at 902; see also *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) (*Shaw I*) (Constitution forbids "separat[ion of] voters into different districts on the basis of race" when the separation "lacks sufficient justification"); *Bush* v. *Vera*, 517 U. S. 952, 958–959, 976 (1996) (plurality opinion) (same). But, after trial the District Court held (2 to 1) that the Caucus and the Conference had failed to prove their racial gerrymandering claims. The Caucus along with the Conference (and several other plaintiffs) appealed. We noted probable jurisdiction with respect to the racial gerrymandering claims. 572 U. S. 1149 (2014).

We shall focus upon four critical District Court determinations underlying its ultimate "no violation" conclusion. They concern:

1. *The Geographical Nature of the Racial Gerrymandering Claims.* The District Court characterized the appellants' claims as falling into two categories. In the District Court's view, both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) (emphasis added), and one of the appellants (the Conference) had also argued that the State had racially gerrymandered four specific electoral districts, Senate Districts 7, 11, 22, and 26, *id.*, at 1288.
2. *Standing.* The District Court held that the Caucus had standing to argue its racial gerrymandering claim with respect to the State "as a whole." But the Conference lacked standing to make any of its racial gerrymandering claims—the claim requiring consideration of the State "as a whole," and the claims requiring consideration of four individual Senate districts. *Id.*, at 1292.
3. *Racial Predominance.* The District Court held that, in any event, the appellants' claims must fail because race "was not the predominant motivating factor" either (a) "for the Acts as a whole" or (b) with respect to "Senate Districts 7, 11, 22, or 26." *Id.*, at 1293.

4. *Narrow Tailoring/Compelling State Interest.* The District Court also held that, even were it wrong about standing and predominance, the appellants' racial gerrymandering claims must fail. That is because any predominant use of race in the drawing of electoral boundaries was "narrowly tailored" to serve a "compelling state interest," *id.*, at 1306–1307, namely, the interest in avoiding retrogression with respect to racial minorities' "ability . . . to elect their preferred candidates of choice." § 10304(b).

In our view, each of these determinations reflects an error about relevant law. And each error likely affected the District Court's conclusions—to the point where we must vacate the lower court's judgment and remand the cases to allow the appellants to reargue their racial gerrymandering claims. In light of our opinion, all parties remain free to introduce such further evidence as the District Court shall reasonably find appropriate.

II

We begin by considering the geographical nature of the racial gerrymandering claims. The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole.* See, *e. g.*, 989 F. Supp. 2d, at 1293 ("Race was not the predominant motivating factor for the Acts as a whole"); *id.*, at 1287 (construing the plaintiffs' challenge as arguing that the "Acts as a whole constitute racial gerrymanders"); *id.*, at 1292 (describing the plaintiffs' challenge as a "claim of racial gerrymandering to the Acts as a whole"); cf. *supra*, at 261 (noting four exceptions).

A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district by district. It does not apply to a State considered as an undifferentiated "whole." We have consistently described a claim of

racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*. See, *e. g.*, *Shaw I*, 509 U. S., at 649 (violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Vera*, 517 U. S., at 965 (plurality opinion) ("[Courts] must scrutinize *each challenged district* . . . " (emphasis added)). We have described the plaintiff's evidentiary burden similarly. See *Miller*, *supra*, at 916 (plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*" (emphasis added)).

Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally . . . subjected to [a] racial classification," *Vera*, *supra*, at 957, as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I*, *supra*, at 648. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995).

Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. See *Miller*, *supra*, at 916. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase "as a whole," considered here. Rather, the concept as used here suggests the existence of a legal unicorn, an animal that exists only in the legal imagination.

This is not a technical, linguistic point. Nor does it criticize what might seem, in effect, a slip of the pen. Rather, here the District Court's terminology mattered. That is be-

cause the District Court found that racial criteria had not predominated in the drawing of some Alabama districts. And it found that fact (the fact that race did not predominate in the drawing of some, or many, districts) sufficient to defeat what it saw as the basic claim before it, namely, a claim of racial gerrymandering with respect to the State *as an undifferentiated whole.* See, *e. g.*, 989 F. Supp. 2d, at 1294 (rejecting the plaintiffs' challenge because "[the legislature] followed no bright-line rule" with respect to every majority-minority district); *id.*, at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split).

A showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here. See *id.*, at 1329 (Thompson, J., dissenting) ("[T]he drafters['] fail[ure] to achieve their sought-after percentage in one district does not detract one iota from the fact that they did achieve it in another"). Thus, the District Court's undifferentiated statewide analysis is insufficient. And we must remand for consideration of racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges.

The State and principal dissent argue that (but for four specifically mentioned districts) there were in effect no such districts. The Caucus and the Conference, the State and principal dissent say, did not seek a district-by-district analysis. And, the State and principal dissent conclude that the Caucus and the Conference have consequently waived the right to any further consideration. Brief for Appellees 14, 31; *post*, at 286–292 (opinion of SCALIA, J.).

We do not agree. We concede that the District Court's opinion suggests that it was the Caucus and the Conference

that led the Court to consider racial gerrymandering of the State "as a whole." 989 F. Supp. 2d, at 1287. At least the District Court interpreted their filings to allege only that kind of claim. *Ibid.* But our review of the record indicates that the plaintiffs did not claim only that the legislature had racially gerrymandered the State "as" an undifferentiated "whole." Rather, their evidence and their arguments embody the claim that individual majority-minority districts were racially gerrymandered. And those are the districts that we believe the District Court must reconsider.

There are 35 majority-minority districts, 27 in the House and 8 in the Senate. The District Court's opinion itself refers to evidence that the legislature's redistricting committee, in order to satisfy what it believed the Voting Rights Act required, deliberately chose additional black voters to move into underpopulated majority-minority districts, *i. e.*, a specific set of individual districts. See, *e. g.*, 989 F. Supp. 2d, at 1274 (referring to Senator Dial's testimony that the Committee "could have used," but did not use, "white population within Jefferson County to repopulate the majority-black districts" because "doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for [Justice Department] preclearance"); *id.*, at 1276 (stating that Representative Jim McClendon, also committee cochair, "testified consistently with Senator Dial"); *id.*, at 1277 (noting that the committee's expert, Randolph Hinaman, testified that "he needed to add population" to majority-black districts "without significantly lowering the percentage of the population in each district that was majority-black").

The Caucus and the Conference presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts—again, a specific set of districts—in order to prevent the percentage of minority voters in each district from declining. See, *e. g.*, Committee Guidelines 3–5; 1 Tr. 28–29, 36–37, 55, 63, 67–

68, 77, 81, 96, 115, 124, 136, 138 (testimony of Senator Dial); Deposition of Gerald Dial in No. 12–cv–691 (May 21, 2013), Doc. 125–3, pp. 17, 39–41, 62, 100 (Dial Deposition); 3 Tr. 222 (testimony of Representative McClendon); *id.*, at 118–119, 145–146, 164, 182–183, 186–187 (testimony of Hinaman); Deposition of Randolph Hinaman in No. 12–cv–691 (June 25, 2013), Doc. 134–4, pp. 23–24, 101 (Hinaman Deposition).

In their post-trial Proposed Findings of Fact and Conclusions of Law, the plaintiffs stated that the evidence showed a racial gerrymander with respect to the majority of the majority-minority districts; they referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence. *E. g.*, Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 194, pp. 9–10, 13–14, 30–35, 40 (Caucus Post-Trial Brief); Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 33–35, 56–61, 64–67, 69–74, 82–85, 108, 121–122 (Conference Post-Trial Brief); see also Appendix A, *infra* (organizing these citations by district).

We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines. See generally Caucus Post-Trial Brief 1, 3–7, 48–50; Conference Post-Trial Brief 2, 44–45, 105–106. And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well. See, *e. g.*, 1 Tr. 36–37, 48, 55, 70–71, 93, 111, 124 (testimony of Dial); 3 Tr. 142, 162 (testimony of Hinaman); see generally Caucus Post-Trial Brief 8–16. Such evidence is perfectly relevant. We have said that the plaintiff's burden in a racial gerrymandering case is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was

the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. Cf. *Easley* v. *Cromartie*, 532 U. S. 234, 258 (2001) (explaining the plaintiff's burden in cases, unlike these, in which the State argues that politics, not race, was its predominant motive). That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole."

We, like the principal dissent, recognize that the plaintiffs could have presented their district-specific claims more clearly, *post*, at 287–288, 290–292 (opinion of SCALIA, J.), but the dissent properly concedes that its objection would weaken had the Conference "developed such a claim in the course of discovery and trial." *Post*, at 287. And that is just what happened.

In the past few pages and in Appendix A, we set forth the many record references that establish this fact. The Caucus helps to explain the complaint omissions when it tells us that the plaintiffs unearthed the factual basis for their racial gerrymandering claims when they deposed the committee's redistricting expert. See Brief for Appellants in No. 13–895, pp. 12–13. The State neither disputes this procedural history nor objects that the plaintiffs' pleadings failed to conform with the proof. Indeed, throughout, the plaintiffs litigated these claims not as if they were wholly separate entities but as if they were a team. See, *e. g.*, Caucus Post-Trial Brief 1 ("[We] support the additional claims made by the [Conference] plaintiffs"); but cf. *post*, at 283–292 (SCALIA,

J., dissenting) (treating separately Conference claims from Caucus claims). Thus we, like the dissenting judge below (who also lived with these cases through trial), conclude that the record as a whole shows that the plaintiffs brought, and their argument rested significantly upon, district-specific claims. See 989 F. Supp. 2d, at 1313 (opinion of Thompson, J.) (construing the plaintiffs as also challenging "each majority-black House and Senate District").

The principal dissent adds that the Conference waived its district-specific claims on appeal. Cf. *post*, at 288–289. But that is not so. When asked specifically about its position at oral argument, the Conference stated that it was relying on statewide evidence to prove its district-specific challenges. Tr. of Oral Arg. 15–16. Its counsel said that "the exact same policy was applied in every black-majority district," *id.*, at 15, and "[b]y statewide, we simply mean a common policy applied to every district in the State," *id.*, at 16. We accept the Conference's clarification, which is consistent with how it presented these claims below.

We consequently conclude that the District Court's analysis of racial gerrymandering of the State "as a whole" was legally erroneous. We find that the appellants did not waive their right to consideration of their claims as applied to particular districts. Accordingly, we remand the cases. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982) (remand is required when the District Court "failed to make a finding because of an erroneous view of the law"); *Rapanos* v. *United States*, 547 U. S. 715, 757 (2006) (same).

III

We next consider the District Court's holding with respect to standing. The District Court, *sua sponte*, held that the Conference lacked standing—either to bring racial gerrymandering claims with respect to the four individual districts that the court specifically considered (*i. e.*, Senate Districts 7, 11, 22, and 26) or to bring a racial gerrymandering

claim with respect to the "Acts as a whole." 989 F. Supp. 2d, at 1282.

The District Court recognized that ordinarily

> " '[a]n association has standing to bring suit on behalf of its members *when its members would [sic] have standing to sue in their own right*, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation [*sic*] in the lawsuit." *Id.*, at 1291 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 181 (2000); emphasis added).

It also recognized that a "member" of an association "would have standing to sue" in his or her "own right" when that member "resides in the district that he alleges was the product of a racial gerrymander." 989 F. Supp. 2d, at 1291 (citing *Hays*, 515 U. S., at 744–745). But, the District Court nonetheless denied standing because it believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside," and the Conference had "not proved that it has members who have standing to pursue any district-specific claims of racial gerrymandering." 989 F. Supp. 2d, at 1292.

The District Court conceded that Dr. Joe Reed, a representative of the Conference, testified that the Conference "has members in almost every county in Alabama." *Ibid.* But, the District Court went on to say that "the counties in Alabama are split into many districts." *Ibid.* And the "Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the [four] specific districts that it challenged." *Ibid.*

The record, however, lacks adequate support for the District Court's conclusion. Dr. Reed's testimony supports, and nothing in that record undermines, the Conference's own statement, in its post-trial brief, that it is a "statewide politi-

cal caucus founded in 1960." Conference Post-Trial Brief 3. It has the "purpose" of "endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people." *Id.*, at 3–4. These two statements (the second of which the principal dissent ignores), taken together with Dr. Reed's testimony, support an inference that the organization has members in all of the State's majority-minority districts, other things being equal, which is sufficient to meet the Conference's burden of establishing standing. That is to say, it seems highly likely that a "statewide" organization with members in "almost every county," the purpose of which is to help "blacks and other minorities and poor people," will have members in each majority-minority district. But cf. *post*, at 283–285 (SCALIA, J., dissenting).

At the very least, the commonsense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. We have found nothing in the record, nor has the State referred us to anything in the record, that suggests the contrary. Cf. App. 204–205, 208 (State arguing lack of standing, not because of inadequate member residency but because an association "lives" nowhere and that the Conference should join individual members). The most the State argued was that "[n]one of the *individual* [p]laintiffs [who brought the case with the Conference] claims to live in" Senate District 11, *id.*, at 205 (emphasis added), but the Conference would likely not have understood that argument as a request that *it* provide a membership list. In fact, the Conference might have understood the argument as an indication that the State did *not* contest its membership in every district.

To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. See *post*, at 285 (SCALIA, J., dissenting). But,

in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence. Cf. *Warth* v. *Seldin*, 422 U. S. 490, 501–502 (1975) (explaining that a court may "allow or [r]equire" a plaintiff to supplement the record to show standing and that "[i]f, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed" (emphasis added)). Moreover, we have no reason to believe that the Conference would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked. It has filed just such a list in this Court. See Affidavit of Joe L. Reed Pursuant to this Court's Rule 32.3 (Lodging of Conference affidavit listing members residing in each majority-minority district in the State); see also *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007) (accepting a lodged affidavit in similar circumstances). Thus, the District Court on remand should reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate.

IV

The District Court held in the alternative that the claims of racial gerrymandering must fail because "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. 989 F. Supp. 2d, at 1293. In our view, however, the District Court did not properly calculate "predominance." In particular, it judged race to lack "predominance" in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. See, *e. g.*, *id.*, at 1305 (the "need to bring the neighboring districts into compliance with the requirement of one person, one vote *served as the primary motivating factor* for the changes to [Senate] Dis-

trict 22" (emphasis added)); *id.*, at 1297 (the "constitutional requirement of one person, one vote trumped every other districting principle"); *id.*, at 1296 (the "record establishes that the drafters of the new districts, above all, had to correct [for] severe malapportionment . . . "); *id.*, at 1306 (the "inclusion of additional precincts [in Senate District 26] is a reasonable response to the underpopulation of the District").

In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

To understand this conclusion, recall what "predominance" is about: A plaintiff pursuing a racial gerrymandering claim must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. To do so, the "plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations." *Ibid.* (emphasis added).

Now consider the nature of those offsetting "traditional race-neutral districting principles." We have listed several, including "compactness, contiguity, . . . respect for political subdivisions or communities defined by actual shared interests," *ibid.*, incumbency protection, and political affiliation, *Vera*, 517 U. S., at 964, 968 (plurality opinion).

But we have not listed equal population objectives. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of "traditional" criteria is that equal population objectives play a different role in a State's redistricting process. That role is not a minor one. Indeed, in light of the Constitution's demands, that role may often prove "predominant" in the ordi-

nary sense of that word. But, as the United States points out, "predominance" in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature "placed" race "above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." Brief for United States as *Amicus Curiae* 19 (some emphasis added). In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the "predominance" question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, "traditional" factors when doing so.

Consequently, we agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place. *Id.*, at 12. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, "traditional" factors in the drawing of district boundaries.

Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, once the legislature's "equal population" objectives are put to the side—*i. e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.

The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See

supra, at 265–266 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries. See 3 Tr. 175–180 (testimony of Hinaman); Appendix C, *infra* (change of district's shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. See, *e. g.*, 2 Tr. 130 (testimony of Senator Quinton Ross); 3 Tr. 179 (testimony of Hinaman). Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs' Opposition to Summary Judgment in No. 12–cv–691, Doc. 140–1, pp. 91–95. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black." 989 F. Supp. 2d, at 1306.

We recognize that the District Court also found, with respect to District 26, that "preservi[ng] the core of the existing [d]istrict," following "county lines," and following "highway lines" played an important boundary-drawing role. *Ibid.* But the first of these (core preservation) is not directly relevant to the origin of the *new* district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative redistricting guidelines. Cf. Committee Guidelines 3–5.

All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consider-

ation. Thus, on remand, the District Court should reconsider its "no predominance" conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Finally, we note that our discussion in this section is limited to correcting the District Court's misapplication of the "predominance" test for strict scrutiny discussed in *Miller*, 515 U. S., at 916. It does not express a view on the question whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny. See *Vera*, 517 U. S., at 996 (KENNEDY, J., concurring).

V

The District Court, in a yet further alternative holding, found that "[e]ven if the [State] subordinated traditional districting principles to racial considerations," the racial gerrymandering claims failed because, in any event, "the Districts would satisfy strict scrutiny." 989 F. Supp. 2d, at 1306. In the District Court's view, the "Acts are narrowly tailored to comply with Section 5" of the Voting Rights Act. *Id.*, at 1311. That provision "required the Legislature to maintain, where feasible, the existing number of majority-black districts and *not substantially reduce the relative percentages of black voters in those districts*." *Ibid.* (emphasis added). And, insofar as the State's redistricting embodied racial considerations, it did so in order to meet this § 5 requirement.

In our view, however, this alternative holding rests upon a misperception of the law. Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says. It prohibits a covered jurisdiction from adopting any change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred

candidates of choice." 52 U. S. C. § 10304(b); see also § 10304(d) (the "purpose of subsection (b) . . . is to protect the ability of such citizens to elect their preferred candidates of choice").

That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department's preclearance determinations are not based

> "on any predetermined or fixed demographic percentages. . . . Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. . . . [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Consistent with this view, the United States tells us that "Section 5" does not "requir[e] the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans." Brief for United States as *Amicus Curiae* 22. Rather, it "prohibits only those diminutions of a minority group's proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice." *Id.*, at 22–23. We agree. Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, § 5 is satisfied if minority voters retain the ability to elect their preferred candidates.

The history of § 5 further supports this view. In adopting the statutory language to which we referred above, Congress rejected this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, 480 (2003) (holding that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts), and it adopted the views of the dissent. H. R. Rep. No. 109–478, pp. 68–

69, and n. 183 (2006). While the thrust of Justice Souter's dissent was that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice—language that Congress adopted in revising § 5—his dissent also made clear that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances. *Georgia* v. *Ashcroft*, *supra*, at 493, 498, 505, 509. And while the revised language of § 5 may raise some interpretive questions—*e. g.*, its application to coalition, crossover, and influence districts—it is clear that Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive. See Persily, The Promises and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 218 (2007). Indeed, Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns. See *Miller*, *supra*, at 926.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. See Appendix B, *infra*. And the difference between that view and the more purpose-oriented view reflected in the statute's language can matter. Imagine a majority-minority district with a 70% black population. Assume also that voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters' preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is "narrowly tailored" to achieve a "compelling state interest," namely, the interest in preventing § 5 retrogression.

The circumstances of this hypothetical example, we add, are close to those characterizing Senate District 26, as set forth in the District Court's opinion and throughout the record. See, *e. g.*, 1 Tr. 131–132 (testimony of Dial); 3 Tr. 180 (testimony of Hinaman).

In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few. See *Vera*, 517 U. S., at 977 (plurality opinion). Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29 (citing *Ricci* v. *DeStefano*, 557 U. S. 557, 585 (2009)). This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." Brief for United States as *Amicus Curiae* 29. And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (emphasis added).

Here the District Court enunciated a narrow tailoring standard close to the one we have just mentioned. It said that a plan is "narrowly tailored . . . when the race-based action taken was *reasonably necessary*" to achieve a compelling interest. 989 F. Supp. 2d, at 1307 (emphasis added). And it held that preventing retrogression is a compelling interest. *Id.*, at 1306–1307. While we do not here decide whether, given *Shelby County* v. *Holder*, 570 U. S. 529 (2013), continued compliance with § 5 remains a compelling interest, we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

* * *

For these reasons, the judgment of the District Court is vacated. We note that the appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.

The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIXES

A

Majority-minority District	**Instances in Plaintiffs' Post-Trial Briefs Arguing That Traditional Race-Neutral Districting Principles Were Subordinated to Race**
HOUSE	
HD 52, 54–60	Caucus Post-Trial Brief 30; Conference Post-Trial Brief 56–57, 60, 82–83, 121–122
HD 53	Caucus Post-Trial Brief 33–35; Conference Post-Trial Brief 59–61
HD 68	Conference Post-Trial Brief 70, 84–85
HD 69	Conference Post-Trial Brief 66–67, 85
HD 70	Conference Post-Trial Brief 85
HD 71	Conference Post-Trial Brief 83–85
HD 72	Caucus Post-Trial Brief 40; Conference Post-Trial Brief 83–85
HD 76–78	Conference Post-Trial Brief 65–66
SENATE*	
SD 18–20	Conference Post-Trial Brief 56–59
SD 23–24	Caucus Post-Trial Brief 9–10, 40; Conference Post-Trial Brief 69–74
SD 33	Caucus Post-Trial Brief 13–14

* Senate District 26 excluded from this list

B

State's Use of Incorrect Retrogression Standard

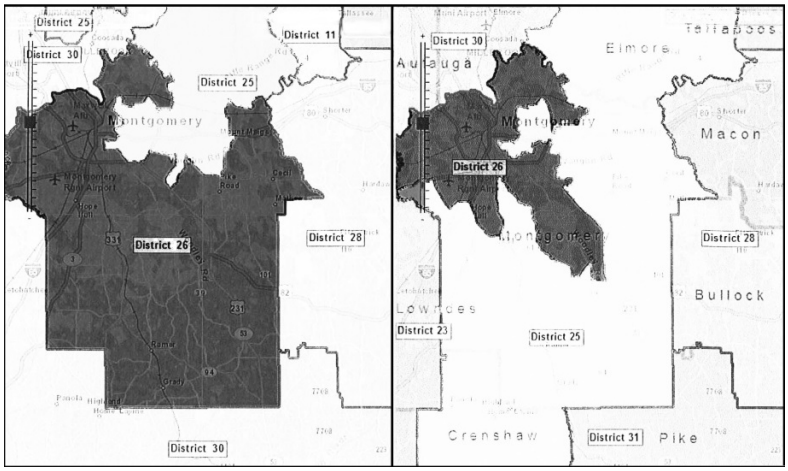
The following citations reflect instances in either the District Court opinion or in the record showing that the State believed that § 5 forbids, not just *substantial* reductions, but

any reduction in the percentage of black inhabitants of a majority-minority district.

District Court Findings	989 F. Supp. 2d, at 1307; *id.*, at 1273; *id.*, at 1247	
Evidence in the Record	Senator Gerald Dial	1 Tr. 28–29, 36–37, 55, 81, 96, 136, 138
		Dial Deposition 17, 39–41, 81, 100
	Representative Jim McClendon	3 Tr. 222
	Randolph Hinaman	3 Tr. 118–119, 145–146, 149–150, 164, 182–183, 187
		Hinaman Deposition 23–24, 101; but see *id.*, at 24–25, 101

C

2001 Districting Plan 2012 Districting Plan



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

Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court's destination seems fantastical, just wait until you see the journey.

Two groups of plaintiffs, the Alabama Democratic Conference and the Alabama Legislative Black Caucus, brought separate challenges to the way in which Alabama drew its state legislative districts following the 2010 census. These cases were consolidated before a three-judge District Court. Even after a full trial, the District Court lamented that "[t]he filings and arguments made by the plaintiffs on these claims were mystifying at best." 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013). Nevertheless, the District Court understood both groups of plaintiffs to argue, as relevant here, only that "the Acts as a whole constitute racial gerrymanders." *Id.*, at 1287. It also understood the Democratic Conference to argue that "Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders," *id.*, at 1288, but held that the Democratic Conference lacked standing to bring "*any* district-specific claims of racial gerrymandering," *id.*, at 1292 (emphasis added). It then found for Alabama on the merits.

The Court rightly concludes that our racial-gerrymandering jurisprudence does not allow for statewide claims. *Ante*, at 262–268. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it allows them to take a mulligan, remanding the case with orders that the District Court consider whether some (all?) of Alabama's 35 majority-minority districts result from impermissible racial gerrymandering. In doing this, the Court disregards the detailed findings and thoroughly reasoned conclusions of the District Court—in particular its determination, reached after watching the development of

the case from complaint to trial, that no appellant proved (or even pleaded) district-specific claims with respect to the majority-minority districts. Worse still, the Court ignores the Democratic Conference's express waiver of these claims before this Court. It does this on the basis of a few stray comments, cherry-picked from district-court filings that are more Rorschach brief than Brandeis brief, in which the vague outline of what could be district-specific racial-gerrymandering claims begins to take shape only with the careful, post-hoc nudging of appellate counsel.

Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law. It is therefore understandable, if not excusable, that the Court balks at denying merits review simply because appellants pursued a flawed litigation strategy. But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.

I. The Alabama Democratic Conference

The District Court concluded that the Democratic Conference lacked standing to bring district-specific claims. It did so on the basis of the Conference's failure to present any evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them. 989 F. Supp. 2d, at 1292.

A voter has standing to bring a racial-gerrymandering claim only if he votes in a gerrymandered district, or if specific evidence demonstrates that he has suffered the special harms that attend racial gerrymandering. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995). However, the Democratic Conference only claimed to have "chapters and mem-

bers in *almost* all counties in the state." Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 3–4 (Democratic Conference Post-Trial Brief) (emphasis added). Yet the Court concludes that this fact, combined with the Conference's self-description as a "'statewide political caucus'" that endorses candidates for political office, "support[s] an inference that the organization has members in all of the State's majority-minority districts, other things being equal." *Ante*, at 269–270. The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing. See *Summers* v. *Earth Island Institute*, 555 U. S. 488, 497 (2009) (rejecting a test for organizational standing that asks "whether, accepting [an] organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury").

The inference to be drawn from the Conference's statements cuts in precisely the opposite direction. What is at issue here is not just counties but voting districts within counties. If the Conference has members in *almost* every county, then there must be counties in which it does not have members; and we have no basis for concluding (or inferring) that those counties do not contain all of the majority-minority voting districts. Moreover, even in those counties in which the Conference does have members, we have no basis for concluding (or inferring) that those members vote in majority-minority districts. The Conference had plenty of opportunities, including at trial, to demonstrate that this was the case, and failed to do so. This failure lies with the Democratic Conference, and the consequences should be borne by it, not by the people of Alabama, who must now shoulder the expense of further litigation and the uncertainty that attends a resuscitated constitutional challenge to their legislative districts.

Incredibly, the Court thinks that "elementary principles of procedural fairness" *require* giving the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial. *Ante*, at 270. It observes that the Conference had no reason to believe it should provide such information because "the State did *not* contest its membership in every district," and the opinion cites an affidavit lodged *with this Court* providing a list of the Conference's members in each majority-minority district in Alabama. *Ibid.* I cannot imagine why the absence of a state challenge would matter. Whether or not there was such a challenge, it was the Conference's responsibility, as "[t]he party invoking federal jurisdiction," to establish standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992). That responsibility was enforceable, challenge or no, by the court: "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990) (citations omitted). And because standing is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, *supra*, at 561.

The Court points to *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007), as support for its decision to sandbag Alabama with the Democratic Conference's out-of-time (indeed, out-of-court) lodging in this Court. The circumstances in that case, however, are far afield. The organization of parents in that case had established organizational standing in the lower court by showing that it had members with children who would be subject to the school district's "integration tie-breaker," which was applied at ninth grade. Brief for Re-

spondents, O. T. 2006, No. 05–908, p. 16. By the time the case reached this Court, however, the youngest of these children had entered high school, and so would no longer be subject to the challenged policy. *Ibid.* Accordingly, we accepted a lodging that provided names of additional, younger children in order to show that the organization had not *lost* standing as a result of the long delay that often accompanies federal litigation. Here, by contrast, the Democratic Conference's lodging in the Supreme Court is its first attempt to show that it has members in the majority-minority districts. This is too little, too late.

But that is just the start. Even if the Democratic Conference *had standing to bring* district-specific racial-gerrymandering claims, there remains the question whether it *did* bring them. Its complaint alleged three counts: (1) Violation of § 2 of the Voting Rights Act, (2) Racial gerrymandering in violation of the Equal Protection Clause, and (3) § 1983 violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Complaint in No. 2:12–cv–1081, Doc. 1, pp. 17–18. The racial-gerrymandering count alleged that "Alabama Acts 2012-602 and 2012-603 were drawn for the purpose and effect of minimizing the opportunity of minority voters to participate effectively in the political process," and that this "racial gerrymandering by Alabama Acts 2012-602 and 2012-603 violates the rights of Plaintiffs." *Id.*, at 17. It made no reference to specific districts that were racially gerrymandered; indeed, the only particular jurisdictions mentioned *anywhere* in the complaint were Senate District 11, Senate District 22, Madison County Senate Districts, House District 73, and Jefferson and Montgomery County House Districts. None of the Senate Districts is majority-minority. Nor is House District 73. Jefferson County does, admittedly, contain 8 of the 27 majority-minority House Districts in Alabama, and Montgomery County contains another 4, making a total of 12. But they also contain 14 majority-white House Dis-

tricts between them. In light of this, it is difficult to understand the Court's statement that appellants' "evidence and . . . arguments embody the claim that individual majority-minority districts were racially gerrymandered." *Ante*, at 265.

That observation would, of course, make sense if the Democratic Conference had developed such a claim in the course of discovery and trial. But in its post-trial Proposed Findings of Fact and Conclusions of Law, the Conference hewed to its original charge of statewide racial gerrymandering—or, rather, it did so as much as it reasonably could without actually proposing that the Court find *any* racial gerrymandering, statewide or otherwise. Instead, the Conference chose only to pursue claims that Alabama violated § 2 of the Voting Rights Act under two theories. See Democratic Conference Post-Trial Brief 91–103 (alleging a violation of the results prong of Voting Rights Act § 2) and 103–124 (alleging a violation of the purpose prong of Voting Rights Act § 2).

To be sure, the Conference employed language and presented factual claims at various points in its 126-page post-trial brief that are evocative of a claim of racial gerrymandering. But in clinging to these stray comments to support its conclusion that the Conference made district-specific racial-gerrymandering claims, *ante*, at 265–266, the Court ignores the context in which these comments appear—the context of a clear Voting Rights Act § 2 claim. Voting Rights Act claims and racial-gerrymandering claims share some of the same elements. See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 514 (2006) (SCALIA, J., concurring in judgment in part and dissenting in part). Thus, allegations made in the course of arguing a § 2 claim will often be indistinguishable from allegations that would be made in support of a racial-gerrymandering claim. The appearance of such allegations in one of the Conference's briefs might support reversal if this case came to us on appeal from

the District Court's grant of a motion to dismiss. See *Johnson* v. *City of Shelby*, 574 U. S. 10, 11 (2014) (*per curiam*) (noting that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). But here the District Court held a full trial before concluding that the Conference failed to make or prove any district-specific racial-gerrymandering claims with respect to the majority-minority districts. In this posture, and on this record, I cannot agree with the Court that the Conference's district-specific evidence, clearly made in the course of arguing a § 2 theory, should be read to give rise to district-specific claims of racial gerrymandering with respect to Alabama's majority-minority districts.

The Court attempts to shift responsibility for the Democratic Conference's ill-fated statewide theory from the Conference to the District Court, implying that it was the "legally erroneous" analysis of the District Court, *ante*, at 268, rather than the arguments made by the Conference, that conjured this "legal unicorn," *ante*, at 263, so that the Conference did not forfeit the claims that the Court now attributes to it, *ante*, at 268. I suspect this will come as a great surprise to the Conference. Whatever may have been presented to the District Court, the Conference unequivocally stated in its opening brief: "Appellants challenge Alabama's race-based statewide redistricting policy, *not* the design of any one particular election district." Brief for Appellants in No. 13–1138, p. 2 (emphasis added). It drove the point home in its reply brief: "[I]f the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy*, not to the design of each particular district one-by-one." Reply Brief in No. 11–1138, p. 7. How could anything be clearer? As the Court observes, the Conference attempted to walk back this unqualified description of its case at oral argument. *Ante*, at 268. Its assertion that what it *really* meant to chal-

lenge was the policy as applied to every district (*not* every majority-minority district, mind you) is not "clarification," *ibid.*, but an entirely new argument—indeed, the same argument it expressly disclaimed in its briefing. "We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U. S. 134, 140, n. 2 (2014); we certainly should not do so when the issue is first presented at oral argument.

II. The Alabama Legislative Black Caucus

The Court does not bother to disentangle the independent claims brought by the Black Caucus from those of the Democratic Conference, but it strongly implies that both parties asserted racial-gerrymandering claims with respect to Alabama's 35 majority-minority districts. As we have described, the Democratic Conference brought no such claims; and the Black Caucus's filings provide even weaker support for the Court's conclusion.

The Black Caucus complaint contained three counts: (1) Violation of One Person, One Vote, see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); (2) Dilution and Isolation of Black Voting Strength in violation of § 2 of the Voting Rights Act; and (3) Partisan Gerrymandering. Complaint in No. 2:12–cv–691, Doc. 1, pp. 15–22. The failure to raise *any* racial-gerrymandering claim was not a mere oversight or the consequence of inartful pleading. Indeed, in its amended complaint the Black Caucus specifically cited this Court's leading racial-gerrymandering case for the proposition that "traditional or neutral districting principles may not be subordinated in a dominant fashion by *either racial or partisan interests* absent a compelling state interest for doing so." Amended Complaint in No. 2:12–cv–691, Doc. 60, p. 23 (citing *Shaw* v. *Reno*, 509 U. S. 630, 642 (1993); emphasis added). This quote appears in the first paragraph under the "Partisan Gerrymandering" heading, and claims of subordination

to *racial* interests are notably absent from the Black Caucus complaint.

Racial gerrymandering was not completely ignored, however. In a brief introductory paragraph to the amended complaint, before addressing jurisdiction and venue, the Black Caucus alleged that "Acts 2012–602 and 2012–603 are racial gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution with both the purpose and effect of minimizing black voting strength and isolating from influence in the Alabama Legislature legislators chosen by African Americans." Amended Complaint, at 3. This was the first and last mention of racial gerrymandering, and like the Democratic Conference's complaint, it focused exclusively on the districting maps as a whole rather than individual districts. Moreover, even this allegation appears primarily concerned with the use of racially motivated districting as a means of violating one person, one vote (by splitting counties), and § 2 of the Voting Rights Act (by minimizing and isolating black voters and legislators).

To the extent the Black Caucus cited particular districts in the body of its complaint, it did so only with respect to its enumerated one-person, one-vote, Voting Rights Act, and partisan-gerrymandering counts. See, *e. g.*, *id.*, at 13–14 (alleging that the "deviation restriction and disregard of the 'whole county' requirements . . . facilitated the Republican majority's efforts to gerrymander the district boundaries in Acts 2012–602 and 2012–603 for partisan purposes. By packing the majority-black House and Senate districts, the plans remove reliable Democratic voters from adjacent majority-white districts . . . "); *id.*, at 36 ("The partisan purpose of [one] gerrymander was to remove predominately black Madison County precincts to SD 1, avoiding a potential crossover district"); *id.*, at 44–45 (asserting that "splitting Jefferson County among 11 House and Senate districts" and "increasing the size of its local legislative delegation and the

number of other counties whose residents elect members" of the delegation "dilut[es] the votes of Jefferson County residents" by diminishing their ability to control county-level legislation in the state legislature). And even these claims were made with a statewide scope in mind. *Id.*, at 55 ("Viewed in their entirety, the plans in Acts 2012–602 and 2012–603 have the purpose and effect of minimizing the opportunities for black and white voters who support the Democratic Party to elect candidates of their choice").

Here again, discovery and trial failed to produce any clear claims with respect to the majority-minority districts. In a curious inversion of the Democratic Conference's practice of pleading racial gerrymandering and then effectively abandoning the claims, the Black Caucus, which failed to plead racial gerrymandering, did clearly advance the theory after the trial. See Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 2:12–cv–691, Doc. 194, pp. 48–51 (Black Caucus Post-Trial Brief). The Black Caucus asserted racial-gerrymandering claims in its post-trial brief, but they all had a clear statewide scope. It charged that Alabama "started their line drawing with the majority-black districts" so as to maximize the size of their black majorities, which "impacted the drawing of majority-white districts in nearly every part of the state." *Id.*, at 48–49. "[R]ace was the predominant factor in drafting both plans," *id.*, at 49, which "drove nearly every districting decision," "dilut[ing] the influence of black voters in the majority-white districts," *id.*, at 50.

The Black Caucus did present district-specific evidence in the course of developing its other legal theories. Although this included evidence that Alabama manipulated the racial composition of certain majority-minority districts, it also included evidence that Alabama manipulated racial distributions with respect to the districting maps as a whole, *id.*, at 6 ("Maintaining the same high black percentages had a

predominant impact on the entire plan"), and with respect to majority-white districts, *id.*, at 10–11 ("Asked why [majority-white] SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts"), and 43–44 ("Sen. Irons' quick, 'primative' [*sic*] analysis of the new [majority-white] SD 1 convinced her that it was designed to 'shed' the minority population of Sen. Sanford's [majority-white] SD 7 to SD 1" in order to "crack a minority influence district"). The Black Caucus was attacking the legislative districts from every angle. Nothing gives rise to an inference that it ever homed in on majority-minority districts—or, for that matter, any particular set of districts. Indeed, the fair reading of the Black Caucus's filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.

III. Conclusion

Frankly, I do not know what to make of appellants' arguments. They are pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything. This, the Court believes, justifies demanding that the District Court go back and squint harder, so that it may divine some new means of construing the filings. This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past. See, *e. g.*, Amended Complaint and Motion for Preliminary and Permanent Injunction in

Cromartie v. *Hunt*, No. 4:96–cv–104 (EDNC), Doc. 21, p. 9 ("Under the March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation," which were "the fruit of [earlier] racially gerrymandered plans"). Even the complaint in *Shaw*, which established a cause of action for racial gerrymandering, displayed greater lucidity than appellants', alleging that defendants "creat[ed] two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota" "totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest." Complaint and Motion for Preliminary and Permanent Injunction and for Temporary Restraining Order in *Shaw* v. *Barr*, No. 5:92–cv–202 (EDNC), Doc. 1, pp. 11–12.

The Court seems to acknowledge that appellants never focused their racial-gerrymandering claims on Alabama's majority-minority districts. While remanding to consider whether the majority-minority districts were racially gerrymandered, it admits that plaintiffs "basically claim that the State, in adding so many new minority voters to majority-minority districts (*and to others*), went too far." *Ante*, at 260 (emphasis added). It further concedes that appellants "relied heavily upon statewide evidence," and that they "also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well." *Ante*, at 266.

The only reason I see for the Court's selection of the majority-minority districts as the relevant set of districts for the District Court to consider on remand is that this was the set chosen by appellants after losing on the claim they actually presented in the District Court. By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and

repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case.

Accordingly, I dissent.

JUSTICE THOMAS, dissenting.

"[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder* v. *Hall*, 512 U. S. 874, 907 (1994) (THOMAS, J., concurring in judgment). These consolidated cases are yet another installment in the "disastrous misadventure" of this Court's voting rights jurisprudence. *Id.*, at 893. We have somehow arrived at a place where the parties agree that Alabama's legislative districts should be fine-tuned to achieve some "optimal" result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the "best" racial quota.

I join JUSTICE SCALIA's dissent. I write only to point out that, as these cases painfully illustrate, our jurisprudence in this area continues to be infected with error.

I

The Alabama Legislature faced a difficult situation in its 2010 redistricting efforts. It began with racially segregated district maps that were inherited from previous decades. The maps produced by the 2001 redistricting contained 27 majority-black House districts and 8 majority-black Senate districts—both at the time they were drawn, App. to Juris. Statement 47–48, and at the time of the 2010 census, App. 103–108. Many of these majority-black districts were over 70% black when they were drawn in 2001, and even more were over 60% black. App. to Juris. Statement 47–48. Even after the 2010 census, the population remained above 60% black in the majority of districts. App. 103–108.

Under the 2006 amendments to § 5 of the Voting Rights Act of 1965, Alabama was also under a federal command to avoid drawing new districts that would "have the effect of diminishing the ability" of black voters "to elect their preferred candidates of choice." 52 U. S. C. § 10304(b). To comply with § 5, the legislature adopted a policy of maintaining the same percentage of black voters within each of those districts as existed in the 2001 plans. See *ante*, at 273–274. This, the districting committee thought, would preserve the ability of black voters to elect the same number of preferred candidates. App. to Juris. Statement 174–175. The Department of Justice (DOJ) apparently agreed. Acting under its authority to administer § 5 of the Voting Rights Act, the DOJ precleared Alabama's plans.[1] *Id.*, at 9.

Appellants—including the Alabama Legislative Black Caucus and the Alabama Democratic Conference—saw matters differently. They sued Alabama, and on appeal they argue that the State's redistricting plans are racially gerrymandered because many districts are highly packed with black voters. According to appellants, black voters would have more voting power if they were spread over more districts rather than concentrated in the same number of districts as in previous decades. The DOJ has entered the fray in support of appellants, arguing that the State's redistricting maps fail strict scrutiny because the State focused too heavily on a single racial characteristic—the number of black voters in majority-minority districts—which potentially resulted in impermissible packing of black voters.

[1] As I have previously explained, § 5 of the Voting Rights Act is unconstitutional. See *Shelby County* v. *Holder*, 570 U. S. 529, 557–559 (2013) (concurring opinion). And § 5 no longer applies to Alabama after the Court's decision in *Shelby County*. See *id.*, at 556–557 (majority opinion). Because appellants' claims are not properly before us, however, I express no opinion on whether compliance with § 5 was a compelling governmental purpose at the time of Alabama's 2012 redistricting, nor do I suggest that Alabama would necessarily prevail if appellants had properly raised district-specific claims.

Like the DOJ, today's majority sides with appellants, faulting Alabama for choosing the wrong percentage of blacks in the State's majority-black districts, or at least for arriving at that percentage using the wrong reasoning. In doing so, the Court—along with appellants and the DOJ—exacerbates a problem many years in the making. It seems fitting, then, to trace that history here. The practice of creating highly packed—"safe"—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin. Alabama's current legislative districts have their genesis in the "max-black" policy that the DOJ itself applied to § 5 throughout the 1990's and early 2000's. The 2006 amendments to § 5 then effectively locked in place Alabama's max-black districts that were established during the 1990's and 2000's. These three problems—a jurisprudence requiring segregated districts, the distortion created by the DOJ's max-black policy, and the ossifying effects of the 2006 amendments—are the primary culprits in these cases, not Alabama's redistricting policy. Nor does this Court have clean hands.

II

This Court created the current system of race-based redistricting by adopting expansive readings of § 2 and § 5 of the Voting Rights Act. Both § 2 and § 5 prohibit States from implementing voting laws that "den[y] or abridg[e] the right to vote on account of race or color." §§ 10304(a), 10301(a). But both provisions extend to only certain types of voting laws: any "voting qualification or prerequisite to voting, or standard, practice, or procedure." *Ibid.* As I have previously explained, the terms "'standard, practice, or procedure' . . . refer only to practices that affect minority citizens' access to the ballot," such as literacy tests. *Holder*, 512 U. S., at 914 (opinion concurring in judgment). They do not apply to "[d]istricting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted." *Ibid.* Yet this Court has adopted

far-reaching interpretations of both provisions, holding that they encompass legislative redistricting and other actions that might "dilute" the strength of minority votes. See generally *Thornburg* v. *Gingles*, 478 U. S. 30 (1986) (§ 2 "vote dilution" challenge to legislative districting plan); see also *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 583–587 (1969) (Harlan, J., concurring in part and dissenting in part).

The Court's interpretation of § 2 and § 5 have resulted in challenge after challenge to the drawing of voting districts. See, *e. g.*, *Bartlett* v. *Strickland*, 556 U. S. 1 (2009); *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399 (2006); *Georgia* v. *Ashcroft*, 539 U. S. 461 (2003); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320 (2000) (*Bossier II*); *Hunt* v. *Cromartie*, 526 U. S. 541 (1999); *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471 (1997) (*Bossier I*); *Bush* v. *Vera*, 517 U. S. 952 (1996); *Shaw* v. *Hunt*, 517 U. S. 899 (1996); *Miller* v. *Johnson*, 515 U. S. 900 (1995); *United States* v. *Hays*, 515 U. S. 737 (1995); *Holder*, *supra*; *Johnson* v. *De Grandy*, 512 U. S. 997 (1994); *Growe* v. *Emison*, 507 U. S. 25 (1993); *Shaw* v. *Reno*, 509 U. S. 630 (1993); *Voinovich* v. *Quilter*, 507 U. S. 146 (1993).

The consequences have been as predictable as they are unfortunate. In pursuing "undiluted" or maximized minority voting power, "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." *Holder*, *supra*, at 892 (THOMAS, J., concurring in judgment). Section 5, the provision at issue here, has been applied to require States that redistrict to maintain the number of pre-existing majority-minority districts, in which minority voters make up a large enough portion of the population to be able to elect their candidate of choice. See, *e. g.*, *Miller*, *supra*, at 923–927 (rejecting the DOJ's policy of requiring States to increase the number of majority-black districts because maintaining the same number of majority-black districts would not violate § 5).

In order to maintain these "racially 'safe boroughs,'" States or courts must perpetually "divid[e] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands." *Holder*, 512 U. S., at 905 (opinion of THOMAS, J.) (internal quotation marks omitted). The assumptions underlying this practice of creating and maintaining "safe minority districts"—"that members of [a] racial group must think alike and that their interests are so distinct that they must be provided a separate body of representatives"—remain "repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.*, at 905–906. And, as predicted, the States' compliance efforts have "embroil[ed] the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created." *Id.*, at 905. It is this fateful system that has produced these cases.

III

A

In tandem with our flawed jurisprudence, the DOJ has played a significant role in creating Alabama's current redistricting problem. It did so by enforcing § 5 in a manner that required States, including Alabama, to create supermajority-black voting districts or face denial of preclearance.

The details of this so-called "max-black" policy were highlighted in federal court during Georgia's 1991 congressional redistricting. See *Johnson* v. *Miller*, 864 F. Supp. 1354, 1360–1361 (SD Ga. 1994). On behalf of the Black Caucus of the Georgia General Assembly, the American Civil Liberties Union (ACLU) submitted a redistricting proposal to the Georgia Legislature that became known as the "max-black plan." *Id.*, at 1360. The ACLU's map created two new "black" districts and "further maximized black voting strength by pushing the percentage of black voters within its majority-black districts as high as possible." *Id.*, at 1361 (internal quotation marks omitted).

The DOJ denied several of Georgia's proposals on the ground that they did not include enough majority-black districts. *Id.*, at 1366. The plan it finally approved was substantially similar to the ACLU's max-black proposal, *id.*, at 1364–1366, creating three majority-black districts, with total black populations of 56.63%, 62.27%, and 64.07%, *id.*, at 1366, and n. 12.[2]

Georgia was not the only State subject to the DOJ's maximization policy. North Carolina, for example, submitted a congressional redistricting plan after the 1990 census, but the DOJ rejected it because it did not create a new majority-minority district, and thus "appear[ed] to minimize minority voting strength." *Shaw* v. *Barr*, 808 F. Supp. 461, 463–464 (EDNC 1992) (quoting Letter from John R. Dunne, Assistant Attorney General of N. C., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney General of N. C., 4 (Dec. 18, 1991)). The DOJ likewise pressured Louisiana to create a new majority-black district when the State sought approval of its congressional redistricting plan following the 1990 census. See *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1190 (WD La. 1993), vacated on other grounds by *Louisiana* v. *Hays*, 512 U. S. 1230 (1994).

Although we eventually rejected the DOJ's max-black policy, see *Miller*, 512 U. S., at 924–927, much damage to the States' congressional and legislative district maps had already been done. In those States that had enacted districting plans in accordance with the DOJ's max-black policy, the prohibition on retrogression under § 5 meant that the legislatures were effectively required to maintain those max-black plans during any subsequent redistricting. That is what happened in Alabama.

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[2] The District Court found it "unclear whether DOJ's maximization policy was driven more by [the ACLU's] advocacy or DOJ's own misguided reading of the Voting Rights Act," and it concluded that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Miller*, 864 F. Supp., at 1368.

B

Alabama's 2010 redistricting plans were modeled after max-black-inspired plans that the State put in place in the 1990's under the DOJ's max-black policy. See generally *Kelley* v. *Bennett*, 96 F. Supp. 2d 1301 (MD Ala. 2000), vacated on other grounds by *Sinkfield* v. *Kelley*, 531 U. S. 28 (2000) (*per curiam*).

Following the 1990 census, the Alabama Legislature began redrawing its state legislative districts. After several proposals failed in the legislature, a group of plaintiffs sued, and the State entered into a consent decree agreeing to use the "Reed-Buskey" plan. 96 F. Supp. 2d, at 1309. The primary designer of this plan was Dr. Joe Reed, the current chairman of appellant Alabama Democratic Conference. According to Dr. Reed, the previous plan from the 1980's was not "fair" because it did not achieve the number of "black-preferred" representatives that was proportionate to the percentage of blacks in the population. *Id.*, at 1310. And because of the DOJ's max-black policy, "it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials." *Id.*, at 1310, n. 14. "Dr. Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." *Id.*, at 1310. Illustrating this strategy, Alabama's letter to the DOJ seeking preclearance of the Reed-Buskey plan "emphasize[d] the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature," *ibid.*, n. 14, and boasted that the plan had created four new majority-black districts and two additional majority-black Senate districts, *ibid.*

Dr. Reed populated these districts with a percentage of black residents that achieved an optimal middle ground—a "happy medium"—between too many and too few. *Id.*, at 1311. Twenty-three of the twenty-seven majority-black House districts were between 60% and 70% black under

Reed's plan, *ibid.*, and Senate District 26—one of the districts at issue today—was pushed from 65% to 70% black, *id.*, at 1315.[3] A District Court struck down several districts created in the Reed-Buskey plan as unconstitutionally based on race. *Id.*, at 1324. This Court reversed, however, holding that the plaintiffs lacked standing because they did not live in the gerrymandered districts. *Sinkfield*, *supra*, at 30–31.

The Reed-Buskey plan thus went into effect and provided the template for the State's next redistricting efforts in 2001. See *Montiel* v. *Davis*, 215 F. Supp. 2d 1279, 1282 (SD Ala. 2002). The 2001 maps maintained the same number of majority-black districts as the Reed-Buskey plan had created: 27 House districts and 8 Senate districts. *Ibid.* And "to maintain the same relative percentages of black voters in those districts," the legislature "redrew the districts by shifting more black voters into the majority-black districts." App. to Juris. Statement 4. The State's letters requesting preclearance of the 2001 plans boasted that the maps maintained the same number of majority-black districts and the same (or higher) percentages of black voters within those districts, other than "slight reductions" that were "necessary to satisfy other legitimate, nondiscriminatory redistricting considerations." Letter from William H. Pryor, Alabama Attorney General, to Voting Section Chief, Civil Rights Div., Dept. of Justice 6–7 (Aug. 14, 2001) (Senate districts); Letter from William H. Pryor, Alabama Attorney General, to Voting

[3] In this litigation, Dr. Reed and the Alabama Democratic Conference argue that the percentage of black residents needed to maintain the ability to elect a black-preferred candidate is lower than it was in the 2000's because black participation has increased over the last decade. Brief for Appellants in No. 13–1138, pp. 39–40. Although appellants disclaim any argument that the State must achieve an optimal percentage of black voters in majority-black districts, *id.*, at 35, it is clear that that is what they seek: a plan that maximizes voting strength by maintaining "safe" majority-minority districts while also spreading black voters into other districts where they can influence elections, *id.*, at 17–18.

Section Chief, Civil Rights Div., Dept. of Justice 7, 9 (Sept. 4, 2001) (House districts).

Section 5 tied the State to those districts: Under this Court's § 5 precedents, States are prohibited from enacting a redistricting plan that "would lead to a retrogression in the position of racial minorities." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In other words, the State could not retrogress from the previous plan if it wished to comply with § 5.

IV

Alabama's quandary as it attempted to redraw its legislative districts after 2010 was exacerbated by the 2006 amendments to § 5. Those amendments created an inflexible definition of "retrogression" that Alabama understandably took as requiring it to maintain the same percentages of minority voters in majority-minority districts. The amendments thus provide the last piece of the puzzle that explains why the State sought to maintain the same percentages of blacks in each majority-black district.

Congress passed the 2006 amendments in response to our attempt to define "retrogression" in *Georgia* v. *Ashcroft*, 539 U. S. 461. Prior to that decision, practically any reapportionment change could "be deemed 'retrogressive' under our vote dilution jurisprudence by a court inclined to find it so." *Bossier I*, 520 U. S., at 490–491 (THOMAS, J., concurring). "[A] court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts)." *Id.*, at 491. Our § 5 jurisprudence thus "inevitably force[d] the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments courts are ill equipped to make." *Id.*, at 492.

We tried to pull the courts and the DOJ away from making these sorts of judgments in *Georgia* v. *Ashcroft*, *supra*. Insofar as § 5 applies to the drawing of voting districts, we

held that a District Court had wrongly rejected Georgia's reapportionment plan, and we adopted a retrogression standard that gave States flexibility in determining the percentage of black voters in each district. *Id.*, at 479–481. As we explained, "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." *Id.*, at 480. Alternatively, "a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Ibid.* We noted that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice," even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts. *Id.*, at 481. Thus, States would be permitted to make judgments about how best to prevent retrogression in a minority group's voting power, including assessing the range of appropriate minority population percentages within each district. *Id.*, at 480–481.

In response, Congress amended § 5 and effectively overruled *Georgia* v. *Ashcroft*. See 120 Stat. 577. The 2006 amendments added subsection (b), which provides:

> "Any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of . . . this section." 52 U. S. C. § 10304(b). See § 5, 120 Stat. 577.

Thus, any change that has the effect of "diminishing the ability" of a minority group to "elect their preferred candidate of choice" is retrogressive.

Some were rightly worried that the 2006 amendments would impose too much inflexibility on the States as they sought to comply with § 5. Richard Pildes, who argued on behalf of the Alabama Democratic Conference in these cases, testified in congressional hearings on the 2006 amendments. He explained that *Georgia* v. *Ashcroft* "recognizes room . . . for some modest flexibility in Section 5," and warned that if "Congress overturns *Georgia* v. *Ashcroft*, it will make even this limited amount of flexibility illegal." Hearing on the Continuing Need for Section 5 Pre-Clearance before the Senate Committee on the Judiciary, 109th Congress, 2d Sess., 11–12 (2006). Pildes also observed that the proposed standard of "no 'diminished ability to elect' . . . has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests." *Id.*, at 12. Although this testimony says nothing about how § 5 ought to be interpreted, it tells us that the Alabama Democratic Conference's own attorney believes that the State was subject to a "rigi[d]" and "mechanical" standard in determining the number of black voters that must be maintained in a majority-black district.

V

All of this history explains Alabama's circumstances when it attempted to redistrict after the 2010 census. The legislature began with the max-black district maps that it inherited from the days of Reed-Buskey. Using these inherited maps, combined with population data from the 2010 census, many of the State's majority-black House and Senate districts were between 60% and 70% black, and some were over 70%. App. to Juris. Statement 103–108. And the State was prohibited from drawing new districts that would "have the effect of diminishing the ability" of blacks "to elect their preferred candidates of choice." § 10304(b). The legislature thus adopted a policy of maintaining the same number of majority-black districts and roughly the same percentage of blacks within each of those districts. See *ante*, at 273–274.

The majority faults the State for taking this approach. I do not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But, today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help. States covered by § 5 have been whipsawed, first required to create "safe" majority-black districts, then told not to "diminis[h]" the ability to elect, and now told they have been too rigid in preventing any "diminishing" of the ability to elect. *Ante*, at 275.

Worse, the majority's solution to appellants' gerrymandering claims requires States to analyze race even *more* exhaustively, not less, by accounting for black voter registration and turnout statistics. *Ante*, at 276–278. The majority's command to analyze black voting patterns en route to adopting the "correct" racial quota does nothing to ease the conflict between our colorblind Constitution and the "consciously segregated districting system" the Court has required in the name of equality. *Holder*, 512 U. S., at 907. Although I dissent today on procedural grounds, I also continue to disagree with the Court's misguided and damaging jurisprudence.

Syllabus

GRADY *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 14–593. Decided March 30, 2015

After petitioner Grady served his sentence for a second sex offense, a state court ordered him to enroll in a satellite-based monitoring program as a recidivist sex offender. The court rejected Grady's argument that the State's monitoring program—under which he would be forced to wear tracking devices at all times—violated his Fourth Amendment right to be free from unreasonable searches and seizures. Grady renewed his challenge on appeal, relying on *United States* v. *Jones*, 565 U. S. 400, in which this Court held that police officers engaged in a Fourth Amendment search when they installed and monitored a Global Positioning System tracking device on a suspect's car. The State Court of Appeals distinguished *Jones* on the ground that it was decided in the context of a defendant's motion to suppress evidence, rather than in a civil proceeding about monitoring. The State Supreme Court summarily dismissed Grady's appeal and denied his petition for discretionary review.

Held: The state courts' determination that a system of nonconsensual satellite-based monitoring does not entail a Fourth Amendment search is inconsistent with this Court's precedents. See *Jones*, 565 U. S., at 404, 406, n. 3; *Florida* v. *Jardines*, 569 U. S. 1, 5–6 (2013). Under those precedents—which hold that the government conducts a search when it physically intrudes on a constitutionally protected area in order to obtain information—a State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements. In concluding otherwise, the State Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is civil in nature. But "the Fourth Amendment's protection extends beyond the sphere of criminal investigations," *Ontario* v. *Quon*, 560 U. S. 746, 755, and the government's purpose in collecting information does not control whether the method of collection constitutes a search. The State's monitoring program is plainly designed to obtain information, and since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search. Because the state courts did not view the monitoring program as a search, they did not decide whether it is reasonable. That determination, which de-

pends on the totality of the circumstances, will not be made by this Court in the first instance.

Certiorari granted; 367 N. C. 523, 762 S. E. 2d 460, vacated and remanded.

PER CURIAM.

Petitioner Torrey Dale Grady was convicted in North Carolina trial courts of a second degree sexual offense in 1997 and of taking indecent liberties with a child in 2006. After serving his sentence for the latter crime, Grady was ordered to appear in New Hanover County Superior Court for a hearing to determine whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender. See N. C. Gen. Stat. Ann. §§ 14–208.40(a)(1), 14–208.40B (2013). Grady did not dispute that his prior convictions rendered him a recidivist under the relevant North Carolina statutes. He argued, however, that the monitoring program—under which he would be forced to wear tracking devices at all times—would violate his Fourth Amendment right to be free from unreasonable searches and seizures. Unpersuaded, the trial court ordered Grady to enroll in the program and be monitored for the rest of his life. Record in No. COA13–958 (N. C. App.), pp. 3–4, 18–22.

Grady renewed his Fourth Amendment challenge on appeal, relying on this Court's decision in *United States* v. *Jones*, 565 U. S. 400 (2012). In that case, this Court held that police officers had engaged in a "search" within the meaning of the Fourth Amendment when they installed and monitored a Global Positioning System (GPS) tracking device on a suspect's car. The North Carolina Court of Appeals rejected Grady's argument, concluding that it was foreclosed by one of its earlier decisions. App. to Pet. for Cert. 5a–7a. In that decision, coincidentally named *State* v. *Jones*, the court had said:

> "Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing

> an ankle bracelet to an individual must constitute a search of the individual as well. We disagree. The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States* v.] *Jones*, where the Court considered the propriety of a search in the context of a motion to suppress evidence. We conclude, therefore, that the specific holding in [*United States* v.] *Jones* does not control in the case *sub judice*." 231 N. C. App. 123, 127, 750 S. E. 2d 883, 886 (2013).

The court in Grady's case held itself bound by this reasoning and accordingly rejected his Fourth Amendment challenge. App. to Pet. for Cert. 6a–7a. The North Carolina Supreme Court in turn summarily dismissed Grady's appeal and denied his petition for discretionary review. 367 N. C. 523, 762 S. E. 2d 460 (2014). Grady now asks us to reverse these decisions.*

The only explanation provided below for the rejection of Grady's challenge is the quoted passage from *State* v. *Jones*. And the only theory we discern in that passage is that the State's system of nonconsensual SBM does not entail a search within the meaning of the Fourth Amendment. That theory is inconsistent with this Court's precedents.

In *United States* v. *Jones*, we held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 565 U. S., at 404 (footnote omitted). We stressed the importance of the fact that the Government had "physically occupied private property for the purpose of obtaining information." *Ibid.* Under such circumstances, it

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*Grady aims his petition at the decisions of both North Carolina appellate courts. See Pet. for Cert. 1. Because we treat the North Carolina Supreme Court's dismissal of an appeal for lack of a substantial constitutional question as a decision on the merits, it is that court's judgment, rather than the judgment of the Court of Appeals, that is subject to our review under 28 U. S. C. § 1257(a). See *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 138–139 (1986).

was not necessary to inquire about the target's expectation of privacy in his vehicle's movements in order to determine if a Fourth Amendment search had occurred. "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Id.*, at 406–407, n. 3.

We reaffirmed this principle in *Florida* v. *Jardines*, 569 U. S. 1, 5–6 (2013), where we held that having a drug-sniffing dog nose around a suspect's front porch was a search, because police had "gathered . . . information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner." See also *id.*, at 11 (a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas"). In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.

In concluding otherwise, the North Carolina Court of Appeals apparently placed decisive weight on the fact that the State's monitoring program is civil in nature. See *Jones*, 231 N. C. App., at 127, 750 S. E. 2d, at 886 ("the instant case . . . involves a civil SBM proceeding"). "It is well settled," however, "that the Fourth Amendment's protection extends beyond the sphere of criminal investigations," *Ontario* v. *Quon*, 560 U. S. 746, 755 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967) (housing inspections are "administrative searches" that must comply with the Fourth Amendment).

In its brief in opposition to certiorari, the State faults Grady for failing to introduce "evidence about the State's implementation of the SBM program or what information, if

any, it currently obtains through the monitoring process." Brief in Opposition 11. Without evidence that it is acting to obtain information, the State argues, "there is no basis upon which this Court can determine whether North Carolina conducts a 'search' of an offender enrolled in its SBM program." *Ibid.* (citing *Jones*, 565 U. S., at 408, n. 5 (noting that a government intrusion is not a search unless "done to obtain information")). In other words, the State argues that we cannot be sure its program for satellite-based *monitoring* of sex offenders collects any information. If the very name of the program does not suffice to rebut this contention, the text of the statute surely does:

> "The satellite-based monitoring program shall use a system that provides all of the following:
>
> "(1) Time-correlated and continuous tracking of the geographic location of the subject . . . .
>
> "(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements." N. C. Gen. Stat. Ann. § 14–208.40(c).

The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.

That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. See, *e. g.*, *Samson* v. *California*, 547 U. S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646 (1995) (random drug testing of student athletes was reasonable). The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

The petition for certiorari is granted, the judgment of the Supreme Court of North Carolina is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

WOODS, WARDEN *v.* DONALD

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

No. 14–618. Decided March 30, 2015

Respondent Donald's counsel in his state-court trial for felony murder and armed robbery briefly left the courtroom during testimony concerning Donald's codefendants, having indicated that this particular testimony did not apply to his client. Donald was convicted. The Michigan Court of Appeals rejected Donald's claim that he was entitled to a new trial because his attorney's absence denied him his Sixth Amendment right to effective assistance of counsel, and the State Supreme Court denied review. A Federal District Court, however, granted him habeas relief. The Sixth Circuit affirmed, holding that the State Court of Appeals' decision was both contrary to, and involved an unreasonable application of, this Court's decision in *United States* v. *Cronic*, 466 U. S. 648.

Held: The Sixth Circuit should not have affirmed the *Cronic*-based grant of habeas relief in this case. Under the exacting standard of the Antiterrorism and Effective Death Penalty Act of 1996, the State Court of Appeals' decision was not contrary to any clearly established holding of this Court. This Court has never addressed whether *Cronic*'s rule—that courts may presume that a defendant has suffered unconstitutional prejudice if he "is denied counsel at a critical stage of his trial," 466 U. S., at 659—applies to testimony regarding codefendants' actions. The Sixth Circuit's conclusion that a government witness's testimony "is similar to the trial events that th[is] Court has deemed to be critical stages," *Donald* v. *Rapelje*, 580 Fed. Appx. 277, 284, is doubly wrong. First, if the circumstances of a case are only "similar to" this Court's precedents, then the state court's decision is not "contrary to" the holdings in those cases. See, *e. g.*, *Carey* v. *Musladin*, 549 U. S. 70, 76–77, and n. 2. Second, the Sixth Circuit framed the issue at too high a level of generality, see, *e. g.*, *Lopez* v. *Smith*, 574 U. S. 1, for the relevant testimony was not merely a government witness's testimony but was prosecution testimony *about other defendants*. Nor was the state court's decision an unreasonable application of this Court's cases. Within the contours of *Cronic*, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case.

Certiorari granted; 580 Fed. Appx. 277, reversed and remanded.

PER CURIAM.

Federal courts may grant habeas corpus relief if the underlying state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U. S. C. § 2254(d)(1). Here, the Sixth Circuit held that respondent Cory Donald's attorney provided *per se* ineffective assistance of counsel under *United States* v. *Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. Because no decision from this Court clearly establishes that Donald is entitled to relief under *Cronic*, we reverse.

I

After a day of drinking and smoking marijuana, Cory Donald and four others—Seante Liggins, Rashad Moore, Dewayne Saine, and Fawzi Zaya—decided to rob a drug dealer named Mohammed Makki. Donald, Moore, and Liggins drove to Makki's home in Dearborn, Michigan, wearing black skull caps and coats. Moore and Donald entered the house, while Liggins waited in the car.

Michael McGinnis, one of Makki's drug runners, was in the house at the time. When Donald and Moore came through the door, McGinnis raised his hands and dropped facedown to the floor. He heard a scuffle in the kitchen and two gunshots as someone said, "'[L]et it go.'" *Donald* v. *Rapelje*, 580 Fed. Appx. 277, 279 (CA6 2014). After that, McGinnis felt a gun on the back of his head while someone rifled through his pockets saying, "'[W]hat you got, what you got?'" *Donald* v. *Rapelje*, 2012 WL 6047130, *3 (ED Mich., Dec. 5, 2012). He also heard one of the two men whisper to the other, "'I got shot, I got shot.'" 580 Fed. Appx., at 279. After Moore and Donald left, McGinnis found Makki slumped against the refrigerator dying.

About seven minutes after they entered the house, Moore and Donald returned, guns in hand, to Liggins' car. Donald told the others that he had stolen $320 and that Moore had

accidentally shot him during the crime. That night, Donald checked into a hospital for a gunshot wound to his foot. Police arrested him about three weeks later.

The State charged Donald with one count of first-degree felony murder and two counts of armed robbery. Liggins and Zaya pleaded guilty, and Donald was tried with Moore and Saine. His defense theory was that he was present at the scene of the crime but he did not participate. At trial, the government sought to admit a chart chronicling phone calls from the day of the crime among Moore, Saine, and Zaya. Moore and Saine's attorneys objected, but Donald's attorney declined, saying: "'I don't have a dog in this race. It does not affect me at all.'" *Id.*, at 280. The court admitted the exhibit and took a short recess.

When the trial resumed, Donald's counsel was not in the courtroom. At first, the judge indicated that he would wait for the attorney. But he then decided to proceed because Donald's counsel had already indicated that the exhibit and testimony did not apply to his client. About 10 minutes later, the lawyer returned. The judge informed him that "'up until that point we only were discussing the telephone chart,'" to which the attorney replied, "'[Y]es, your Honor, and as I had indicated on the record, I had no dog in the race and no interest in that.'" *Ibid.*

The jury found Donald guilty on all three counts. He was sentenced to life imprisonment for the felony-murder count and to concurrent prison terms of 10½ to 20 years for each of the armed robbery counts. On appeal, Donald argued that he was entitled to a new trial because his attorney's absence during the phone call testimony denied him his Sixth Amendment right to effective assistance of counsel. The Michigan Court of Appeals rejected his claim, and the Michigan Supreme Court denied review.

The United States District Court for the Eastern District of Michigan granted federal habeas relief, and the Sixth Circuit affirmed. The Sixth Circuit held that the Michi-

gan Court of Appeals' decision was both contrary to and involved an unreasonable application of this Court's decision in *Cronic*. In the normal course, defendants claiming ineffective assistance of counsel must satisfy the familiar framework of *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984), which requires a showing that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." And when reviewing an ineffective-assistance-of-counsel claim, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689.

In *Cronic*, however, we held that courts may presume that a defendant has suffered unconstitutional prejudice if he "is denied counsel at a critical stage of his trial." 466 U. S., at 659. And in *Bell* v. *Cone*, 535 U. S. 685, 696 (2002), we characterized a "critical stage" as one that "held significant consequences for the accused." According to the Sixth Circuit, these statements should have compelled the Michigan court to hold that the phone call testimony was a "critical stage" and that counsel's absence constituted *per se* ineffective assistance. Without identifying any decision from this Court directly in point, the Sixth Circuit concluded that the relevant testimony in this case was "similar to" our cases applying *Cronic*. 580 Fed. Appx., at 284.

II

A

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from this Court, or was "based on an unreasonable determination of the facts." 28 U. S. C. § 2254(d). Donald does not argue that the state-court decision in his

case was factually erroneous. Instead, he argues that the decision was both contrary to and involved an unreasonable application of this Court's ineffective-assistance-of-counsel cases.

AEDPA's standard is intentionally "'"difficult to meet."'" *White* v. *Woodall*, 572 U. S. 415, 419 (2014) (quoting *Metrish* v. *Lancaster*, 569 U. S. 351, 358 (2013)). We have explained that "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White*, 572 U. S., at 419 (some internal quotation marks omitted). "And an 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Ibid.* (same). To satisfy this high bar, a habeas petitioner is required to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

Adherence to these principles serves important interests of federalism and comity. AEDPA's requirements reflect a "presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*). When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong. Federal habeas review thus exists as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington*, *supra*, at 102–103 (internal quotation marks omitted). This is especially true for claims of ineffective assistance of counsel, where AEDPA review must be "'"doubly deferential"'" in order to afford "both the state court and the defense attor-

ney the benefit of the doubt." *Burt* v. *Titlow*, 571 U. S. 12, 15 (2013) (quoting *Cullen* v. *Pinholster*, 563 U. S. 170, 190 (2011)).

B

The Sixth Circuit should not have affirmed the *Cronic*-based grant of habeas relief in this case. The Michigan Court of Appeals' decision was not contrary to any clearly established holding of this Court. We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions. In *Cronic* itself, we rejected the defendant's claim that his counsel's lack of experience and short time for preparation warranted a presumption of prejudice, not a claim based on counsel's absence. See 466 U. S., at 663–666. When announcing the rule in *Cronic*, we cited earlier cases finding prejudice where "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.*, at 659, n. 25. But none of those cases dealt with circumstances like those present here. And *Bell* did not involve the absence of counsel; instead, we declined to presume prejudice where a capital defendant's counsel "failed to 'mount some case for life' after the prosecution introduced evidence in the sentencing hearing and gave a closing statement." 535 U. S., at 696.

Because none of our cases confront "the specific question presented by this case," the state court's decision could not be "contrary to" any holding from this Court. *Lopez* v. *Smith*, 574 U. S. 1, 6 (2014) (*per curiam*). The most that the Sixth Circuit could muster was that "[t]he testimony of a government witness is similar to the trial events that th[is] Court has deemed to be critical stages." 580 Fed. Appx., at 284. But that conclusion is doubly wrong. First, if the circumstances of a case are only "similar to" our precedents, then the state court's decision is not "contrary to" the holdings in those cases. See, *e. g.*, *Carey* v. *Musladin*, 549

U. S. 70, 76–77, and n. 2 (2006). Second, the Sixth Circuit framed the issue at too high a level of generality. See, *e. g.*, *Lopez*, *supra*, at 6. The relevant testimony was not merely "testimony of a government witness"; it was prosecution testimony *about other defendants*. To be sure, the Sixth Circuit considered the testimony relevant to Donald because he was being prosecuted on an aiding-and-abetting theory for felony murder. But Donald's position was that he had nothing to do with the planning among his codefendants. And none of our holdings address counsel's absence during testimony that is irrelevant within the defendant's own theory of the case.

Nor was the state court's decision an unreasonable application of our cases. The Sixth Circuit stated "that a critical stage of trial is a 'step of a criminal proceeding . . . that h[olds] significant consequences for the accused.'" 580 Fed. Appx., at 284 (quoting *Bell*, *supra*, at 696). And it held that the Michigan Court of Appeals' decision was "objectively unreasonable" because the phone call evidence might have indirectly inculpated Donald in the eyes of the jury. But that holding is not correct. Just last Term we warned the Sixth Circuit that "where the '"precise contours"' of [a] right remain '"unclear,"' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims." *White*, *supra*, at 424 (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003), in turn quoting *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (KENNEDY, J., concurring in part and in judgment)). Within the contours of *Cronic*, a fairminded jurist could conclude that a presumption of prejudice is not warranted by counsel's short absence during testimony about other defendants where that testimony was irrelevant to the defendant's theory of the case.

Cronic applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U. S., at 658. The Michigan Court of Appeals' refusal to apply it to these circum-

stances was not the "extreme malfunction" required for federal habeas relief. *Harrington*, 562 U. S., at 102.

III

Because we consider this case only in the narrow context of federal habeas review, we "expres[s] no view on the merits of the underlying Sixth Amendment principle." *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*). All that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that *Cronic* applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

ARMSTRONG ET AL. *v.* EXCEPTIONAL CHILD CENTER, INC., ET AL.

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

No. 14–15. Argued January 20, 2015—Decided March 31, 2015

Providers of "habilitation services" under Idaho's Medicaid plan are reimbursed by the State's Department of Health and Welfare. Section 30(A) of the Medicaid Act requires Idaho's plan to "assure that payments are consistent with efficiency, economy, and quality of care" while "safeguard-[ing] against unnecessary utilization of . . . care and services." 42 U. S. C. § 1396a(a)(30)(A). Respondents, providers of habilitation services, sued petitioners, Idaho Health and Welfare Department officials, claiming that Idaho reimbursed them at rates lower than § 30(A) permits, and seeking to enjoin petitioners to increase these rates. The District Court entered summary judgment for the providers. The Ninth Circuit affirmed, concluding that the Supremacy Clause gave the providers an implied right of action, and that they could sue under this implied right of action to seek an injunction requiring Idaho to comply with § 30(A).

Held: The judgment is reversed.

567 Fed. Appx. 496, reversed.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part IV, concluding that the Supremacy Clause does not confer a private right of action, and that Medicaid providers cannot sue for an injunction requiring compliance with § 30(A). Pp. 324–331.

(a) The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210. But it is not the "'source of any federal rights,'" *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107, and certainly does not create a cause of action. Nothing in the Clause's text suggests otherwise, and nothing suggests it was ever understood as conferring a private right of action. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers. Art I., § 8; *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. It is unlikely that the Constitution gave Congress broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. Pp. 324–326.

(b) Reading the Supremacy Clause not to confer a private right of action is consistent with this Court's preemption jurisprudence. The ability to sue to enjoin unconstitutional actions by state and federal

officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. This Court has never held nor suggested that this judge-made remedy, in its application to state officers, rests upon an implied right of action contained in the Supremacy Clause. Pp. 326–327.

(c) Respondents' suit cannot proceed in equity. The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e. g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 74. Here, the express provision of a single remedy for a State's failure to comply with Medicaid's requirements—the withholding of Medicaid funds by the Secretary of Health and Human Services, 42 U. S. C. § 1396c—and the sheer complexity associated with enforcing § 30(A) combine to establish Congress's "intent to foreclose" equitable relief, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 647. Pp. 327–331.

SCALIA, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined, and an opinion with respect to Part IV, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 333. SOTOMAYOR, J., filed a dissenting opinion, in which KENNEDY, GINSBURG, and KAGAN, JJ., joined, *post*, p. 336.

Carl J. Withroe, Deputy Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *Lawrence G. Wasden*, Attorney General, *Brian Kane*, Assistant Chief Deputy Attorney General, and *Steven L. Olsen* and *Peg M. Dougherty*, Deputy Attorneys General.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Allon Kedem*, *Mark B. Stern*, *Alisa B. Klein*, and *Jeffrey E. Sandberg*.

James M. Piotrowski argued the cause for respondents. With him on the brief were *Stephen P. Berzon* and *Stacey M. Leyton*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, and *Jonathan F. Mitchell*, Solicitor General, and by the Attorneys General for their respective States as follows:

JUSTICE SCALIA delivered the opinion of the Court, except as to Part IV.

We consider whether Medicaid providers can sue to enforce § 30(A) of the Medicaid Act. 81 Stat. 911 (codified as amended at 42 U. S. C. § 1396a(a)(30)(A)).

Luther Strange of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Joseph A. Foster* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery* of Tennessee, *Sean Reyes* of Utah, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; for the California Health and Human Services Agency by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Kathleen A. Kenealy*, Chief Assistant Attorney General, *Julie Weng-Gutierrez*, Senior Assistant Attorney General, *Gregory D. Brown*, Deputy Solicitor General, *Susan M. Carson*, Supervising Deputy Attorney General, and *Joshua N. Sondheimer*, Deputy Attorney General; and for the National Governors Association et al. by *Michael W. McConnell*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of People with Disabilities et al. by *Elizabeth B. McCallum* and *Samuel R. Bagenstos*; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Omar C. Jadwat*, *Jon Greenbaum*, *Sherrilyn Ifill*, *Janai S. Nelson*, *Christina A. Swarns*, *Jin Hee Lee*, and *Nina Perales*; for the American Hospital Association et al. by *Dominic F. Perella*; for the American Medical Association et al. by *Stuart H. Singer*, *Carl E. Goldfarb*, *Andrew L. Adler*, and *Benjamin D. Geffen*; for the American Network of Community Options and Resources et al. by *Joel M. Hamme*; for the Chamber of Commerce of the United States of America by *Carter G. Phillips*, *Peter D. Keisler*, *Quin M. Sorenson*, *Lowell J. Schiller*, *Kate Comerford Todd*, and *Tyler R. Green*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Douglas T. Kendall*, *David H. Gans*, and *Brianne J. Gorod*; for Former HHS Officials by *Stephen I. Vladeck* and *Matthew M. Hoffman*; for the Medicaid Defense Fund by *Lynn S. Carman*; for Members of Congress by *Paul M. Smith* and *Matthew S. Hellman*; and for the National Health Law Program et al. by *Jane Perkins* and *Kelly Bagby*.

I

Medicaid is a federal program that subsidizes the States' provision of medical services to "families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." § 1396–1. Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions.

In order to qualify for Medicaid funding, the State of Idaho adopted, and the Federal Government approved, a Medicaid "plan," § 1396a(a), which Idaho administers through its Department of Health and Welfare. Idaho's plan includes "habilitation services"—in-home care for individuals who, "but for the provision of such services . . . would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan," § 1396n(c) and (c)(1). Providers of these services are reimbursed by the Department of Health and Welfare.

Section 30(A) of the Medicaid Act requires Idaho's plan to:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . ." 42 U. S. C. § 1396a(a)(30)(A).

Respondents are providers of habilitation services to persons covered by Idaho's Medicaid plan. They sued petitioners—

two officials in Idaho's Department of Health and Welfare—in the United States District Court for the District of Idaho, claiming that Idaho violates § 30(A) by reimbursing providers of habilitation services at rates lower than § 30(A) permits. They asked the court to enjoin petitioners to increase these rates.

The District Court entered summary judgment for the providers, holding that Idaho had not set rates in a manner consistent with § 30(A). *Inclusion, Inc.* v. *Armstrong*, 835 F. Supp. 2d 960 (2011). The Ninth Circuit affirmed. 567 Fed. Appx. 496 (2014). It said that the providers had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Id.*, at 497 (citing *Independent Living Center of Southern Cal.* v. *Shewry*, 543 F. 3d 1050, 1065 (CA9 2008)). We granted certiorari. 573 U. S. 991 (2014).

II

The Supremacy Clause, Art. VI, cl. 2, reads:

> "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."

It is apparent that this Clause creates a rule of decision: Courts "shall" regard the "Constitution," and all laws "made in Pursuance thereof," as "the supreme Law of the Land." They must not give effect to state laws that conflict with federal laws. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210 (1824). It is equally apparent that the Supremacy Clause is not the "'source of any federal rights,'" *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107 (1989) (quoting *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 613

(1979)), and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

Hamilton wrote that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government." The Federalist No. 33, p. 207 (J. Cooke ed. 1961). And Story described the Clause as "a positive affirmance of that, which is necessarily implied." 3 Commentaries on the Constitution of the United States § 1831, p. 693 (1833). These descriptions would have been grossly inapt if the Clause were understood to give affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States. And had it been understood to provide such significant private rights against the States, one would expect to find that mentioned in the preratification historical record, which contained ample discussion of the Supremacy Clause by both supporters and opponents of ratification. See C. Drahozal, The Supremacy Clause: A Reference Guide to the United States Constitution 25 (2004); The Federalist No. 44, at 306 (J. Madison). We are aware of no such mention, and respondents have not provided any. Its conspicuous absence militates strongly against their position.

Additionally, it is important to read the Supremacy Clause in the context of the Constitution as a whole. Article I vests Congress with broad discretion over the manner of implementing its enumerated powers, giving it authority to "make all Laws which shall be necessary and proper for carrying [them] into Execution." Art. I, § 8. We have said that this confers upon the Legislature "that discretion, with respect to the means by which the powers [the Constitution] confers are to be carried into execution, which will enable that body to perform the high duties assigned to it," *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). It is unlikely that the Constitution gave Congress such broad discretion with re-

gard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, making it impossible to leave the enforcement of federal law to federal actors. If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. For once a case or controversy properly comes before a court, judges are bound by federal law. Thus, a court may not convict a criminal defendant of violating a state law that federal law prohibits. See, *e. g.*, *Pennsylvania* v. *Nelson*, 350 U. S. 497, 499, 509 (1956). Similarly, a court may not hold a civil defendant liable under state law for conduct federal law requires. See, *e. g.*, *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472, 486–487 (2013). And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted. *Ex parte Young*, 209 U. S. 123, 155–156 (1908).

Respondents contend that our preemption jurisprudence—specifically, the fact that we have regularly considered whether to enjoin the enforcement of state laws that are alleged to violate federal law—demonstrates that the Supremacy Clause creates a cause of action for its violation. They are incorrect. It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. See, *e. g.*, *Osborn* v. *Bank of United*

States, 9 Wheat. 738, 838–839, 844 (1824); *Ex parte Young*, *supra*, at 150–151 (citing *Davis* v. *Gray*, 16 Wall. 203, 220 (1873)). But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110 (1902); see generally L. Jaffe, Judicial Control of Administrative Action 152–196 (1965). Thus, the Supremacy Clause need not be (and in light of our textual analysis above, cannot be) the explanation. What our cases demonstrate is that, "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Carroll* v. *Safford*, 3 How. 441, 463 (1845).

The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. See Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L. Q. Rev. 345 (1956). It is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause. That is because, as even the dissent implicitly acknowledges, *post*, at 339 (opinion of SOTOMAYOR, J.), it does not. The Ninth Circuit erred in holding otherwise.

III

A

We turn next to respondents' contention that, quite apart from any cause of action conferred by the Supremacy Clause, this suit can proceed against Idaho in equity.

The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. See, *e. g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 74 (1996). "'Courts of equity can no more disregard statutory and constitutional requirements and provi-

sions than can courts of law.' " *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893); brackets omitted). In our view the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement. See *Douglas* v. *Independent Living Center of Southern Cal., Inc.*, 565 U. S. 606, 619–620 (2012) (ROBERTS, C. J., dissenting).

Two aspects of § 30(A) establish Congress's "intent to foreclose" equitable relief. *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 647 (2002). First, the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's "breach" of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services. 42 U. S. C. § 1396c. As we have elsewhere explained, the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U. S. 275, 290 (2001).

The provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief. See *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 256, n. 3 (2011). But it does so when combined with the judicially unadministrable nature of § 30(A)'s text. It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are "consistent with efficiency, economy, and quality of care," all the while "safeguard[ing] against unnecessary utilization of . . . care and services." Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency deci-

sionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 292 (2002) (BREYER, J., concurring in judgment). The sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts.

B

The dissent agrees with us that the Supremacy Clause does not provide an implied right of action, and that Congress may displace the equitable relief that is traditionally available to enforce federal law. It disagrees only with our conclusion that such displacement has occurred here.

The dissent insists that, "because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it *affirmatively* manifests a contrary intent." *Post*, at 340 (emphasis added). But a "long-established practice" does not justify a rule that denies statutory text its fairest reading. Section 30(A), fairly read in the context of the Medicaid Act, "display[s] a[n] intent to foreclose" the availability of equitable relief. *Verizon*, *supra*, at 647. We have no warrant to revise Congress's scheme simply because it did not "affirmatively" preclude the availability of a judge-made action at equity. See *Seminole Tribe*, *supra*, at 75 (inferring, in the absence of an "affirmative" statement by Congress, that equitable relief was unavailable).

Equally unavailing is the dissent's reliance on § 30(A)'s history. Section 30(A) was amended, on December 19, 1989, to include what the dissent calls the "equal access mandate," *post*, at 344—the requirement that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that

such care and services are available to the general population in the geographic area." § 6402(a), 103 Stat. 2260. There existed at the time another provision, known as the "Boren Amendment," that likewise imposed broad requirements on state Medicaid plans. 42 U. S. C. § 1396a(a)(13)(A) (1982 ed., Supp. V). Lower courts had interpreted the Boren Amendment to be privately enforceable under § 1983. From this, the dissent infers that, when Congress amended § 30(A), it could not "have failed to anticipate" that § 30(A)'s broad language—or at least that of the equal access mandate—would be interpreted as enforceable in a private action. Thus, concludes the dissent, Congress's failure to *expressly* preclude the private enforcement of § 30(A) suggests it intended *not to* preclude private enforcement. *Post*, at 345.

This argument appears to rely on the prior-construction canon; the rule that, when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute" is presumed to incorporate that interpretation. *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998). But that canon has no application here. The language of the two provisions is nowhere near identical; and even if it had been, the question whether the Boren Amendment permitted private actions was far from "settled." When Congress amended § 30(A) in 1989, this Court had already granted certiorari to decide, but had not yet decided, whether the Boren Amendment could be enforced through a § 1983 suit. See *Baliles* v. *Virginia Hospital Assn.*, 493 U. S. 808 (Oct. 2, 1989) (granting certiorari). Our decision permitting a § 1983 action did not issue until June 14, 1990—almost six months after the amendment to § 30(A). *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498.*

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*Respondents do not claim that *Wilder* establishes precedent for a private cause of action in this case. They do not assert a § 1983 action, since our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified. See *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 283 (2002) (expressly "reject[ing] the notion," implicit in *Wilder*, "that our

The existence of a granted petition for certiorari demonstrates quite clearly that the question whether the Boren Amendment could be privately enforced was *un*settled at the time of § 30(A)'s 1989 amendment—so that if Congress was aware of the parallel (which is highly doubtful) the course that awareness would have prompted (if any) would not have been legislative silence but rather express specification of the availability of private enforcement (if that was what Congress intended).

Finally, the dissent speaks as though we leave these plaintiffs with no resort. That is not the case. Their relief must be sought initially through the Secretary rather than through the courts. The dissent's complaint that the sanction available to the Secretary (the cut-off of funding) is too massive to be a realistic source of relief seems to us mistaken. We doubt that the Secretary's notice to a State that its compensation scheme is inadequate will be ignored.

IV

The last possible source of a cause of action for respondents is the Medicaid Act itself. They do not claim that, and rightly so. Section 30(A) lacks the sort of rights-creating language needed to imply a private right of action. *Sandoval*, *supra*, at 286–287. It is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid. The Act says that the "Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," the subsection that includes § 30(A). 42 U. S. C. § 1396a(b). We have held that such language "reveals no congressional intent to create a private right of action." *Sandoval*, *supra* at 289; see also *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 772 (1981). And again, the explicitly conferred means of en-

cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983").

forcing compliance with § 30(A) by the Secretary's withholding funding, § 1396c, suggests that other means of enforcement are precluded, *Sandoval*, *supra*, at 290.

Spending Clause legislation like Medicaid "is much in the nature of a contract." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). The notion that respondents have a right to sue derives, perhaps, from the fact that they are beneficiaries of the federal-state Medicaid agreement, and that intended beneficiaries, in modern times at least, can sue to enforce the obligations of private contracting parties. See 13 R. Lord, Williston on Contracts §§ 37:12–37.13, pp. 123–135 (4th ed. 2013). We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves. See *Pharmaceutical Research and Mfrs. of America* v. *Walsh*, 538 U. S. 644, 683 (2003) (THOMAS, J., concurring in judgment). More fundamentally, however, the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government, *Astra USA, Inc.* v. *Santa Clara County*, 563 U. S. 110, 117–118 (2011); see Williston, *supra*, at §§ 37:35–37:36, at 256–271; 9 J. Murray, Corbin on Contracts § 45.6, p. 92 (rev. ed. 2007)—much less to contracts between two governments. Our precedents establish that a private right of action under federal law is not created by mere implication, but must be "unambiguously conferred," *Gonzaga*, 536 U. S., at 283. Nothing in the Medicaid Act suggests that Congress meant to change that for the commitments made under § 30(A).

* * *

The judgment of the Ninth Circuit Court of Appeals is reversed.

It is so ordered.

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

I join Parts I, II, and III of the Court's opinion.

Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause "cause of action." Rather, I would ask whether "federal courts may in [these] circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Ante*, at 326; *post*, at 339 (SOTOMAYOR, J., dissenting). I believe the answer to this question is no.

That answer does not follow from the application of a simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not. "[T]he statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer" courts "more than general guidance." *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 291 (2002) (BREYER, J., concurring in judgment). Rather, I believe that several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing this particular action for injunctive relief.

For one thing, as the majority points out, § 30(A) of the Medicaid Act, 42 U. S. C. § 1396a(a)(30)(A), sets forth a federal mandate that is broad and nonspecific. See *ante*, at 328. But, more than that, § 30(A) applies its broad standards to the setting of rates. The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges. More than a century ago, Congress created the Interstate Commerce Commission, the first great federal regulatory ratesetting agency, and endowed it with authority to set "reasonable" railroad rates. Ch. 104, 24 Stat. 379 (1887). It did so in part because judicial efforts to maintain reasonable rate levels had proved inadequate. See I. Sharfman, Railway Regulation: An Analysis of the Underlying Problems in Railway Economics From the Standpoint of Government Regulation 43–44 (1915).

Reading § 30(A) underscores the complexity and nonjudicial nature of the ratesetting task. That provision requires State Medicaid plans to "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to assure "care and services" equivalent to that "available to the general population in the geographic area." § 1396a(a)(30)(A). The methods that a state agency, such as Idaho's Department of Health and Welfare, uses to make this kind of determination may involve subsidiary determinations of, for example, the actual cost of providing quality services, including personnel and total operating expenses; changes in public expectations with respect to delivery of services; inflation; a comparison of rates paid in neighboring States for comparable services; and a comparison of any rates paid for comparable services in other public or private capacities. See App. to Reply to Brief in Opposition 16; Idaho Code Ann. § 56–118 (2012).

At the same time, § 30(A) applies broadly, covering reimbursements provided to approximately 1.36 million doctors, serving over 69 million patients across the Nation. See Dept. of Health and Human Servs., Office of Inspector General, Access to Care: Provider Availability in Medicaid Managed Care 1, 5 (Dec. 2014). And States engage in time-consuming efforts to obtain public input on proposed plan amendments. See, *e. g.*, Kansas Medicaid: Design and Implementation of a Public Input and Stakeholder Consult Process (Sept. 16, 2011) (prepared by Deloitte Consulting, LLP) (describing public input on Kansas' proposed Medicaid amendments).

I recognize that federal courts have long become accustomed to reviewing for reasonableness or constitutionality the ratesetting determinations made by agencies. See 5 U. S. C. § 706; *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602–606 (1944). But this is not such an action. Instead, the lower courts here, relying on the ratesetting standard articulated in *Orthopaedic Hospital* v. *Belshe*, 103 F. 3d 1491 (CA9 1997), required the State to set rates that "approximate the

cost of quality care provided efficiently and economically." *Id.*, at 1496. See *Inclusion, Inc.* v. *Armstrong*, 835 F. Supp. 2d 960, 963–964 (Idaho 2011), aff'd, 567 Fed. Appx. 496 (CA9 2014). To find in the law a basis for courts to engage in such direct ratesetting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decision-making. The consequence, I fear, would be increased litigation, inconsistent results, and disorderly administration of highly complex federal programs that demand public consultation, administrative guidance, and coherence for their success. I do not believe Congress intended to allow a statute-based injunctive action that poses such risks (and that has the other features I mention).

I recognize that courts might in particular instances be able to resolve rate-related requests for injunctive relief quite easily. But I see no easy way to separate in advance the potentially simple sheep from the more harmful rate-making goats. In any event, this case, I fear, belongs in the latter category. See *Belshe*, *supra*, at 1496. Compare Brief for Respondents 2, n. 1 (claiming that respondents seek only to enforce federally approved methodology), with Brief for United States as *Amicus Curiae* 5, n. 2 (the relevant methodology has not been approved). See also Idaho Code Ann. § 56–118 (describing in general terms what appears to be a complex ratesetting methodology, while leaving unclear the extent to which Idaho is bound to use, rather than merely consider, actual provider costs).

For another thing, like the majority, I would ask why, in the complex ratesetting area, other forms of relief are inadequate. If the Secretary of Health and Human Services concludes that a State is failing to follow legally required federal rules, the Secretary can withhold federal funds. See *ante*, at 328 (citing 42 U. S. C. § 1396c). If withholding funds does not work, the federal agency may be able to sue a State to compel compliance with federal rules. See Tr. of Oral Arg.

23, 52 (Solicitor General and respondents acknowledging that the Federal Government might be able to sue a State to enjoin it from paying less than what § 30(A) requires). Cf., *e. g.*, *Arizona* v. *United States*, 567 U. S. 387 (2012) (allowing similar action in another context).

Moreover, why could respondents not ask the federal agency to interpret its rules to respondents' satisfaction, to modify those rules, to promulgate new rules or to enforce old ones? See 5 U. S. C. § 553(e). Normally, when such requests are denied, an injured party can seek judicial review of the agency's refusal on the grounds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." §§ 702, 706(2)(A). And an injured party can ask the court to "compel agency action unlawfully withheld or unreasonably delayed." §§ 702, 706(1). See also Tr. of Oral Arg. 15–16 (arguing that providers can bring an action under the Administrative Procedure Act (APA) whenever a waiver program is renewed or can seek new agency rulemaking); *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 230, n. 4, 231 (1986) (APA challenge to the Secretary of Commerce's failure to act).

I recognize that the law may give the federal agency broad discretionary authority to decide when and how to exercise or to enforce statutes and rules. See *Massachusetts* v. *EPA*, 549 U. S. 497, 527 (2007). As a result, it may be difficult for respondents to prevail on an APA claim unless it stems from an agency's particularly egregious failure to act. But, if that is so, it is because Congress decided to vest broad discretion in the agency to interpret and to enforce § 30(A). I see no reason for this Court to circumvent that congressional determination by allowing this action to proceed.

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

Suits in federal court to restrain state officials from executing laws that assertedly conflict with the Constitution or

with a federal statute are not novel. To the contrary, this Court has adjudicated such requests for equitable relief since the early days of the Republic. Nevertheless, today the Court holds that Congress has foreclosed private parties from invoking the equitable powers of the federal courts to require States to comply with § 30(A) of the Medicaid Act, 42 U. S. C. § 1396a(a)(30)(A). It does so without pointing to the sort of detailed remedial scheme we have previously deemed necessary to establish congressional intent to preclude resort to equity. Instead, the Court relies on Congress' provision for agency enforcement of § 30(A)—an enforcement mechanism of the sort we have already definitively determined *not* to foreclose private actions—and on the mere fact that § 30(A) contains relatively broad language. As I cannot agree that these statutory provisions demonstrate the requisite congressional intent to restrict the equitable authority of the federal courts, I respectfully dissent.

I

A

That parties may call upon the federal courts to enjoin unconstitutional government action is not subject to serious dispute. Perhaps the most famous exposition of this principle is our decision in *Ex parte Young*, 209 U. S. 123 (1908), from which the doctrine derives its usual name. There, we held that the shareholders of a railroad could seek an injunction preventing the Minnesota attorney general from enforcing a state law setting maximum railroad rates because the Eleventh Amendment did not provide the officials with immunity from such an action and the federal court had the "power" in equity to "grant a temporary injunction." *Id.*, at 148. This Court had earlier recognized similar equitable authority in *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824), in which a federal court issued an injunction prohibiting an Ohio official from executing a state law taxing the

Bank of the United States. *Id.*, at 838–839. We affirmed in relevant part, concluding that the case was "cognizable in a Court of equity," and holding it to be "proper" to grant equitable relief insofar as the state tax was "repugnant" to the federal law creating the national bank. *Id.*, at 839, 859. More recently, we confirmed the vitality of this doctrine in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). There, we found no support for the argument that a challenge to "'governmental action under the Appointments Clause or separation-of-powers principles'" should be treated "differently than every other constitutional claim" for which "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Id.*, at 491, n. 2.

A suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within this doctrine. A claim that a state law contravenes a federal statute is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause," *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 271–272 (1977), and the application of preempted state law is therefore "unconstitutional," *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 388 (2000); accord, *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316, 436 (1819) (that States have "no power" to enact laws interfering with "the operations of the constitutional laws enacted by Congress" is the "unavoidable consequence of that supremacy which the constitution has declared"; such a state law "is unconstitutional and void"). We have thus long entertained suits in which a party seeks prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action. See, *e. g.*, *Foster* v. *Love*, 522 U. S. 67 (1997) (state election law that permitted the winner of a state primary to be deemed the winner of election to Congress held preempted by federal statute setting date of con-

gressional elections); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983) (state law preempted in part by the federal Employee Retirement Income Security Act of 1974); *Railroad Transfer Service, Inc.* v. *Chicago*, 386 U. S. 351 (1967) (city ordinance imposing licensing requirements on motor carrier transporting railroad passengers held preempted by federal Interstate Commerce Act); *Campbell* v. *Hussey*, 368 U. S. 297 (1961) (state law requiring labeling of certain strains of tobacco held preempted by the federal Tobacco Inspection Act); *Railway Co.* v. *McShane*, 22 Wall. 444 (1875) (state taxation of land possessed by railroad company held invalid under federal Act of July 2, 1864). Indeed, for this reason, we have characterized "the availability of prospective relief of the sort awarded in *Ex parte Young*" as giving "life to the Supremacy Clause." *Green* v. *Mansour*, 474 U. S. 64, 68 (1985).

Thus, even though the Court is correct that it is somewhat misleading to speak of "an implied right of action contained in the Supremacy Clause," *ante*, at 327, that does not mean that parties may not enforce the Supremacy Clause by bringing suit to enjoin preempted state action. As the Court also recognizes, we "have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Ante*, at 326.

B

Most important for purposes of this case is not the mere existence of this equitable authority, but the fact that it is exceedingly well established—supported, as the Court puts it, by a "long history." *Ante*, at 327. Congress may, if it so chooses, either expressly or implicitly preclude *Ex parte Young* enforcement actions with respect to a particular statute or category of lawsuit. See, *e. g.*, 28 U. S. C. § 1341 (prohibiting federal judicial restraints on the collection of state taxes); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 75–76 (1996) (comprehensive alternative remedial scheme can

establish Congress' intent to foreclose *Ex parte Young* actions). But because Congress is undoubtedly aware of the federal courts' long-established practice of enjoining preempted state action, it should generally be presumed to contemplate such enforcement unless it affirmatively manifests a contrary intent. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946).

In this respect, equitable preemption actions differ from suits brought by plaintiffs invoking 42 U. S. C. § 1983 or an implied right of action to enforce a federal statute. Suits for "redress designed to halt or prevent the constitutional violation rather than the award of money damages" seek "traditional forms of relief." *United States* v. *Stanley*, 483 U. S. 669, 683 (1987). By contrast, a plaintiff invoking § 1983 or an implied statutory cause of action may seek a variety of remedies—including damages—from a potentially broad range of parties. Rather than simply pointing to background equitable principles authorizing the action that Congress presumably has not overridden, such a plaintiff must demonstrate specific congressional intent to *create* a statutory right to these remedies. See *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 290 (2002); *Alexander* v. *Sandoval*, 532 U. S. 275, 286 (2001); see also *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 114 (1989) (KENNEDY, J., dissenting) (Because a preemption claim does not seek to enforce a statutory right, "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system"). For these reasons, the principles that we have developed to determine whether a statute creates an implied right of action, or is enforceable through § 1983, are not transferable to the *Ex parte Young* context.

II

In concluding that Congress has "implicitly preclude[d] private enforcement of § 30(A)," *ante*, at 328, the Court ignores this critical distinction and threatens the vitality of our *Ex parte Young* jurisprudence. The Court identifies only a single prior decision—*Seminole Tribe*—in which we have ever discerned such congressional intent to foreclose equitable enforcement of a statutory mandate. *Ante*, at 327. Even the most cursory review of that decision reveals how far afield it is from this case.

In *Seminole Tribe*, the plaintiff Indian Tribe had invoked *Ex parte Young* in seeking to compel the State of Florida to "negotiate in good faith with [the] tribe toward the formation of a compact" governing certain gaming activities, as required by a provision of the Indian Gaming Regulatory Act, 25 U. S. C. § 2710(d)(3). 517 U. S., at 47. We rejected this effort, observing that "Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)." *Id.*, at 73–74. That latter provision allowed a tribe to sue for violations of the duty to negotiate 180 days after requesting such negotiations, but specifically limited the remedy that a court could grant to "an order directing the State and the Indian tribe to conclude a compact within 60 days," and provided that the only sanction for the violation of such an order would be to require the parties to "submit a proposed compact to a mediator." *Id.*, at 74; §§ 2710(d)(7)(B)(i), (iii), (iv). The statute further directed that if the State should fail to abide by the mediator's selected compact, the sole remedy would be for the Secretary of the Interior, in consultation with the tribe, to prescribe regulations governing gaming. See *id.*, at 74–75; § 2710(d)(7)(B)(vii). We concluded that Congress must have intended this procedural route to be the exclusive means of enforcing § 2710(d)(3). As we explained: "If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, § 2710(d)(7) would have been superfluous; it is difficult to see why an

Indian tribe would suffer through the intricate scheme of § 2710(d)(7) when more complete and more immediate relief would be available under *Ex parte Young*." *Id.*, at 75.

What is the equivalent "carefully crafted and intricate remedial scheme" for enforcement of § 30(A)? The Court relies on two aspects of the Medicaid Act, but, whether considered separately or in combination, neither suffices.

First, the Court cites 42 U. S. C. § 1396c, which authorizes the Secretary of Health and Human Services (HHS) to withhold federal Medicaid payments to a State in whole or in part if the Secretary determines that the State has failed to comply with the obligations set out in § 1396a, including § 30(A). See *ante*, at 328–329. But in striking contrast to the remedial provision set out in the Indian Gaming Regulatory Act, § 1396c provides no specific procedure that parties actually affected by a State's violation of its statutory obligations may invoke in lieu of *Ex parte Young*—leaving them without any other avenue for seeking relief from the State. Nor will § 1396c always provide a particularly effective means for redressing a State's violations: If the State has violated § 30(A) by refusing to reimburse medical providers at a level "sufficient to enlist enough providers so that care and services are available" to Medicaid beneficiaries to the same extent as they are available to "the general population," agency action resulting in a reduced flow of federal funds to that State will often be self-defeating. § 1396a(a)(30)(A); see Brief for Former HHS Officials as *Amici Curiae* 18 (noting that HHS is often reluctant to initiate compliance actions because a "state's non-compliance creates a damned-if-you-do, damned-if-you-don't scenario where the withholding of state funds will lead to depriving the poor of essential medical assistance"). Far from rendering § 1396c "superfluous," then, *Ex parte Young* actions would seem to be an anticipated and possibly necessary supplement to this limited agency-enforcement mechanism. *Seminole Tribe*, 517 U. S., at 75. Indeed, presumably for these reasons, we recently rejected

the very contention the Court now accepts, holding that "[t]he fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds . . . does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 256, n. 3 (2011) (internal quotation marks omitted).

Section 1396c also parallels other provisions scattered throughout the Social Security Act that likewise authorize the withholding of federal funds to States that fail to fulfill their obligations. See, *e. g.*, §§ 609(a), 1204, 1354. Yet, we have consistently authorized judicial enforcement of the Act. See *Maine* v. *Thiboutot*, 448 U. S. 1, 6 (1980) (collecting cases). *Rosado* v. *Wyman*, 397 U. S. 397 (1970), provides a fitting illustration. There, we considered a provision of the Social Security Act mandating that, in calculating benefits for participants in the Aid to Families with Dependent Children Program, States make adjustments "'to reflect fully changes in living costs.'" *Id.*, at 412 (quoting § 602(a)(23) (1964 ed., Supp. IV)). We expressed no hesitation in concluding that federal courts could require compliance with this obligation, explaining: "It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Id.*, at 422–423. We so held notwithstanding the existence of an enforcement provision permitting a federal agency to "make a total or partial cutoff of federal funds." See *id.*, at 406, n. 8 (citing § 1316).

Second, perhaps attempting to reconcile its treatment of § 1396c (2012 ed.) with this longstanding precedent, the Court focuses on the particular language of § 30(A), contending that this provision, at least, is so "judicially unadminis-

trable" that Congress must have intended to preclude its enforcement in private suits. *Ante*, at 328. Admittedly, the standard set out in § 30(A) is fairly broad, requiring that a state Medicaid plan:

> "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." § 1396a(a)(30)(A).

But mere breadth of statutory language does not require the Court to give up all hope of judicial enforcement—or, more important, to infer that Congress must have done so.

In fact, the contention that § 30(A)'s language was intended to foreclose private enforcement actions entirely is difficult to square with the provision's history. The specific equal access mandate invoked by the plaintiffs in this case—that reimbursement rates be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"—was added to § 30(A) in 1989. 103 Stat. 2260. At that time, multiple Federal Courts of Appeals had held that the so-called Boren Amendment to the Medicaid Act was enforceable pursuant to § 1983—as we soon thereafter concluded it was. See *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 504–505, 524 (1990). The Boren Amendment employed language quite similar to that used in § 30(A), requiring that a state plan:

> "provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under

> the plan through the use of rates . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality." § 1396a(a)(13)(A) (1982 ed., Supp. V).

It is hard to believe that the Congress that enacted the operative version of § 30(A) could have failed to anticipate that it might be similarly enforceable. Even if, as the Court observes, the question whether the Boren Amendment was enforceable under § 1983 was "unsettled at the time," *ante*, at 331 (emphasis deleted), surely Congress would have spoken with far more clarity had it actually intended to preclude private enforcement of § 30(A) through not just § 1983 but also *Ex parte Young*.

Of course, the broad scope of § 30(A)'s language is not irrelevant. But rather than compelling the conclusion that the provision is wholly unenforceable by private parties, its breadth counsels in favor of interpreting § 30(A) to provide substantial leeway to States, so that only in rare and extreme circumstances could a State actually be held to violate its mandate. The provision's scope may also often require a court to rely on HHS, which is "comparatively expert in the statute's subject matter." *Douglas* v. *Independent Living Center of Southern Cal., Inc.*, 565 U. S. 604, 614 (2012). When the agency has made a determination with respect to what legal standard should apply, or the validity of a State's procedures for implementing its Medicaid plan, that determination should be accorded the appropriate deference. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). And if faced with a question that pre-

sents a special demand for agency expertise, a court might call for the views of the agency, or refer the question to the agency under the doctrine of primary jurisdiction. See *Rosado*, 397 U. S., at 406–407; *Pharmaceutical Research and Mfrs. of America* v. *Walsh*, 538 U. S. 644, 673 (2003) (BREYER, J., concurring in part and concurring in judgment). Finally, because the authority invoked for enforcing § 30(A) is equitable in nature, a plaintiff is not entitled to relief as of right, but only in the sound discretion of the court. See *Amoco Production Co.* v. *Gambell*, 480 U. S. 531, 542 (1987). Given the courts' ability to both respect States' legitimate choices and defer to the federal agency when necessary, I see no basis for presuming that Congress believed the Judiciary to be completely incapable of enforcing § 30(A).*

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*That is not to say that the Court of Appeals in this case necessarily applied § 30(A) correctly. Indeed, there are good reasons to think the court construed § 30(A) to impose an overly stringent obligation on the States. While the Ninth Circuit has understood § 30(A) to compel States to "rely on responsible cost studies," and to reimburse for services at rates that "approximate the cost of quality care provided efficiently and economically," *Orthopaedic Hospital* v. *Belshe*, 103 F. 3d 1491, 1496 (1997), other courts have read § 30(A) to require only that rates be high enough to ensure that services are *available* to Medicaid participants. See *Pennsylvania Pharmacists Assn.* v. *Houstoun*, 283 F. 3d 531, 538 (CA3 2002); *Evergreen Presbyterian Ministries, Inc.* v. *Hood*, 235 F. 3d 908, 928–929 (CA5 2000); *Methodist Hospitals, Inc.* v. *Sullivan*, 91 F. 3d 1026, 1030 (CA7 1996). This Court declined to grant certiorari to address whether the Ninth Circuit's reading of § 30(A) is correct. See 573 U. S. 991 (2014). But JUSTICE BREYER, in his concurrence, appears to mistake that question about the merits of the Ninth Circuit's standard for the question this Court actually granted certiorari to address—that is, whether § 30(A) is judicially enforceable at all. See *ante*, at 334–335 (opinion concurring in part and concurring in judgment). To answer that question, one need only recognize, as JUSTICE BREYER does, that "federal courts have long become accustomed to reviewing for reasonableness or constitutionality the rate-setting determinations made by agencies." *Ante*, at 334. A private party who invokes the jurisdiction of the federal courts in order to enjoin a state agency's implementation of rates that are so unreasonably low as to violate § 30(A) seeks a determination of exactly this sort.

* * *

In sum, far from identifying a "carefully crafted . . . remedial scheme" demonstrating that Congress intended to foreclose *Ex parte Young* enforcement of § 30(A), *Seminole Tribe*, 517 U. S., at 73–74, the Court points only to two provisions. The first is § 1396c, an agency-enforcement provision that, given our precedent, cannot preclude private actions. The second is § 30(A) itself, which, while perhaps broad, cannot be understood to manifest congressional intent to preclude judicial involvement.

The Court's error today has very real consequences. Previously, a State that set reimbursement rates so low that providers were unwilling to furnish a covered service for those who need it could be compelled by those affected to respect the obligation imposed by § 30(A). Now, it must suffice that a federal agency, with many programs to oversee, has authority to address such violations through the drastic and often counterproductive measure of withholding the funds that pay for such services. Because a faithful application of our precedents would have led to a contrary result, I respectfully dissent.

Syllabus

RODRIGUEZ *v.* UNITED STATES

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

No. 13–9972. Argued January 21, 2015—Decided April 21, 2015

Officer Struble, a K–9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, *inter alia*, checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge recommended denial of the motion. He found no reasonable suspicion supporting detention once Struble issued the written warning. Under Eighth Circuit precedent, however, he concluded that prolonging the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was for that reason permissible. The District Court then denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed. Noting that the seven or eight minute delay was an acceptable "*de minimis* intrusion on Rodriguez's personal liberty," the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

Held:

1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under *Terry* v. *Ohio*, 392 U. S. 1, than an arrest, see, *e. g.*, *Arizona* v. *Johnson*, 555 U. S. 323, 330. Its tolerable duration is determined by the seizure's "mission," which is to address the traffic violation that warranted the stop, *Illinois* v. *Caballes*, 543 U. S. 405, 407, and attend to related safety concerns.

Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, *Johnson*, 555 U. S., at 327–328 (questioning); *Caballes*, 543 U. S., at 406, 408 (dog sniff), but a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket, *id.*, at 407.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Delaware* v. *Prouse*, 440 U. S. 648, 658–659. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In concluding that the *de minimis* intrusion here could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on *Pennsylvania* v. *Mimms*, 434 U. S. 106. The Court reasoned in *Mimms* that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis*" additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, *id.*, at 110–111. The officer safety interest recognized in *Mimms*, however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore gains no support from *Mimms*.

The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop "prolonged beyond" the time in fact needed for the officer to complete his traffic-based inquiries is "unlawful," *Caballes*, 543 U. S., at 407. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 354–357.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. Pp. 357–358.

741 F. 3d 905, vacated and remanded.

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Breyer, Sotomayor, and Kagan, JJ., joined. Ken-

NEDY, J., filed a dissenting opinion, *post*, p. 358. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which KENNEDY, J., joined as to all but Part III, *post*, p. 358. ALITO, J., filed a dissenting opinion, *post*, p. 370.

Shannon P. O'Connor argued the cause for petitioner. With him on the briefs were *David R. Stickman*, *Jennifer L. Gilg*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup.*

Ginger D. Anders argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *Christopher J. Smith.**

JUSTICE GINSBURG delivered the opinion of the Court.

In *Illinois* v. *Caballes*, 543 U. S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to com-

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**Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Mark B. Weinberg* filed a brief for the United States Justice Foundation et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E. Shapiro* and *Brett E. Legner*, Deputy Solicitors General, and *Eldad Z. Malamuth* and *Michael M. Glick*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Russell A. Suzuki* of Hawaii, *Bill Schuette* of Michigan, *Gary K. King* of New Mexico, *Marty J. Jackley* of South Dakota, *Sean D. Reyes* of Utah, *William Sorrell* of Vermont, *Robert W. Ferguson* of Washington, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming.

plete th[e] mission" of issuing a ticket for the violation. *Id.*, at 407. The Court so recognized in *Caballes*, and we adhere to the line drawn in that decision.

I

Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road. Nebraska law prohibits driving on highway shoulders, see Neb. Rev. Stat. § 60–6,142 (2010), and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] . . . took care of all the business." App. 70.

Nevertheless, Struble did not consider Rodriguez "free to leave." *Id.*, at 69–70. Although justification for the traffic stop was "out of the way," *id.*, at 70, Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U. S. C. §§ 841(a)(1) and (b)(1). He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. App. 100 (apart from "information given by the dog," "Officer Struble had [no]thing other than a rather

large hunch"). He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible.

The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." *Id.*, at 114 (quoting *United States* v. *Alexander*, 448 F. 3d 1014, 1016 (CA8 2006)). The court thus agreed with the Magistrate Judge that the "7 to 10 minutes" added to the stop by the dog sniff "was not of constitutional significance." App. 114. Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison.

The Eighth Circuit affirmed. The "seven- or eight-minute delay" in this case, the opinion noted, resembled delays that the court had previously ranked as permissible. 741 F. 3d 905, 907 (2014). The Court of Appeals thus ruled that the delay here constituted an acceptable "*de minimis* intrusion on Rodriguez's personal liberty." *Id.*, at 908. Given that ruling, the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. 573 U. S. 991 (2014). Compare, *e. g.*, *United States* v. *Morgan*, 270 F. 3d 625, 632 (CA8 2001) (postcompletion delay of "well under ten minutes" permissible), with, *e. g.*, *State* v. *Baker*, 2010 UT 18, ¶13, 229 P. 3d 650, 658 (2010) ("[W]ithout additional reason-

able suspicion, the officer must allow the seized person to depart once the purpose of the stop has concluded.").

II

A seizure for a traffic violation justifies a police investigation of that violation. "[A] relatively brief encounter," a routine traffic stop is "more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." *Knowles* v. *Iowa*, 525 U. S. 113, 117 (1998) (quoting *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984), in turn citing *Terry* v. *Ohio*, 392 U. S. 1 (1968)). See also *Arizona* v. *Johnson*, 555 U. S. 323, 330 (2009). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, *Caballes*, 543 U. S., at 407, and attend to related safety concerns, *infra*, at 356–357. See also *United States* v. *Sharpe*, 470 U. S. 675, 685 (1985); *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification."). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." *Ibid.* See also *Caballes*, 543 U. S., at 407. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe*, 470 U. S., at 686 (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation").

Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. *Johnson*, 555 U. S., at 327–328 (questioning); *Caballes*, 543 U. S., at 406, 408 (dog sniff). In *Caballes*, however, we cautioned that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a

warning ticket. 543 U. S., at 407. And we repeated that admonition in *Johnson*: The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." 555 U. S., at 333. See also *Muehler* v. *Mena*, 544 U. S. 93, 101 (2005) (because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] . . . no additional Fourth Amendment justification . . . was required"). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to JUSTICE ALITO's suggestion, *post*, at 372, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see *post*, at 370 (ALITO, J., dissenting) (premising opinion on the dissent's own finding of "reasonable suspicion," although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).

Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Caballes*, 543 U. S., at 408. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. See *Delaware* v. *Prouse*, 440 U. S. 648, 658–660 (1979). See also 4 W. LaFave, Search and Seizure § 9.3(c), pp. 507–517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse*, 440 U. S., at 658–659; LaFave, Search and Seizure § 9.3(c), at 516 (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis* v. *Edmond*, 531 U. S. 32, 40–41 (2000). See also *Florida* v. *Jardines*, 569 U. S. 1, 9–10 (2013). Candidly, the Govern-

ment acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. See Tr. of Oral Arg. 33. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In advancing its *de minimis* rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (*per curiam*). See *United States* v. *$404,905.00 in U. S. Currency*, 182 F. 3d 643, 649 (CA8 1999). In *Mimms*, we reasoned that the government's "legitimate and weighty" interest in officer safety outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. 434 U. S., at 110–111. See also *Maryland* v. *Wilson*, 519 U. S. 408, 413–415 (1997) (passengers may be required to exit vehicle stopped for traffic violation). The Eighth Circuit, echoed in JUSTICE THOMAS's dissent, believed that the imposition here similarly could be offset by the Government's "strong interest in interdicting the flow of illegal drugs along the nation's highways." *$404,905.00 in U. S. Currency*, 182 F. 3d, at 649; see *post*, at 366.

Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," *Johnson*, 555 U. S., at 330 (internal quotation marks omitted), so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. Cf. *United States* v. *Holt*, 264 F. 3d 1215, 1221–1222 (CA10 2001) (en banc) (recognizing officer safety justification for criminal record and outstanding warrant checks), abrogated on other grounds as recognized in *United States* v. *Stewart*, 473 F. 3d 1265, 1269 (CA10 2007). On-scene investigation into other crimes, however, detours from that mission. See *supra*, at 355 and this page. So too do safety precautions taken in order to facilitate such detours. But cf. *post*, at 371–372 (ALITO, J., dissenting).

Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. Brief for United States 36–39. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. See also *post*, at 360–362 (THOMAS, J., dissenting) (embracing the Government's argument). The reasonableness of a seizure, however, depends on what the police in fact do. See *Knowles*, 525 U. S., at 115–117. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." Tr. of Oral Arg. 49. How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." *Caballes*, 543 U. S., at 407. As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." *Ibid.* The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as JUSTICE ALITO supposes, *post*, at 370–372, but whether conducting the sniff "prolongs"—*i. e.*, adds time to—"the stop," *supra*, at 355.

III

The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, see App. 100, and the District Court

adopted the Magistrate Judge's findings, see *id.*, at 112–113. The Court of Appeals, however, did not review that determination. But see *post*, at 359, 367–369 (THOMAS, J., dissenting) (resolving the issue, never mind that the Court of Appeals left it unaddressed); *post*, at 370 (ALITO, J., dissenting) (upbraiding the Court for addressing the sole issue decided by the Court of Appeals and characterizing the Court's answer as "unnecessary" because the Court, instead, should have decided an issue the Court of Appeals did not decide). The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, dissenting.

My join in JUSTICE THOMAS' dissenting opinion does not extend to Part III. Although the issue discussed in that Part was argued here, the Court of Appeals has not addressed that aspect of the case in any detail. In my view the better course would be to allow that court to do so in the first instance.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, and with whom JUSTICE KENNEDY joins as to all but Part III, dissenting.

Ten years ago, we explained that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Illinois* v. *Caballes*, 543 U. S. 405, 408 (2005). The

only question here is whether an officer executed a stop in a reasonable manner when he waited to conduct a dog sniff until after he had given the driver a written warning and a backup unit had arrived, bringing the overall duration of the stop to 29 minutes. Because the stop was reasonably executed, no Fourth Amendment violation occurred. The Court's holding to the contrary cannot be reconciled with our decision in *Caballes* or a number of common police practices. It was also unnecessary, as the officer possessed reasonable suspicion to continue to hold the driver to conduct the dog sniff. I respectfully dissent.

I

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U. S. Const., Amdt. 4. As the text indicates, and as we have repeatedly confirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). We have defined reasonableness "in objective terms by examining the totality of the circumstances," *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996), and by considering "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Atwater* v. *Lago Vista*, 532 U. S. 318, 326 (2001) (internal quotation marks omitted). When traditional protections have not provided a definitive answer, our precedents have "analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia* v. *Moore*, 553 U. S. 164, 171 (2008) (internal quotation marks omitted).

Although a traffic stop "constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]," such a sei-

zure is constitutionally "reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren* v. *United States*, 517 U. S. 806, 809–810 (1996). But "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Caballes*, *supra*, at 407.

Because Rodriguez does not dispute that Officer Struble had probable cause to stop him, the only question is whether the stop was otherwise executed in a reasonable manner. See Brief for Appellant in No. 13–1176 (CA8), p. 4, n. 2. I easily conclude that it was. Approximately 29 minutes passed from the time Officer Struble stopped Rodriguez until his narcotics-detection dog alerted to the presence of drugs. That amount of time is hardly out of the ordinary for a traffic stop by a single officer of a vehicle containing multiple occupants even when no dog sniff is involved. See, *e. g.*, *United States* v. *Ellis*, 497 F. 3d 606 (CA6 2007) (22 minutes); *United States* v. *Barragan*, 379 F. 3d 524 (CA8 2004) (approximately 30 minutes). During that time, Officer Struble conducted the ordinary activities of a traffic stop—he approached the vehicle, questioned Rodriguez about the observed violation, asked Pollman about their travel plans, ran serial warrant checks on Rodriguez and Pollman, and issued a written warning to Rodriguez. And when he decided to conduct a dog sniff, he took the precaution of calling for backup out of concern for his safety. See 741 F. 3d 905, 907 (CA8 2014); see also *Pennsylvania* v. *Mimms*, 434 U. S. 106, 110 (1977) (*per curiam*) (officer safety is a "legitimate and weighty" concern relevant to reasonableness).

As *Caballes* makes clear, the fact that Officer Struble waited until after he gave Rodriguez the warning to conduct the dog sniff does not alter this analysis. Because "the use of a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests," 543 U. S., at 409, "conducting a dog sniff would not change the character of a

traffic stop that is lawful at its inception and otherwise executed in a reasonable manner," *id.*, at 408. The stop here was "lawful at its inception and otherwise executed in a reasonable manner." *Ibid.* As in *Caballes*, "conducting a dog sniff [did] not change the character of [the] traffic stop," *ibid.*, and thus no Fourth Amendment violation occurred.

II

Rather than adhere to the reasonableness requirement that we have repeatedly characterized as the "touchstone of the Fourth Amendment," *Brigham City*, *supra*, at 403, the majority constructed a test of its own that is inconsistent with our precedents.

A

The majority's rule requires a traffic stop to "en[d] when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Ante*, at 354. "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission" and he may hold the individual no longer. *Ante*, at 357 (internal quotation marks and alterations omitted). The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop: If a driver is stopped by a particularly efficient officer, then he will be entitled to be released from the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. Similarly, if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology.

I "cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren*, 517 U. S., at 815 (citations omitted). We have repeatedly explained that the rea-

sonableness inquiry must not hinge on the characteristics of the individual officer conducting the seizure. We have held, for example, that an officer's state of mind "does not invalidate [an] action taken as long as the circumstances, viewed objectively, justify that action." *Id.*, at 813 (internal quotation marks omitted). We have spurned theories that would make the Fourth Amendment "change with local law enforcement practices." *Moore*, *supra*, at 172. And we have rejected a rule that would require the offense establishing probable cause to be "closely related to" the offense identified by the arresting officer, as such a rule would make "the constitutionality of an arrest . . . vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists." *Devenpeck* v. *Alford*, 543 U. S. 146, 154 (2004) (internal quotation marks and citation omitted). In *Devenpeck*, a unanimous Court explained: "An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection." *Ibid.*

The majority's logic would produce similarly arbitrary results. Under its reasoning, a traffic stop made by a rookie could be executed in a reasonable manner, whereas the same traffic stop made by a knowledgeable, veteran officer *in precisely the same circumstances* might not, if in fact his knowledge and experience made him capable of completing the stop faster. We have long rejected interpretations of the Fourth Amendment that would produce such haphazard results, and I see no reason to depart from our consistent practice today.

B

As if that were not enough, the majority also limits the duration of the stop to the time it takes the officer to com-

plete a narrow category of "traffic-based inquiries." *Ante*, at 357. According to the majority, these inquiries include those that "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Ante*, at 355. Inquiries directed to "detecting evidence of ordinary criminal wrongdoing" are not traffic-related inquiries and thus cannot count toward the overall duration of the stop. *Ibid.* (internal quotation marks and alteration omitted).

The combination of that definition of traffic-related inquiries with the majority's officer-specific durational limit produces a result demonstrably at odds with our decision in *Caballes*. *Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff. We explained that no Fourth Amendment violation had occurred in *Caballes*, where the "duration of the stop . . . was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," but suggested a different result might attend a case "involving a dog sniff that occurred during an *unreasonably* prolonged traffic stop." 543 U. S., at 407–408 (emphasis added). The dividing line was whether the overall duration of the stop exceeded "the time reasonably required to complete th[e] mission," *id.*, at 407, not, as the majority suggests, whether the duration of the stop "in fact" exceeded the time necessary to complete the traffic-related inquiries, *ante*, at 357.

The majority's approach draws an artificial line between dog sniffs and other common police practices. The lower courts have routinely confirmed that warrant checks are a constitutionally permissible part of a traffic stop, see, *e. g.*, *United States* v. *Simmons*, 172 F. 3d 775, 778 (CA11 1999); *United States* v. *Mendez*, 118 F. 3d 1426, 1429 (CA10 1997); *United States* v. *Shabazz*, 993 F. 2d 431, 437 (CA5 1993), and the majority confirms that it finds no fault in these measures, *ante*, at 355. Yet its reasoning suggests the opposite. Such warrant checks look more like they are directed to "detecting

evidence of ordinary criminal wrongdoing" than to "ensuring that vehicles on the road are operated safely and responsibly." *Ibid.* (internal quotation marks and alteration omitted). Perhaps one could argue that the existence of an outstanding warrant might make a driver less likely to operate his vehicle safely and responsibly on the road, but the same could be said about a driver in possession of contraband. A driver confronted by the police in either case might try to flee or become violent toward the officer. But under the majority's analysis, a dog sniff, which is directed at uncovering that problem, is not treated as a traffic-based inquiry. Warrant checks, arguably, should fare no better. The majority suggests that a warrant check is an ordinary inquiry incident to a traffic stop because it can be used "'to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.'" *Ibid.* (quoting 4 W. LaFave, Search and Seizure § 9.3(c), p. 516 (5th ed. 2012)). But as the very treatise on which the majority relies notes, such checks are a "manifest[ation of] the 'war on drugs' motivation so often underlying [routine traffic] stops," and thus are very much like the dog sniff in this case. *Id.*, at 507–508.

Investigative questioning rests on the same basis as the dog sniff. "Asking questions is an essential part of police investigations." *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 185 (2004). And the lower courts have routinely upheld such questioning during routine traffic stops. See, *e. g.*, *United States* v. *Rivera*, 570 F. 3d 1009, 1013 (CA8 2009); *United States* v. *Childs*, 277 F. 3d 947, 953–954 (CA7 2002). The majority's reasoning appears to allow officers to engage in *some* questioning aimed at detecting evidence of ordinary criminal wrongdoing. *Ante*, at 354. But it is hard to see how such inquiries fall within the "seizure's 'mission' [of] address[ing] the traffic violation that warranted the stop," or "attend[ing] to related safety concerns." *Ibid.* Its reasoning appears to come down to the principle that dogs are different.

C

On a more fundamental level, the majority's inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion. Probable cause is *the* "traditional justification" for the seizure of a person. *Whren*, 517 U. S., at 817 (emphasis deleted); see also *Dunaway* v. *New York*, 442 U. S. 200, 207–208 (1979). This Court created an exception to that rule in *Terry* v. *Ohio*, 392 U. S. 1 (1968), permitting "police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause," *Michigan* v. *Summers*, 452 U. S. 692, 698 (1981). Reasonable suspicion is the justification for such seizures. *Prado Navarette* v. *California*, 572 U. S. 393, 397 (2014).

Traffic stops can be initiated based on probable cause or reasonable suspicion. Although the Court has commented that a routine traffic stop is "more analogous to a so-called '*Terry* stop' than to a formal arrest," it has rejected the notion "that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer* v. *McCarty*, 468 U. S. 420, 439, and n. 29 (1984) (citation omitted).

Although all traffic stops must be executed reasonably, our precedents make clear that traffic stops justified by reasonable suspicion are subject to additional limitations that those justified by probable cause are not. A traffic stop based on reasonable suspicion, like all *Terry* stops, must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Hiibel*, 542 U. S., at 185 (internal quotation marks omitted). It also "cannot continue for an excessive period of time or resemble a traditional arrest." *Id.*, at 185–186 (citation omitted). By contrast, a stop based on probable cause affords an officer considerably more leeway. In such seizures, an officer may engage in a warrantless arrest of the driver, *Atwater*, 532 U. S., at 354, a warrantless search incident to arrest of the driver, *Riley* v. *California*, 573 U. S.

373, 382 (2014), and a warrantless search incident to arrest of the vehicle if it is reasonable to believe evidence relevant to the crime of arrest might be found there, *Arizona* v. *Gant*, 556 U. S. 332, 335 (2009).

The majority casually tosses this distinction aside. It asserts that the traffic stop in this case, which was undisputedly initiated on the basis of probable cause, can last no longer than is in fact necessary to effectuate the mission of the stop. *Ante*, at 357. And, it assumes that the mission of the stop was merely to write a traffic ticket, rather than to consider making a custodial arrest. *Ante*, at 354. In support of that durational requirement, it relies primarily on cases involving *Terry* stops. See *ante*, at 354–356 (citing *Arizona* v. *Johnson*, 555 U. S. 323 (2009) (analyzing "stop and frisk" of *passenger* in a vehicle temporarily seized for a traffic violation); *United States* v. *Sharpe*, 470 U. S. 675 (1985) (analyzing seizure of individuals based on suspicion of marijuana trafficking); *Florida* v. *Royer*, 460 U. S. 491 (1983) (plurality opinion) (analyzing seizure of man walking through airport on suspicion of narcotics activity)).

The *only* case involving a traffic stop based on probable cause that the majority cites for its rule is *Caballes*. But, that decision provides no support for today's restructuring of our Fourth Amendment jurisprudence. In *Caballes*, the Court made clear that, in the context of a traffic stop supported by probable cause, "a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." 543 U. S., at 408. To be sure, *the dissent* in *Caballes* would have "appl[ied] *Terry*'s reasonable-relation test . . . to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes." *Id.*, at 420 (opinion of GINSBURG, J.). But even it conceded that the *Caballes* majority had "implicitly [rejected] the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search." *Id.*, at 421.

By strictly limiting the tasks that define the durational scope of the traffic stop, the majority accomplishes today what the *Caballes* dissent could not: strictly limiting the scope of an officer's activities during a traffic stop justified by probable cause. In doing so, it renders the difference between probable cause and reasonable suspicion virtually meaningless in this context. That shift is supported neither by the Fourth Amendment nor by our precedents interpreting it. And, it results in a constitutional framework that lacks predictability. Had Officer Struble arrested, handcuffed, and taken Rodriguez to the police station for his traffic violation, he would have complied with the Fourth Amendment. See *Atwater*, *supra*, at 354–355. But because he made Rodriguez wait for seven or eight extra minutes until a dog arrived, he evidently committed a constitutional violation. Such a view of the Fourth Amendment makes little sense.

III

Today's revision of our Fourth Amendment jurisprudence was also entirely unnecessary. Rodriguez suffered no Fourth Amendment violation here for an entirely independent reason: Officer Struble had reasonable suspicion to continue to hold him for investigative purposes. Our precedents make clear that the Fourth Amendment permits an officer to conduct an investigative traffic stop when that officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Prado Navarette*, 572 U. S., at 396 (internal quotation marks omitted). Reasonable suspicion is determined by looking at "the whole picture," *id.*, at 397, taking into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Ornelas* v. *United States*, 517 U. S. 690, 695 (1996) (internal quotation marks omitted).

Officer Struble testified that he first became suspicious that Rodriguez was engaged in criminal activity for a num-

ber of reasons. When he approached the vehicle, he smelled an "overwhelming odor of air freshener coming from the vehicle," which is, in his experience, "a common attempt to conceal an odor that [people] don't want . . . to be smelled by the police." App. 20–21. He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was "more nervous than your typical passenger" who "do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation." *Id.*, at 34.

Officer Struble's interactions with the vehicle's occupants only increased his suspicions. When he asked Rodriguez why he had driven onto the shoulder, Rodriguez claimed that he swerved to avoid a pothole. But that story could not be squared with Officer Struble's observation of the vehicle slowly driving off the road before being jerked back onto it. And when Officer Struble asked Pollman where they were coming from and where they were going, Pollman told him they were traveling from Omaha, Nebraska, back to Norfolk, Nebraska, after looking at a vehicle they were considering purchasing. Pollman told the officer that he had neither seen pictures of the vehicle nor confirmed title before the trip. As Officer Struble explained, it "seemed suspicious" to him "to drive . . . approximately two hours . . . late at night to see a vehicle sight unseen to possibly buy it," *id.*, at 26, and to go from Norfolk to Omaha to look at it because "[u]sually people leave Omaha to go get vehicles, not the other way around" due to higher Omaha taxes, *id.*, at 65.

These facts, taken together, easily meet our standard for reasonable suspicion. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion," *Illinois* v. *Wardlow*, 528 U. S. 119, 124 (2000), and both vehicle occupants were engaged in such conduct. The officer also recog-

nized heavy use of air freshener, which, in his experience, indicated the presence of contraband in the vehicle. "[C]ommonsense judgments and inferences about human behavior" further support the officer's conclusion that Pollman's story about their trip was likely a cover story for illegal activity. *Id.*, at 125. Taking into account all the relevant facts, Officer Struble possessed reasonable suspicion of criminal activity to conduct the dog sniff.

Rodriguez contends that reasonable suspicion cannot exist because each of the actions giving rise to the officer's suspicions could be entirely innocent, but our cases easily dispose of that argument. Acts that, by themselves, might be innocent can, when taken together, give rise to reasonable suspicion. *United States* v. *Arvizu*, 534 U. S. 266, 274–275 (2002). *Terry* is a classic example, as it involved two individuals repeatedly walking back and forth, looking into a store window, and conferring with one another as well as with a third man. 392 U. S., at 6. The Court reasoned that this "series of acts, each of them perhaps innocent in itself, . . . together warranted further investigation," *id.*, at 22, and it has reiterated that analysis in a number of cases, see, *e. g.*, *Arvizu*, *supra*, at 277; *United States* v. *Sokolow*, 490 U. S. 1, 9–10 (1989). This one is no different.

* * *

I would conclude that the police did not violate the Fourth Amendment here. Officer Struble possessed probable cause to stop Rodriguez for driving on the shoulder, and he executed the subsequent stop in a reasonable manner. Our decision in *Caballes* requires no more. The majority's holding to the contrary is irreconcilable with *Caballes* and a number of other routine police practices, distorts the distinction between traffic stops justified by probable cause and those justified by reasonable suspicion, and abandons reasonableness as the touchstone of the Fourth Amendment. I respectfully dissent.

JUSTICE ALITO, dissenting.

This is an unnecessary,[1] impractical, and arbitrary decision. It addresses a purely hypothetical question: whether the traffic stop in this case *would be* unreasonable if the police officer, prior to leading a drug-sniffing dog around the exterior of petitioner's car, did not already have reasonable suspicion that the car contained drugs. In fact, however, the police officer *did have* reasonable suspicion, and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue.

The relevant facts are not in dispute. Officer Struble, who made the stop, was the only witness at the suppression hearing, and his testimony about what happened was not challenged. Defense counsel argued that the facts recounted by Officer Struble were insufficient to establish reasonable suspicion, but defense counsel did not dispute those facts or attack the officer's credibility. Similarly, the Magistrate Judge who conducted the hearing did not question the officer's credibility. And as JUSTICE THOMAS's opinion shows, the facts recounted by Officer Struble "easily meet our standard for reasonable suspicion." *Ante*, at 368 (dissenting opinion); see also, *e. g.*, *United States* v. *Carpenter*, 462 F. 3d 981, 986–987 (CA8 2006) (finding reasonable suspicion for a dog sniff based on implausible travel plans and nervous conduct); *United States* v. *Ludwig*, 641 F. 3d 1243, 1248–1250 (CA10 2011) (finding reasonable suspicion for a dog sniff where, among other things, the officer smelled "strong masking odors," the defendant's "account of his travel was suspect," and the defendant "was exceptionally nervous throughout his encounter").

Not only does the Court reach out to decide a question not really presented by the facts in this case, but the Court's answer to that question is arbitrary. The Court refuses to address the real Fourth Amendment question: whether the

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[1] See Brief in Opposition 11–14.

stop was unreasonably prolonged. Instead, the Court latches onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks.

This holding is not only arbitrary; it is perverse since Officer Struble chose that sequence for the purpose of protecting his own safety and possibly the safety of others. See App. 71–72. Without prolonging the stop, Officer Struble could have conducted the dog sniff while one of the tasks that the Court regards as properly part of the traffic stop was still in progress, but that sequence would have entailed unnecessary risk. At approximately 12:19 a.m., after collecting Pollman's driver's license, Officer Struble did two things. He called in the information needed to do a records check on Pollman (a step that the Court recognizes was properly part of the traffic stop), and he requested that another officer report to the scene. Officer Struble had decided to perform a dog sniff but did not want to do that without another officer present. When occupants of a vehicle who know that their vehicle contains a large amount of illegal drugs see that a drug-sniffing dog has alerted for the presence of drugs, they will almost certainly realize that the police will then proceed to search the vehicle, discover the drugs, and make arrests. Thus, it is reasonable for an officer to believe that an alert will increase the risk that the occupants of the vehicle will attempt to flee or perhaps even attack the officer. See, *e. g.*, *United States* v. *Dawdy*, 46 F. 3d 1427, 1429 (CA8 1995) (recounting scuffle between officer and defendant after drugs were discovered).

In this case, Officer Struble was concerned that he was outnumbered at the scene, and he therefore called for backup and waited for the arrival of another officer before conducting the sniff. As a result, the sniff was not completed until

seven or eight minutes after he delivered the warning. But Officer Struble could have proceeded with the dog sniff while he was waiting for the results of the records check on Pollman and before the arrival of the second officer. The drug-sniffing dog was present in Officer Struble's car. If he had chosen that riskier sequence of events, the dog sniff would have been completed before the point in time when, according to the Court's analysis, the authority to detain for the traffic stop ended. Thus, an action that would have been lawful had the officer made the *unreasonable* decision to risk his life became unlawful when the officer made the *reasonable* decision to wait a few minutes for backup. Officer Struble's error—apparently—was following prudent procedures motivated by legitimate safety concerns. The Court's holding therefore makes no practical sense. And nothing in the Fourth Amendment, which speaks of *reasonableness*, compels this arbitrary line.

The rule that the Court adopts will do little good going forward.[2] It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement. (I would love to be the proverbial fly on the wall when police instructors teach this rule to officers who make traffic stops.)

For these reasons and those set out in JUSTICE THOMAS's opinion, I respectfully dissent.

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[2] It is important to note that the Court's decision does not affect procedures routinely carried out during traffic stops, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Ante,* at 355. And the Court reaffirms that police "may conduct certain unrelated checks during an otherwise lawful traffic stop." *Ibid.* Thus, it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants out of their car during a valid stop. See *Arizona* v. *Johnson*, 555 U. S. 323, 333 (2009); *Maryland* v. *Wilson*, 519 U. S. 408, 414–415 (1997); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 111 (1977) (*per curiam*).

ONEOK, INC., ET AL. *v.* LEARJET, INC., ET AL.

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

No. 13–271. Argued January 12, 2015—Decided April 21, 2015

Respondents, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines, sued petitioner interstate pipelines, claiming that the pipelines had engaged in behavior that violated state antitrust laws. In particular, respondents alleged that petitioners reported false information to the natural-gas indices on which respondents' natural-gas contracts were based. The indices affected not only retail natural-gas prices, but also wholesale natural-gas prices.

After removing the cases to federal court, the petitioner pipelines sought summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law claims. That Act gives the Federal Energy Regulatory Commission (FERC) the authority to determine whether rates charged by natural-gas companies or practices affecting such rates are unreasonable. 15 U. S. C. § 717d(a). But it also limits FERC's jurisdiction to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies engaged in such transportation or sale. § 717(b). The Act leaves regulation of other portions of the industry—such as retail sales—to the States. *Ibid.*

The District Court granted petitioners' motion for summary judgment, reasoning that because petitioners' challenged practices directly affected wholesale as well as retail prices, they were pre-empted by the Act. The Ninth Circuit reversed. While acknowledging that the pipelines' index manipulation increased wholesale prices as well as retail prices, it held that the state-law claims were not pre-empted because they were aimed at obtaining damages only for excessively high retail prices.

Held: Respondents' state-law antitrust claims are not within the field of matters pre-empted by the Natural Gas Act. Pp. 384–391.

(a) The Act "was drawn with meticulous regard for the continued exercise of state power." *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517–518. Where, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption

can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court's precedents. Those precedents emphasize the importance of considering the target at which the state-law claims aim. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84; *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493. Here, respondents' claims are aimed at practices affecting retail prices, a matter "firmly on the States' side of [the] dividing line." *Id.*, at 514.

Schneidewind v. *ANR Pipeline Co.*, 485 U. S. 293, is not to the contrary. That opinion explains that the Act does not pre-empt "traditional" state regulation, such as blue sky laws. *Id.*, at 308, n. 11. Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. The broad applicability of state antitrust laws supports a finding of no pre-emption here.

So, too, does the fact that States have long provided "common-law and statutory remedies against monopolies and unfair business practices," *California* v. *ARC America Corp.*, 490 U. S. 93, 101. As noted earlier, the Act circumscribes FERC's powers and preserves traditional areas of state authority. § 717(b). Pp. 384–388.

(b) Neither *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, nor *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621, supports petitioners' position. *Mississippi Power* is best read as a conflict pre-emption case, not a field pre-emption case. In any event, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust suits are not. *Louisiana Power* is also a conflict pre-emption case, and thus does not significantly help petitioners' field pre-emption argument. Pp. 388–390.

(c) Because the parties have not argued conflict pre-emption, questions involving conflicts between state antitrust proceedings and the federal ratesetting process are left for the lower courts to resolve in the first instance. P. 390.

(d) While petitioners and the Government argue that this Court should defer to FERC's determination that field pre-emption bars respondents' claims, they fail to point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Thus, this Court need not consider what legal effect such a determination might have. P. 390.

715 F. 3d 716, affirmed.

Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, Sotomayor, and Kagan, JJ., joined, and in which Thomas, J., joined as to all but Part I–A. Thomas, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 391. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., joined, *post*, p. 392.

Neal K. Katyal argued the cause for petitioners. With him on the briefs were *Dominic F. Perella* and *Sean Marotta*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, and *Robert H. Solomon*.

Jeffrey L. Fisher argued the cause for respondents. With him on the brief for respondents Learjet, Inc., et al. were *Jennifer Gille Bacon*, *William E. Quirk*, *Gregory M. Bentz*, *Brian Wolfman*, *Donald D. Barry*, *Eric I. Unrein*, *Gary D. McCallister*, *Thomas J. H. Brill*, and *Melvin Goldstein*. *Robert L. Gegios*, *Ryan M. Billings*, *Stephen D. R. Taylor*, *Melinda A. Bialzik*, and *Amy Irene Washburn* filed a brief for the Wisconsin respondents.

Stephen R. McAllister, Solicitor General of Kansas, argued the cause for the State of Kansas et al. as *amici curiae* urging affirmance. With him on the brief were *Derek Schmidt*, Attorney General, *Jeffrey A. Chanay*, Chief Deputy Attorney General, and the Attorneys General for their respective States as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *George Jepsen* of Connecticut, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Janet T. Mills* of Maine, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Michael DeWine* of Ohio, *Peter F. Kilmartin* of Rhode Island, *Herbert*

H. Slatery III of Tennessee, *Robert W. Ferguson* of Washington, and *J. B. Van Hollen* of Wisconsin.*

JUSTICE BREYER delivered the opinion of the Court.

In this case, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines sued the pipelines, claiming that they engaged in behavior that violated state antitrust laws. The pipelines' behavior affected *both* federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices. The question is whether the federal Natural Gas Act pre-empts these lawsuits. We have said that, in passing the Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 305 (1988). Nevertheless, for the reasons given below, we conclude that the Act does not pre-empt the state-law antitrust suits at issue here.

I

A

The Supremacy Clause provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Congress may consequently pre-empt, *i. e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt

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*Briefs of *amici curiae* urging reversal were filed for the Interstate Natural Gas Association of America et al. by *Thomas C. Goldstein* and *Kevin K. Russell*; for Noble Americas Energy Solutions et al. by *Sean D. Jordan*; and for the Washington Legal Foundation by *Cory L. Andrews*.

Richard M. Brunell and *Albert A. Foer* filed a brief for the American Antitrust Institute as *amicus curiae* urging affirmance.

a state law, rule, or other state action. See *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 64 (2002).

It may do so either through "field" pre-emption or "conflict" pre-emption. As to the former, Congress may have intended "to foreclose any state regulation in the *area*," irrespective of whether state law is consistent or inconsistent with "federal standards." *Arizona* v. *United States*, 567 U. S. 387, 401 (2012) (emphasis added). In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts.

By contrast, conflict pre-emption exists where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California* v. *ARC America Corp.*, 490 U. S. 93, 100, 101 (1989). In either situation, federal law must prevail.

No one here claims that any relevant federal statute expressly pre-empts state antitrust lawsuits. Nor have the parties argued at any length that these state suits conflict with federal law. Rather, the interstate pipeline companies (petitioners here) argue that Congress implicitly "'occupied *the field of matters* relating to wholesale sales and transportation of natural gas in interstate commerce.'" Brief for Petitioners 18 (quoting *Schneidewind*, *supra*, at 305 (emphasis added)). And they contend that the state antitrust claims advanced by their direct-sales customers (respondents here) fall within that field. The United States, supporting the pipelines, argues similarly. See Brief for United States as *Amicus Curiae* 15. Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question.

B

1

Federal regulation of the natural-gas industry began at a time when the industry was divided into three segments.

See 1 Regulation of the Natural Gas Industry § 1.01 (W. Mogel ed. 2008) (hereinafter Mogel); *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 283 (1997). First, natural-gas producers sunk wells in large oil and gas fields (such as the Permian Basin in Texas and New Mexico). They gathered the gas, brought it to transportation points, and left it to interstate gas pipelines to transport the gas to distant markets. Second, interstate pipelines shipped the gas from the field to cities and towns across the Nation. Third, local gas distributors bought the gas from the interstate pipelines and resold it to business and residential customers within their localities.

Originally, the States regulated all three segments of the industry. See 1 Mogel § 1.03. But in the early 20th century, this Court held that the Commerce Clause forbids the States to regulate the second part of the business—*i. e.*, the interstate shipment and sale of gas to local distributors for resale. See, *e. g.*, *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 89–90 (1927); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 307–308 (1924). These holdings left a regulatory gap. Congress enacted the Natural Gas Act, 52 Stat. 821, to fill it. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682–684, and n. 13 (1954) (citing H. R. Rep. No. 709, 75th Cong., 1st Sess., 1–2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 1–2 (1937)).

The Act, in § 5(a), gives ratesetting authority to the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission (FPC)). That authority allows FERC to determine whether "any rate, charge, or classification . . . collected by any natural-gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of* [*FERC*]," or "any rule, regulation, practice, or contract affecting *such* rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." 15 U. S. C. § 717d(a) (emphasis added). As the italicized words make clear, § 5(a) limits the scope of FERC's authority

to activities "in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission*." *Ibid.* (emphasis added). And the Act, in § 1(b), limits FERC's "jurisdiction" to (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale." § 717(b). The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States. See *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493, 507 (1989) (Section 1(b) of the Act "expressly" provides that "States retain jurisdiction over *intrastate* transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas' ").

To simplify our discussion, we shall describe the firms that engage in interstate transportation as "jurisdictional sellers" or "interstate pipelines" (though various brokers and others may also fall within the Act's jurisdictional scope). Similarly, we shall refer to the sales over which FERC has jurisdiction as "jurisdictional sales" or "wholesale sales."

2

Until the 1970's, natural-gas regulation roughly tracked the industry model we described above. Interstate pipelines would typically buy gas from field producers and resell it to local distribution companies for resale. See *Tracy*, *supra*, at 283. FERC (or FPC), acting under the authority of the Natural Gas Act, would set interstate pipeline wholesale rates using classical "cost-of-service" ratemaking methods. See *Public Serv. Comm'n of N. Y.* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319, 328 (1983). That is, FERC would determine a pipeline's revenue requirement by calculating the costs of providing its services, including operating and maintenance expenses, depreciation expenses, taxes, and a reasonable profit. See FERC, Cost-of-Service Rates Man-

ual 6 (June 1999). FERC would then set wholesale rates at a level designed to meet the pipeline's revenue requirement.

Deregulation of the natural-gas industry, however, brought about changes in FERC's approach. In the 1950's, this Court had held that the Natural Gas Act required regulation of prices at the interstate pipelines' *buying* end—*i. e.*, the prices at which field producers sold natural gas to interstate pipelines. *Phillips Petroleum Co.*, *supra*, at 682, 685. By the 1970's, many in Congress thought that such efforts to regulate field prices had jeopardized natural-gas supplies in an industry already dependent "on the caprice of nature." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 630 (1944) (opinion of Jackson, J.); see *id.*, at 629 (recognizing that "the wealth of Midas and the wit of man cannot produce . . . a natural gas field"). Hoping to avoid future shortages, Congress enacted forms of field price deregulation designed to rely upon competition, rather than regulation, to keep field prices low. See, *e. g.*, Natural Gas Policy Act of 1978, 92 Stat. 3409, codified in part at 15 U. S. C. § 3301 *et seq.* (phasing out regulation of wellhead prices charged by producers of natural gas); Natural Gas Wellhead Decontrol Act of 1989, 103 Stat. 157 (removing price controls on wellhead sales as of January 1993).

FERC promulgated new regulations designed to further this process of deregulation. See, *e. g.*, Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (1985) (allowing "open access" to pipelines so that consumers could pay to ship their own gas). Most important here, FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory ratesetting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level. Order No. 636, issued in 1992, allowed FERC to issue blanket certificates that permitted jurisdictional sellers (typically interstate pipelines) to charge market-based rates for gas, provided that FERC had first determined that the sellers lacked mar-

ket power. See 57 Fed. Reg. 57957–57958 (1992); *id.*, at 13270.

After the issuance of this order, FERC's oversight of the natural-gas market largely consisted of (1) ex ante examinations of jurisdictional sellers' market power, and (2) the availability of a complaint process under § 717d(a). See Brief for United States as *Amicus Curiae* 4. The new system also led many large gas consumers—such as industrial and commercial users—to buy their own gas directly from gas producers, and to arrange (and often pay separately) for transportation from the field to the place of consumption. See *Tracy*, 519 U. S., at 284. Insofar as interstate pipelines sold gas to such consumers, they sold it for direct consumption rather than resale.

3

The free-market system for setting interstate pipeline rates turned out to be less than perfect. Interstate pipelines, distributing companies, and many of the customers who bought directly from the pipelines found that they had to rely on privately published price indices to determine appropriate prices for their natural-gas contracts. These indices listed the prices at which natural gas was being sold in different (presumably competitive) markets across the country. The information on which these indices were based was voluntarily reported by natural-gas traders.

In 2003, FERC found that the indices were inaccurate, in part because much of the information that natural-gas traders reported had been false. See FERC, Final Report on Price Manipulation in Western Markets (Mar. 2003), App. 88–89. FERC found that false reporting had involved "inflating the volume of trades, omitting trades, and adjusting the price of trades." *Id.*, at 88. That is, sometimes those who reported information simply fabricated it. Other times, the information reported reflected "wash trades," *i. e.*, "*prearranged* pair[s] of trades of the same good between the same parties, involving no economic risk and no net change in ben-

eficial ownership." *Id.*, at 215. FERC concluded that these "efforts to manipulate price indices compiled by trade publications" had helped raise "to extraordinary levels" the prices of both jurisdictional sales (that is, interstate pipeline sales for resale) and nonjurisdictional direct sales to ultimate consumers. *Id.*, at 86, 85.

After issuing its final report on price manipulation in western markets, FERC issued a Code of Conduct. That code amended all blanket certificates to prohibit jurisdictional sellers "from engaging in actions without a legitimate business purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." 68 Fed. Reg. 66324 (2003). The code also required jurisdictional companies, when they provided information to natural-gas index publishers, to "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id.*, at 66337. At the same time, FERC issued a policy statement setting forth "minimum standards for creation and publication of any energy price index" and "for reporting transaction data to index developers." *Price Discovery in Natural Gas and Elec. Markets*, 104 FERC ¶61,121, pp. 61,407, 61,408 (2003). Finally, FERC, after finding that certain jurisdictional sellers had "engaged in wash trading . . . that resulted in the manipulation of [natural-gas] prices," terminated those sellers' blanket marketing certificates. *Enron Power Marketing, Inc.*, 103 FERC ¶61,343, p. 62,303 (2003).

Congress also took steps to address these problems. In particular, it passed the Energy Policy Act of 2005, 119 Stat. 594, which gives FERC the authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" by "any entity . . . in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of" FERC, 15 U. S. C. § 717c–1.

C

We now turn to the cases before us. Respondents, as we have said, bought large quantities of natural gas directly from interstate pipelines for their own consumption. They believe that they overpaid in these transactions due to the interstate pipelines' manipulation of the natural-gas indices. Based on this belief, they filed state-law antitrust suits against petitioners in state and federal courts. See App. 244–246 (alleging violations of Wis. Stat. §§ 133.03, 133.14, 133.18); see also App. 430–433 (same); *id.*, at 519–521 (same); *id.*, at 362–364 (alleging violations of Kansas Restraint of Trade Act, Kan. Stat. Ann. § 50–101 *et seq.*); App. 417–419 (alleging violations of Missouri Antitrust Law, Mo. Rev. Stat. §§ 416.011–416.161). The pipelines removed all the state cases to federal court, where they were consolidated and sent for pretrial proceedings to the Federal District Court for the District of Nevada. See 28 U. S. C. § 1407.

The pipelines then moved for summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law antitrust claims. The District Court granted their motion. It concluded that the pipelines were "jurisdictional sellers," *i. e.*, "natural gas companies engaged in" the "transportation of natural gas in interstate commerce." Order in No. 03–cv–1431 (D Nev., July 18, 2011), pp. 4, 11. And it held that respondents' claims, which were "aimed at" these sellers' "alleged practices of false price reporting, wash trades, and anticompetitive collusive behavior" were pre-empted because "such practices" not only affected nonjurisdictional direct-sale prices but also "directly affect[ed]" jurisdictional (*i. e.*, wholesale) rates. *Id.*, at 36–37.

The Ninth Circuit reversed. It emphasized that the price manipulation of which respondents complained affected not only jurisdictional (*i. e.*, wholesale) sales, but also nonjurisdictional (*i. e.*, retail) sales. The court construed the Natural Gas Act's pre-emptive scope narrowly in light of Congress' intent—manifested in § 1(b) of the Act—to preserve

for the States the authority to regulate nonjurisdictional sales. And it held that the Act did not pre-empt state-law claims aimed at obtaining damages for excessively high *retail* natural-gas prices stemming from interstate pipelines' price manipulation, even if the manipulation raised *wholesale* rates as well. See *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F. 3d 716, 729–736 (2013).

The pipelines sought certiorari. They asked us to resolve confusion in the lower courts as to whether the Natural Gas Act pre-empts retail customers' state antitrust law challenges to practices that also affect wholesale rates. Compare *id.*, at 729–736, with *Leggett* v. *Duke Energy Corp.*, 308 S. W. 3d 843 (Tenn. 2010). We granted the petition.

II

Petitioners, supported by the United States, argue that their customers' state antitrust lawsuits are within the field that the Natural Gas Act pre-empts. See Brief for Petitioners 18 (citing *Schneidewind*, 485 U. S., at 305); Brief for United States as *Amicus Curiae* 13 (same). They point out that respondents' antitrust claims target anticompetitive activities that affected wholesale (as well as retail) rates. See Brief for Petitioners 2. They add that the Natural Gas Act expressly grants FERC authority to keep wholesale rates at reasonable levels. See *ibid.* (citing 15 U. S. C. §§ 717(b), 717d(a)). In exercising this authority, FERC has prohibited the very kind of anticompetitive conduct that the state actions attack. See Part I–B–3, *supra.* And, petitioners contend, letting these actions proceed will permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC might reach or has already reached. Accordingly, petitioners argue, respondents' state-law antitrust suits fall within the pre-empted field.

A

Petitioners' arguments are forceful, but we cannot accept their conclusion. As we have repeatedly stressed, the Natu-

ral Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co.* v. *Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517–518 (1947); see also *Northwest Central*, 489 U. S., at 511 (the "legislative history of the [Act] is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions'" (quoting 81 Cong. Rec. 6721 (1937))). Accordingly, where (as here) a state law can be applied to nonjurisdictional as well as jurisdictional sales, we must proceed cautiously, finding preemption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents. See *Panhandle Eastern*, *supra*, at 516–518; *Interstate Natural Gas Co.* v. *FPC*, 331 U. S. 682, 689–693 (1947).

Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted. For example, in *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84 (1963), the Court said that it had "consistently recognized" that the "significant distinction" for purposes of preemption in the natural-gas context is the distinction between "measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at" subjects left to the States to regulate. *Id.*, at 94 (emphasis added). And, in *Northwest Central*, the Court found that the Natural Gas Act did not pre-empt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, *i. e.*, jurisdictional sales. 489 U. S., at 514. In reaching this conclusion, the Court explained that the state regulation aimed primarily at "protect[ing] producers' . . . rights—a matter firmly on the States' side of that dividing line." *Ibid.* The Court contrasted this state regulation with the state orders at issue in *Northern Natural*, which "'invalidly invade[d] the federal

agency's exclusive domain' precisely because" they were "'unmistakably and unambiguously *directed at purchasers*.'" *Id.*, at 513 (quoting *Northern Natural*, *supra*, at 92; emphasis added). Here, too, the lawsuits are directed at practices affecting *retail* rates—which are "firmly on the States' side of that dividing line."

Petitioners argue that *Schneidewind* constitutes contrary authority. In that case, the Court found pre-empted a state law that required public utilities, such as interstate pipelines crossing the State, to obtain state approval before issuing long-term securities. 485 U. S., at 306–309. But the Court there thought that the State's securities regulation was aimed directly at interstate pipelines. It wrote that the state law was designed to keep "a natural gas company from raising its equity levels above a certain point" in order to keep the company's revenue requirement low, thereby ensuring lower *wholesale* rates. *Id.*, at 307–308. Indeed, the Court expressly said that the state law was pre-empted because it was "*directed at* . . . the control of rates and facilities of natural gas companies," "precisely the things over which FERC has comprehensive authority." *Id.*, at 308 (emphasis added).

The dissent rejects the notion that the proper test for purposes of pre-emption in the natural-gas context is whether the challenged measures are "aimed directly at interstate purchasers and wholesales for resale" or not. *Northern Natural*, *supra*, at 94. It argues that this approach is "unprecedented," and that the Court's focus should be on "*what* the State seeks to regulate . . . , not *why* the State seeks to regulate it." *Post*, at 397 (opinion of SCALIA, J.). But the "target" to which our cases refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. To repeat the point we made above, no one could claim that FERC's regu-

lation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Indeed, although the dissent argues that *Schneidewind* created a definitive test for pre-emption in the natural gas context that turns on whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act," *post*, at 394 (quoting 485 U. S., at 310, n. 13), *Schneidewind* could not mean this statement as an absolute test. It goes on to explain that the Natural Gas Act does not pre-empt "traditional" state regulation, such as state blue sky laws (which, of course, raise wholesale—as well as retail—investment costs). *Id.*, at 308, n. 11.

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. See *ibid.* They are far broader in their application than, for example, the regulations at issue in *Northern Natural*, which applied only to entities buying gas from fields within the State. See 372 U. S., at 85–86, n. 1; contra, *post*, at 396 (stating that *Northern Natural* concerned "background market conditions"). This broad applicability of state antitrust law supports a finding of no pre-emption here.

Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. See Brief for Petitioners 18; *post*, at 397–398. But that Platonic ideal does not describe the natural-gas regulatory world. Suppose FERC, when setting wholesale rates in the former cost-of-service ratemaking days, had denied cost recovery for pipelines' failure to recycle. Would that fact deny States the power to enact and apply recycling laws? These state laws might well raise pipelines' operating costs, and thus the costs of wholesale natural-gas transportation. But in *Northwest Central* we said that "[t]o find field pre-emption of [state] regulation merely because purchasers' costs and hence rates might be

affected would be largely to nullify . . . § 1(b)." 489 U. S., at 514.

The dissent barely mentions the limitations on FERC's powers in § 1(b), but the enumeration of FERC's powers in § 5(a) is circumscribed by a reference back to the limitations in § 1(b). See *post*, at 392–394. As we explained above, see Part I–B–1, *supra*, those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern*, 332 U. S., at 517–518. Contra, *post*, at 399. States have a "long history of" providing "common-law and statutory remedies against monopolies and unfair business practices." *ARC America*, 490 U. S., at 101; see also *Watson* v. *Buck*, 313 U. S. 387, 404 (1941) (noting the States' "long-recognized power to regulate combinations in restraint of trade"). Respondents' state-law antitrust suits relied on this well-established state power.

B

Petitioners point to two other cases that they believe support their position. The first is *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354 (1988). There, the Court held that the Federal Power Act—which gives FERC the authority to determine whether rates charged by public utilities in electric energy sales are "just and reasonable," 16 U. S. C. § 824d(a)—pre-empted a state inquiry into the reasonableness of FERC-approved prices for the sale of nuclear power to wholesalers of electricity (which led to higher retail electricity rates). 487 U. S., at 373–377. Petitioners argue that this case shows that state regulation of similar sales here—*i. e.*, by a pipeline to a direct consumer—must also be pre-empted. See Reply Brief 11–12. *Mississippi Power*, however, is best read as a conflict pre-emption case, not a field pre-emption case. See 487 U. S., at 377 ("[A]

state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity'" (quoting *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 318–319 (1981))).

Regardless, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust lawsuits are not. Mississippi's inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to "regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." 487 U. S., at 374. By contrast, respondents' state antitrust lawsuits do not seek to challenge the reasonableness of any rates expressly approved by FERC. Rather, they seek to challenge the background marketplace conditions that affected both jurisdictional and nonjurisdictional rates.

Petitioners additionally point to *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621 (1972). In that case, the Court held that federal law gave FPC the authority to allocate natural gas during shortages by ordering interstate pipelines to curtail gas deliveries to all customers, *including retail customers.* This latter fact, the pipelines argue, shows that FERC has authority to regulate index manipulation insofar as that manipulation affects *retail* (as well as wholesale) sales. Brief for Petitioners 26. Accordingly, they contend that state laws that aim at this same subject are pre-empted.

This argument, however, makes too much of too little. The Court's finding of pre-emption in *Louisiana Power* rested on its belief that the state laws in question *conflicted* with federal law. The Court concluded that "FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale," 406 U. S., at 631, because otherwise there would be "unavoidable conflict between" state regulation of direct sales and the "uniform fed-

eral regulation" that the Natural Gas Act foresees, *id.*, at 633–635. Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not. Because petitioners have not argued this case as a conflict pre-emption case, *Louisiana Power* does not offer them significant help.

C

To the extent any conflicts arise between state antitrust law proceedings and the federal ratesetting process, the doctrine of conflict pre-emption should prove sufficient to address them. But as we have noted, see Part I–A, *supra*, the parties have not argued conflict pre-emption. See also, *e. g.*, Tr. of Oral Arg. 24 (Solicitor General agrees that he has not "analyzed this [case] under a conflict preemption regime"). We consequently leave conflict pre-emption questions for the lower courts to resolve in the first instance.

D

We note that petitioners and the Solicitor General have argued that we should defer to FERC's determination that field pre-emption bars respondents' claims. See Brief for Petitioners 22 (citing *Arlington* v. *FCC*, 569 U. S. 290, 301–305 (2013); Brief for United States as *Amicus Curiae* 32 (same). But they have not pointed to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Rather, they point only to the fact that FERC has promulgated detailed rules governing manipulation of price indices. Because there is no determination by FERC that its regulation pre-empts the field into which respondents' state-law antitrust suits fall, we need not consider what legal effect such a determination might have. And we conclude that the detailed federal regulations here do not offset the other considerations that weigh against a finding of pre-emption in this context.

* * *

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

It is so ordered.

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

I agree with much of the majority's application of our precedents governing pre-emption under the Natural Gas Act. I write separately to reiterate my view that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth* v. *Levine*, 555 U. S. 555, 583 (2009) (THOMAS, J., concurring in judgment). The Supremacy Clause of our Constitution "gives 'supreme' status only to those [federal laws] that are 'made in Pursuance'" of it. *Id.*, at 585 (quoting Art. VI, cl. 2). And to be "made in Pursuance" of the Constitution, a law must fall within one of Congress' enumerated powers and be promulgated in accordance with the lawmaking procedures set forth in that document. 555 U. S., at 585–586. "The Supremacy Clause thus 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." *Id.*, at 586.

In light of this constitutional requirement, I have doubts about the legitimacy of this Court's precedents concerning the pre-emptive scope of the Natural Gas Act, see, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84, 91–92 (1963) (defining the pre-empted field in light of the "objective[s]" of the Act). Neither party, however, has asked us to overrule these longstanding precedents or "to overcome the presumption of *stare decisis* that attaches to" them. *Kurns* v. *Railroad Friction Products Corp.*, 565 U. S. 625, 633 (2012). And even under these precedents, the challenged state antitrust laws fall outside the

pre-empted field. Because the Court today avoids extending its earlier questionable precedents, I concur in its judgment and join all but Part I–A of its opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Natural Gas Act divides responsibility over trade in natural gas between federal and state regulators. The Act and our cases interpreting it draw a firm line between national and local authority over this trade: If the Federal Government may regulate a subject, the States may not. Today the Court smudges this line. It holds that States may use their antitrust laws to regulate practices already regulated by the Federal Energy Regulatory Commission whenever "other considerations . . . weigh against a finding of pre-emption." *Ante*, at 390. The Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice.

I

Trade in natural gas consists of three parts. A drilling company collects gas from the earth; a pipeline company then carries the gas to its destination and sells it at wholesale to a local distributor; and the local distributor sells the gas at retail to industries and households. See *ante*, at 377–378. The Natural Gas Act empowers the Commission to regulate the middle of this three-leg journey—interstate transportation and wholesale sales. 15 U. S. C. § 717 *et seq.* But it does not empower the Commission to regulate the opening and closing phases—production at one end, retail sales at the other—thus leaving those matters to the States. § 717(b). (Like the Court, I will for simplicity's sake call the sales controlled by the Commission wholesale sales, and the companies controlled by the Commission pipelines. See *ante*, at 379.)

Over 70 years ago, the Court concluded that the Act confers "exclusive jurisdiction upon the federal regulatory

agency." *Public Util. Comm'n of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 469 (1943). The Court thought it "clear" that the Act contemplates "a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere," "without any confusion of functions." *Id.*, at 467. The Court drew this inference from the law's purpose and legislative history, though it could just as easily have relied on the law's terms and structure. The Act grants the Commission a wide range of powers over wholesale sales and transportation, but qualifies only some of these powers with reservations of state authority over the same subject. See § 717g(a) (concurrent authority over recordkeeping); § 717h(a) (concurrent authority over depreciation and amortization rates). Congress's decision to include express reservations of state power alongside these grants of authority, but to omit them alongside other grants of authority, suggests that the other grants are exclusive. Right or wrong, in any event, our inference of exclusivity is now settled beyond debate.

United Fuel rejected a State's regulation of wholesale rates. *Id.*, at 468. But our later holdings establish that the Act makes exclusive the Commission's powers in general, not just its rate-setting power in particular. We have again and again set aside state laws—even those that do not purport to fix wholesale rates—for regulating a matter already subject to regulation by the Commission. See, *e. g.*, *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kan.*, 372 U. S. 84, 89 (1963) (state regulation of pipelines' gas purchases preempted because it "invade[s] the exclusive jurisdiction which the Natural Gas Act has conferred upon the [Commission]"); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 185 (1983) (state law prohibiting producers from passing on production taxes preempted because it "trespasse[s] upon FERC's authority"); *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 309 (1988) (state securities regulation directly af-

fecting wholesale rates and gas transportation facilities preempted because it regulates "matters that Congress intended FERC to regulate"). The test for preemption in this setting, the Court has confirmed, " 'is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' " *Id.*, at 310, n. 13.

Straightforward application of these precedents would make short work of the case at hand. The Natural Gas Act empowers the Commission to regulate "practice[s] . . . affecting [wholesale] rate[s]." § 717d. Nothing in the Act suggests that the States share power to regulate these practices. The Commission has reasonably determined that this power allows it to regulate the behavior involved in this case, pipelines' use of sham trades and false reports to manipulate gas price indices. Because the Commission's exclusive authority extends to the conduct challenged here, state antitrust regulation of that conduct is preempted.

II

The Court agrees that the Commission may regulate index manipulation, but upholds state antitrust regulation of this practice anyway on account of "other considerations that weigh against a finding of pre-emption in this context." *Ante*, at 390. That is an unprecedented decision. The Court does not identify a single case—not one—in which we have sustained state regulation of behavior already regulated by the Commission. The Court's justifications for its novel approach do not persuade.

A

The Court begins by considering "the *target* at which the state law *aims*." *Ante*, at 385. It reasons that because this case involves a practice that affects both wholesale and retail rates, the Act tolerates state regulation that takes aim at the practice's retail-stage effects. *Ante*, at 386.

This analysis misunderstands how the Natural Gas Act divides responsibilities between national and local regulators. The Act does not give the Commission the power to aim at

particular effects; it gives it the power to regulate particular activities. When the Commission regulates those activities, it may consider their effects on *all* parts of the gas trade, not just on wholesale sales. It may, for example, set wholesale rates with the aim of encouraging producers to conserve gas supplies—even though production is a state-regulated activity. See *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 602–603 (1945); *id.*, at 609–610 (Jackson, J., concurring). Or it may regulate wholesale sales with an eye toward blunting the sales' anticompetitive effects in the retail market—even though retail prices are controlled by the States. See *FPC* v. *Conway Corp.*, 426 U. S. 271, 276–280 (1976). The Court's ad hoc partition of authority over index manipulation—leaving it to the Commission to control the practice's consequences for wholesale sales, but allowing the States to target its consequences for retail sales—thus clashes with the design of the Act.

To justify its fixation on aims, the Court stresses that this case involves regulation of "background marketplace conditions" rather than regulation of wholesale rates or sales themselves. *Ante*, at 389. But the Natural Gas Act empowers the Commission to regulate wholesale rates *and* "background" practices affecting such rates. It grants both powers in the same clause: "Whenever the Commission . . . find[s] that a [wholesale] rate, charge, or classification . . . [or] any rule, regulation, *practice*, or contract affecting such rate, charge, or classification is unjust [or] unreasonable, . . . the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, *practice*, or contract to be thereafter observed." § 717d(a) (emphasis added). Nothing in this provision, and for that matter nothing in the Act, suggests that federal authority over practices is a second-class power, somehow less exclusive than the authority over rates.

The Court persists that the background conditions in this case affect *both* wholesale and retail sales. *Ante*, at 389. This observation adds atmosphere, but nothing more. The

Court concedes that index manipulation's dual effect does not weaken the Commission's power to regulate it. *Ante*, at 384–385. So too should the Court have seen that this simultaneous effect does not strengthen the claims of the States. It is not at all unusual for an activity controlled by the Commission to have effects in the States' field; production, wholesale, and retail are after all interdependent stages of a single trade. We have never suggested that the rules of field preemption change in such situations. For example, producers' ability to pass production taxes on to pipelines no doubt affects both producers and pipelines. Yet we had no trouble concluding that a state law restricting producers' ability to pass these taxes impermissibly attempted to manage "a matter within the sphere of FERC's regulatory authority." *Exxon*, *supra*, at 185–186.

The Court's approach makes a snarl of our precedents. In *Northern Natural*, the Court held that the Act preempts state regulations requiring pipelines to buy gas ratably from gas wells. 372 U. S., at 90. The regulations in that case shared each of the principal features emphasized by the Court today. They governed background market conditions, not wholesale prices. *Id.*, at 90–91. The background conditions in question, pipelines' purchases from gas wells, affected both the federal field of wholesale sales and the state field of gas production. *Id.*, at 92–93. And the regulations took aim at the purchases' effects on production; they sought to promote conservation of natural resources by limiting how much gas pipelines could take from each well. *Id.*, at 93. No matter; the Court still concluded that the regulations "invade[d] the federal agency's exclusive domain." *Id.*, at 92. The factors that made no difference in *Northern Natural* should make no difference today.

Contrast *Northern Natural* with *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493 (1989), which involved state regulations that restricted the times when producers could take gas from wells. On

this occasion the Court upheld the regulations—not because the law aimed at the objective of gas conservation, but because the State pursued this end by regulating "'the physical ac[t] of drawing gas from the earth.'" *Id.*, at 510. Our precedents demand, in other words, that the Court focus in the present case upon *what* the State seeks to regulate (a pipeline practice that is subject to regulation by the Commission), not *why* the State seeks to regulate it (to curb the practice's effects on retail rates).

Trying to turn liabilities into assets, the Court brandishes statements from *Northern Natural* and *Northwest Central* that (in its view) discuss where state law was "aimed" or "directed." *Ante*, at 385, 386. But read in context, these statements refer to the entity or activity that the state law regulates, not to which of the activity's effects the law seeks to control by regulating it. See, *e. g.*, *Northern Natural*, *supra*, at 94 ("[O]ur cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales . . . , and those aimed at producers and production"); *Northwest Central*, *supra*, at 512 ("[This regulation] is directed to the behavior of gas producers"). The lawsuits at hand target pipelines (entities regulated by the Commission) for their manipulation of indices (behavior regulated by the Commission). That should have sufficed to establish preemption.

B

The Court also tallies several features of state antitrust law that, it believes, weigh against preemption. *Ante*, at 387–388. Once again the Court seems to have forgotten its precedents. We have said before that "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction'" over the gas trade. *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953, 966 (1986) (quoting *FPC* v. *Southern Cal. Edison Co.*, 376 U. S. 205, 215–216 (1964)). Our decisions have therefore "'squarely rejected'"

the theory, endorsed by the Court today, that the boundary between national and local authority turns on "'a case-by-case analysis of the impact of state regulation upon the national interest.'" *Ibid.*

State antitrust law, the Court begins, applies to "all businesses in the marketplace" rather than just "natural-gas companies in particular." *Ante*, at 387. So what? No principle of our natural-gas preemption jurisprudence distinguishes particularized state laws from state laws of general applicability. We have never suggested, for example, that a State may use general price-gouging laws to fix wholesale rates, or general laws about unfair trade practices to control wholesale contracts, or general common-carrier laws to administer interstate pipelines. The Court in any event could not have chosen a worse setting in which to attempt a distinction between general and particular laws. Like their federal counterpart, state antitrust laws tend to use the rule of reason to judge the lawfulness of challenged practices. Legal Aspects of Buying and Selling § 10:12 (P. Zeidman ed. 2014–2015). This amorphous standard requires the reviewing court to consider "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997). Far from authorizing across-the-board application of a uniform requirement, therefore, the Court's decision will invite state antitrust courts to engage in targeted regulation of the natural-gas industry.

The Court also stresses the "'long history'" of state antitrust regulation. *Ante*, at 388. Again, quite beside the point. States have long regulated public utilities, yet the Natural Gas Act precludes them from using that established power to fix gas wholesale prices. *United Fuel*, 317 U. S., at 468. States also have long enacted laws to conserve natural resources, yet the Act precludes them from deploying that power to control purchases made by gas pipelines. *North-*

ern Natural, 372 U. S., at 93–94. The Court's invocation of the pedigree of state antitrust law rests on air.

One need not launch this unbounded inquiry into the features of state law in order to preserve the States' authority to apply "tax laws," "disclosure laws," and "blue sky laws" to natural-gas companies, *ante*, at 386, 387. One need only stand by the principle that if the Commission has authority over a subject, the States lack authority over that subject. The Commission's authority to regulate gas pipelines "in the public interest," § 717a, is a power to address matters that are traditionally the concern of utility regulators, not "a broad license to promote the general public welfare," *NAACP* v. *FPC*, 425 U. S. 662, 669 (1976). We have explained that the Commission does not, for example, have power to superintend "employment discrimination" or "unfair labor practices." *Id.*, at 670–671. So the Act does not preempt state employment discrimination or labor laws. But the Commission does have power to consider, say, "conservation, environmental, and *antitrust* questions." *Id.*, at 670, n. 6 (emphasis added). So the Act does preempt state antitrust laws.

C

At bottom, the Court's decision turns on its perception that the Natural Gas Act "'was drawn with meticulous regard for the continued exercise of state power.'" *Ante*, at 385. No doubt the Act protects state authority in a variety of ways. It gives the Commission authority over only some parts of the gas trade. § 717(b). It establishes procedures under which the Commission may consult, collaborate, or share information with States. § 717p. It even provides that the Commission may regulate practices affecting wholesale rates "upon its own motion *or upon complaint of any State*." § 717d(a) (emphasis added). It should have gone without saying, however, that no law pursues its purposes at all costs. Nothing in the Act and nothing in our cases suggests that Congress protected state power in the way imag-

ined by today's decision: by licensing state sorties into the Commission's domain whenever judges conclude that an incursion would not be too disruptive.

The Court's preoccupation with the purpose of preserving state authority is all the more inexpiable because that is not the Act's only purpose. The Act also has competing purposes, the most important of which is promoting "uniformity of regulation." *Northern Natural*, *supra*, at 91–92. The Court's decision impairs *that* objective. Before today, interstate pipelines knew that their practices relating to price indices had to comply with one set of regulations promulgated by the Commission. From now on, however, pipelines will have to ensure that their behavior conforms to the discordant regulations of 50 States—or more accurately, to the discordant verdicts of untold state antitrust juries. The Court's reassurance that pipelines may still invoke conflict preemption, see *ante*, at 390, provides little comfort on this front. Conflict preemption will resolve only discrepancies between state and federal regulations, not the discrepancies among differing state regulations to which today's opinion subjects the industry.

* * *

"The Natural Gas Act was designed . . . to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949) (footnote omitted). Today, however, the Court allows the States to encroach. Worse still, it leaves pipelines guessing about when States will be allowed to encroach again. May States aim at retail rates under laws that share none of the features of antitrust law advertised today? Under laws that share only some of those features? May States apply their antitrust laws to pipelines *without* aiming at retail rates? But that is just the start. Who knows what other "considerations that weigh against a finding of pre-emption" remain

to be unearthed in future cases? The Court's all-things-considered test does not make for a stable background against which to carry on the natural-gas trade.

I would stand by the more principled and more workable line traced by our precedents. The Commission may regulate the practices alleged in this case; the States therefore may not. I respectfully dissent.

Syllabus

UNITED STATES *v.* KWAI FUN WONG

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

No. 13–1074. Argued December 10, 2014—Decided April 22, 2015*

The Federal Tort Claims Act (FTCA) provides that a tort claim against the United States "shall be forever barred" unless the claimant meets two deadlines. First, a claim must be presented to the appropriate federal agency for administrative review "within two years after [the] claim accrues." 28 U. S. C. § 2401(b). Second, if the agency denies the claim, the claimant may file suit in federal court "within six months" of the agency's denial. *Ibid.*

Kwai Fun Wong and Marlene June, respondents in Nos. 13–1074 and 13–1075, respectively, each missed one of those deadlines. Wong failed to file her FTCA claim in federal court within six months, but argued that that was only because the District Court had not permitted her to file that claim until after the period expired. June failed to present her FTCA claim to a federal agency within two years, but argued that her untimely filing should be excused because the Government had, in her view, concealed facts vital to her claim. In each case, the District Court dismissed the FTCA claim for failure to satisfy § 2401(b)'s time bars, holding that, despite any justification for delay, those time bars are jurisdictional and not subject to equitable tolling. The Ninth Circuit reversed in both cases, concluding that § 2401(b)'s time bars may be equitably tolled.

Held: Section 2401(b)'s time limits are subject to equitable tolling. Pp. 407–421.

(a) *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, provides the framework for deciding the applicability of equitable tolling to statutes of limitations on suits against the Government. There, the Court adopted a "rebuttable presumption" that such time bars may be equitably tolled. *Id.*, at 95. *Irwin*'s presumption may, of course, be rebutted. One way to do so—pursued by the Government here—is to demonstrate that the statute of limitations at issue is jurisdictional; if so, the statute cannot be equitably tolled. But this Court will not conclude that a time bar is jurisdictional unless Congress provides a "clear statement" to that effect. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S.

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*Together with No. 13–1075, *United States* v. *June*, *Conservator*, also on certiorari to the same court.

145, 153. And in applying that clear statement rule, this Court has said that most time bars, even if mandatory and emphatic, are nonjurisdictional. See *ibid.* Congress thus must do something special to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it. Pp. 407–410.

(b) Congress did no such thing in enacting § 2401(b). The text of that provision speaks only to a claim's timeliness; it does not refer to the jurisdiction of the district courts or address those courts' authority to hear untimely suits. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515. Instead, it "reads like an ordinary, run-of-the-mill statute of limitations." *Holland* v. *Florida*, 560 U. S. 631, 647. Statutory context confirms that reading. Congress's separation of a filing deadline from a jurisdictional grant often indicates that the deadline is not jurisdictional, and here the FTCA's jurisdictional grant appears not in § 2401(b) but in another section of Title 28, § 1346(b)(1). That jurisdictional grant is not expressly conditioned on compliance with § 2401(b)'s limitations periods. Finally, assuming it could provide the clear statement that this Court's cases require, § 2401(b)'s legislative history does not clearly demonstrate that Congress intended the provision to impose a jurisdictional bar. Pp. 410–412.

(c) The Government's two principal arguments for treating § 2401(b) as jurisdictional are unpersuasive and foreclosed by this Court's precedents. Pp. 412–420.

(1) The Government first points out that § 2401(b) includes the same "shall be forever barred" language as the statute of limitations governing Tucker Act claims, which this Court has held to be jurisdictional. See, *e. g.*, *Kendall* v. *United States*, 107 U. S. 123, 125–126. But that phrase was a commonplace in statutes of limitations enacted around the time of the FTCA, and it does not carry talismanic jurisdictional significance. Indeed, this Court has construed the same language to be subject to tolling in the Clayton Act's statute of limitations. See *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 559. And in two decisions addressing the Tucker Act's statute of limitations, the Court has dismissed the idea that that language is jurisdictionally significant. See *Irwin*, 498 U. S., at 95; *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 137, 139. The "shall be forever barred" phrase is thus nothing more than an ordinary way to set a statutory deadline. Pp. 412–417.

(2) The Government next argues that § 2401(b) is jurisdictional because it is a condition on the FTCA's waiver of sovereign immunity. But that argument is foreclosed by *Irwin*, which considered an identical objection but concluded that even time limits that condition a waiver of immunity may be equitably tolled. See 498 U. S., at 95–96. The

Government's invocation of sovereign immunity principles is also peculiarly inapt here. Unlike other waivers of sovereign immunity, the FTCA treats the Government much like a private party, and the Court has accordingly declined to construe the Act narrowly merely because it waives the Government's immunity from suit. There is no reason to do differently here. Pp. 417–420.

No. 13–1074, 732 F. 3d 1030, and No. 13–1075, 550 Fed. Appx. 505, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 421.

Roman Martinez argued the cause for the United States in No. 13–1074. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, and *Anne Murphy.*

Elizabeth Prelogar argued the cause for the United States in No. 13–1075. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mr. Martinez*, *Mr. Stern*, and *Ms. Murphy.*

Eric Schanpper argued the cause for respondent in No. 13–1074. With him on the brief was *Tom Steenson.*

E. Joshua Rosenkranz argued the cause for respondent in No. 13–1075. With him on the brief were *Robert M. Loeb*, *Brian D. Ginsberg*, *John P. Leader*, and *Stanley G. Feldman.*†

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†Briefs of *amici curiae* urging affirmance in both cases were filed for the American Association for Justice by *Jeffrey R. White* and *Lisa Blue Baron*; and for the Clinic for Legal Assistance to Servicemembers and Veterans by *James C. Martin* and *Colin E. Wrabley.*

Joshua D. N. Hess filed a brief for Paralyzed Veterans of America et al. as *amici curiae* urging affirmance in No. 13–1074.

Briefs of *amici curiae* urging affirmance were filed in No. 13–1075 for the Arizona Association for Justice/Arizona Trial Lawyers Association by *David L. Abney*; for the National Center for Law and Economic Justice

JUSTICE KAGAN delivered the opinion of the Court.

The Federal Tort Claims Act (FTCA or Act) provides that a tort claim against the United States "shall be forever barred" unless it is presented to the "appropriate Federal agency within two years after such claim accrues" and then brought to federal court "within six months" after the agency acts on the claim. 28 U. S. C. § 2401(b). In each of the two cases we resolve here, the claimant missed one of those deadlines, but requested equitable tolling on the ground that she had a good reason for filing late. The Government responded that § 2401(b)'s time limits are not subject to tolling because they are jurisdictional restrictions. Today, we reject the Government's argument and conclude that courts may toll both of the FTCA's limitations periods.

I

In the first case, respondent Kwai Fun Wong asserts that the Immigration and Naturalization Service (INS) falsely imprisoned her for five days in 1999. As the FTCA requires, Wong first presented that claim to the INS within two years of the alleged unlawful action. See § 2401(b); § 2675(a). The INS denied the administrative complaint on December 3, 2001. Under the Act, that gave Wong six months, until June 3, 2002, to bring her tort claim in federal court. See § 2401(b).

Several months prior to the INS's decision, Wong had filed suit in federal district court asserting various *non*-FTCA claims against the Government arising out of the same alleged misconduct. Anticipating the INS's ruling, Wong moved in mid-November 2001 to amend the complaint in that suit by adding her tort claim. On April 5, 2002, a Magistrate Judge recommended granting Wong leave to amend.

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et al. by *Edward P. Krugman* and *Susan Buckley*; and for the Southeastern Legal Foundation by *Shannon Lee Goessling*, *Steffen N. Johnson*, and *Linda T. Coberly*.

But the District Court did not finally adopt that proposal until June 25—three weeks *after* the FTCA's 6-month deadline.

The Government moved to dismiss the tort claim on the ground that it was filed late. The District Court at first rejected the motion. It recognized that Wong had managed to add her FTCA claim only after § 2401(b)'s 6-month time period had expired. But the court equitably tolled that period for all the time between the Magistrate Judge's recommendation and its own order allowing amendment, thus bringing Wong's FTCA claim within the statutory deadline. Several years later, the Government moved for reconsideration of that ruling based on an intervening Ninth Circuit decision. This time, the District Court dismissed Wong's claim, reasoning that § 2401(b)'s 6-month time bar was jurisdictional and therefore not subject to equitable tolling. On appeal, the Ninth Circuit agreed to hear the case en banc to address an intra-circuit conflict on the issue. The en banc court held that the 6-month limit is not jurisdictional and that equitable tolling is available. *Kwai Fun Wong* v. *Beebe*, 732 F. 3d 1030 (2013). It then confirmed the District Court's prior ruling that the circumstances here justify tolling because Wong "exercis[ed] due diligence" in attempting to amend her complaint before the statutory deadline. *Id.*, at 1052.

The second case before us arises from a deadly highway accident. Andrew Booth was killed in 2005 when a car in which he was riding crossed through a cable median barrier and crashed into oncoming traffic. The following year, respondent Marlene June, acting on behalf of Booth's young son, filed a wrongful death action alleging that the State of Arizona and its contractor had negligently constructed and maintained the median barrier. Years into that state-court litigation, June contends, she discovered that the Federal Highway Administration (FHWA) had approved installation of the barrier knowing it had not been properly crash tested.

Relying on that new information, June presented a tort claim to the FHWA in 2010, more than five years after the accident. The FHWA denied the claim, and June promptly filed this action in federal district court. The court dismissed the suit because June had failed to submit her claim to the FHWA within two years of the collision. The FTCA's 2-year bar, the court ruled, is jurisdictional and therefore not subject to equitable tolling; accordingly, the court did not consider June's contention that tolling was proper because the Government had concealed its failure to require crash testing. On appeal, the Ninth Circuit reversed in light of its recent decision in *Wong*, thus holding that § 2401(b)'s 2-year deadline, like its 6-month counterpart, is not jurisdictional and may be tolled. 550 Fed. Appx. 505 (2013).

We granted certiorari in both cases, 573 U. S. 945 (2014), to resolve a circuit split about whether courts may equitably toll § 2401(b)'s two time limits. Compare, *e. g.*, *In re FEMA Trailer Formaldehyde Prods. Liability Litigation*, 646 F. 3d 185, 190–191 (CA5 2011) (*per curiam*) (tolling not available), with *Arteaga* v. *United States*, 711 F. 3d 828, 832–833 (CA7 2013) (tolling allowed).[1] We now affirm the Court of Appeals' rulings.

II

Irwin v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990), sets out the framework for deciding "the applicability of equitable tolling in suits against the Government." In *Irwin*, we recognized that time bars in suits between *private* parties are presumptively subject to equitable tolling. See *id.*, at 95–96. That means a court usually may pause the

[1] Although we did not consolidate these cases, we address them together because everyone agrees that the core arguments for and against equitable tolling apply equally to both of § 2401(b)'s deadlines. See, *e. g.*, Brief for United States in *June* 15 ("Nothing in the text or relevant legislative history . . . suggests that the respective time bars should be interpreted differently with respect to whether they are jurisdictional or subject to equitable tolling").

running of a limitations statute in private litigation when a party "has pursued his rights diligently but some extraordinary circumstance" prevents him from meeting a deadline. *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 10 (2014). We held in *Irwin* that "the same rebuttable presumption of equitable tolling" should also apply to suits brought against the United States under a statute waiving sovereign immunity. 498 U. S., at 95–96. Our old "ad hoc," law-by-law approach to determining the availability of tolling in those suits, we reasoned, had produced inconsistency and "unpredictability" without the offsetting virtue of enhanced "fidelity to the intent of Congress." *Id.*, at 95. Adopting the "general rule" used in private litigation, we stated, would "amount[ ] to little, if any, broadening" of a statutory waiver of immunity. *Ibid.* Accordingly, we thought such a presumption "likely to be a realistic assessment of legislative intent as well as a practically useful" rule of interpretation. *Ibid.*

A rebuttable presumption, of course, may be rebutted, so *Irwin* does not end the matter. When enacting a time bar for a suit against the Government (as for one against a private party), Congress may reverse the usual rule if it chooses. See *id.*, at 96. The Government may therefore attempt to establish, through evidence relating to a particular statute of limitations, that Congress opted to forbid equitable tolling.

One way to meet that burden—and the way the Government pursues here—is to show that Congress made the time bar at issue jurisdictional.[2] When that is so, a litigant's fail-

[2] The Government notes, and we agree, that Congress may preclude equitable tolling of even a nonjurisdictional statute of limitations. See Brief for United States in *Wong* 20; *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153–158 (2013) (finding a nonjurisdictional time limit not amenable to tolling). And the Government contends in passing that even if § 2401(b) is nonjurisdictional, it prohibits equitable tolling. See Brief for United States in *Wong* 20. But the Government makes no independent arguments in support of that position; instead, it relies (and even then implicitly) on the same indicia of congressional intent that, in its view,

ure to comply with the bar deprives a court of all authority to hear a case. Hence, a court must enforce the limitation even if the other party has waived any timeliness objection. See *Gonzalez* v. *Thaler*, 565 U. S. 134, 141 (2012). And, more crucially here, a court must do so even if equitable considerations would support extending the prescribed time period. See *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133–134 (2008).[3]

Given those harsh consequences, the Government must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515 (2006)); see *Gonzalez*, 565 U. S., at 141–142. "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'" *Auburn Regional*, 568 U. S., at 153 (quoting *Arbaugh*, 546 U. S., at 516). That does not mean "Congress must incant magic words." *Auburn Regional*,

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show that § 2401(b)'s time limits are jurisdictional. See *infra*, at 412–413, 417. In addressing the Government's predominant, jurisdictional claim, we therefore also deal with its subsidiary one.

[3] The dissent takes issue with the sequence in which we decide the jurisdictional question, contending that we must do so prior to mentioning *Irwin*'s presumption. See *post*, at 430–432 (opinion of ALITO, J.). We do not understand the point—or more precisely, why the dissent thinks the ordering matters. When Congress makes a time bar in a suit against the Government jurisdictional, one could say (as the dissent does) that *Irwin* does not apply, or one could say (as we do) that *Irwin*'s presumption is conclusively rebutted. The bottom line is the same: Tolling is not available. We frame the inquiry as we do in part because that is how the Government presented the issue. See Brief for United States in *Wong* 19 ("One way to show that [*Irwin*'s presumption is rebutted] is to establish that the statutory time limit is a 'jurisdictional' restriction"). And we think that choice makes especially good sense in these cases because various aspects of *Irwin*'s reasoning are central to considering the parties' positions on whether § 2401(b) is jurisdictional. See *infra*, at 415–420.

568 U. S., at 153. But traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.

And in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. See, *e. g.*, *id.*, at 154–155 (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson* v. *Shinseki*, 562 U. S. 428, 435 (2011); see *Auburn Regional*, 568 U. S., at 154; *Scarborough* v. *Principi*, 541 U. S. 401, 413 (2004). That is so, contrary to the dissent's suggestion, see *post*, at 423, 430, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be, *Henderson*, 562 U. S., at 439 (quoting *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 81 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.

In enacting the FTCA, Congress did nothing of that kind. It provided no clear statement indicating that § 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar.

Most important, § 2401(b)'s text speaks only to a claim's timeliness, not to a court's power. It states that "[a] tort claim against the United States shall be forever barred unless it is presented [to the agency] within two years . . . or unless action is begun within six months" of the agency's denial of the claim. That is mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred. See *infra*,

at 414, n. 7 (citing many similarly worded limitations statutes). The language is mandatory—"shall" be barred—but (as just noted) that is true of most such statutes, and we have consistently found it of no consequence. See, *e. g.*, *Gonzalez*, 565 U. S., at 146. Too, the language might be viewed as emphatic—"forever" barred—but (again) we have often held that not to matter. See, *e. g.*, *Henderson*, 562 U. S., at 439; *Union Pacific*, 558 U. S., at 81. What matters instead is that § 2401(b) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U. S., at 515 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982)). It does not define a federal court's jurisdiction over tort claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers. Section 2401(b), in short, "reads like an ordinary, run-of-the-mill statute of limitations," spelling out a litigant's filing obligations without restricting a court's authority. *Holland* v. *Florida*, 560 U. S. 631, 647 (2010).[4]

Statutory context confirms that reading. This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. See *Henderson*, 562 U. S., at 439–440; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 164–165 (2010); *Arbaugh*, 546 U. S., at 515; *Zipes*, 455 U. S., at 393–394. So too here. Whereas § 2401(b) houses the FTCA's

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[4] The dissent argues that nonjurisdictional time limits typically mention claimants, whereas § 2401(b) does not. See *post*, at 429. But none of our precedents have either said or suggested that such a difference matters—that, for example, a statute barring a "tort claim" is jurisdictional, but one barring a "person's tort claim" is not. See, *e. g.*, *Zipes*, 455 U. S., at 394, and n. 10 (concluding that a time limit did "not speak in jurisdictional terms" even though it did not refer to a claimant). Rather, in case after case, we have emphasized another distinction—that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers. See *Auburn Regional*, 568 U. S., at 154; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 160–161 (2010); *Arbaugh*, 546 U. S., at 515.

time limitations, a different section of Title 28 confers power on federal district courts to hear FTCA claims. See § 1346(b)(1) ("district courts . . . shall have exclusive jurisdiction" over tort claims against the United States). Nothing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions. Treating § 2401(b)'s time bars as jurisdictional would thus disregard the structural divide built into the statute.

Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here. The report accompanying the FTCA did not discuss whether § 2401(b)'s time limits are jurisdictional. See S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946). And in amending § 2401(b) four times after its enactment, Congress declined again (four times over) to say anything specific about whether the statute of limitations imposes a jurisdictional bar. Congress thus failed to provide anything like the clear statement this Court has demanded before deeming a statute of limitations to curtail a court's power.

And so we wind up back where we started, with *Irwin*'s "general rule" that equitable tolling is available in suits against the Government. 498 U. S., at 95. The justification the Government offers for departing from that principle fails: Section 2401(b) is not a jurisdictional requirement. The time limits in the FTCA are just time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds.

III

The Government balks at that straightforward analysis, claiming that it overlooks two reasons for thinking § 2401(b) jurisdictional. But neither of those reasons is persuasive. Indeed, our precedents in this area foreclose them both.

A

The Government principally contends that § 2401(b) is jurisdictional because it includes the same language as the

statute of limitations governing contract (and some other non-tort) suits brought against the United States under the Tucker Act. See § 2501.[5] That statute long provided that such suits "shall be forever barred" if not filed within six years. Act of Mar. 3, 1863, § 10, 12 Stat. 767; see Act of Mar. 3, 1911, § 156, 36 Stat. 1139.[6] And this Court repeatedly held that 6-year limit to be jurisdictional and thus not subject to equitable tolling. See *Kendall* v. *United States*, 107 U. S. 123, 125–126 (1883); *Finn* v. *United States*, 123 U. S. 227, 232 (1887); *Soriano* v. *United States*, 352 U. S. 270, 273–274 (1957). When Congress drafted the FTCA's time bar, it used the same "shall be forever barred" language (though selecting a shorter limitations period). "In these circumstances," the Government maintains, "the only reasonable conclusion is that Congress intended the FTCA's identically worded time limit to be a jurisdictional bar." Brief for United States in *Wong* 21–22. According to the Government, Congress wanted the FTCA to serve as "a tort-law analogue to the Tucker Act" and incorporated the words "shall be forever barred" to similarly preclude equitable tolling. Reply Brief in *Wong* 4. (The dissent relies heavily on the same argument. See *post*, at 423–428.)

But the Government takes too much from Congress's use in § 2401(b) of an utterly unremarkable phrase. The "shall be forever barred" formulation was a commonplace in federal limitations statutes for many decades surrounding Con-

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[5] The Tucker Act of 1887, ch. 359, 24 Stat. 505, enlarged the Court of Claims' jurisdiction over contract and other non-tort actions against the Government. The statute of limitations applying to such suits pre-dated the Tucker Act by more than two decades.

[6] During a recodification occurring in 1948 (two years after passage of the FTCA), Congress omitted the word "forever" from the Tucker Act's statute of limitations; since then, it has provided simply that untimely claims "shall be barred." 28 U. S. C. § 2501; see § 2501, 62 Stat. 976. No party contends that change makes any difference to the resolution of these cases.

gress's enactment of the FTCA.[7] And neither this Court nor any other has accorded those words talismanic power to render time bars jurisdictional. To the contrary, we have construed the very same "shall be forever barred" language in 15 U. S. C. § 15b, the Clayton Act's statute of limitations, to be subject to tolling; nothing in that provision, we found, "restrict[s] the power of the federal courts" to extend a limitations period when circumstances warrant. *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 559 (1974); see *Hardin* v. *City Title & Escrow Co.*, 797 F. 2d 1037, 1040 (CADC 1986) (calling § 15(b) "a good example of a nonjurisdictional time limitation" based on its text and separation from the Clayton Act's jurisdictional provisions).[8] As the Government itself has previously acknowledged, refer-

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[7] See, *e. g.*, § 6 of the Portal-to-Portal Act of 1947, 61 Stat. 87, 29 U. S. C. § 255 (1952 ed.); § 3 of the Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U. S. C. § 1223 (1958 ed.); § 111(b) of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 725, 15 U. S. C. § 1400(b) (1970 ed.); § 7(e) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 605, 29 U. S. C. § 626(e) (1970 ed.); § 6(c) of the Agricultural Fair Practices Act of 1967, 82 Stat. 95, 7 U. S. C. § 2305(c) (1970 ed.); § 613(b) of the National Manufactured Housing Construction and Safety Standards Act of 1974, 88 Stat. 707, 42 U. S. C. § 5412(b) (1976 ed.).

[8] Even before this Court's decision in *American Pipe*, Courts of Appeals had unanimously construed the Clayton Act's statute of limitations to allow equitable tolling. See *General Elec. Co.* v. *San Antonio*, 334 F. 2d 480, 484–485 (CA5 1964) (joining six other Circuits in reaching that conclusion). Similarly, every Court of Appeals to have considered the issue has found that § 6 of the Portal-to-Portal Act, which contains the same "shall be forever barred" phrase, permits hearing late claims. See, *e. g.*, *Hodgson* v. *Humphries*, 454 F. 2d 1279, 1283–1284 (CA10 1972); *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (CA6 1975); *Partlow* v. *Jewish Orphans' Home of Southern Cal., Inc.*, 645 F. 2d 757, 760–761 (CA9 1981), abrogated on other grounds by *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165 (1989). And so too Courts of Appeals unanimously found that the ADEA's longtime (though not current) time bar containing that language was subject to tolling. See, *e. g.*, *Vance* v. *Whirlpool Corp.*, 707 F. 2d 483, 489 (CA4 1983); *Callowhill* v. *Allen-Sherman-Hoff Co.*, 832 F. 2d 269, 273–274 (CA3 1987).

ring to the "shall be forever barred" locution: "[T]hat type of language has more to do with the legal rhetoric at the time the statute was passed" than with anything else, and should not "make[ ] a difference" to the jurisdictional analysis. Tr. of Oral Arg. in *Irwin*, O. T. 1990, No. 89–5867, p. 30. Or, put just a bit differently: Congress's inclusion of a phrase endemic to limitations statutes of that era, at least some of which allow tolling, cannot provide the requisite clear statement that a time bar curtails a court's authority.

Indeed, in two decisions directly addressing the Tucker Act's statute of limitations, this Court dismissed the idea that the language the Government relies on here has jurisdictional significance. Twice we described the words in that provision as not meaningfully different from those in a nonjurisdictional statute of limitations. And twice we made clear that the jurisdictional status of the Tucker Act's time bar has precious little to do with its phrasing.

We first did so in *Irwin*. Using our newly minted presumption, see *supra*, at 407–408, we decided there that the limitations period governing Title VII suits against the Government, 42 U. S. C. § 2000e–16(c) (1988 ed.), allowed equitable tolling. In reaching that conclusion, we compared § 2000e–16(c)'s text (then stating that an employee "may file a civil action" within 30 days of an agency's denial of her claim) with the language of the Tucker Act's time bar. We noted that we had formerly held the Tucker Act's limitations statute to "jurisdictionally bar[ ]" late claims, and we acknowledged the possibility of justifying that different treatment by characterizing its "language [as] more stringent than" § 2000e–16(c)'s. *Irwin*, 498 U. S., at 94–95. But we rejected that reasoning, instead finding that the two formulations were materially alike. "[W]e are not persuaded," we stated, "that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.*, at 95. Leaving for another day the question of what *did* account for the jurisdictional status

of the Tucker Act's time bar, the Court thus ruled out reliance on its language. In other words, on the core question the Government raises here—whether the phrase "shall be forever barred," as used in both the Tucker Act and the FTCA, manifests a congressional decision to preclude tolling—*Irwin* said no.

More recently, *John R. Sand* reaffirmed that conclusion, even as it refused to overturn our century-old view that the Tucker Act's time bar is jurisdictional. No less than three times, *John R. Sand* approvingly repeated *Irwin*'s statement that the textual differences between the Tucker Act's time bar and § 2000e–16(c) were insignificant—*i. e.*, that the language of the two provisions could not explain why the former was jurisdictional and the latter not. See 552 U. S., at 137, 139 (calling the provisions "linguistically similar," "similar . . . in language," and "similarly worded"). But if that were so, *John R. Sand* asked, why not hold that the Tucker Act's time limit, like § 2000e–16(c), is nonjurisdictional? The answer came down to two words: *stare decisis*. The Tucker Act's bar was different because it had been the subject of "a definitive earlier interpretation." *Id.*, at 138; see *id.*, at 137; *supra*, at 413. And for that reason alone, *John R. Sand* left in place our prior construction of the Tucker Act's time limit. See 552 U. S., at 139 (observing, in Justice Brandeis's words, that "it is more important that" the rule "be settled than that it be settled right" (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting opinion))). What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from this Court's prior rulings, not from Congress's choice of wording.

The Government thus cannot show that the phrase "shall be forever barred" in § 2401(b) plainly signifies a jurisdictional statute, as our decisions require. See *supra*, at 409–410. Unlike in *John R. Sand*, here *stare decisis* plays no role: We have not previously considered whether § 2401(b) restricts a court's authority. What we have done is to say, again and

again, that the core language in that provision has no jurisdictional significance. It is materially indistinguishable from the language in one nonjurisdictional time bar (*i. e.*, § 2000e–16(c)). See *Irwin*, 498 U. S., at 95; *John R. Sand*, 552 U. S., at 137, 139. And it is identical to the language in another (*i. e.*, 15 U. S. C. § 15b). See *American Pipe*, 414 U. S., at 559. Yes, we have held that the Tucker Act's time bar, which includes those same words, constrains a court's power to hear late claims. But as we explained in *Irwin*, that is not because the phrase itself "manifest[s] a . . . congressional intent with respect to the availability of equitable tolling." 498 U. S., at 95. The words on which the Government pins its hopes are just the words of a limitations statute of a particular era. And nothing else supports the Government's claim that Congress, when enacting the FTCA, wanted to incorporate this Court's view of the Tucker Act's time bar—much less that Congress expressed that purported intent with the needed clear statement.

B

The Government next contends that at the time of the FTCA's enactment, Congress thought that *every* limitations statute applying to suits against the United States, however framed or worded, cut off a court's jurisdiction over untimely claims. On that view, the particular language of those statutes makes no difference. All that matters is that such time limits function as conditions on the Government's waiver of sovereign immunity. In that era—indeed, up until *Irwin* was decided—those conditions were generally supposed to be "strictly observed." *Soriano*, 352 U. S., at 276. That meant, the Government urges, that all time limits on actions against the United States "carr[ied] jurisdictional consequences." Brief for United States in *Wong* 34. Accordingly, the Government concludes, Congress "would have expected courts to apply [§ 2401(b)] as a jurisdictional requirement—just as conditions on waivers of sovereign immunity had always been applied." *Id.*, at 32.

Irwin, however, forecloses that argument. After all, *Irwin* also considered a pre-*Irwin* time bar attached to a waiver of sovereign immunity. The Government argued there—anticipating its claim here—that because § 2000e–16(c)'s statute of limitations conditioned such a waiver, it must be jurisdictional and not subject to equitable tolling. See Brief for Respondents 6, 10, 14, 19, and Tr. of Oral Arg. 31–37, in *Irwin*, O. T. 1990, No. 89–5867. But *Irwin* disagreed, applying the opposite presumption to a time limit passed two decades earlier. See 498 U. S., at 94–96; *supra*, at 407–408. Justice White protested, much as the Government does now, that at the time of § 2000e–16(c)'s enactment, limitations statutes for suits against the Government were "strictly observed" and not amenable to tolling. 498 U. S., at 97 (opinion concurring in part and concurring in judgment) (quoting *Soriano*, 352 U. S., at 276); see 498 U. S., at 99, n. 2. How could an earlier Congress, Justice White asked, have "had in mind the Court's present departure from that longstanding rule"? *Ibid.*; see *post*, at 428–429 (asking a variant of the same question). But the *Irwin* Court was undeterred. The Court noted that it had not applied the former rule so consistently as Justice White suggested. See 498 U. S., at 94. And the Court doubted that the former approach so well reflected congressional intent: On the contrary, because equitable tolling "amounts to little, if any, broadening of the congressional waiver," we thought that a rule generally *allowing* tolling is the more "realistic assessment of legislative intent." *Id.*, at 95; see *supra*, at 408. For those reasons, the Court declined to count time bars as jurisdictional merely because they condition waivers of immunity—even if Congress enacted the deadline when the Court interpreted limitations statutes differently.

In the years since, this Court has repeatedly followed *Irwin*'s lead. We have applied *Irwin* to pre-*Irwin* statutes, just as we have to statutes that followed in that decision's wake. See *Scarborough*, 541 U. S., at 420–422; *Franconia*

Associates v. *United States*, 536 U. S. 129, 145 (2002). To be sure, *Irwin*'s presumption is rebuttable. But the rebuttal cannot rely on what *Irwin* itself deemed irrelevant—that Congress passed the statute in an earlier era, when this Court often attached jurisdictional consequence to conditions on waivers of sovereign immunity. Rather, the rebuttal must identify something distinctive about the time limit at issue, whether enacted then or later—a reason for thinking Congress wanted *that* limitations statute (not all statutes passed in an earlier day) to curtail a court's jurisdiction. On the Government's contrary view, *Irwin* would effectively become only a prospective decision. Nothing could be less consonant with *Irwin*'s ambition to adopt a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U. S., at 95.

And the Government's claim is peculiarly inapt as applied to § 2401(b) because all that is special about the FTCA cuts *in favor of* allowing equitable tolling. As compared to other waivers of immunity (prominently including the Tucker Act), the FTCA treats the United States more like a commoner than like the Crown. The FTCA's jurisdictional provision states that courts may hear suits "under circumstances where the United States, if a private person, would be liable to the claimant." 28 U. S. C. § 1346(b). And when defining substantive liability for torts, the Act reiterates that the United States is accountable "in the same manner and to the same extent as a private individual." § 2674. In keeping with those provisions, this Court has often rejected the Government's calls to cabin the FTCA on the ground that it waives sovereign immunity—and indeed, the Court did so in the years immediately after the Act's passage, even as it was construing *other* waivers of immunity narrowly. See, *e. g.*, *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 65 (1955); *Rayonier Inc.* v. *United States*, 352 U. S. 315, 319–320 (1957). There is no reason to do differently here. As

Irwin recognized, treating the Government like a private person means (among other things) permitting equitable tolling. See 498 U. S., at 95–96. So in stressing the Government's equivalence to a private party, the FTCA goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims.

IV

Our precedents make this a clear-cut case. *Irwin* requires an affirmative indication from Congress that it intends to preclude equitable tolling in a suit against the Government. See 498 U. S., at 95–96. Congress can provide that signal by making a statute of limitations jurisdictional. But that requires its own plain statement; otherwise, we treat a time bar as a mere claims-processing rule. See *Auburn Regional*, 568 U. S., at 153–154. Congress has supplied no such statement here. As this Court has repeatedly stated, nothing about § 2401(b)'s core language is special; "shall be forever barred" is an ordinary (albeit old-fashioned) way of setting a deadline, which does not preclude tolling when circumstances warrant. See *Irwin*, 498 U. S., at 95–96; *John R. Sand*, 552 U. S., at 137, 139; *American Pipe*, 414 U. S., at 558–559. And it makes no difference that a time bar conditions a waiver of sovereign immunity, even if Congress enacted the measure when different interpretive conventions applied; that is the very point of this Court's decision to treat time bars in suits against the Government, whenever passed, the same as in litigation between private parties. See *Irwin*, 498 U. S., at 95–96; *Scarborough*, 541 U. S., at 420–422; *Franconia*, 536 U. S., at 145. Accordingly, we hold that the FTCA's time bars are nonjurisdictional and subject to equitable tolling.

We affirm the judgments of the U. S. Court of Appeals for the Ninth Circuit and remand the cases for further proceedings consistent with this opinion. On remand in *June*, it is

for the District Court to decide whether, on the facts of her case, June is entitled to equitable tolling.

It is so ordered.

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

Our task in these cases is to interpret and enforce a federal statute that specifies the limits of the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA). The FTCA waives the immunity of the United States for certain tort claims but provides that any "tort claim against the United States shall be forever barred unless" it is filed with the appropriate agency "within two years after such claim accrues" and in federal court "within six months after" the agency's final decision. 28 U. S. C. § 2401(b). The statutory text, its historical roots, and more than a century of precedents show that this absolute bar is not subject to equitable tolling. I would enforce the statute as Congress intended and reverse.

I

The FTCA is a waiver of sovereign immunity and must be understood in that context. In the 19th and early 20th centuries, Congress was reluctant to allow individual tort claims against the United States. Instead, it granted relief to individuals through private laws enacted solely for those individuals' benefit. These waivers of sovereign immunity were surgical and sporadic, but "notoriously clumsy," and by 1946 Congress thought it better to adopt a "simplified" approach. *Dalehite* v. *United States*, 346 U. S. 15, 24–25 (1953). The FTCA thus waived sovereign immunity for tort claims against the Government and set out a procedure for adjudicating those claims.

This waiver of sovereign immunity was no trivial matter. Long before the FTCA, Congress authorized suits against the Government for contract and property claims under the Tucker Act and a number of predecessor statutes, but the

Tucker Act excluded tort claims from its waiver of sovereign immunity. The concern was obvious: As opposed to the more predictable nature of contractual and property claims, tort-based harms are sometimes unperceived and open-ended. Even frivolous claims require the Federal Government to expend administrative and litigation costs, which ultimately fall upon society at large. For every dollar spent to defend against or to satisfy a tort claim against the United States, the Government must either raise taxes or shift funds originally allocated to different public programs.

To reduce these risks, Congress placed strict limits on the FTCA's waiver of sovereign immunity. The statute "exempts from [its] waiver certain categories of claims," *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 218 (2008), and includes a broad exemption for claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U. S. C. § 2680(h); see also §§ 2680(a)–(n). In addition, in order to limit the scope and unpredictability of the Government's potential liability, the Act exempts from the waiver of sovereign immunity certain types of recovery, such as prejudgment interest and punitive damages. See § 2674.

Most relevant here, the FTCA "condition[s]" its waiver of sovereign immunity on strict filing deadlines. *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979). As enacted in 1946, the Act granted district courts exclusive jurisdiction over tort claims against the Government, "[s]ubject to the [other] provisions of" the Act. FTCA, ch. 753, § 410(a), 60 Stat. 843–844. One of those provisions stated that "[e]very claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued . . . it is presented in writing to the [relevant] Federal agency . . . or . . . an action is begun" in federal court. § 420, *id.*, at 845. The current version provides in full as follows:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U. S. C. § 2401(b).

II

The question presented in these two cases is whether the FTCA's filing deadlines are subject to equitable tolling. We must therefore decide (1) whether the deadlines are "jurisdictional" in nature, so that courts are without power to adjudicate claims filed outside their strict limits and (2) if they are not jurisdictional, whether the statute nonetheless prohibits equitable tolling. Both of these inquiries require close attention to the text, context, and history of the Act. And both lead to the conclusion that the FTCA allows no equitable tolling.

A

The FTCA's filing deadlines are jurisdictional. The statute's plain text prohibits adjudication of untimely claims. Once the Act's filing deadlines have run, all untimely claims "shall be forever barred." *Ibid.* These words are not qualified or aspirational. They are absolute. If not filed with the agency within two years, or with a federal court within six months, a claim "shall be" "barred" "forever." "Shall be forever barred" is not generally understood to mean "should be allowed sometimes." The statute brooks no exceptions. And because the filing deadlines restrict the FTCA's waiver of sovereign immunity, they impose a limit on the courts' jurisdiction that "we should not take it upon ourselves to extend." *Kubrick*, *supra*, at 117–118.

For over 130 years, we have understood these terms as jurisdictional. When crafting the FTCA's limitations provi-

sion, Congress did not write on a clean slate. Rather, it borrowed language from limitations provisions in the Tucker Act and its predecessor statutes. The 1911 version of the Tucker Act included language that was nearly identical to that in the 1946 version of the FTCA: "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues." § 156, 36 Stat. 1139. That statutory language came, in turn, from the 1863 predecessor to the Tucker Act. See § 10, 12 Stat. 767.

As early as 1883, we interpreted these precise terms to impose a "jurisdiction[al]" requirement that the "court may not disregard." *Kendall* v. *United States*, 107 U. S. 123, 125. We emphasized that, when waiving sovereign immunity, Congress "may restrict the jurisdiction of the [courts] to certain classes of demands." *Ibid.* And we held that "[t]he express words of the statute leave no room for contention." *Ibid.* The Court thus had no "authority to engraft" an equitable tolling provision where Congress had so clearly constrained the Judiciary's authority. *Ibid.*

Over the ensuing decades, we repeatedly reaffirmed our interpretation of the phrase. In *Finn* v. *United States*, 123 U. S. 227, 232 (1887), we held that the Government could not waive the jurisdictional time bar and thus that the "duty of the court" was "to dismiss the petition" when a plaintiff raised an untimely claim. We reached the same conclusion in *De Arnaud* v. *United States*, 151 U. S. 483, 495–496 (1894). We reaffirmed the rule in *United States* v. *New York*, 160 U. S. 598, 616–619 (1896), while holding that there *was* jurisdiction where the plaintiff presented its claim before the statutory deadline. And in *Munro* v. *United States*, 303 U. S. 36, 38, n. 1, 41 (1938), we held that a District Court lacked jurisdiction to resolve untimely claims, even if the Government waived any objection, under a different statute that incorporated the Tucker Act's time limits. All the

while, the lower courts similarly enforced the deadline as "a jurisdictional requirement, compliance with which is necessary to enable suit to be maintained against the sovereign." *Compagnie Generale Transatlantique* v. *United States*, 51 F. 2d 1053, 1056 (CA2 1931). Thus, by 1946, the phrase "shall be forever barred" was well understood to deprive federal courts of jurisdiction over untimely claims.[1]

The FTCA's statutory terms must be understood in this context. When Congress crafted the FTCA as a tort-based analogue to the Tucker Act, it consciously borrowed the well-known wording of the Tucker Act's filing deadline. Then, as now, it was settled that "[i]n adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); see also *Shapiro* v. *United States*, 335 U. S. 1, 16 (1948); *Sekhar* v. *United States*, 570 U. S. 729, 733 (2013) ("'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it'" (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947))).

Indeed, Congress considered departing from the Tucker Act's prohibition on equitable tolling, but decided against it. Proposals to include an equitable tolling provision were "included in nine of the thirty-one bills prior to the enactment of the FTCA," but "the Act passed by the 1946 Congress did not provide for any equitable tolling of the limitations

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[1] At times in the past we have too loosely conferred the "jurisdictional" label. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 90 (1998). But our use of the term in this context was conscious, as we recognized in *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 134 (2008) ("Justice Harlan, writing for the Court, said the statute was 'jurisdiction[al],' . . . and that '*it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not*'" (quoting *Kendall* v. *United States*, 107 U. S. 123, 125 (1883))). And it was correct.

periods." Colella & Bain, Revisiting Equitable Tolling and the Federal Tort Claims Act, 31 Seton Hall L. Rev. 174, 195–196 (2000). Instead, it was understood that individuals with claims outside those deadlines could turn to Congress for relief through private bills, as they did before the FTCA's enactment. See *id.*, at 195.[2]

The evidence of statutory meaning does not end there. We reaffirmed the phase's jurisdictional nature in the decades following the FTCA's enactment. In *Soriano* v. *United States*, 352 U. S. 270 (1957), we rejected a request to allow equitable tolling under the Tucker Act. Confirming the connection between the Tucker Act and the FTCA, we noted that "statutes permitting suits for tax refunds, *tort actions*, alien property litigation, patent cases, and other claims against the Government would be affected" if the Court allowed equitable tolling under the Tucker Act. *Id.*, at 275 (emphasis added). And in *Kubrick*, 444 U. S., at 117–118, we cited *Soriano*'s warning while emphasizing that the FTCA's time limits are a condition of the Act's waiver of sovereign immunity.

The lower courts also quickly recognized the statutes' common heritage and enforced § 2401(b) as a jurisdictional requirement. In *Anderegg* v. *United States*, 171 F. 2d 127, 128 (1948) (*per curiam*), the Fourth Circuit cited *Finn* and *Munro* while holding that the FTCA's filing deadline is a jurisdictional limit that the Government cannot waive. The

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[2] Congress has occasionally modified the FTCA's limitations provision. Initially, the Act required plaintiffs to file suit within one year of a claim's accrual, or if the claim was for less than $1,000 to present the claim to the appropriate agency within one year of accrual. § 420, 60 Stat. 845. In 1949, to relieve the hardship of the 1-year deadline, Congress enlarged the filing deadline to two years. Act of Apr. 25, ch. 92, § 1, 63 Stat. 62. Then, in 1966, it made the filing of an administrative claim with the appropriate agency a prerequisite to filing suit, and it shortened the litigation filing deadline to six months from the agency's denial of the claim. Act of July 18, §§ 2(a), 7, 80 Stat. 306, 307. But Congress has never suggested that the deadlines could be excused or enlarged by the courts.

Fifth Circuit, in *Simon* v. *United States*, 244 F. 2d 703, 705, n. 4 (1957), held that the FTCA's deadline is a jurisdictional condition on the Act's waiver of sovereign immunity and cited *Carpenter* v. *United States*, 56 F. 2d 828, 829 (CA2 1932), a Tucker Act case, to support its holding. And in *Humphreys* v. *United States*, 272 F. 2d 411 (1959), the Ninth Circuit similarly relied on Tucker Act precedents to hold that "the District Court has no jurisdiction over [an untimely FTCA] action," because no waiver of sovereign immunity exists once the filing deadline "has run." *Id.*, at 412 (citing *Edwards* v. *United States*, 163 F. 2d 268, 269 (CA9 1947), in turn citing *Finn* and *Munro*). When Congress amended the FTCA in 1966, it readopted the "forever barred" language against the backdrop of *Soriano* and the lower courts' interpretation of the phrase. We must therefore assume that Congress meant to keep the universally recognized meaning of those words. See, *e. g.*, *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 593–594 (2004).

That meaning, of course, cannot change over time. But even if there were any doubt, we recently reaffirmed our view in *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130 (2008). We explained that, unlike run-of-the-mill statutes of limitations, jurisdictional time limits "seek . . . to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id.*, at 133 (citations omitted). Recounting our decisions in *Kendall*, *Finn*, *De Arnaud*, *New York*, and *Soriano*, we "reiterated" our understanding of the "absolute nature of the court of claims limitations statute." 552 U. S., at 135. And we rejected an invitation to abandon that interpretation, noting that Congress has long accepted our interpretation of the statute. *Id.*, at 139.

The same must be said of the FTCA. As we have often explained, "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement

as 'jurisdictional,' we will presume that Congress intended to follow that course." *Henderson* v. *Shinseki*, 562 U. S. 428, 436 (2011) (citation and some internal quotation marks omitted); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 168 (2010); *Union Pacific R. Co.* v. *Locomotive Engineers*, 558 U. S. 67, 82 (2009). Every single decision from this Court interpreting the Tucker Act's "similar requirement" has treated it as jurisdictional. And there is strong historical evidence that Congress "intended to follow that course." That should be the end of the matter: Section 2401(b)'s filing deadlines are jurisdictional limits that are not subject to equitable tolling.

B

Even if the FTCA's filing deadlines are not jurisdictional, they still prohibit equitable tolling. To be sure, in recent years, we have grown reluctant to affix the "jurisdictional" label. See, *e. g.*, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510 (2006); *Henderson*, *supra*, at 434–436. "But calling a rule nonjurisdictional does not mean that it is not mandatory." *Gonzalez* v. *Thaler*, 565 U. S. 134, 146 (2012). Where Congress imposes an inflexible claims processing rule, it is our duty to enforce the law and prohibit equitable tolling, whether it is jurisdictional or not.

Here, Congress' intent is clear. The words of the statute leave no doubt that untimely claims are never allowed: They are "*forever* barred." This is no weak-kneed command. The history underlying the text only bolsters its apparent meaning, and our repeated reaffirmation of the phrase's meaning should remove any doubt. Congress never meant for equitable tolling to be available under the FTCA.

The only factor pointing in the opposite direction is our suggestion in *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990), that we would thenceforth apply a rebuttable presumption in favor of equitable tolling in suits against the Government. But it is beyond me how *Irwin*'s judge-made presumption announced in 1990 can trump the obvious meaning of a statute enacted many decades earlier.

Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 718 (1979) (Rehnquist, J., concurring). In any event, *Irwin*'s rebuttable presumption is overcome in these cases. For well over a century, we have recognized the inflexible nature of the Tucker Act's provision. Since its adoption, we have recognized that the FTCA's language bears the same meaning as its Tucker Act companion. See *Soriano*, 352 U. S., at 275; *Kubrick*, *supra*, at 118. And in *John R. Sand & Gravel*, we held that our "definitive earlier interpretation of the" Tucker Act is a "sufficient rebuttal" to *Irwin*'s presumption. 552 U. S., at 138. There is no principled way to distinguish these cases. Section 2401(b) allows no equitable tolling.

III

The Court's contrary conclusion is wrong at every step. In its view, § 2401(b)'s statutory text is "mundane" language that "'reads like an ordinary, run-of-the-mill statute of limitations.'" *Ante*, at 411. But "ordinary" nonjurisdictional time limits are typically directed at claimants. The deadline in *Henderson*, for example, required that "*a person* adversely affected by [a Board of Veterans' Appeals] decision shall file a notice of appeal . . . within 120 days after" the decision. 38 U. S. C. § 7266(a) (emphasis added); 562 U. S., at 438. The "run-of-the-mill" limitations provision in *Holland* v. *Florida*, 560 U. S. 631, 647 (2010), likewise applied to the "person" responsible for filing: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus *by a person* in custody pursuant to the judgment of a State court." 28 U. S. C. § 2244(d)(1) (emphasis added); 560 U. S., at 635. And the provision at issue in *Irwin* was similar, if not an even weaker command. It provided that "'[w]ithin thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an *employee or applicant* for employment . . . *may file* a civil action.'" 498 U. S., at 94 (quoting 42 U. S. C. § 2000e–16(c) (1998 ed.); emphasis added).

Section 2401(b), by contrast, never mentions the claimant, and it is phrased in emphatically absolute terms. It says unequivocally that untimely tort claims against the United States "shall be forever barred." Although it does not use the word "jurisdiction," it speaks at least as much to the courts (who are "forever barred" from considering untimely claims) as it does to claimants (who are "forever barred" from bringing stale claims). More important, though, the words in § 2401(b) have a well-known meaning that *ipse dixit* labels cannot overcome.[3]

The majority tells us this "old 'ad hoc,' law-by-law approach"—also known as *statutory interpretation*—has been replaced with a broad presumption in favor of equitable tolling and a judicial preference against jurisdictional labels. *Ante*, at 408. I dispute the premise. But in any event, as I explained above, and as six Members of the current Court held in *John R. Sand & Gravel*, the overwhelming evidence of congressional intent here easily overtakes *Irwin*'s rebuttable presumption. Even if we would rather not call § 2401(b)'s deadlines "jurisdictional," with all that label entails, we must nonetheless recognize that Congress never meant to allow equitable tolling.

The majority avoids this latter point by declining to give it any separate attention. See *ante*, at 408, n. 2. But we cannot conflate the two questions because, though the relevant evidence is the same, the analysis is different. In particular, the majority is wrong to rely on *Irwin* when assessing the jurisdictional question, which is the only question it really

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[3] The majority relies on the fact that we have allowed equitable tolling under "forever barred" language in the Clayton Act. See *ante*, at 414. But there is no evidence that Congress meant to import *that* statute's terms into the FTCA. Nor does the Clayton Act involve the waiver of sovereign immunity for money damages against the Government. The Tucker Act, by contrast, was clearly the blueprint for the FTCA's time bar, it *did* involve a waiver of sovereign immunity, and our cases have uniformly held that its language is *not* subject to equitable tolling.

decides. We do not indulge *Irwin*'s presumption when determining whether a requirement is jurisdictional. Instead, we typically invoke *Irwin* only *after* finding that a requirement is not jurisdictional, to decide whether Congress nonetheless intended to prohibit equitable tolling. In *Henderson*, for instance, we never mentioned *Irwin* because the parties did not ask us to address whether the rule was "subject to equitable tolling if it [was] not jurisdictional." 562 U. S., at 442, n. 4. Likewise, in *Bowles* v. *Russell*, 551 U. S. 205 (2007), we held that the deadline for filing a notice of appeal is jurisdictional, without a word about *Irwin*.[4] In *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153–155, 158–161 (2013), we considered *Irwin* only after deciding that a deadline was not jurisdictional. And in *Holland*, we held that the Antiterrorism and Effective Death Penalty Act of 1996's time limits are not jurisdictional, without relying on *Irwin*, and then stated that "[w]e have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling.'" 560 U. S., at 645–646 (quoting *Irwin*, *supra*, at 95–96; emphasis deleted); cf. *Young* v. *United States*, 535 U. S. 43, 49–50 (2002) (invoking *Irwin* after concluding that a limitations period was not a "substantive" component of the Bankruptcy Code).[5] This error matters because the majority's jurisdictional analysis literally begins and ends with *Irwin*, see *ante*, at 407–408, 420, and thus relies on a presumption that should have no bearing on the question. Without that presumption, the majority could

[4] Even the dissent in *Bowles* recognized *Irwin*'s irrelevance: It cited the decision only when discussing equitable exceptions to *nonjurisdictional* statutes of limitations. 551 U. S., at 219 (opinion of Souter, J.).

[5] We considered *Irwin* in *John R. Sand & Gravel* while holding that 28 U. S. C. § 2501's time limits are jurisdictional. But we did so only to *reject* the suggestion that *Irwin* compelled a contrary result. So there, too, *Irwin*'s presumption did not influence the jurisdictional question. Nor did it influence the outcome in *Irwin* itself, where we held that equitable tolling was not available. See 498 U. S., at 96.

not so readily ignore the unmistakable evidence that § 2401(b)'s limits are jurisdictional.

* * *

For these reasons, I would hold that § 2401(b) does not allow equitable tolling, and I therefore respectfully dissent.

WILLIAMS-YULEE *v.* FLORIDA BAR

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 13–1499. Argued January 20, 2015—Decided April 29, 2015

Florida is one of 39 States where voters elect judges at the polls. To promote public confidence in the integrity of the judiciary, the Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct, which provides that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons" to raise money for election campaigns.

Petitioner Lanell Williams-Yulee (Yulee) mailed and posted online a letter soliciting financial contributions to her campaign for judicial office. The Florida Bar disciplined her for violating a Florida Bar Rule requiring candidates to comply with Canon 7C(1), but Yulee contended that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. The Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailored to serve the State's compelling interest.

Held: The judgment is affirmed.

138 So. 3d 379, affirmed.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II, concluding that the First Amendment permits Canon 7C(1)'s ban on the personal solicitation of campaign funds by judicial candidates. Pp. 444–457.

(a) Florida's interest in preserving public confidence in the integrity of its judiciary is compelling. The State may conclude that judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. Simply put, the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors. This Court's precedents have recognized the "vital state interest" in safeguarding "'public confidence in the fairness and integrity of the nation's elected judges,'" *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 889. Unlike the legislature or the executive, the judiciary "has no influence over either the sword or the purse," Federalist No. 78, p. 465 (A. Hamilton), so its authority depends in large measure on the public's willingness to respect and follow its decisions. Public perception of judicial integrity is accordingly "'a state interest of the highest order.'" 556 U. S., at 889.

Syllabus

A State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, because a judge's role differs from that of a politician. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 783. Unlike a politician, who is expected to be appropriately responsive to the preferences of supporters, a judge in deciding cases may not follow the preferences of his supporters or provide any special consideration to his campaign donors. As in *White*, therefore, precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States allowing personal solicitation serve with fairness and honor, but in the eyes of the public, a judicial candidate's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey* v. *Ohio*, 273 U. S. 510, 532. That risk is especially pronounced where most donors are lawyers and litigants who may appear before the judge they are supporting. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. Pp. 445–448.

(b) Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of viewpoint or means of solicitation. And unlike some laws that have been found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. When the judicial candidate himself asks for money, the stakes are higher for all involved. A judicial candidate asking for money places his name and reputation behind the request, and the solicited individual knows that the same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no. However sim-

ilar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public.

Permitting a judicial candidate to write thank you notes to campaign donors likewise does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. The State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U. S. 380, 400. The State should not be punished for leaving open more, rather than fewer, avenues of expression, especially when there is no indication of a pretextual motive for the selective restriction of speech. Pp. 448–452.

(c) Canon 7C(1) is also not overinclusive. By any measure, it restricts a narrow slice of speech. It leaves judicial candidates free to discuss any issue with any person at any time; to write letters, give speeches, and put up billboards; to contact potential supporters in person, on the phone, or online; and to promote their campaigns through the media. Though they cannot ask for money, they can direct their campaign committees to do so.

Yulee concedes that Canon 7C(1) is valid in numerous applications, but she contends that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. This argument misperceives the breadth of the compelling interest underlying Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money. Canon 7C(1) must be narrowly tailored, not "perfectly tailored." *Burson* v. *Freeman*, 504 U. S. 191, 209. The First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Yulee errs in contending that Florida can accomplish its compelling interest through recusal rules and campaign contribution limits. A

rule requiring recusal in every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions, and a flood of postelection recusal motions could exacerbate the very appearance problem the State is trying to solve. As for contribution limits, Florida already applies them to judicial elections, and this Court has never held that adopting such limits precludes a State from pursuing its compelling interests through additional means.

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years, but it is not the Court's place to resolve that enduring debate. The Court's limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity. Pp. 452–457.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part II. BREYER, SOTOMAYOR, and KAGAN, JJ., joined that opinion in full, and GINSBURG, J., joined except as to Part II. BREYER, J., filed a concurring opinion, *post*, p. 457. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined as to Part II, *post*, p. 457. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 462. KENNEDY, J., *post*, p. 474, and ALITO, J., *post*, p. 479, filed dissenting opinions.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Charles A. Rothfeld*, *Michael B. Kimberly*, *Paul W. Hughes*, *Ernest J. Myers*, *Lee W. Marcus*, and *Eugene R. Fidell*.

Barry Richard argued the cause for respondent. With him on the brief was *M. Hope Keating*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Robert Corn-Revere*, *Peter Karanjia*, *Ronald G. London*, *Micah J. Ratner*, *Steven R. Shapiro*, and *Nancy G. Abudu*; for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler*; for Cameron A. Blau by *Christopher Wiest*; and for Randolph Wolfson et al. by *James Bopp*, *Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II.

Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to

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L. Ellman, Solicitor General, and *Paula S. Bickett*, Chief Counsel, Civil Appeals, and by the Attorneys General for their respective States as follows: *Dustin McDaniel* of Arkansas, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Jim Hood* of Mississippi, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenbaum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Marty J. Jackley* of South Dakota, *William H. Sorrell* of Vermont, and *Robert W. Ferguson* of Washington; for the American Bar Association by *William C. Hubbard*, *Joshua G. Vincent*, *Steven M. Puiszis*, *Matthew R. Henderson*, and *Adam R. Vaught*; for the Brennan Center for Justice at NYU School of Law et al. by *Randolph S. Sherman*, *Robert M. Grass*, *Wendy Weiser*, *Matthew Menendez*, *Elizabeth Kennedy*, *Brenda Wright*, *Hayley Gorenberg*, and *J. Gerald Hebert*; for the Carter Center by *Boris Bershteyn* and *Martha F. Davis*; for the Conference of Chief Justices by *Igor Timofeyev*, *George T. Patton, Jr.*, and *Karl J. Sandstrom*; for Free Speech for People et al. by *Ronald A. Fein*; for Professors of Law, Economics, and Political Science by *Jessica Ring Amunson*; for Public Citizen, Inc., by *Scott L. Nelson*, *Allison M. Zieve*, *Seth P. Waxman*, *Catherine M. A. Carroll*, *Donald J. Simon*, and *Fred Wertheimer*; for State and Local Judicial Reform Groups by *Paul Titus*, *Nancy Winkelman*, *Roger A. Cooper*, and *Peter Fox*; for Jed Shugerman by *Donald B. Ayer*; for Major B. Harding et al. by *Daniel L. Wallach*; for Norman Dorsen et al. by *Burt Neuborne* and *Mr. Dorsen*, both *pro se*; and for Thomas R. Phillips et al. by *Scott E. Gant*.

treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money. We affirm the judgment of the Florida Supreme Court.

I

A

When Florida entered the Union in 1845, its Constitution provided for trial and appellate judges to be elected by the General Assembly. Florida soon followed more than a dozen of its sister States in transferring authority to elect judges to the voting public. See J. Shugerman, The People's Courts: Pursuing Judicial Independence in America 103–122 (2012). The experiment did not last long in the Sunshine State. The war came, and Florida's 1868 Constitution returned judicial selection to the political branches. Over time, however, the people reclaimed the power to elect the state bench: Supreme Court justices in 1885 and trial court judges in 1942. See Little, An Overview of the Historical Development of the Judicial Article of the Florida Constitution, 19 Stetson L. Rev. 1, 40 (1989).

In the early 1970s, four Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution again. Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee—a process known as "merit selection." Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection. Fla. Const., Art. V, § 10; Hawkins, Perspective on Judicial Merit Retention in Florida, 64 Fla. L. Rev. 1421, 1423–1428 (2012).

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. 281

So. 2d 21 (1973). In its present form, the first sentence of Canon 1 reads, "An independent and honorable judiciary is indispensable to justice in our society." Code of Judicial Conduct for the State of Florida 6 (2014). Canon 1 instructs judges to observe "high standards of conduct" so that "the integrity and independence of the judiciary may be preserved." *Ibid.* Canon 2 directs that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*, at 7. Other provisions prohibit judges from lending the prestige of their offices to private interests, engaging in certain business transactions, and personally participating in soliciting funds for nonprofit organizations. Canons 2B, 5C(3)(b)(i), 5D; *id.*, at 7, 23, 24.

Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

> "A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law." *Id.*, at 38.

Florida statutes impose additional restrictions on campaign fundraising in judicial elections. Contributors may not donate more than $1,000 per election to a trial court candidate or more than $3,000 per retention election to a Supreme Court justice. Fla. Stat. § 106.08(1)(a) (2014). Campaign committee treasurers must file periodic reports

disclosing the names of contributors and the amount of each contribution. § 106.07.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors. An Aid To Understanding Canon 7, pp. 51–58 (2014).

Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1). Brief for American Bar Association as *Amicus Curiae* 4.

B

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the County Court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." App. to Pet. for Cert. 31a. The letter then stated:

> "An early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge', will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support." *Id.*, at 32a.

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee's bid for the bench did not unfold as she had hoped. She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. As relevant here, the Bar charged her with violating Rule 4–8.2(b) of the Rules Regulating the Florida Bar. That Rule requires judicial candidates to comply with applicable provisions of Florida's Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election.* The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding ($1,860). App. to Pet. for Cert. 19a–25a.

The Florida Supreme Court adopted the referee's recommendations. 138 So. 3d 379 (2014). The court explained that Canon 7C(1) "clearly restricts a judicial candidate's speech" and therefore must be "narrowly tailored to serve a compelling state interest." *Id.*, at 384. The court held that the Canon satisfies that demanding inquiry. First, the court reasoned, prohibiting judicial candidates from personally soliciting funds furthers Florida's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." *Ibid.* (internal quotation marks omitted; alteration in original). In the court's view, "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impar-

*Yulee also contended that she had not violated Canon 7C(1), which applies to "a judicial office that is filled by public election between competing candidates," because the incumbent judge had not declared his campaign for reelection at the time she sent her solicitation letter. She has since abandoned that argument.

tiality." *Id.*, at 385. Second, the court concluded that Canon 7C(1) is narrowly tailored to serve that compelling interest because it "'insulate[s] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" *Id.*, at 387 (quoting *Simes* v. *Arkansas Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 588, 247 S. W. 3d 876, 883 (2007)).

The Florida Supreme Court acknowledged that some Federal Courts of Appeals—"whose judges have lifetime appointments and thus do not have to engage in fundraising"—had invalidated restrictions similar to Canon 7C(1). 138 So. 3d, at 386, n. 3. But the court found it persuasive that every State Supreme Court that had considered similar fundraising provisions—along with several Federal Courts of Appeals—had upheld the laws against First Amendment challenges. *Id.*, at 386. Florida's chief justice and one associate justice dissented. *Id.*, at 389. We granted certiorari. 573 U. S. 990 (2014).

II

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. *Stromberg* v. *California*, 283 U. S. 359, 368 (1931). The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest. See *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 798 (1988); *id.*, at 810 (Rehnquist, C. J., dissenting). As we have explained, noncommercial solicitation "is characteristically intertwined with informative

and perhaps persuasive speech." *Id.*, at 796 (majority opinion) (quoting *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 632 (1980)). Applying a lesser standard of scrutiny to such speech would threaten "the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 161 (1939).

The principles underlying these charitable solicitation cases apply with even greater force here. Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her "message out to the public." App. to Pet. for Cert. 32a. As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. See *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989). Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 774 (2002).

Although the Florida Supreme Court upheld Canon 7C(1) under strict scrutiny, the Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be "closely drawn" to match a "sufficiently important interest." *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). The "closely drawn" standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor's "freedom of political association." *Id.*, at 24–25. Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. And the Florida Bar can hardly dispute that the Canon infringes Yulee's freedom to discuss candidates and public issues—namely, herself and her qualifica-

tions to be a judge. The Bar's call to import the "closely drawn" test from the contribution limit context into a case about solicitation therefore has little avail.

As several of the Bar's *amici* note, we applied the "closely drawn" test to solicitation restrictions in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 136 (2003), overruled in part by *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010). But the Court in that case determined that the solicitation restrictions operated primarily to prevent circumvention of the contribution limits, which were the subject of the "closely drawn" test in the first place. 540 U. S., at 138–139. *McConnell* offers no help to the Bar here, because Florida did not adopt Canon 7C(1) as an anticircumvention measure.

In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that "it is the rare case" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion). But those cases do arise. See *ibid.*; *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 25–39 (2010); *McConnell*, 540 U. S., at 314 (opinion of KENNEDY, J.); cf. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237 (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' "). Here, Canon 7C(1) advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." 138 So. 3d, at 385. The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 395 (2d ed. 1914). The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will," 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908), and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich," 28 U. S. C. § 453. Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 889 (2009) (internal quotation marks omitted). The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to re-

spect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). It follows that public perception of judicial integrity is "a state interest of the highest order." *Caperton*, 556 U. S., at 889 (quoting *White*, 536 U. S., at 793 (KENNEDY, J., concurring)).

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. *Post*, at 462–463 (opinion of SCALIA, J.). We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize "new categories of unprotected speech." *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791 (2011); see *post*, at 462. But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. 536 U. S., at 783; *id.*, at 805 (GINSBURG, J., dissenting). Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such "responsiveness is key to the very concept of self-governance through elected officials." *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185, 227 (2014) (plurality opinion). The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his support-

ers, or provide any special consideration to his campaign donors. A judge instead must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or controul him but God and his conscience." Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). As in *White*, therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *White*, 536 U. S., at 790 (O'Connor, J., concurring). In the eyes of the public, a judge's personal solicitation could result (even unknowingly) in "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting. See A. Bannon, E. Velasco, L. Casey, & L. Reagan, The New Politics of Judicial Elections: 2011–12, p. 15 (2013).

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. As the Supreme Court of Oregon explained, "the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary."

In re Fadeley, 310 Ore. 548, 565, 802 P. 2d 31, 41 (1990). Moreover, personal solicitation by a judicial candidate "inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes*, 368 Ark., at 585, 247 S. W. 3d, at 882. Potential litigants then fear that "the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions." *Ibid.* A State's decision to elect its judges does not require it to tolerate these risks. The Florida Bar's interest is compelling.

B

Yulee acknowledges the State's compelling interest in judicial integrity. She argues, however, that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position. In particular, she notes that Canon 7C(1) allows a judge's campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge's personal solicitation. Yulee also points out that Florida permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U. S., at 802. In a textbook illustration of that principle, we invalidated a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 543–547 (1993).

Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy. *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 104–105 (1979).

Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 387 (1992) (internal quotation marks omitted). A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests. *Burson*, 504 U. S., at 207; see *McConnell*, 540 U. S., at 207–208; *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 511–512 (1981) (plurality opinion); *Buckley*, 424 U. S., at 105.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. See *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52–53 (1994). Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of under-

mining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom* v. *Roemer*, 501 U. S. 380, 400 (1991). They belie the principal dissent's suggestion that Canon 7C(1) reflects general "hostility toward judicial campaigning" and has "nothing to do with the appearances created by judges' asking for money." *Post*, at 472. Nothing?

The principal dissent also suggests that Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans. *Post*, at 470–471. But Florida law treats a personal "gift" or "loan" as a campaign contribution if the donor makes it "for the purpose of influencing the results of an election," Fla. Stat. § 106.011(5)(a), and Florida's Judicial Qualifications Commission has determined that a judicial candidate violates Canon 7C(1) by personally soliciting such a loan. See *In re Turner*, 76 So. 3d 898, 901–902 (Fla. 2011). In any event, Florida can ban personal solicitation of campaign funds by judicial candidates without making them obey a comprehensive code to leading an ethical life. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way.* See *Florida Star* v. *B. J. F.*, 491 U. S. 524, 540 (1989). The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. *Post*, at 470–471. Even under strict scrutiny, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson*, 504 U. S., at 207 (State's regulation of political solicitation around a polling place, but not charitable or

commercial solicitation, was not fatally underinclusive under strict scrutiny).

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

C

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000).

By any measure, Canon 7C(1) restricts a narrow slice of speech. A reader of JUSTICE KENNEDY's dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving "state censorship" that "locks the First Amendment out," imposes a "gag" on candidates, and inflicts "dead weight" on a "silenced" public debate. *Post*, at 475–476. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so. Whatever else may be said of the Canon, it is surely not

a "wildly disproportionate restriction upon speech." *Post*, at 462 (SCALIA, J., dissenting).

Indeed, Yulee concedes—and the principal dissent seems to agree, *post*, at 468—that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. Reply Brief 18. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." *Ibid.* She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. Tr. of Oral Arg. 7; cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (permitting State to ban in person solicitation of clients by lawyers). But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the pub-

lic impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." *Burson*, 504 U. S., at 209. The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. See *id.*, at 210. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who "sit as their judges." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991).

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every

case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of post-election recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. *Caperton*, 556 U. S., at 891 (ROBERTS, C. J., dissenting). Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. Fla. Stat. § 106.08(1)(a). A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. Even if Florida decreased its contribution limit, the appearance that judges who personally solicit funds might improperly favor their campaign donors would remain. Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means. And in any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way. The principal dissent faults us for not answering a slew of broader questions, such as whether Florida

may cap a judicial candidate's spending or ban independent expenditures by corporations. *Post*, at 469. Yulee has not asked these questions, and for good reason—they are far afield from the narrow regulation actually at issue in this case.

We likewise have no cause to consider whether the citizens of States that elect their judges have decided anything about the "oracular sanctity of judges" or whether judges are due "a hearty helping of humble pie." *Post*, at 472–473. The principal dissent could be right that the decision to adopt judicial elections "probably springs," at least in part, from a desire to make judges more accountable to the public, *post*, at 472, although the history on this matter is more complicated. See Shugerman, The People's Courts, at 5 (arguing that States adopted judicial elections to increase judicial independence). In any event, it is a long way from general notions of judicial accountability to the principal dissent's view, which evokes nothing so much as Delacroix's painting of Liberty leading a determined band of *citoyens*, this time against a robed aristocracy scurrying to shore up the ramparts of the judicial castle through disingenuous ethical rules. We claim no similar insight into the People's passions, hazard no assertions about ulterior motives of those who promulgated Canon 7C(1), and firmly reject the charge of a deceptive "pose of neutrality" on the part of those who uphold it. *Post*, at 472.

* * *

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." The Federalist No. 78, at 465. Jefferson thought that making judges "dependent on none but themselves" ran counter to the principle of "a government founded on the public will." 12 The Works of Thomas Jef-

ferson 5 (P. Ford ed. 1905). The federal courts reflect the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining "the public's respect . . . and a reserve of public goodwill, without becoming subservient to public opinion." Rehnquist, Judicial Independence, 38 U. Rich. L. Rev. 579, 596 (2004).

It is not our place to resolve this enduring debate. Our limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State's decision to elect judges does not compel it to compromise public confidence in their integrity.

The judgment of the Florida Supreme Court is

Affirmed.

JUSTICE BREYER, concurring.

As I have previously said, I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. See, *e. g.*, *United States* v. *Alvarez*, 567 U. S. 709, 730–731 (2012) (opinion concurring in judgment); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (concurring opinion). On that understanding, I join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins as to Part II, concurring in part and concurring in the judgment.

I

I join the Court's opinion save for Part II. As explained in my dissenting opinion in *Republican Party of Minnesota* v. *White*, 536 U. S. 765, 803 (2002), I would not apply exacting

scrutiny to a State's endeavor sensibly to "differentiate elections for political offices . . . , from elections designed to select those whose office it is to administer justice without respect to persons," *id.*, at 805.

II

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. "Judges," the Court rightly recognizes, "are not politicians," *ante*, at 437, so "States may regulate judicial elections differently than they regulate political elections," *ante*, at 446. And because "the role of judges differs from the role of politicians," *ibid.*, this Court's "precedents applying the First Amendment to political elections [should] have little bearing" on elections to judicial office, *ante*, at 447.

The Court's recent campaign-finance decisions, trained on political actors, should not hold sway for judicial elections. In *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), the Court invalidated a campaign-finance restriction designed to check the outsized influence of moneyed interests in politics. Addressing the Government's asserted interest in preventing "influence over or access to elected officials," *id.*, at 359, the Court observed that "[f]avoritism and influence" are inevitable "in *representative* politics," *ibid.* (quoting *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 297 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part); emphasis added). A plurality of the Court responded similarly in *McCutcheon* v. *Federal Election Comm'n*, 572 U. S. 185 (2014), when it addressed the prospect that wealthy donors would have ready access to, and could therefore influence, elected policymakers. "[A] central feature of democracy," the plurality maintained, is "that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.*, at 192.

For reasons spelled out in the dissenting opinions in *Citizens United* and *McCutcheon*, I would have upheld the legislation there at issue. But even if one agrees with those judgments, they are geared to elections for representative posts, and should have "little bearing" on judicial elections. *Ante*, at 447. "Favoritism," *i. e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain. See *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). Unlike politicians, judges are not "expected to be responsive to [the] concerns" of constituents. *McCutcheon*, 572 U. S., at 192 (plurality opinion). Instead, "it is the business of judges to be indifferent to popularity." *Chisom* v. *Roemer*, 501 U. S. 380, 401, n. 29 (1991) (internal quotation marks omitted).

States may therefore impose different campaign-finance rules for judicial elections than for political elections. Experience illustrates why States may wish to do so. When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in campaigns for judicial office will yield similar returns. Elected judges understand this dynamic. As Ohio Supreme Court Justice Paul Pfeifer put it: "Whether they succeed or not," campaign contributors "mean to be buying a vote." Liptak & Roberts, Campaign Cash Mirrors a High Court's Rulings, N. Y. Times, Oct. 1, 2006, pp. A1, A22 (internal quotation marks omitted).

In recent years, moreover, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not toe a party line or are alleged to be out of step with public opinion. Following the Iowa Supreme Court's 2009 invalidation of the State's same-sex marriage ban, for example, national

organizations poured money into a successful campaign to remove three justices from that court. J. Shugerman, The People's Courts: Pursuing Judicial Independence in America 3 (2012). Attack advertisements funded by issue or politically driven organizations portrayed the justices as political actors; they lambasted the Iowa Supreme Court for "usurp[ing] the will of voters." A. Skaggs, M. da Silva, L. Casey, & C. Hall, The New Politics of Judicial Elections 2009–10, p. 9 (C. Hall ed. 2011) (internal quotation marks omitted).

Similarly portraying judges as belonging to another political branch, huge amounts have been spent on advertisements opposing retention of judges because they rendered unpopular decisions in favor of criminal defendants. D. Goldberg, S. Samis, E. Bender, & R. Weiss, The New Politics of Judicial Elections 2004, pp. 5, 10–11 (J. Rutledge ed. 2005) (hereinafter Goldberg). In North Carolina, for example, in 2014, a political action committee aired "a widely condemned TV spot accusing [North Carolina Supreme Court Justice Robin] Hudson of being 'soft' on child-molesters." Oliphant, When Judges Go Courting, National Journal Magazine, Oct. 18, 2014, p. 28. And in West Virginia, as described in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 873 (2009), coal executive Don Blankenship lavishly funded a political action committee called "And For The Sake Of The Kids." That group bought advertisements accusing Justice Warren McGraw of freeing a "child rapist" and allowing that "rapist" to "work as a janitor at a West Virginia school." Goldberg 4; see A. Bannon, E. Velasco, L. Casey, & L. Reagan, The New Politics of Judicial Elections 2011–12, p. 22 (L. Kinney and P. Hardin eds. 2013) (reporting that in 2011 and 2012, interest-oriented groups were 22 times more likely to purchase an "attack" advertisement than were judicial candidates themselves).

Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial inde-

pendence. Numerous studies report that the money pressure groups spend on judicial elections "can affect judicial decision-making across a broad range of cases." Brief for Professors of Law, Economics, and Political Science as *Amici Curiae* 14 (hereinafter Professors' Brief), see *id.*, at 5–17; J. Shepherd & M. Kang, Skewed Justice 1 (2014), available at http://skewedjustice.org (All Internet materials as visited Apr. 24, 2015, and included in Clerk of Court's case file) (finding that a recent "explosion in spending on television attack advertisements . . . has made courts less likely to rule in favor of defendants in criminal appeals").

How does the electorate perceive outsized spending on judicial elections? Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges' campaigns have at least "some influence" on judicial decisionmaking. See Professors' Brief 23 (citing polls). Disquieting as well, in response to a recent poll, 87% of voters stated that advertisements purchased by interest groups during judicial elections can have either "some" or "a great deal of influence" on an elected "judge's later decisions." Justice at Stake/Brennan Center National Poll 3, Question 9 (Oct. 22–24, 2013) (conducted by 20/20 Insight LLC), available at http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf.

"A State's decision to elect its judges does not require it to tolerate these risks." *Ante*, at 448. What may be true of happy families, L. Tolstoy, Anna Karenina 1 (R. Pevear and L. Volokhonsky transls. 2000) ("All happy families are alike"), or of roses, G. Stein, Sacred Emily, in Geography and Plays 178, 187 (1922) (reprint 1968) ("Rose is a rose is a rose is a rose"), does not hold true in elections of every kind. States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the

unique setting of an elected judiciary." *White*, 536 U. S., at 821 (GINSBURG, J., dissenting).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

An ethics canon adopted by the Florida Supreme Court bans a candidate in a judicial election from asking anyone, under any circumstances, for a contribution to his campaign. Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech. Intent upon upholding the Canon, however, the Court flattens one settled First Amendment principle after another.

I

The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content. One need not equate judges with politicians to see that this principle does not grow weaker merely because the censored speech is a judicial candidate's request for a campaign contribution. Our cases hold that speech enjoys the full protection of the First Amendment unless a widespread and longstanding tradition ratifies its regulation. *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011). No such tradition looms here. Georgia became the first State to elect its judges in 1812, and judicial elections had spread to a large majority of the States by the time of the Civil War. *Republican Party of Minn.* v. *White*, 536 U. S. 765, 785 (2002). Yet there appears to have been no regulation of judicial candidates' speech throughout the 19th and early 20th centuries. *Ibid.* The American Bar Association first proposed ethics rules concerning speech of judicial candidates in 1924, but these rules did not achieve widespread adoption until after the Second World War. *Id.*, at 786.

Rules against soliciting campaign contributions arrived more recently still. The ABA first proposed a canon advis-

ing against it in 1972, and a canon prohibiting it only in 1990. See Brief for American Bar Association as *Amicus Curiae* 2–4. Even now, 9 of the 39 States that elect judges allow judicial candidates to ask for campaign contributions. See *id.*, at 4. In the absence of any long-settled custom about judicial candidates' speech in general or their solicitations in particular, we have no basis for relaxing the rules that normally apply to laws that suppress speech because of content.

One likewise need not equate judges with politicians to see that the electoral setting calls for all the more vigilance in ensuring observance of the First Amendment. When a candidate asks someone for a campaign contribution, he tends (as the principal opinion acknowledges) also to talk about his qualifications for office and his views on public issues. *Ante*, at 443 (plurality opinion). This expression lies at the heart of what the First Amendment is meant to protect. In addition, banning candidates from asking for money personally "favors some candidates over others—incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders." *Carey* v. *Wolnitzek*, 614 F. 3d 189, 204 (CA6 2010). This danger of legislated (or judicially imposed) favoritism is the very reason the First Amendment exists.

Because Canon 7C(1) restricts fully protected speech on the basis of content, it presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny—that is to say, only if it shows that the Canon is narrowly tailored to serve a compelling interest. I do not for a moment question the Court's conclusion that States have different compelling interests when regulating judicial elections than when regulating political ones. Unlike a legislator, a judge must be impartial—without bias for or against any party or attorney who comes before him. I accept for the

sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not. But Canon 7C(1) does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate's court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment. This case should have been just that straightforward.

II

The Court concludes that Florida may prohibit personal solicitations by judicial candidates as a means of preserving "public confidence in the integrity of the judiciary." *Ante*, at 444. It purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny.

A

The first sign that mischief is afoot comes when the Court describes Florida's compelling interest. The State must first identify its objective with precision before one can tell whether that interest is compelling and whether the speech restriction narrowly targets it. In *White*, for example, the Court did not allow a State to invoke hazy concerns about judicial impartiality in justification of an ethics rule against judicial candidates' announcing their positions on legal issues. 536 U. S., at 775. The Court instead separately analyzed the State's concerns about judges' bias against parties, preconceptions on legal issues, and openmindedness, and ex-

plained why each concern (and each for a different reason) did not suffice to sustain the rule. *Id.*, at 775–780.

In stark contrast to *White*, the Court today relies on Florida's invocation of an ill-defined interest in "public confidence in judicial integrity." The Court at first suggests that "judicial integrity" involves the "ability to administer justice without fear or favor." *Ante*, at 445. As its opinion unfolds, however, today's concept of judicial integrity turns out to be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." 12 The Works of Thomas Jefferson 137 (P. Ford ed. 1905). When the Court explains how solicitation undermines confidence in judicial integrity, integrity starts to sound like saintliness. It involves independence from any "'*possible* temptation'" that "'*might* lead'" the judge, "even unknowingly," to favor one party. *Ante*, at 447 (emphasis added). When the Court turns to distinguishing in-person solicitation from solicitation by proxy, the any-possible-temptation standard no longer helps and thus drops out. The critical factors instead become the "pressure" a listener feels during a solicitation and the "appearance that the candidate will remember who says yes, and who says no." *Ante*, at 450. But when it comes time to explain Florida's decision to allow candidates to write thank-you notes, the "appearance that the candidate . . . remember[s] who says yes" gets nary a mention. *Ibid.* And when the Court confronts Florida's decision to prohibit mass-mailed solicitations, concern about pressure fades away. *Ante*, at 453. More outrageous still, the Court at times molds the interest in the perception that judges have integrity into an interest in the perception that judges do not solicit—for example when it says, "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern." *Ante*, at 454. This is not strict scrutiny; it is sleight of hand.

B

The Court's twistifications have not come to an end; indeed, they are just beginning. In order to uphold Canon 7C(1) under strict scrutiny, Florida must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective. The State "bears the risk of uncertainty," so "ambiguous proof will not suffice." *Entertainment Merchants*, 564 U. S., at 799–800. In an arresting illustration, this Court held that a law punishing lies about winning military decorations like the Congressional Medal of Honor failed exacting scrutiny, because the Government could not satisfy its "heavy burden" of proving that "the public's general perception of military awards is diluted by false claims." *United States* v. *Alvarez*, 567 U. S. 709, 726 (2012) (plurality opinion).

Now that we have a case about the public's perception of judicial honor rather than its perception of military honors, the Justices of this Court change the rules. The Court announces, on the basis of its "intuiti[on]," that allowing personal solicitations will make litigants worry that "'judges' decisions may be motivated by the desire to repay campaign contributions.'" *Ante*, at 445, 447. But this case is not about whether Yulee has the right to receive campaign contributions. It is about whether she has the right to *ask* for campaign contributions that Florida's statutory law already allows her to receive. Florida bears the burden of showing that banning *requests* for lawful contributions will improve public confidence in judges—not just a little bit, but significantly, because "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Entertainment Merchants*, *supra*, at 804, n. 9.

Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does common

sense make this happy forecast obvious. The concept of judicial integrity "dates back at least eight centuries," *ante*, at 445, and judicial elections in America date back more than two centuries, *supra*, at 462—but rules against personal solicitations date back only to 1972, *supra*, at 462–463. The peaceful coexistence of judicial elections and personal solicitations for most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions than elsewhere. And in any event, if candidates' appeals for money are " 'characteristically intertwined' " with discussion of qualifications and views on public issues, *ante*, at 442 (plurality opinion), how can the Court be so sure that the public will regard them as improprieties rather than as legitimate instances of campaigning? In the final analysis, Florida comes nowhere near making the convincing demonstration required by our cases that the speech restriction in this case substantially advances its objective.

C

But suppose we play along with the premise that prohibiting solicitations will significantly improve the public reputation of judges. Even then, Florida must show that the ban restricts no more speech than necessary to achieve the objective. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989).

Canon 7C(1) falls miles short of satisfying this requirement. The Court seems to accept Florida's claim that solicitations erode public confidence by creating the perception that judges are selling justice to lawyers and litigants. *Ante*, at 445. Yet the Canon prohibits candidates from asking for money from *anybody*—even from someone who is neither lawyer nor litigant, even from someone who (because of recusal rules) cannot possibly appear before the candidate as lawyer or litigant. Yulee thus may not call up an old friend, a

cousin, or even her parents to ask for a donation to her campaign. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

No less important, Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular—mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary. Consider online solicitations. They avoid "'the spectacle of lawyers or potential litigants directly handing over money to judicial candidates,'" *ante*, at 447. People who come across online solicitations do not feel "pressure" to comply with the request, *ante*, at 450. Nor does the candidate's signature on the online solicitation suggest "that the candidate will remember who says yes, and who says no," *ibid.* Yet Canon 7C(1) prohibits these and similar solicitations anyway. This tailoring is as narrow as the Court's scrutiny is strict.

Perhaps sensing the fragility of the initial claim that *all* solicitations threaten public confidence in judges, the Court argues that "the lines Yulee asks [it] to draw are unworkable." *Ante*, at 453. That is a difficulty of the Court's own imagination. In reality, the Court could have chosen from a whole spectrum of workable rules. It could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate's court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online). The Supreme Court of Florida has made similar accommoda-

tions in other settings. It allows sitting judges to solicit memberships in civic organizations if (among other things) the solicitee is not "likely ever to appear before the court on which the judge serves." Code of Judicial Conduct for the State of Florida 27 (2014) (Judicial Conduct Code). And it allows sitting judges to accept gifts if (among other things) "the donor is not a party or other person . . . whose interests have come or are likely to come before the judge." *Id.*, at 24. It is not too much to ask that the State show election speech similar consideration.

The Court's accusation of unworkability also suffers from a bit of a pot-kettle problem. Consider the many real-world questions left open by today's decision. Does the First Amendment permit restricting a candidate's appearing at an event where somebody *else* asks for campaign funds on his behalf? See Florida Judicial Ethics Advisory Committee Opinion No. 2012–14 (JEAC Op.). Does it permit prohibiting the candidate's *family* from making personal solicitations? See *ibid.* Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate's name does not appear next to the request? See JEAC Op. No. 2008–11. More broadly, could Florida ban thank-you notes to donors? Cap a candidate's campaign spending? Restrict independent spending by people other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by "judicial integrity"? For the Court to wring its hands about workability under these circumstances is more than one should have to bear.

D

Even if Florida could show that banning all personal appeals for campaign funds is necessary to protect public confidence in judicial integrity, the Court must overpower one

last sentinel of free speech before it can uphold Canon 7C(1). Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas. The state ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. Applying this principle, we invalidated a law that prohibited picketing dwellings but made an exception for picketing about labor issues; the State could not show that labor picketing harmed its asserted interest in residential privacy any less than other kinds of picketing. *Carey* v. *Brown*, 447 U. S. 455, 464–465 (1980). In another case, we set aside a ban on showing movies containing nudity in drive-in theaters, because the government did not demonstrate that movies with nude scenes would distract passing drivers any more than, say, movies with violent scenes. *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 214–215 (1975).

The Court's decision disregards these principles. The Court tells us that "all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary." *Ante*, at 454. But Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. The part of the Canon challenged here prohibits personal pleas for "campaign funds," and the Canon elsewhere prohibits personal appeals to attorneys for "publicly stated support." Judicial Conduct Code 38. So although Canon 7C(1) prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not. Could anyone say with a straight face that it

looks *worse* for a candidate to say "please give my campaign $25" than to say "please give *me* $25"? *

Fumbling around for a fig-leaf, the Court says that "the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Ante*, at 449. This analysis elides the distinction between selectivity on the basis of content and selectivity on other grounds. Because the First Amendment does not prohibit underinclusiveness as such, lawmakers may target a problem only at certain times or in certain places. Because the First Amendment *does* prohibit content discrimination as such, lawmakers may *not* target a problem only in certain messages. Explaining this distinction, we have said that the First Amendment would allow banning obscenity "only in certain media or markets" but would preclude banning "only that obscenity which includes offensive political messages." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 387–388 (1992) (emphasis deleted). This case involves selectivity on the basis of content. The Florida Supreme Court has decided to eliminate the appearances associated with "personal appeals for money," *ante*, at 453, when the appeals seek money for a campaign but not when the appeals seek money for other purposes. That distinction violates the First Amendment. See *Erznoznik*, *supra*, at 215.

Even on the Court's own terms, Canon 7C(1) cannot stand. The Court concedes that "underinclusiveness can raise 'doubts about whether the government is in fact pursuing

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*Neither Florida nor the Court identifies any other ethics rule that would prevent candidates like Yulee from asking for favors unrelated to elections, and I know of none. The Supreme Court of Florida has adopted various rules restricting *sitting judges'* solicitation and acceptance of favors, but these rules do not bind challengers like Yulee. See, *e. g.*, Canon 4D(2)(a), Judicial Conduct Code 18–19 ("A judge as [a member or officer of an organization] . . . shall not personally or directly participate in the solicitation of funds . . . "); Canon 5D(5), *id.*, at 24 ("A judge shall not accept . . . a gift, bequest, favor or loan . . . "); JEAC Op. No. 2010–14 ("[J]udicial candidates are only governed by Canon 7, and not by the remainder of the Code of Judicial Conduct").

the interest it invokes.' " *Ante*, at 448. Canon 7C(1)'s scope suggests that it has nothing to do with the appearances created by judges' asking for money, and everything to do with hostility toward judicial campaigning. How else to explain the Florida Supreme Court's decision to ban *all* personal appeals for campaign funds (even when the solicitee could never appear before the candidate), but to tolerate appeals for other kinds of funds (even when the solicitee will surely appear before the candidate)? It should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections—preferring instead a system in which (surprise!) a committee of lawyers proposes candidates from among whom the Governor must make his selection. See *White*, 536 U. S., at 787.

The Court tries to strike a pose of neutrality between appointment and election of judges, but no one should be deceived. A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them. When a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges, their immunity from the (shudder!) indignity of begging for funds, and their exemption from those shadows of impropriety that fall over the proletarian public officials who must run for office. A free society, accustomed to electing its rulers, does not much care whether the rulers operate through statute and executive order, or through judicial distortion of statute, executive order, and constitution. The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers—and (it must be said) from just a deep-down feeling that members of the Third Branch will

profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People. (It should not be thought that I myself harbor such irreverent and revolutionary feelings; but I think it likely—and year by year more likely—that those who favor the election of judges do so.) In any case, hostility to campaigning by judges entitles the people of Florida to amend their Constitution to replace judicial elections with the selection of judges by lawyers' committees; it does not entitle the Florida Supreme Court to adopt, or this Court to endorse, a rule of judicial conduct that abridges candidates' speech in the judicial elections that the Florida Constitution prescribes.

* * *

This Court has not been shy to enforce the First Amendment in recent Terms—even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals. See *United States* v. *Stevens*, 559 U. S. 460 (2010); *Entertainment Merchants*, 564 U. S. 786; *Alvarez*, 567 U. S. 709. Who would have thought that the same Court would today exert such heroic efforts to save so plain an abridgement of the freedom of speech? It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

I respectfully dissent.

JUSTICE KENNEDY, dissenting.

The dissenting opinion by JUSTICE SCALIA gives a full and complete explanation of the reasons why the Court's opinion contradicts settled First Amendment principles. This separate dissent is written to underscore the irony in the Court's having concluded that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue. It is written to underscore, too, the irony in the Court's having weakened the rigors of the First Amendment in a case concerning elections, a paradigmatic forum for speech and a process intended to protect freedom in so many other manifestations.

First Amendment protections are both personal and structural. Free speech begins with the right of each person to think and then to express his or her own ideas. Protecting this personal sphere of intellect and conscience, in turn, creates structural safeguards for many of the processes that define a free society. The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court to allow unprecedented content-based restrictions on speech. See *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971) (the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns for political office"). As James Madison observed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. [A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter to William T. Barry (Aug. 4, 1822), in J. Madison, Writings 790 (J. Rakove ed. 1999). The Court's decision in this case imperils the content neutrality essential both for individual speech and the election process.

With all due respect for the Court, it seems fair and necessary to say its decision rests on two premises, neither one correct. One premise is that in certain elections—here an

election to choose the best qualified judge—the public lacks the necessary judgment to make an informed choice. Instead, the State must protect voters by altering the usual dynamics of free speech. The other premise is that since judges should be accorded special respect and dignity, their election can be subject to certain content-based rules that would be unacceptable in other elections. In my respectful view neither premise can justify the speech restriction at issue here. Although States have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal. See *Republican Party of Minn.* v. *White*, 536 U. S. 765, 788 (2002).

While any number of troubling consequences will follow from the Court's ruling, a simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State.

The First Amendment consequences of the Court's ruling do not end with its denial of the individual's right to speak. For the very purpose of the candidate's fundraising was to facilitate a larger speech process: an election campaign. By

cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced.

Elections are a paradigmatic forum for speech. Though present day campaign rhetoric all too often might thwart or obscure deliberative discourse, the idea of elections is that voters can engage in, or at least consider, a principled debate. That debate can be a means to find consensus for a civic course that is prudent and wise. This pertains both to issues and to the choice of elected officials. The First Amendment seeks to make the idea of discussion, open debate, and consensus building a reality. But the Court decides otherwise. The Court locks the First Amendment out.

Whether an election is the best way to choose a judge is itself the subject of fair debate. But once the people of a State choose to have elections, the First Amendment protects the candidate's right to speak and the public's ensuing right to open and robust debate. See *ibid.* One advantage of judicial elections is the opportunity offered for the public to become more knowledgeable about their courts and their law. This might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds. Yet now that teaching process is hindered by state censorship. By allowing the State's speech restriction, the Court undermines the educational process that free speech in elections should facilitate.

It is not within our Nation's First Amendment tradition to abridge speech simply because the government believes a question is too difficult or too profound for voters. If the State is concerned about unethical campaign practices, it need not revert to the assumption that voters themselves are insensitive to ethics. Judicial elections were created to enable citizens to decide for themselves which judges are

best qualified and which are most likely to "stand by the constitution of the State against the encroachment of power." Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York 672 (1846). The Court should not now presume citizens are unequipped for that task when it comes to judging for themselves who should judge them.

If there is concern about principled, decent, and thoughtful discourse in election campaigns, the First Amendment provides the answer. That answer is more speech. See, *e. g.*, *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) (when the government objects to speech, "the remedy to be applied is more speech, not enforced silence"). For example, candidates might themselves agree to appoint members of a panel charged with periodic evaluation of campaign statements, candor, and fairness. Those evaluations could be made public. And any number of private organizations or voter groups seeking to evaluate campaign rhetoric could do the same. See *White*, *supra*, at 795 (KENNEDY, J. concurring).

Modern communication technologies afford voters and candidates an unparalleled opportunity to engage in the campaign and election process. These technologies may encourage a discourse that is principled and informed. The Internet, in particular, has increased in a dramatic way the rapidity and pervasiveness with which ideas may spread. Whether as a result of disclosure laws or a candidate's voluntary decision to make the campaign transparent, the Internet can reveal almost at once how a candidate sought funds; who the donors were; and what amounts they gave. Indeed, disclosure requirements offer a powerful, speech-enhancing method of deterring corruption—one that does not impose limits on how and when people can speak. See *Doe* v. *Reed*, 561 U. S. 186, 199 (2010) ("Public disclosure also promotes transparency and accountability in the electoral

process to an extent other measures cannot"). Based on disclosures the voters can decide, among other matters, whether the public is well served by an elected judiciary; how each candidate defines appropriate campaign conduct (which may speak volumes about his or her judicial demeanor); and what persons and groups support or oppose a particular candidate. See *Buckley* v. *Valeo*, 424 U. S. 1, 67 (1976) (*per curiam*). With detailed information about a candidate's practices in soliciting funds, voters may be better informed in choosing those judges who are prepared to do justice "without fear or favor." 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908). The speech the Court now holds foreclosed might itself have been instructive in this regard, and it could have been open to the electorate's scrutiny. Judicial elections, no less than other elections, presuppose faith in democracy. Judicial elections are no exception to the premise that elections can teach.

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. As JUSTICE SCALIA well explains, the state law at issue fails strict scrutiny for any number of reasons. The candidate who is not wealthy or well connected cannot ask even a close friend or relative for a bit of financial help, despite the lack of any increased risk of partiality and despite the fact that disclosure laws might be enacted to make the solicitation and support public. This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by JUSTICE SCALIA, it is necessary for me to file this respectful dissent.

JUSTICE ALITO, dissenting.

I largely agree with what I view as the essential elements of the dissents filed by JUSTICES SCALIA and KENNEDY. The Florida rule before us regulates speech that is part of the process of selecting those who wield the power of the State. Such speech lies at the heart of the protection provided by the First Amendment. The Florida rule regulates that speech based on content and must therefore satisfy strict scrutiny. This means that it must be narrowly tailored to further a compelling state interest. Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest.

Indeed, this rule is about as narrowly tailored as a burlap bag. It applies to all solicitations made in the name of a candidate for judicial office—including, as was the case here, a mass mailing. It even applies to an ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.

When petitioner sent out a form letter requesting campaign contributions, she was well within her First Amendment rights. The Florida Supreme Court violated the Constitution when it imposed a financial penalty and stained her record with a finding that she had engaged in unethical conduct. I would reverse the judgment of the Florida Supreme Court.

Syllabus

MACH MINING, LLC *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

No. 13–1019. Argued January 13, 2015—Decided April 29, 2015

Before suing an employer for employment discrimination under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC or Commission) must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U. S. C. § 2000e–5(b). Once the Commission determines that conciliation has failed, it may file suit in federal court. § 2000e–5(f)(1). However, "[n]othing said or done during" conciliation may be "used as evidence in a subsequent proceeding without written consent of the persons concerned." § 2000e–5(b).

After investigating a sex discrimination charge against petitioner Mach Mining, LLC, respondent EEOC determined that reasonable cause existed to believe that the company had engaged in unlawful hiring practices. The Commission sent a letter inviting Mach Mining and the complainant to participate in informal conciliation proceedings and notifying them that a representative would be contacting them to begin the process. About a year later, the Commission sent Mach Mining another letter stating that it had determined that conciliation efforts had been unsuccessful. The Commission then sued Mach Mining in federal court. In its answer, Mach Mining alleged that the Commission had not attempted to conciliate in good faith. The Commission countered that its conciliation efforts were not subject to judicial review and that, regardless, the two letters it sent to Mach Mining provided adequate proof that it had fulfilled its statutory duty. The District Court agreed that it could review the adequacy of the Commission's efforts, but granted the Commission leave to immediately appeal. The Seventh Circuit reversed, holding that the Commission's statutory conciliation obligation was unreviewable.

Held:

1. Courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation. This Court has recognized a "strong presumption" that Congress means to allow judicial review of administrative action. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670. That presumption is rebuttable when a statute's language or structure demonstrates that Congress intended an

agency to police itself. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351. But nothing rebuts that presumption here.

By its choice of language, Congress imposed a mandatory duty on the EEOC to attempt conciliation and made that duty a precondition to filing a lawsuit. Such compulsory prerequisites are routinely enforced by courts in Title VII litigation. And though Congress gave the EEOC wide latitude to choose which "informal methods" to use, it did not deprive courts of judicially manageable criteria by which to review the conciliation process. By its terms, the statutory obligation to attempt conciliation necessarily entails communication between the parties concerning the alleged unlawful employment practice. The statute therefore requires the EEOC to notify the employer of the claim and give the employer an opportunity to discuss the matter. In enforcing that statutory condition, a court applies a manageable standard. Pp. 486–489.

2. The appropriate scope of judicial review of the EEOC's conciliation activities is narrow, enforcing only the EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance. This limited review respects the expansive discretion that Title VII gives the EEOC while still ensuring that it follows the law.

The Government's suggestion that review be limited to checking the facial validity of its two letters to Mach Mining falls short of Title VII's demands. That standard would merely accept the EEOC's word that it followed the law, whereas the aim of judicial review is to verify that the EEOC actually tried to conciliate a discrimination charge. Citing the standard set out in the National Labor Relations Act, Mach Mining proposes review for whether the EEOC engaged in good-faith negotiation, laying out a number of specific requirements to implement that standard. But the NLRA's process-based approach provides a poor analogy for Title VII, which ultimately cares about substantive outcomes and eschews any reciprocal duty to negotiate in good faith. Mach Mining's proposed code of conduct also conflicts with the wide latitude Congress gave the Commission to decide how to conduct and when to end conciliation efforts. And because information obtained during conciliation would be necessary evidence in a good-faith determination proceeding, Mach Mining's brand of review would violate Title VII's confidentiality protections.

The proper scope of review thus matches the terms of Title VII's conciliation provision. In order to comply with that provision, the EEOC must inform the employer about the specific discrimination allegation. Such notice must describe what the employer has done and which employees (or class of employees) have suffered. And the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. A

sworn affidavit from the EEOC stating that it has performed these obligations should suffice to show that it has met the conciliation requirement. Should the employer present concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to resolve that limited dispute. Should it find for the employer, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. Pp. 489–495.

738 F. 3d 171, vacated and remanded.

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

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *R. Lance Witcher* and *David L. Schenberg.*

Nicole A. Saharsky argued the cause for respondent. With her on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Gershengorn*, *P. David Lopez*, *Carolyn L. Wheeler*, and *Gail S. Coleman.**

JUSTICE KAGAN delivered the opinion of the Court.

Before suing an employer for discrimination, the Equal Employment Opportunity Commission (EEOC or Commission) must try to remedy unlawful workplace practices

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*Briefs of *amici curiae* urging reversal were filed for the American Insurance Association by *Gerald L. Maatman, Jr.*, and *Rebecca S. Bjork*; for the Equal Employment Advisory Council et al. by *Rae T. Vann*; and for the Retail Litigation Center, Inc., et al. by *Eric S. Dreiband*, *Shay Dvoretzky*, *Deborah White*, *Karen R. Harned*, *Elizabeth Milito*, *Kate Comerford Todd*, *Warren Postman*, *Prasad Sharma*, and *Richard Pianka*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, and *Rose A. Daly-Rooney* and *Chris Carlsen*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, and *Robert W. Ferguson* of Washington; for the Impact Fund et al. by *Jocelyn D. Larkin*, *Robert L. Schug*, *Meredith Johnson*, and *Michael L. Foreman*; and for Women's Rights Organizations et al. by *Jeremy Heisler*, *Deborah K. Marcuse*, *Andrew C. Melzer*, *Jenifer Rajkumar*, *Michelle Caiola*, and *Christina Brandt-Young*.

through informal methods of conciliation. This case requires us to decide whether and how courts may review those efforts. We hold that a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit. But we find that the scope of that review is narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case.

I

Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 42 U. S. C. § 2000e *et seq.*, sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination. The process generally starts when "a person claiming to be aggrieved" files a charge of an unlawful workplace practice with the EEOC. § 2000e–5(b). At that point, the EEOC notifies the employer of the complaint and undertakes an investigation. See *ibid.* If the Commission finds no "reasonable cause" to think that the allegation has merit, it dismisses the charge and notifies the parties. *Ibid.* The complainant may then pursue her own lawsuit if she chooses. See § 2000e–5(f)(1).

If, on the other hand, the Commission finds reasonable cause, it must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). To ensure candor in those discussions, the statute limits the disclosure and use of the participants' statements: "Nothing said or done during and as a part of such informal endeavors" may be publicized by the Commission or "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* The statute leaves to the EEOC the ultimate decision whether to accept a settlement or instead to bring a lawsuit. So long as "the Commission has been unable to secure from the respondent a conciliation

agreement acceptable to the Commission" itself, the EEOC may sue the employer. § 2000e–5(f)(1).

This case began when a woman filed a charge with the EEOC claiming that petitioner Mach Mining, LLC, had refused to hire her as a coal miner because of her sex. The Commission investigated the allegation and found reasonable cause to believe that Mach Mining had discriminated against the complainant, along with a class of women who had similarly applied for mining jobs. See App. 15. In a letter announcing that determination, the EEOC invited both the company and the complainant to participate in "informal methods" of dispute resolution, promising that a Commission representative would soon "contact [them] to begin the conciliation process." *Id.*, at 16. The record does not disclose what happened next. But about a year later, the Commission sent Mach Mining a second letter, stating that "such conciliation efforts as are required by law have occurred and have been unsuccessful" and that any further efforts would be "futile." *Id.*, at 18–19.

The EEOC then sued Mach Mining in federal district court alleging sex discrimination in hiring. The Commission's complaint maintained that "[a]ll conditions precedent to the institution of this lawsuit"—including an attempt to end the challenged practice through conciliation—"ha[d] been fulfilled." *Id.*, at 22. In its answer, Mach Mining contested that statement, asserting that the EEOC had failed to "conciliat[e] in good faith" prior to filing suit. *Id.*, at 30.

The Commission subsequently moved for summary judgment on that issue, contending that its "conciliation efforts are not subject to judicial review." Motion for Summary Judgment in No. 3:11–cv–00879 (SD Ill.), p. 1. At most, the Commission argued, the court could inspect the EEOC's two letters to Mach Mining to confirm that the EEOC had met its duty to attempt conciliation. See *id.*, at 11, 19. Mach Mining responded by urging the court to consider the overall "reasonable[ness]" of the EEOC's efforts, based on evidence the company would present about the conciliation process.

Memorandum in Opposition to Motion for Partial Summary Judgment in No. 3:11–cv–00879 (SD Ill.), p. 20. The trial court agreed with Mach Mining that it should review whether the Commission had made "a sincere and reasonable effort to negotiate." Civ. No. 11–879 (SD Ill., Jan. 28, 2013), App. to Pet. for Cert. 40a, 2013 WL 319337, *5 (internal quotation marks omitted). At the EEOC's request, the court then authorized an immediate appeal of its ruling. See Civ. No. 11–879 (SD Ill., May 20, 2013), App. to Pet. for Cert. 52a–55a, 2013 WL 2177770, *5–*6; 28 U. S. C. § 1292(b).

The Court of Appeals for the Seventh Circuit reversed, holding that "the statutory directive to attempt conciliation" is "not subject to judicial review." 738 F. 3d 171, 177 (2013). According to the court, that provision entrusts conciliation "solely to the EEOC's expert judgment" and thus provides no "workable standard" of review for courts to apply. *Id.*, at 174, 177. The Seventh Circuit further reasoned that judicial review of the conciliation process would "undermine enforcement of Title VII" by "protract[ing] and complicat[ing]" discrimination suits. *Id.*, at 178–179 (quoting *Doe* v. *Oberweis Dairy*, 456 F. 3d 704, 710 (CA7 2006)). In its concluding paragraph, however, the court indicated that it had in fact subjected the EEOC's activities to a smidgen of review: Because the Commission "pled on the face of its complaint that it ha[d] complied with all" prerequisites to suit and because its two letters to Mach Mining were "facially sufficient" to show that conciliation had occurred, the court stated, "our review of [that process] is satisfied." 738 F. 3d, at 184.

Other Courts of Appeals have held that Title VII allows judicial review of the EEOC's conciliation efforts, but without agreeing on what that review entails.[1] We granted certiorari, 573 U. S. 944 (2014), to address whether and to what

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[1] See, *e. g.*, *EEOC* v. *Asplundh Tree Expert Co.*, 340 F. 3d 1256, 1259 (CA11 2003) (holding that the EEOC must, among other things, "respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC* v. *Keco Industries, Inc.*, 748 F. 2d 1097, 1102 (CA6 1984) (holding that the EEOC must "make a good faith effort to conciliate").

extent such an attempt to conciliate is subject to judicial consideration.

II

Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986). That presumption is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. See *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349, 351 (1984). But the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review" of the agency's compliance with a legislative mandate. *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975).

Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit. See Brief for Respondent 20. That obligation is a key component of the statutory scheme. In pursuing the goal of "bring[ing] employment discrimination to an end," Congress chose "[c]ooperation and voluntary compliance" as its "preferred means." *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 228 (1982) (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974)). Accordingly, the statute provides, as earlier noted, that the Commission "shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b); see *supra*, at 483. That language is mandatory, not precatory. Cf. *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 109 (2002) (noting that the word "shall" admits of no discretion). And the duty it imposes serves as a necessary precondition to filing a lawsuit. Only if the Commission is "unable to secure" an acceptable conciliation agreement—that

is, only if its attempt to conciliate has failed—may a claim against the employer go forward. § 2000e–5(f)(1).

Courts routinely enforce such compulsory prerequisites to suit in Title VII litigation (and in many other contexts besides). An employee, for example, may bring a Title VII claim only if she has first filed a timely charge with the EEOC—and a court will usually dismiss a complaint for failure to do so. See, *e. g.*, *id.*, at 104–105, 114–115. Similarly, an employee must obtain a right-to-sue letter before bringing suit—and a court will typically insist on satisfaction of that condition. See, *e. g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973); see also, *e. g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 26 (1989) (upholding dismissal of an environmental suit for failure to comply with a notice provision serving as a "condition precedent"); *United States* v. *Zucca*, 351 U. S. 91 (1956) (affirming dismissal of a denaturalization suit because of the Government's failure to comply with a mandatory prerequisite). That ordinary part of Title VII litigation—see a prerequisite to suit, enforce a prerequisite to suit—supports judicial review of the EEOC's compliance with the law's conciliation provision.

The Government, reiterating the Seventh Circuit's view, contests that conclusion, arguing that Title VII provides "no standards by which to judge" the EEOC's performance of its statutory duty. Brief for Respondent 17. The Government highlights the broad leeway the statute gives the EEOC to decide how to engage in, and when to give up on, conciliation. In granting that discretion, the Government contends, Congress deprived courts of any "judicially manageable" criteria with which to review the EEOC's efforts. *Id.*, at 36 (quoting *Heckler* v. *Chaney*, 470 U. S. 821, 830 (1985)). And in that way Congress "demonstrate[d] [its] intention to preclude judicial review." Brief for Respondent 39.

But in thus denying that Title VII creates a "reviewable prerequisite to suit," the Government takes its observation about discretion too far. *Id.*, at 37 (quoting 738 F. 3d, at

175). Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review. See *infra*, at 492. But no, Congress has not left *everything* to the Commission. Consider if the EEOC declined to make any attempt to conciliate a claim—if, after finding reasonable cause to support a charge, the EEOC took the employer straight to court. In such a case, Title VII would offer a perfectly serviceable standard for judicial review: Without any "endeavor" at all, the EEOC would have failed to satisfy a necessary condition of litigation.

Still more, the statute provides certain concrete standards pertaining to what that endeavor must entail. Again, think of how the statute describes the obligatory attempt: "to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b). Those specified methods necessarily involve communication between parties, including the exchange of information and views. As one dictionary variously defines the terms, they involve "consultation or discussion," an attempt to "reconcile" different positions, and a "means of argument, reasoning, or entreaty." American Heritage Dictionary 385, 382, 1318 (5th ed. 2011). That communication, moreover, concerns a particular thing: the "alleged unlawful employment practice." So the EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. See also *infra*, at 494. If the Commission does not take those specified actions, it has not satisfied Title VII's requirement to attempt conciliation. And in insisting that the Commission do so, as the statutory language directs, a court applies a manageable standard.

Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need

not doubt the EEOC's trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action. See *supra,* at 486. Nothing overcomes that presumption with respect to the EEOC's duty to attempt conciliation of employment discrimination claims.

III

That conclusion raises a second dispute between the parties: What is the proper scope of judicial review of the EEOC's conciliation activities? The Government (once having accepted the necessity for some review) proposes that courts rely solely on facial examination of certain EEOC documents. Mach Mining argues for far more intrusive review, in part analogizing to the way judges superintend bargaining between employers and unions. We accept neither suggestion, because we think neither consistent with the choices Congress made in enacting Title VII. The appropriate scope of review enforces the statute's requirements as just described—in brief, that the EEOC afford the employer a chance to discuss and rectify a specified discriminatory practice—but goes no further. See *supra,* at 488; *infra*, at 494. Such limited review respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the Commission follows the law.

The Government argues for the most minimalist form of review imaginable. Echoing the final paragraph of the decision below, the Government observes that the EEOC, in line with its standard practice, wrote two letters to Mach Mining. See *supra,* at 484, 485. The first, after announcing the Commission's finding of reasonable cause, informed the company that "[a] representative of this office will be in contact with each party in the near future to begin the conciliation proc-

ess." App. 16. The second, sent about a year later, stated that the legally mandated conciliation attempt had "occurred" and failed. *Id.*, at 18. According to the Government, those "bookend" letters are all a court ever needs for review, because they "establish" that the EEOC met its obligation to attempt conciliation. Brief for Respondent 21.

But review of that kind falls short of what Title VII demands because the EEOC's bookend letters fail to prove what the Government claims. Contrary to its intimation, those letters do not themselves fulfill the conciliation condition: The first declares only that the process will start soon, and the second only that it has concluded. The two letters, to be sure, may provide indirect evidence that conciliation efforts happened in the interim; the later one expressly represents as much. But suppose an employer contests that statement. Let us say the employer files an affidavit alleging that although the EEOC promised to make contact, it in fact did not. In that circumstance, to treat the letters as sufficient—to take them at face value, as the Government wants—is simply to accept the EEOC's say-so that it complied with the law. And as earlier explained, the point of judicial review is instead to *verify* the EEOC's say-so—that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge. See *supra*, at 488–489. For that, a court needs more than the two bookend letters the Government proffers.

Mach Mining, for its part, would have a court do a deep dive into the conciliation process. Citing the standard set out in the National Labor Relations Act (NLRA), Mach Mining wants a court to consider whether the EEOC has "negotiate[d] in good faith" over a discrimination claim. Brief for Petitioner 37; see 29 U. S. C. § 158(d) (imposing a duty on employers and unions to bargain "in good faith with respect to . . . terms and conditions of employment"). That good-faith obligation, Mach Mining maintains, here incorporates a number of specific requirements. In every case, the EEOC

must let the employer know the "minimum . . . it would take to resolve" the claim—that is, the smallest remedial award the EEOC would accept. Tr. of Oral Arg. 63. The Commission must also lay out "the factual and legal basis for" all its positions, including the calculations underlying any monetary request. Brief for Petitioner 39. And the Commission must refrain from making "take-it-or-leave-it" offers; rather, the EEOC has to go back and forth with the employer, considering and addressing its various counteroffers and giving it sufficient time at each turn "to review and respond." *Id.,* at 40. The function of judicial review, Mach Mining concludes, is to compel the Commission to abide by these rules.

To begin, however, we reject any analogy between the NLRA and Title VII. The NLRA is about process and process alone. It creates a sphere of bargaining—in which both sides have a mutual obligation to deal fairly—without expressing any preference as to the substantive agreements the parties should reach. See §§ 151, 158(d). By contrast, Title VII ultimately cares about substantive results, while eschewing any reciprocal duties of good-faith negotiation. Its conciliation provision explicitly serves a substantive mission: to "eliminate" unlawful discrimination from the workplace. 42 U. S. C. § 2000e–5(b). In discussing a claim with an employer, the EEOC must always insist upon legal compliance; and the employer, for its part, has no duty at all to confer or exchange proposals, but only to refrain from any discrimination. Those differences make judicial review of the NLRA's duty of good-faith bargaining a poor model for review of Title VII's conciliation requirement. In addressing labor disputes, courts have devised a detailed body of rules to police good-faith dealing divorced from outcomes—and so to protect the NLRA's core procedural apparatus. But those kinds of rules do not properly apply to a law that treats the conciliation process not as an end in itself, but only as a tool to redress workplace discrimination.

More concretely, Mach Mining's proposed code of conduct conflicts with the latitude Title VII gives the Commission to pursue voluntary compliance with the law's commands. Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only "endeavor" to conciliate a claim, without having to devote a set amount of time or resources to that project. § 2000e–5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever "informal" means of "conference, conciliation, and persuasion" it deems appropriate. *Ibid.* And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever "unable to secure" terms "acceptable *to the Commission*." § 2000e–5(f)(1) (emphasis added). All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining's bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief. For a court to assess any of those choices—as Mach Mining urges and many courts have done, see n. 1, *supra*—is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.

Mach Mining's brand of review would also flout Title VII's protection of the confidentiality of conciliation efforts. The statute, recall, provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the written consent of the persons concerned"—both the employer and the complainant. § 2000e–5(b); see *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S.

590, 598, and n. 13 (1981). But the judicial inquiry Mach Mining proposes would *necessitate* the disclosure and use of such information in a later Title VII suit: How else could a court address an allegation that the EEOC failed to comply with all the negotiating rules Mach Mining espouses?[2] The proof is in this very case: The District Court held that it could not strike from the record descriptions of the conciliation process because they spoke to whether the EEOC had made a "sincere and reasonable effort to negotiate." App. to Pet. for Cert. 40a (internal quotation marks omitted); see *supra*, at 485. The court thus failed to give effect to the law's non-disclosure provision. And in so doing, the court undermined the conciliation process itself, because confidentiality promotes candor in discussions and thereby enhances the prospects for agreement. As this Court has explained, "[t]he maximum results from the voluntary approach will be achieved if" the parties know that statements they make cannot come back to haunt them in litigation. *Associated Dry Goods Corp.*, 449 U. S., at 599, n. 16 (quoting 110 Cong.

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[2] Mach Mining tries to show that broad judicial review is compatible with Title VII's non-disclosure provision, but fails to do so. The company first contends that the statutory bar is limited to "using what was said or done in a conciliation as evidence *going to the merits of the claims*." Brief for Petitioner 27 (emphasis added). But to make that argument, Mach Mining must add many words to the text (those shown here in italics). The actual language refers to "evidence in a subsequent proceeding," without carving out evidence relating to non-merits issues. 42 U. S. C. § 2000e–5(b). And in any case, under Mach Mining's own view of Title VII, compliance with the conciliation mandate *is* a merits issue, because it is a necessary "element of the [EEOC's] claim, which the [EEOC] must plead and prove." Brief for Petitioner 9; see *id.*, at 31. Mach Mining therefore presents a back-up argument: "[T]he confidentiality limitation should be deemed waived" when the employer puts conciliation at issue. *Id.*, at 30. But again, to effect a waiver Title VII requires "the written consent of the persons concerned," which includes not just the employer but the complainant too. § 2000e–5(b); see *supra*, at 492. And the *employer*'s decision to contest the EEOC's conciliation efforts cannot waive, by "deem[ing]" or otherwise, the *employee*'s statutory rights.

Rec. 8193 (1964) (remarks of Sen. Dirksen)). And conversely, the minimum results will be achieved if a party can hope to use accounts of those discussions to derail or delay a meritorious claim.

By contrast with these flawed proposals, the proper scope of judicial review matches the terms of Title VII's conciliation provision, as we earlier described them. See *supra*, at 488–489. The statute demands, once again, that the EEOC communicate in some way (through "conference, conciliation, and persuasion") about an "alleged unlawful employment practice" in an "endeavor" to achieve an employer's voluntary compliance. § 2000e–5(b). That means the EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of "reasonable cause." *Ibid.* Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute. At the same time, that relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. And such review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i. e.*, statements made or positions taken) during those discussions.

A sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement. Cf. *United States* v. *Clarke*, 573 U. S. 248, 254 (2014) ("[A]bsent contrary evidence, the [agency] can

satisfy [the relevant] standard by submitting a simple affidavit from" the agency representative involved). If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to decide that limited dispute. Cf. *id.*, at 254–255. Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. See § 2000e–5(f)(1) (authorizing a stay of a Title VII action for that purpose).

IV

Judicial review of administrative action is the norm in our legal system, and nothing in Title VII withdraws the courts' authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims. But the scope of that review is narrow, reflecting the abundant discretion the law gives the EEOC to decide the kind and extent of discussions appropriate in a given case. In addressing a claim like Mach Mining's, courts may not impinge on that latitude and on the Commission's concomitant responsibility to eliminate unlawful workplace discrimination.

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 495 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 9 THROUGH APRIL 29, 2015

March 9, 2015

Certiorari Granted—Vacated and Remanded

No. 14–392. University of Notre Dame *v.* Burwell, Secretary of Health and Human Services, et al. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014). Reported below: 743 F. 3d 547.

Certiorari Dismissed

No. 14–7834. Lavergne *v.* Busted in Acadiana. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 368.

Miscellaneous Orders. (See also No. 126, Orig., *ante*, p. 134.)

No. 14M90. Oros *v.* Commissioner of Internal Revenue; and

No. 14M92. Oby *v.* Sturdivant et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M91. Eiler *v.* Avera McKennan Hospital et al. Motion for leave to proceed as a veteran denied.

No. 13–895. Alabama Legislative Black Caucus et al. *v.* Alabama et al. D. C. M. D. Ala. [Probable jurisdiction noted, 572 U. S. 1149.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 13–1412. City and County of San Francisco, California, et al. *v.* Sheehan. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1021.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Justice Breyer took no part in the consideration or decision of this motion.

No. 14–46. MICHIGAN ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 14–47. UTILITY AIR REGULATORY GROUP *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 14–49. NATIONAL MINING ASSN. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. [Certiorari granted, 574 U. S. 1021.] Motions for enlargement of time and for divided argument granted.

No. 14–656. RJR PENSION INVESTMENT COMMITTEE ET AL. *v.* TATUM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 14–8444. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 14–8412. IN RE RHODES. 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.

Certiorari Granted

No. 14–7505. HURST *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U. S. 584 (2002)." Reported below: 147 So. 3d 435.

Certiorari Denied

No. 14–615. JONES ET AL. *v.* WAGNER. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 3d 1030.

No. 14–625. OPALINSKI ET AL. *v.* ROBERT HALF INTERNATIONAL, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 761 F. 3d 326.

No. 14–647. GILEAD SCIENCES, INC., ET AL. *v.* NATCO PHARMA LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 753 F. 3d 1208.

No. 14–650. AL JANKO *v.* GATES, FORMER SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 741 F. 3d 136.

No. 14–658. Center for Constitutional Rights *v.* Central Intelligence Agency et al. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 3d 161.

No. 14–660. Cetina *v.* Westchester County, New York. C. A. 2d Cir. Certiorari denied. Reported below: 583 Fed. Appx. 1.

No. 14–756. Lundin *v.* Macomber, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 686.

No. 14–764. Gomez Berezowsky *v.* Rendon Ojeda. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 3d 456.

No. 14–767. Walker *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 14–768. Zwicker & Associates, PSC *v.* Burton. C. A. 6th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 555.

No. 14–769. Premium Balloon Accessories, Inc. *v.* Creative Balloons Mfg., Inc. C. A. 6th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 547.

No. 14–778. Martin *v.* National General Assurance Co. Sup. Ct. Del. Certiorari denied. Reported below: 99 A. 3d 227.

No. 14–782. Stair *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 14–789. McMullan *v.* Booker, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 3d 662.

No. 14–846. Nham Ho *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 118 App. Div. 3d 1390, 988 N. Y. S. 2d 362.

No. 14–863. Philips South Beach, LLC *v.* JPMCC 2005–CIBC13 Collins Lodging, LLC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 162 So. 3d 1020.

No. 14–892. Hinkle *v.* McDonald, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 583 Fed. Appx. 907.

No. 14–918. Crapser *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 148 So. 3d 794.

No. 14–947. Confederated Tribes and Bands of the Yakama Indian Nation et al. *v.* McKenna, Attorney General of Washington. C. A. 9th Cir. Certiorari denied. Reported below: 768 F. 3d 989.

No. 14–956. Phillips *v.* McDonald, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 582 Fed. Appx. 890.

No. 14–971. HRD Corp., dba Marcus Oil & Chemical *v.* Dow Chemical Canada Inc. et al. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 741.

No. 14–5536. LeCroy *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 3d 1297.

No. 14–6899. Chaplin *v.* Bechtold, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 438.

No. 14–6980. Basile *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 252.

No. 14–6982. McTaw *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 612.

No. 14–7038. Gonzalez-Medina *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 3d 425.

No. 14–7210. Fondren *v.* Thomas, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 680.

No. 14–7349. Fowler *v.* Joyner, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 3d 446.

No. 14–7399. Neyland *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 139 Ohio St. 3d 353, 2014-Ohio-1914, 12 N. E. 3d 1112.

No. 14–7777. Michael *v.* Wetzel, Secretary, Pennsylvania Department of Corrections, et al. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 176.

No. 14–7783. Dixon *v.* Wachtendorf, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 758 F. 3d 992.

No. 14–7831. Sims *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120797–U.

No. 14–7835. Sabin *v.* Karber et al. Ct. App. Mich. Certiorari denied.

No. 14–7836. Dumas et al. *v.* Decker et al. C. A. 7th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 514.

No. 14–7838. Chilinski *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 376 Mont. 122, 330 P. 3d 1169.

No. 14–7840. Manges *v.* Neal, Superintendent, Indiana State Prison. C. A. 7th Cir. Certiorari denied.

No. 14–7842. Toliver *v.* Artus, Superintendent, Wende Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 14–7845. Soro *v.* Soro. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 145 So. 3d 183.

No. 14–7848. Schwarz *v.* Davis, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–7850. Allison *v.* City of Bridgeport, Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 603.

No. 14–7852. Ahmad *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–7853. Alvarez *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–7854. Nation *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 408 S. C. 474, 759 S. E. 2d 428.

No. 14–7859. Taffaro *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–7861. Tweed *v.* Coburn et al. C. A. 1st Cir. Certiorari denied.

No. 14–7864. Read *v.* de Bellefeuille et al. C. A. 9th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 647.

No. 14–7865. Bowling *v.* Appalachian Federal Credit Union. Ct. App. Ky. Certiorari denied.

No. 14–7866. Boykins *v.* Hobbs, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 14–7868. Dotson *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 450 S. W. 3d 1.

No. 14–7965. Tyler *v.* Cartledge, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 77.

No. 14–7999. Goza *v.* Welch, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 367.

No. 14–8288. Williams *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 219 N. J. 89, 95 A. 3d 701.

No. 14–8297. Simmons *v.* Florida Commission on Offender Review. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1140.

No. 14–8306. Schmitt *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 524.

No. 14–8310. Anaya *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 280.

No. 14–8318. Oswalt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 3d 849.

No. 14–8335. Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 452.

No. 14–8341. Rodriguez-Negrete *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 772 F. 3d 221.

No. 14–8343. Walker *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 449.

No. 14–8345. Davila-Felix, aka Mona *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 763 F. 3d 105.

No. 14–8346. Cox *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 181.

No. 14–8353. Davis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 473.

No. 14–8363. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 188.

No. 14–8364. KATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 496.

No. 14–8369. FERGUSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 590 Fed. Appx. 41.

No. 14–8371. STOREY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 822.

No. 14–8373. CHRISTIANSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 921.

No. 13–1361. SAMANTAR *v.* YOUSUF ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–8004. DYCHES *v.* MARTIN. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 579 Fed. Appx. 162.

Rehearing Denied

No. 14–382. DAVIS *v.* DAVIS ET AL., 574 U. S. 1074;
No. 14–5360. MCFARLAND *v.* UNITED STATES, 574 U. S. 895;
No. 14–6631. CORTES *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 574 U. S. 1064;
No. 14–6799. WHITE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1084;
No. 14–6857. CUSTIS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 574 U. S. 1085;
No. 14–7226. WOODS *v.* ARIZONA ET AL., 574 U. S. 1139;
No. 14–7329. KING *v.* UNITED STATES, 574 U. S. 1099;
No. 14–7452. ASHE *v.* UNITED STATES, 574 U. S. 1102; and
No. 14–7547. CHAMBERS *v.* UNITED STATES, 574 U. S. 1104. Petitions for rehearing denied.

MARCH 17, 2015

Miscellaneous Orders

No. 14A911. CLAYTON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by

him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

No. 14A975. CLAYTON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

Certiorari Denied

No. 14–8828 (14A959). CLAYTON *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 457 S. W. 3d 735.

MARCH 20, 2015

Miscellaneous Orders

No. 13–720. KIMBLE ET AL. *v.* MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC. C. A. 9th Cir. [Certiorari granted, 574 U. S. 1058.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–896. COMMIL USA, LLC *v.* CISCO SYSTEMS, INC. C. A. Fed. Cir. [Certiorari granted, 574 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 14–116. BULLARD *v.* BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK. C. A. 1st Cir. [Certiorari granted, 574 U. S. 1058.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 23, 2015

Certiorari Granted—Vacated

No. 14–148. AMANATULLAH ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 14–6575. AL-NAJAR *v.* CARTER, SECRETARY OF DEFENSE, ET AL. Petitions in these cases seek review of the judgments of

the United States Court of Appeals for the District of Columbia Circuit in No. 12–5401, *Al-Najar* v. *Obama*, and No. 12–5407, *Amanatullah* v. *Obama*. They do not seek review of the judgments in No. 12–5404, *Al Maqaleh* v. *Hagel*, or No. 12–5399, *Al Bakri* v. *Obama*, which were consolidated with petitioners' appeals. Subsequent to the decisions of the court below, petitioners were transferred from custody of the United States to custody of other nations. As a result, these cases have become moot. Motion of petitioner in No. 14–6575 for leave to proceed *in forma pauperis* granted. Certiorari granted and judgments vacated with respect to these petitioners. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Al-Marri* v. *Spagone*, 555 U. S. 1220 (2009). JUSTICE KAGAN took no part in the consideration or decision of this motion and these petitions. Reported below: 738 F. 3d 312.

Certiorari Dismissed

No. 14–7894. MARGARET B. *v.* MILWAUKEE COUNTY, WISCONSIN, ET AL. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7895. BACH *v.* CIRCUIT COURT OF WISCONSIN, MILWAUKEE COUNTY, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7899. PERRY *v.* EDD ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–7928. LUH *v.* MISSOURI. 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.

No. 14–8020. LAVERGNE *v.* TURK ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 583 Fed. Appx. 367.

No. 14–8118. CLARK *v.* SOCIAL SECURITY 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.

Miscellaneous Orders

No. D–2827. In re Shipley. Response having been filed, the order to show cause, dated December 8, 2014 [574 U. S. 1045], is discharged. All members of the Bar are reminded, however, that they are responsible—as officers of the Court—for compliance with the requirement of this Court's Rule 14.3 that petitions for writs of certiorari be stated "in plain terms," and may not delegate that responsibility to the client.

No. 14M93. Anthony *v.* Coffee County, Georgia, et al.;
No. 14M94. Bowman *v.* United States;
No. 14M97. Atkins *v.* Creighton Elementary School District; and
No. 14M98. Reed *v.* McDonald, Secretary of Veterans Affairs. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M95. Arsis *v.* Jones, Secretary, Florida Department of Corrections, et al.; and
No. 14M96. Williams *v.* Woods, Warden. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 126, Orig. Kansas *v.* Nebraska et al. The Honorable William J. Kayatta, Jr., of Portland, Me., Special Master in this case, is hereby discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, *ante*, p. 134.]

No. 14–614. Hughes, Chairman, Maryland Public Service Commission, et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 4th Cir.;
No. 14–623. CPV Maryland, LLC *v.* PPL EnergyPlus, LLC, et al. C. A. 4th Cir.;
No. 14–634. CPV Power Holdings, LP, Successor in Interest to CPV Power Development, Inc., et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 3d Cir.; and
No. 14–694. Fiordaliso, Commissioner of the New Jersey Board of Public Utilities, et al. *v.* PPL EnergyPlus, LLC, et al. C. A. 3d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 14–8144. LARMANGER *v.* KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, DBA KAISER PERMANENTE, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 13, 2015, 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. 14–8452. IN RE SMITH;
No. 14–8455. IN RE RODRIGUEZ;
No. 14–8595. IN RE EDKINS; and
No. 14–8631. IN RE ZARYCHTA. Petitions for writs of habeas corpus denied.

No. 14–8600. IN RE ADAMS. 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. 14–7901. IN RE TREVINO;
No. 14–7919. IN RE KLAUDT; and
No. 14–8060. IN RE AUSTIN. Petitions for writs of mandamus denied.

No. 14–7959. IN RE REHBERGER. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition 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*).

Certiorari Granted

No. 14–462. DIRECTV, INC. *v.* IMBURGIA ET AL. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari granted. Reported below: 225 Cal. App. 4th 338, 170 Cal. Rptr. 3d 190.

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in

this case to our decision in *Miller* v. *Alabama*, 567 U. S. 460 (2012)?" Reported below: 2013–1163 (La. 6/20/14), 141 So. 3d 264.

Certiorari Denied

No. 13–1512. Hammond et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 3d 880.

No. 13–10288. DeMola *v.* Johnson, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 3d 857.

No. 14–493. Kent Recycling Services, LLC *v.* United States Army Corps of Engineers. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 383.

No. 14–552. Illinois Public Telecommunications Assn. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 752 F. 3d 1018.

No. 14–681. CEATS, Inc. *v.* Continental Airlines, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 755 F. 3d 1356.

No. 14–685. Olson *v.* Merrill Lynch Credit Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 576 Fed. Appx. 506.

No. 14–687. Stiefel Laboratories, Inc., et al. *v.* Finnerty. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1310.

No. 14–688. Shamokin Filler Co. Inc. *v.* Federal Mine Safety and Health Review Commission et al. C. A. 3d Cir. Certiorari denied. Reported below: 772 F. 3d 330.

No. 14–708. Truvia et al. *v.* Connick, District Attorney, Parish of Orleans, et al. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 317.

No. 14–721. Morton Grove Pharmaceuticals, Inc., et al. *v.* Adams et al. Super. Ct. Pa. Certiorari denied. Reported below: 74 A. 3d 221.

No. 14–779. Arneson, County Attorney for Blue Earth County, Minnesota, or His Successor, et al. *v.* 281 Care

Committee et al. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 3d 774.

No. 14–793. Rome *v.* Development Alternatives, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 38.

No. 14–799. Capps et al. *v.* Weflen et al. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 201, 855 N. W. 2d 637.

No. 14–800. McGee-Hudson *v.* AT&T et al. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 134.

No. 14–803. Frank et al. *v.* Walker, Governor of Wisconsin, et al. C. A. 7th Cir. Certiorari denied. Reported below: 768 F. 3d 744.

No. 14–806. Triplett-Fazzone *v.* City of Columbus Division of Police et al. C. A. 6th Cir. Certiorari denied.

No. 14–811. Davis *v.* Producers Agricultural Insurance Co. C. A. 11th Cir. Certiorari denied. Reported below: 762 F. 3d 1276.

No. 14–815. Kienitz *v.* Sconnie Nation, LLC, et al. C. A. 7th Cir. Certiorari denied. Reported below: 766 F. 3d 756.

No. 14–816. Gyamfi *v.* SSCI Corp. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 181.

No. 14–826. Dummett et al. *v.* Padilla, California Secretary of State, et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–831. Eichers *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 853 N. W. 2d 114.

No. 14–833. Victorick *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–834. County of Santa Cruz, California, et al. *v.* Burwell, Secretary of Health and Human Services. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 425.

No. 14–836. Brunetti *v.* Falcone, Warden. C. A. 2d Cir. Certiorari denied.

No. 14–842. Corbett *v.* Transportation Security Administration et al. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 690.

No. 14–865. Rundgren et al. *v.* Washington Mutual Bank, F. A., et al. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 3d 1056.

No. 14–868. Dobrydnev *v.* Burwell, Secretary of Health and Human Services. C. A. Fed. Cir. Certiorari denied. Reported below: 566 Fed. Appx. 976.

No. 14–870. Parker *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 184 So. 3d 465.

No. 14–878. Renaissance Art Investors, LLC *v.* AXA Art Insurance Corp. C. A. 2d Cir. Certiorari denied.

No. 14–879. Harp *v.* Rahme et al. C. A. 3d Cir. Certiorari denied.

No. 14–895. Lemon *v.* Shaw. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 427 S. W. 3d 536.

No. 14–914. Carnacchi *v.* U. S. Bank N. A. et al. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 414.

No. 14–917. Demers *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 136 So. 3d 634.

No. 14–928. Singletary *v.* District of Columbia. C. A. D. C. Cir. Certiorari denied. Reported below: 766 F. 3d 66.

No. 14–942. Shepley, Bulfinch, Richardson & Abbott, Inc. *v.* W. J. O'Neil Co. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 3d 625.

No. 14–948. Caudill *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 389.

No. 14–949. Harrison *v.* Bert Bell/Pete Rozelle NFL Player Retirement Plan. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 413.

No. 14–962. Texas Entertainment Assn., Inc., et al. *v.* Hegar, Texas Comptroller of Public Accounts, et al. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 431 S. W. 3d 790.

No. 14–967. Coffman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 541.

No. 14–970. Friedlander *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 883.

No. 14–994. We The People Foundation for Constitutional Education, Inc., et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied.

No. 14–1016. Bethany *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 447.

No. 14–5069. Harris *v.* Change, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 271.

No. 14–5241. Carter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 226.

No. 14–5246. Hodges *v.* Carpenter, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 3d 517.

No. 14–5757. Taylor *v.* United States; and
No. 14–5794. Edelen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 226.

No. 14–6212. Justice *v.* United States.; and
No. 14–6295. Richards *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 755 F. 3d 269.

No. 14–6505. Taal *v.* St. Mary's Bank. Sup. Ct. N. H. Certiorari denied.

No. 14–6820. Duran *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 568 Fed. Appx. 90.

No. 14–6831. Barcus *v.* Sears, Roebuck & Co. C. A. 4th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 252.

No. 14–6996. Jory *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 562 Fed. Appx. 926.

No. 14–7004. STARKS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2013 WI 69, 349 Wis. 2d 274, 833 N. W. 2d 146.

No. 14–7073. MORALES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 625 Pa. 146, 91 A. 3d 80.

No. 14–7103. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 768 F. 3d 351.

No. 14–7212. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 249.

No. 14–7316. WHEETLEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 14–7548. CARMICHAEL *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–7617. PARRIS *v.* WEAVER. C. A. 11th Cir. Certiorari denied.

No. 14–7855. POPE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 3d 1254.

No. 14–7870. WILLIAMS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–7873. MATA *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–7874. SCOTT *v.* FORSHEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 760 F. 3d 497.

No. 14–7875. O'NEAL *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 566.

No. 14–7877. PAGLIACCETTI *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 134.

No. 14–7880. MCKENZIE *v.* CASILLAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 369.

No. 14–7893. Ballard *v.* Andrews et al. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 97.

No. 14–7896. Johnson *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 14–7902. Ware *v.* Riley et al. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 705.

No. 14–7908. Kissner *v.* Romanowski, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–7912. Alnutt *v.* New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 14–7913. Thompson *v.* DePond. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 442.

No. 14–7916. Deville *v.* California. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 14–7923. Kokinda *v.* United States District Court for the Eastern District of Pennsylvania. C. A. 3d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 160.

No. 14–7925. Moore *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–7930. Purdie *v.* Nebraska. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xix.

No. 14–7934. August *v.* Warren, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–7937. Miller *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 180 Wash. App. 413, 325 P. 3d 230.

No. 14–7942. Bogan *v.* Georgia. Ct. App. Ga. Certiorari denied.

No. 14–7951. Lungberg *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 809.

No. 14–7956. Hinchliffe *v.* Wells Fargo Bank. Super. Ct. Pa. Certiorari denied. Reported below: 82 A. 3d 468.

No. 14–7958. Ford *v.* Wallace-Bryant et al. Sup. Ct. Va. Certiorari denied.

No. 14–7960. Galloway *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 122942–U.

No. 14–7962. Hammersley *v.* County of Oconto, Wisconsin. Ct. App. Wis. Certiorari denied.

No. 14–7967. Villa *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–7971. McClam *v.* Thomas et al. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 231.

No. 14–7981. Hernandez Mejia *v.* Nooth, Superintendent, Snake River Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 14–7985. Zakrzewski *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 147 So. 3d 531.

No. 14–7986. Noordman *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 545.

No. 14–7988. Hiramanek et al. *v.* Clark et al. C. A. 9th Cir. Certiorari denied.

No. 14–7992. Inglis *v.* Connecticut. App. Ct. Conn. Certiorari denied. Reported below: 151 Conn. App. 283, 94 A. 3d 1204.

No. 14–7994. McMiller *v.* Patton, Director, Oklahoma Department of Corrections, et al. C. A. 10th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 749.

No. 14–7998. Flores *v.* Samuels, Director, Federal Bureau of Prisons, et al. C. A. 5th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 248.

No. 14–8000. Falk *v.* Texas. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 449 S. W. 3d 500.

No. 14–8005. CHAE *v.* RODRIGUEZ ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 623.

No. 14–8012. JACKSON *v.* ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 763 F. 3d 115.

No. 14–8015. MCCURDY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 1063, 331 P. 3d 265.

No. 14–8018. STORM *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 14–8023. COLBERT *v.* MARTEL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 382.

No. 14–8024. WELLS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 14–8028. DAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2013 IL App (4th) 120486–U.

No. 14–8032. CLEVELAND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 14–8037. OSIE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 131, 2014-Ohio-2966, 16 N. E. 3d 588.

No. 14–8064. MCCANN *v.* KENNEDY UNIVERSITY HOSPITAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 140.

No. 14–8065. PRYOR *v.* MCHUGH, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 55.

No. 14–8098. MADISON *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 3d 1240.

No. 14–8127. REED *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 3d 1252.

No. 14–8128. CHHUON *v.* MCEWEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8133. Carlucci, aka Odice *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 482.

No. 14–8136. Alfonso Curiel *v.* Ducart, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8141. Ruddock *v.* Holder, Attorney General. C. A. 8th Cir. Certiorari denied.

No. 14–8154. Caballero *v.* California. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–8174. Robertson *v.* Samuels, Director, Federal Bureau of Prisons, et al. C. A. 3d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 91.

No. 14–8185. Hale *v.* Soto, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8199. Engelhardt *v.* Heimgartner, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 671.

No. 14–8207. Wieland *v.* Nooth, Superintendent, Snake River Correctional Institution. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 792.

No. 14–8219. English *v.* Johns et al. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 229.

No. 14–8221. Massey *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8239. Williams *v.* Macomber, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8244. Reed *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 494, 332 P. 3d 172.

No. 14–8246. Hoffman *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 428, 2014-Ohio-4795, 25 N. E. 3d 993.

No. 14–8250. Johnson *v.* Burton. C. A. 8th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 745.

No. 14–8255. Torrence *v.* South Carolina Department of Corrections. Ct. App. S. C. Certiorari denied.

No. 14–8257. Anderson *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 97 A. 3d 814.

No. 14–8264. Merchant *v.* Cassady, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8269. Fulwood *v.* Samuels, Director, Federal Bureau of Prisons, et al. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 753.

No. 14–8272. Grate *v.* McFadden, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 240.

No. 14–8278. Stagg *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 14–8308. Seay *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8309. Blanchard *v.* Wallace, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8314. Casteel *v.* United States District Court for the Southern District of Iowa. C. A. 8th Cir. Certiorari denied.

No. 14–8317. Nie *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 254.

No. 14–8321. Shipton *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8348. Holmes *v.* Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 583 Fed. Appx. 910.

No. 14–8352. Sheafe-Carter *v.* Donahoe, Postmaster General. C. A. 2d Cir. Certiorari denied. Reported below: 579 Fed. Appx. 44.

No. 14–8357. Brown *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 721.

No. 14–8361. Boyle *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 14–8377. Brooks *v.* Caraway, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8386. Blango *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8387. Matthews *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 843.

No. 14–8389. Knight *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8394. Brock *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8396. Sodano *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 114.

No. 14–8397. Rogers *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 598 Fed. Appx. 114.

No. 14–8398. Badgett *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8399. Lee *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 14–8400. Kramer *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 768 F. 3d 766.

No. 14–8405. Villa-Rodriguez *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 342.

No. 14–8407. Muro-Inclain *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 936.

No. 14–8415. Cain *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 104.

No. 14–8417. Burt *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied.

No. 14–8420. Parker *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 14–8421. Cisneros-Castillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 196.

No. 14–8423. McCrea *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 14–8426. Manuel Luis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 1061.

No. 14–8432. Bates *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8433. Clark *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 367.

No. 14–8434. Brown *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–8436. Mosley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 260.

No. 14–8437. Mercado-Cruz *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 761 F. 3d 105.

No. 14–8442. White *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 3d 225.

No. 14–8445. Woods *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 284.

No. 14–8450. Elbe *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 3d 885.

No. 14–8453. Spriggs *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 591 Fed. Appx. 149.

No. 14–8458. Dillon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 198.

No. 14–8459. Coleman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 763 F. 3d 706.

No. 14–8460. Dominguez-Espinoza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 205.

No. 14–8463. Mundy *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 320.

No. 14–8465. LEDEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 3d 224.

No. 14–8468. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 1064.

No. 14–8469. BURCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8473. SEXTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 304.

No. 14–8474. COLON-VEGA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8476. TRAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 574.

No. 14–8481. BIRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8489. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 107.

No. 14–8490. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8494. ONTIVEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 236.

No. 14–8496. RUBIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 643.

No. 14–8500. CABRERA-PARADES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 212.

No. 14–8501. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 583 Fed. Appx. 35.

No. 14–8502. RUIZ-ACOSTA *v.* UNITED STATES (Reported below: 587 Fed. Appx. 840); and GOMEZ-PEREZ *v.* UNITED STATES (606 Fed. Appx. 157). C. A. 5th Cir. Certiorari denied.

No. 14–8504. GOODWIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8505. HAMILTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 43.

No. 14–8506. GRAVLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 899.

No. 14–8507. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 573.

No. 14–8510. FARMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 901.

No. 14–8514. FRANCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–8515. HUERTA-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8516. HARMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 455.

No. 14–8518. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 164.

No. 14–8519. GASKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 290.

No. 14–8531. KOMASA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 767 F. 3d 151 and 577 Fed. Appx. 43.

No. 14–8539. ARCHIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 771 F. 3d 217.

No. 14–8544. LINO GUILLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 240.

No. 14–8560. MALDONADO-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 252.

No. 14–8561. BRUNO-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 267.

No. 14–8647. GISSENDANER *v.* BRYSON, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 779 F. 3d 1275.

No. 14–8663. GISSENDANER *v.* KENNEDY, WARDEN. Super. Ct. Habersham County, Ga. Certiorari denied.

No. 14–292. BOWER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

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

On April 28, 1984, petitioner Lester Leroy Bower was convicted in a Texas court of murdering four men. Each of the four men had been shot multiple times. Their bodies were left in an airplane hangar, and an ultralight aircraft was missing.

The State sought the death penalty. Bower introduced evidence that was, in his view, mitigating. He noted that he was 36 years old, married, employed full time, and a father of two. He had no prior criminal record. Through the testimony of Bower's family members and friends, the jury also heard about Bower's religious devotion, his commitment to his family, his community service, his concern for others, his even temperament, and his lack of any previous violent (or criminal) behavior.

At the time of Bower's sentencing, Texas law permitted the jury to consider this mitigating evidence only insofar as it was relevant to three "special issues": (1) whether the conduct of the defendant that caused the death of the four victims was committed deliberately and with the reasonable expectation that the victims' deaths would result; (2) whether there was a probability that the defendant would continue to commit violent criminal acts, and as such would be a continuing threat to society; and (3) whether the defendant acted in response to provocation. See Tex. Code Crim. Proc. Ann., Art. 37.071(b) (Vernon 1981 and Cum. Supp. 1986). Since the third issue was irrelevant in Bower's case, the court asked the jury to consider only the first two. Because the jury answered "yes" to both, the trial judge automatically imposed a death sentence, as required by then-controlling Texas law. Arts. 37.071(c)–(e).

Bower appealed his case, lost, sought state postconviction relief, lost, appealed that loss, and lost again. See *Bower* v. *Texas*, 769 S. W. 2d 887 (Tex. Crim. App.), cert. denied, 492 U. S. 927 (1989); *Ex parte Bower*, 823 S. W. 2d 284 (Tex. Crim. App. 1991), cert. denied, 506 U. S. 835 (1992). But a week before Bower's conviction became final, this Court decided in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that Texas' special issues procedure was unconstitutional. Specifically, the Court held that Texas' procedure impermissibly prevented the jury from considering or acting upon

potentially mitigating evidence. The Court wrote that a State cannot,

> "consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Id.*, at 318.

Penry himself had offered evidence of mental retardation and childhood abuse. This Court decided that Texas' special issues, while allowing the jury to decide if Penry might commit violent crimes in the future, did not give the jury the constitutionally requisite opportunity to consider whether Penry's mental retardation or childhood abuse constituted significantly mitigating evidence regardless. It "is not enough," the Court wrote,

> "simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing [a] sentence. Only then can [the court] be sure that the sentencer has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence." *Id.*, at 319 (citations and internal quotation marks omitted; last alteration in original).

After this Court decided *Penry*, Bower filed a petition for habeas corpus in Federal District Court. He argued, among other things, that, given *Penry*, his own sentencing proceeding was constitutionally deficient. After a hearing, the court denied his petition and also refused to issue a certificate of appealability on the *Penry* issue. The Fifth Circuit affirmed the District Court's denial of a certificate of appealability, reasoning that, in Bower's case, the second special issue (about future dangerousness) sufficiently permitted the jury to take account of Bower's mitigating evidence. *Bower* v. *Dretke*, 145 Fed. Appx. 879, 885, 887 (2005). In doing so, the Circuit referred to several of its earlier decisions reaching the same conclusion in similar circumstances. See *ibid.* (citing *Coble* v. *Dretke*, 417 F. 3d 508 (2005); *Boyd* v. *Johnson*, 167 F. 3d 907 (1999); *Barnard* v. *Collins*, 958 F. 2d 634 (1992)). Bower then sought certiorari here, but we denied his petition. *Bower* v. *Dretke*, 546 U. S. 1140 (2006).

The Fifth Circuit subsequently changed its mind about the meaning of *Penry*. And, in doing so, it specifically said that it

had been wrong about Bower's *Penry* claim. See *Pierce* v. *Thaler*, 604 F. 3d 197, 210, n. 9 (2010). It said this not in Bower's case, but in an unrelated one. At that point, Bower's case was no longer in federal court. So Bower could not take advantage of the Fifth Circuit's change of mind; he had already brought a subsequent application for postconviction relief in Texas court, arguing (among other things) that Texas had used an unconstitutional sentencing procedure in his case.

The Texas trial court decided that Bower was right. Conclusions of Law ¶97 in *Ex parte Bower*, No. 33426–B (15th Jud. Dist. Ct., Grayson Cty., Dec. 10, 2012), App. to Pet. for Cert. 127 (hereinafter Conclusions of Law). It issued an opinion requiring a new sentencing proceeding. See *ibid.* But the State appealed, and the Texas Court of Criminal Appeals reversed the trial court. See Order in *Ex parte Bower*, No. WR–21005–02 etc. (Tex. Ct. Crim. App., June 11, 2014), App. to Pet. for Cert. 1. It explained that "unlike the double-edged evidence in *Penry* . . . , the mitigating evidence presented by [Bower] during the punishment phase of his trial—evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record—was not outside the scope of special issues given." *Id.*, at 4 (citing *Ex parte Bower*, 823 S. W. 2d, at 286; footnote omitted). Because Bower's evidence was not "double-edged" as Penry's had been, the Texas Court of Criminal Appeals believed that the use of the special issues proceeding in Bower's sentencing proceeding did not constitutionally entitle him to resentencing. See *ibid.*

Bower now asks us to grant certiorari and to reverse the Texas Court of Criminal Appeals. In my view, we should do so. *Penry*'s holding rested on the fact that Texas' former special issues did not tell the jury "what 'to do if it decided that [the defendant] . . . should not be executed'" because of his mitigating evidence. *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 256 (2007) (quoting *Penry*, *supra*, at 324). Bower's sentencing procedure suffered from this defect just as Penry's did. The distinction that the Texas court drew between Penry's and Bower's evidence is irrelevant. Indeed, we have expressly made "clear that *Penry* . . . applies in cases involving evidence that is neither double edged nor purely aggravating, because in some cases a defendant's evidence may have mitigating effect beyond its ability to negate the special issues." 550 U. S., at 255, n. 16. The trial court and the Fifth Circuit both recognized that Bower's *Penry* claim was

improperly rejected on that basis. See Conclusions of Law ¶97; *Pierce*, *supra*, at 210, n. 9.

The Constitution accordingly entitles Bower to a new sentencing proceeding. I recognize that we do not often intervene only to correct a case-specific legal error. But the error here is glaring, and its consequence may well be death. After all, because Bower already filed an application for federal habeas relief raising his *Penry* claim, the law may bar him from filing another application raising this same issue. See 28 U. S. C. § 2254(b)(1). In these circumstances, I believe we should act and act now. I would grant the petition and summarily reverse the judgment below. I dissent from the Court's decision not to do so.

No. 14–531. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* COX. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 757 F. 3d 113.

No. 14–877. BRIGHT *v.* GALLIA COUNTY, OHIO, ET AL. C. A. 6th Cir. Motion of National Association for Public Defense et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 753 F. 3d 639.

No. 14–966. BERMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 766 F. 3d 9.

No. 14–988. SPRINT SPECTRUM L. P., DBA SPRINT PCS *v.* EMILIO. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 582 Fed. Appx. 63.

No. 14–999. D'AMELIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 565 Fed. Appx. 61.

No. 14–1003. AWAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 14–6302. CARLOS ELSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 550 Fed. Appx. 815.

No. 14–8454. DeGlace *v.* Edenfield, Warden. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–10797. McNab *v.* New York et al., 574 U. S. 868;

No. 14–532. Wideman *v.* Pueblo County Department of Social Services, Colorado, Child Support Enforcement, 574 U. S. 1077;

No. 14–5358. Hardy *v.* Colvin, Acting Commissioner of Social Security, et al., 574 U. S. 895;

No. 14–6332. Nhuong Van Nguyen *v.* Pham et al., 574 U. S. 1123;

No. 14–6338. Dixon *v.* Greene et al., 574 U. S. 1030;

No. 14–6636. Robinson *v.* Lassiter, Warden, 574 U. S. 1034;

No. 14–6746. Bailey *v.* Sherman, Acting Warden, 574 U. S. 1082;

No. 14–6785. Warefield *v.* Warefield, 574 U. S. 1083;

No. 14–6808. Mammola *v.* Feeney, Judge, United States Bankruptcy Court for the District of Massachusetts, et al., 574 U. S. 1084;

No. 14–6908. Manuel Navarrette *v.* Texas, 574 U. S. 1086;

No. 14–6924. Scarlett *v.* Rikers Island, 574 U. S. 1086;

No. 14–6935. Phillips et al. *v.* Davis, 574 U. S. 1087;

No. 14–7021. Scott *v.* Nevada, 574 U. S. 1089;

No. 14–7039. Rishar *v.* United States et al., 574 U. S. 1090;

No. 14–7047. Rocco *v.* Superior Court of California, Orange County, 574 U. S. 1123;

No. 14–7061. Lucas *v.* Reynolds, Warden, 574 U. S. 1123;

No. 14–7069. Prater *v.* City of Philadelphia Family Court et al., 574 U. S. 1124;

No. 14–7071. Magana-Torres *v.* Biter, Warden, 574 U. S. 1091;

No. 14–7115. Williams *v.* Maryland, 574 U. S. 1093;

No. 14–7117. Webster *v.* Aramark Correctional Services, Inc., et al., 574 U. S. 1124;

No. 14–7145. Rubio *v.* Gray et al., 574 U. S. 1094;

No. 14–7153. Richards *v.* Clarke, Director, Virginia Department of Corrections, 574 U. S. 1137;

No. 14–7166. WILLIAMS *v.* BOARD OF EDUCATION OF BALTIMORE COUNTY, 574 U. S. 1137;

No. 14–7167. WEEKLEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1137;

No. 14–7225. KLINEFELTER *v.* ALFARO, WARDEN, 574 U. S. 1096;

No. 14–7227. CARTER *v.* CARTER ET AL., 574 U. S. 1139;

No. 14–7228. IN RE CLARK, 574 U. S. 1060;

No. 14–7229. BRATTON *v.* CALIFORNIA, 574 U. S. 1139;

No. 14–7241. PEREZ SANTIAGO *v.* CALIFORNIA, 574 U. S. 1139;

No. 14–7256. SANTISTEVAN *v.* YORDY, WARDEN, 574 U. S. 1097;

No. 14–7262. VIOLA *v.* UNITED STATES, 574 U. S. 1097;

No. 14–7308. HILTON *v.* MCCALL, WARDEN, 574 U. S. 1125;

No. 14–7381. VIVO *v.* CONNECTICUT, 574 U. S. 1126; and

No. 14–7605. AMAR *v.* UNITED STATES, 574 U. S. 1141. Petitions for rehearing denied.

No. 14–426. NIVIA, AKA ROUSSELL *v.* BANK UNITED, 574 U. S. 1075; and

No. 14–490. MOLINA *v.* AURORA LOAN SERVICES LLC, 574 U. S. 1062. Motions for leave to file petitions for rehearing denied.

MARCH 30, 2015

Vacated and Remanded on Appeal

No. 14–518. CANTOR ET AL. *v.* PERSONHUBALLAH ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, *ante*, p. 254. Reported below: 58 F. Supp. 3d 533.

Certiorari Granted—Reversed and Remanded. (See No. 14–618, *ante*, p. 312.)

Certiorari Granted—Vacated and Remanded. (See also No. 14–593, *ante*, p. 306.)

No. 13–1505. FREIDUS ET AL. *v.* ING GROEP N. V. ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, *ante*, p. 175. Reported below: 543 Fed. Appx. 93.

Certiorari Dismissed

No. 14–8081. DAKER *v.* ROBINSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8082. DAKER *v.* DAWES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8084. JENNINGS *v.* VILSACK, SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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. 14–8096. LAVERGNE *v.* TAYLOR ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 606 Fed. Appx. 135.

No. 14–8104. RENNEKE *v.* FLORENCE COUNTY, WISCONSIN. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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: 594 Fed. Appx. 878.

No. 14–8129. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. C. A. 10th Cir.;

No. 14–8130. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. C. A. 10th Cir.;

No. 14–8131. HUNTER *v.* BORON ET AL. C. A. 7th Cir.; and

No. 14–8132. HUNTER *v.* BORON ET AL. C. A. 7th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As peti-

tioner 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. 14–8203. LANCASTER *v.* HICKS ET AL. Ct. App. Tex., 12th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8337. CAMPBELL *v.* UNITED STATES ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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. 14–8483. PINDER *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. 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.

Miscellaneous Orders

No. 14M99. SMITH *v.* CAIN, WARDEN;

No. 14M100. EDWARDS *v.* WALSH ET AL.; and

No. 14M101. MUHAMMAD *v.* MUHAMMAD ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14–280. MONTGOMERY *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, *ante*, p. 911.] Richard Bernstein, Esq., of Washington, D. C., is invited to brief and argue as *amicus curiae* against this Court's jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller* v. *Alabama*, 567 U. S. 460 (2012). Brief for Court-appointed *amicus curiae* is to be filed on or before Wednesday, June 10, 2015. Brief for petitioner is to be filed on or before Friday, July 10, 2015. Brief for respondent is

to be filed on or before Monday, August 10, 2015. Reply briefs are to be filed on or before Wednesday, September 9, 2015.

No. 14–574. Bourke et al. *v.* Beshear, Governor of Kentucky. C. A. 6th Cir. [Certiorari granted, 574 U. S. 1118.] Motion of Chris Sevier for leave to intervene denied.

No. 14–8080. Highsmith *v.* MacFadyen et al. Ct. Sp. App. Md.; and

No. 14–8190. Adkins *v.* Bank of America, N. A. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 20, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–8744. In re Watts;

No. 14–8755. In re Rajkovic; and

No. 14–8762. In re Wells. Petitions for writs of habeas corpus denied.

No. 14–8125. In re McGuire; and

No. 14–8143. In re Muhammad. Petitions for writs of mandamus denied.

No. 14–8152. In re Ajamian. Petition for writ of prohibition denied.

Certiorari Granted

No. 14–723. Montanile *v.* Board of Trustees of the National Elevator Industry Health Benefit Plan. C. A. 11th Cir. Certiorari granted. Reported below: 593 Fed. Appx. 903.

No. 14–449. Kansas *v.* Carr; and

No. 14–450. Kansas *v.* Carr. Sup. Ct. Kan. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 3 presented by the petitions, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 14–449, 300 Kan. 340, 329 P. 3d 1195; No. 14–450, 300 Kan. 1, 331 P. 3d 544.

No. 14–452. Kansas *v.* Gleason. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 299 Kan. 1127, 329 P. 3d 1102.

Certiorari Denied

No. 14–472. Viloski *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 557 Fed. Appx. 28.

No. 14–519. Caminiti *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 45, 353 Wis. 2d 553, 846 N. W. 2d 34.

No. 14–525. Coons et al. *v.* Lew, Secretary of the Treasury, et al. C. A. 9th Cir. Certiorari denied. Reported below: 762 F. 3d 891.

No. 14–555. Nelson *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 2014 WI 70, 355 Wis. 2d 722, 849 N. W. 2d 317.

No. 14–714. Kozak *v.* Workers' Compensation Appeals Board et al. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–717. STC.UNM *v.* Intel Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 754 F. 3d 940.

No. 14–720. Dariano et al., on Behalf of Their Minor Child, M. D., et al. *v.* Morgan Hill Unified School District et al. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 764.

No. 14–730. Davis *v.* Kohn et al.; and

No. 14–736. Trezziova *v.* Kohn et al. C. A. 2d Cir. Certiorari denied. Reported below: 730 F. 3d 112.

No. 14–746. Bigley *v.* Ciber, Inc., Long Term Disability Coverage. C. A. 10th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 756.

No. 14–860. Albecker *v.* Contour Products, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 578 Fed. Appx. 969.

No. 14–861. Target Media Partners Operating Co., LLC, et al. *v.* Specialty Marketing Corp. Sup. Ct. Ala. Certiorari denied.

No. 14–862. Twersky et al. *v.* Yeshiva University et al. C. A. 2d Cir. Certiorari denied. Reported below: 579 Fed. Appx. 7.

No. 14–869. Leskinen *v.* Halsey et al. C. A. 2d Cir. Certiorari denied. Reported below: 571 Fed. Appx. 36.

No. 14–871. Transport Workers Union of America, AFL–CIO, Local 514 *v.* Kovacs et al. Ct. Civ. App. Okla. Certiorari denied.

No. 14–876. Butler et al. *v.* City of Rye Planning Commission et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 114 App. Div. 3d 937, 980 N. Y. S. 2d 831.

No. 14–888. Slater *v.* Hardin et al. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–890. G. M. et al. *v.* Saddleback Valley Unified School District. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 702.

No. 14–897. Krueger *v.* Grand Forks County, North Dakota. Sup. Ct. N. D. Certiorari denied. Reported below: 2014 ND 170, 852 N. W. 2d 354.

No. 14–909. Azam *v.* U. S. Bank N. A., as Trustee (Reported below: 582 Fed. Appx. 710); Azam *v.* United States District Court for the Central District of California et al.; Ringgold et al. *v.* United States District Court for the Central District of California et al.; and Turner et al. *v.* United States District Court for the Central District of California et al. C. A. 9th Cir. Certiorari denied.

No. 14–922. Gomez *v.* Chase Home Finance, LLC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 151 So. 3d 1256.

No. 14–934. Negley *v.* Federal Bureau of Investigation. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 726.

No. 14–943. Hakim *v.* O'Donnell et al. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 49,140 (La. App. 2 Cir. 6/25/14), 144 So. 3d 1179.

No. 14–945. Schuller et al. *v.* Naylor et al. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 307.

No. 14–951. Johnson *v.* Securitas Security Services USA, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 3d 605.

No. 14–955. Niwayama *v.* Texas Tech University. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 351.

No. 14–968. Robertson *v.* McDonald, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 759 F. 3d 1351.

No. 14–985. Johnson *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 136, 2014-Ohio-5021, 22 N. E. 3d 1061.

No. 14–1009. Hashemian *v.* Louisville Regional Airport Authority et al. C. A. 6th Cir. Certiorari denied.

No. 14–1010. Huston et ux. *v.* U. S. Bank N. A., as Trustee. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 306.

No. 14–1033. Stan Lee Media, Inc. *v.* Pow! Entertainment, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 597.

No. 14–6810. Carr *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 1, 331 P. 3d 544.

No. 14–7264. Wolverine *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 646.

No. 14–7327. Carr *v.* Kansas. Sup. Ct. Kan. Certiorari denied. Reported below: 300 Kan. 340, 329 P. 3d 1195.

No. 14–7664. Nooner *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 296, 438 S. W. 3d 233.

No. 14–7680. Banks *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 1113, 331 P. 3d 1206.

No. 14–7683. Cross *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 178 Wash. 2d 519, 309 P. 3d 1186.

No. 14–8033. Singletary *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8036. Smith *v.* Idaho. Ct. App. Idaho. Certiorari denied.

No. 14–8043. Ramirez *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–8046. Westfall *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8048. McGugan *v.* Aldana-Bernier et al. C. A. 2d Cir. Certiorari denied. Reported below: 752 F. 3d 224.

No. 14–8052. Piper *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 722.

No. 14–8054. Katzenbach *v.* Abel. Ct. App. Ore. Certiorari denied. Reported below: 260 Ore. App. 767, 320 P. 3d 675.

No. 14–8057. James *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–8061. Barnhill *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 14–8063. Artiga-Morales *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 795, 335 P. 3d 179.

No. 14–8066. Mason *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 14–8067. Cato *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8068. Chance *v.* Chance. App. Ct. Conn. Certiorari denied. Reported below: 148 Conn. App. 903, 87 A. 3d 629.

No. 14–8085. Kunkel *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 14–8086. Jenkins *v.* Livonia Police Department et al. C. A. 6th Cir. Certiorari denied.

No. 14–8087. Joyce *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–8088. Sheppard *v.* Court of Criminal Appeals of Texas. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 298.

No. 14–8089. Lugo *v.* Davey, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8092. Pounds *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 150 So. 3d 1158.

No. 14–8094. Paris *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8095. Sutton *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1140.

No. 14–8097. Pruett *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8099. Antonio Rodriguez *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1277.

No. 14–8101. Schleiger *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 141 Ohio St. 3d 67, 2014-Ohio-3970, 21 N. E. 3d 1033.

No. 14–8103. Randell *v.* Spearman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 456.

No. 14–8105. Capell *v.* Carter et al. C. A. 4th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 199.

No. 14–8109. Henness *v.* Bagley, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 766 F. 3d 550.

No. 14–8111. Williams *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8113. Ross *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8114. Cook *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 289 Neb. xxi.

No. 14–8117. Cortez *v.* Butler, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8119. Scott *v.* Cohen et al. Ct. App. Ga. Certiorari denied. Reported below: 324 Ga. App. XXVIII.

No. 14–8122. Bouie *v.* Crockett et al. C. A. 11th Cir. Certiorari denied.

No. 14–8137. Davis *v.* Parker, aka Adams, aka Spearbeck. C. A. 9th Cir. Certiorari denied.

No. 14–8139. Idrogo *v.* Gonzalez et al. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 14–8142. Mills *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 14–8146. Jones *v.* Missouri. C. A. 8th Cir. Certiorari denied.

No. 14–8148. Armitage *v.* Sherman, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 808.

No. 14–8157. Murray *v.* Middleton et al. Sup. Ct. Va. Certiorari denied.

No. 14–8164. Cochrun *v.* Dooley, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8165. Cox *v.* McEwen, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8171. Stephens *v.* Texas Board of Pardons and Paroles. C. A. 5th Cir. Certiorari denied.

No. 14–8172. Roland *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–8184. Bland *v.* Operative Plasterers' and Cement Masons' International Assn. C. A. 8th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 701.

No. 14–8191. Avila *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 496, 327 P. 3d 821.

No. 14–8208. Antonio Jimenez *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 153 So. 3d 906.

No. 14–8211. Simms *v.* Bestemps Career Associates. Cir. Ct. Wicomico County, Md. Certiorari denied.

No. 14–8215. Scheuing *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 161 So. 3d 245.

No. 14–8217. Duran *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–8218. Cisneros *v.* Biter, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8220. Makkali, aka Cloird *v.* Hobbs, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 14–8232. Mendoza *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 761 F. 3d 1213.

No. 14–8245. Gray *v.* Pfister, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8248. Sims *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 14–8259. Lucien *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied.

No. 14–8263. Parker *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–1050 (La. App. 1 Cir. 2/20/14).

No. 14–8273. Harris *v.* Lewis, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8287. Anderson *v.* Humphreys, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8292. Michael C. B. *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 119 App. Div. 3d 1356, 989 N. Y. S. 2d 556.

No. 14–8311. Zuniga *v.* Williams, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8320. Ranallo *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8347. Green *v.* Lester, Warden. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–8356. Smith *v.* Arkansas. C. A. 8th Cir. Certiorari denied.

No. 14–8366. Renteria *v.* California. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 14–8388. Lee *v.* Maye, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 416.

No. 14–8391. Turcotte *v.* Humane Society Waterville Area. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 123, 103 A. 3d 1023.

No. 14–8392. Brewer *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 14–8393. Trejo *v.* Wohler. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 423.

No. 14–8402. Mendes *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 180 Wash. 2d 188, 322 P. 3d 791.

No. 14–8410. Simpkins *v.* Nixon, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–8430. Sanders *v.* Straughn, Warden, et al. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 312, 439 S. W. 3d 1.

No. 14–8456. Duppins *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 218 Md. App. 745.

No. 14–8470. Austin *v.* Butler, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8472. Branch *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 273.

No. 14–8475. Webb *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2013–0146 (La. App. 4 Cir. 1/30/14), 133 So. 3d 258.

No. 14–8482. Vasquez *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8488. Joseph *v.* Donahoe, Postmaster General. C. A. 9th Cir. Certiorari denied.

No. 14–8512. Ferguson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 749.

No. 14–8535. Miller *v.* Tax Claim Bureau of Westmoreland County et al. Commw. Ct. Pa. Certiorari denied. Reported below: 84 A. 3d 337.

No. 14–8547. Ephraim, aka Williams *v.* Hogsten, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 65.

No. 14–8549. Smith *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 14–8554. Hills *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 224.

No. 14–8555. Brandon *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 553.

No. 14–8556. Boswell *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 772 F. 3d 469.

No. 14–8557. Williams *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8558. Bonilla *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 138.

No. 14–8559. Armstrong *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 239.

No. 14–8563. Angel Reyes *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 764 F. 3d 1184.

No. 14–8566. Korzybski *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 14–8570. Chapman *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8573. Herring *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 588 Fed. Appx. 201.

No. 14–8574. Franklin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 761 F. 3d 1068.

No. 14–8576. Hymon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 900.

No. 14–8577. Prior Pereira *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 580 Fed. Appx. 908.

No. 14–8581. Burnett *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 3d 122.

No. 14–8590. Davis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 213.

No. 14–8591. Quiroz-Martinez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 687.

No. 14–8593. Majors *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 878.

No. 14–8594. Casteel *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8599. Aranguren-Suarez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 570 Fed. Appx. 908.

No. 14–8604. Hendrickson *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 699.

No. 14–8605. Galarza-Bautista *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 744.

No. 14–8607. Casteel *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–8609. DeCrescenzo *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 563 Fed. Appx. 858.

No. 14–8610. Campbell *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 770 F. 3d 556.

No. 14–8612. KEMP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 138.

No. 14–8619. VEACH *v.* FEATHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8623. SPEARS *v.* FEATHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8626. LIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 699.

No. 14–8629. MYERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 98 A. 3d 192.

No. 14–8630. PERNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 186.

No. 14–8635. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 194.

No. 14–8638. ANGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–8648. BROOMFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 847.

No. 14–8649. ADAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 219.

No. 14–8659. FINLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 964.

No. 14–8660. MYTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–8661. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 149.

No. 14–8666. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8668. MOHR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 3d 1143.

No. 14–8672. BREAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 949.

No. 14–8678. LAMAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8681. WAGNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 818.

No. 14–8683. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 413.

No. 14–8684. WELLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–354. BRONX HOUSEHOLD OF FAITH ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 750 F. 3d 184.

No. 14–544. PLIVA, INC., ET AL. *v.* HUCK. Sup. Ct. Iowa. Motion of Generic Pharmaceutical Association for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 850 N. W. 2d 353.

No. 14–896. LEGRAND, WARDEN, ET AL. *v.* GIBBS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 767 F. 3d 879.

No. 14–8602. BENFORD, AKA MOSLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 14–8628. WARE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 14–680. WHITE *v.* DELOITTE & TOUCHE ET AL., 574 U. S. 1155;

No. 14–7068. ALVARADO *v.* BITER, WARDEN, ET AL., 574 U. S. 1123;

No. 14–7112. MARR *v.* FLORIDA BAR, 574 U. S. 1093;

No. 14–7215. NAKAGAWA *v.* COLORADO, 574 U. S. 1096; and

No. 14–7552. CHHIM *v.* ALDINE INDEPENDENT SCHOOL DISTRICT, 574 U. S. 1168. Petitions for rehearing denied.

No. 14–6968. CRAWFORD *v.* UNITED STATES, 574 U. S. 1037. Motion for leave to file petition for rehearing denied.

APRIL 3, 2015

Dismissal Under Rule 46

No. 14–709. WINSLOW *v.* PENN. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 764 F. 3d 102.

Miscellaneous Order

No. 14–556. OBERGEFELL ET AL. *v.* HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH;

No. 14–562. TANCO ET AL. *v.* HASLAM, GOVERNOR OF TENNESSEE, ET AL.;

No. 14–571. DEBOER ET AL. *v.* SNYDER, GOVERNOR OF MICHIGAN, ET AL.; and

No. 14–574. BOURKE ET AL. *v.* BESHEAR, GOVERNOR OF KENTUCKY. C. A. 6th Cir. [Certiorari granted, 574 U. S. 1118.] Upon consideration of the March 17 and March 31, 2015, letters from counsel for petitioners and respondents, the following order of argument is adopted. On Question 1 the time is allocated as follows: 30 minutes for one advocate on behalf of petitioners, 15 minutes for the Solicitor General, and 45 minutes for one advocate on behalf of respondents. On Question 2 the time is allocated as follows: 30 minutes for one advocate on behalf of petitioners, and 30 minutes for one advocate on behalf of respondents.

APRIL 6, 2015

Certiorari Dismissed

No. 14–8286. HALL *v.* BERGHUIS, WARDEN. 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.

No. 14–8327. HUNTER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA. 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: 588 Fed. Appx. 232.

No. 14–8328. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8329. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8330. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8331. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8332. HUNTER *v.* KALMANSON ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8625. RAMON OCHOA *v.* RUBIN. Super. Ct. Pa. 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*).

No. 14–8695. RAPOSO *v.* UNITED STATES. 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.

Miscellaneous Orders

No. 14M102. TURNER *v.* VIRGINIA 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. 14M103. TRILLO *v.* BITER, WARDEN; and

No. 14M104. GRIFFIN *v.* SMITH ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14–770. BANK MARKAZI, AKA CENTRAL BANK OF IRAN *v.* PETERSON ET AL. C. A. 2d Cir. The Solicitor General is invited

to file a brief in this case expressing the views of the United States.

No. 14–7110. Riggins *v.* United States Court of Appeals for the Fifth Circuit. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1119] denied.

No. 14–8160. Jones *v.* Lockheed Martin Corp. C. A. 11th Cir.;

No. 14–8204. Mangum et al., Individually and as Parents of I. M., a Minor *v.* Renton School District #403. C. A. 9th Cir.;

No. 14–8601. Brown *v.* Michigan Department of Corrections Parole Board. C. A. 6th Cir.; and

No. 14–8624. Milian *v.* Wells Fargo Bank, N. A., et al. Dist. Ct. App. Fla., 3d Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 27, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–8811. In re Mallory; and

No. 14–8859. In re Hard. Petitions for writs of habeas corpus denied.

No. 14–1027. In re Del Rio;

No. 14–8296. In re Jones; and

No. 14–8374. In re Chafe. Petitions for writs of mandamus denied.

No. 14–961. In re Anghel; and

No. 14–8237. In re Piotrowski. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 14–523. Brown *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 762 F. 3d 454.

No. 14–629. Degnan et al. *v.* Burwell, Secretary of Health and Human Services, et al. C. A. 8th Cir. Certiorari denied. Reported below: 765 F. 3d 805.

No. 14–641. SD–3C, LLC, et al. *v.* Oliver et al. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 3d 1081.

No. 14–703. Zebrowski et al. *v.* Evonik Degussa Corporation Administrative Committee et al. C. A. 3d Cir. Certiorari denied. Reported below: 578 Fed. Appx. 89.

No. 14–775. CashCall, Inc. *v.* Inetianbor. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 3d 1346.

No. 14–780. North Carolina et al. *v.* League of Women Voters of North Carolina et al. C. A. 4th Cir. Certiorari denied. Reported below: 769 F. 3d 224.

No. 14–906. Woodel *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 145 So. 3d 782.

No. 14–923. Humphries *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–926. Allston et al. *v.* Lower Merion School District. C. A. 3d Cir. Certiorari denied. Reported below: 767 F. 3d 247.

No. 14–927. Shalaby *v.* Bernzomatic et al. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 419.

No. 14–929. Levy Gardens Partners 2007, L. P. *v.* Commonwealth Land Title Insurance Co. C. A. 5th Cir. Certiorari denied.

No. 14–930. Barnett *v.* Padilla, California Secretary of State, et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–933. Fair *v.* Walker et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 743 and 759.

No. 14–936. Cardinalli *v.* Cardinalli et al. Sup. Ct. Cal. Certiorari denied.

No. 14–937. Porteadores del Noroeste, S. A. de C. V. *v.* Industrial Commission of Arizona et al. Ct. App. Ariz. Certiorari denied. Reported below: 234 Ariz. 53, 316 P. 3d 1241.

No. 14–938. Sullivan *v.* North Carolina. Ct. App. N. C. Certiorari denied.

No. 14–950. Schafler *v.* HSBC Bank USA et al. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 194.

No. 14–957. Collard *v.* Noah et al. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 14–959. KeHE Distributors, LLC *v.* Killion et al. C. A. 6th Cir. Certiorari denied. Reported below: 761 F. 3d 574.

No. 14–960. Lleshi *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied.

No. 14–982. Gross et ux. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 771 F. 3d 10.

No. 14–1026. Gossage *v.* Office of Personnel Management et al. C. A. 9th Cir. Certiorari denied.

No. 14–1029. Collier *v.* Reliastar Life Insurance Co. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 821.

No. 14–1032. Meggison *v.* Bailey, Individually and in His Official Capacity as the Commissioner of the Florida Department of Law Enforcement. C. A. 11th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 865.

No. 14–1035. Hamilton *v.* AVPM Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 314.

No. 14–1065. Tyrone Fire Patrol Company, No. 1, et al. *v.* Borough of Tyrone, Pennsylvania. Commw. Ct. Pa. Certiorari denied. Reported below: 92 A. 3d 79.

No. 14–1066. Weber *v.* Tada et al. C. A. 2d Cir. Certiorari denied. Reported below: 589 Fed. Appx. 563.

No. 14–1076. Lopez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 572 Fed. Appx. 1.

No. 14–6893. Uribe *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 14–6969. Capistrano *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 830, 331 P. 3d 201.

No. 14–7461. LINDNER *v.* NEWELL ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–7502. TIRU-PLAZA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 766 F. 3d 111.

No. 14–7663. PARKER *v.* U. S. BANK N. A. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 776.

No. 14–7701. BELL *v.* NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–7726. KIRKLAND *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N. E. 3d 818.

No. 14–7731. TYREE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–7760. WILLIAMS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 561.

No. 14–8158. CANCHOLA *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8161. YUNG LO *v.* GOLDEN GAMING, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8162. GAINES *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8179. THOMPSON *v.* KELLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 280.

No. 14–8188. MILLER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 997 N. E. 2d 1184.

No. 14–8197. BODNAR *v.* RIVERSIDE COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–8198. ATLAS *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8200. DEMARY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8201. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 152 So. 3d 575.

No. 14–8205. Scott *v.* Davey, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 547.

No. 14–8210. Brown *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8222. Tafoya *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8224. Mendez Cuellar *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8227. Dudley *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 14–8228. Elswick *v.* Plumley, Warden. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–8234. Reed-Rajapaske *v.* Memphis Light, Gas and Water, et al. C. A. 6th Cir. Certiorari denied.

No. 14–8236. Milton *v.* Comerica Bank. Ct. App. Mich. Certiorari denied.

No. 14–8242. Prince *v.* Loma Linda University Medical Center. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 14–8243. Calvo *v.* Commonwealth of the Northern Mariana Islands. Sup. Ct. N. Mar. I. Certiorari denied. Reported below: 2014 MP 7.

No. 14–8252. Lozano *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 413.

No. 14–8261. Love *v.* Ducart, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8262. Jones *v.* California et al. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–8270. Gibbs *v.* Ohio. Ct. App. Ohio, 11th App. Dist., Geauga County. Certiorari denied. Reported below: 2014-Ohio-1341.

No. 14–8271. GRONDON *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8274. GADDY *v.* SOUTH CAROLINA DISTRICT COURTS. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 268.

No. 14–8276. JAVIER BERRIO *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 98.

No. 14–8277. ALLEN *v.* RACKLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8283. VASQUEZ GONZALES *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 569 Fed. Appx. 310.

No. 14–8299. ROLAND *v.* LEWIS. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 288.

No. 14–8301. COLE *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 14–8302. CHAPPELL *v.* MORGAN, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 140 Ohio St. 3d 1449, 2014-Ohio-4414, 17 N. E. 3d 596.

No. 14–8312. WRIGHT *v.* HOLLOWAY, CLERK, SUPERIOR COURT OF GRAHAM COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 14–8313. WATSON *v.* PERRITT, SUPERINTENDENT, LUMBERTON CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 147.

No. 14–8315. LEA *v.* WARREN COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8316. MCDONALD *v.* FOX RUN MEADOWS PUD. Ct. App. Colo. Certiorari denied.

No. 14–8319. MORRIS *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 14–8322. Richardson *v.* Michigan State Treasurer. C. A. 6th Cir. Certiorari denied.

No. 14–8324. Cook *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8325. Christopher *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–8334. Caldeira *v.* Janda, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8336. Castanon *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 14–8339. Allen *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 108 So. 3d 1099.

No. 14–8340. Jones *v.* Ando. C. A. 7th Cir. Certiorari denied.

No. 14–8342. Yegorov *v.* Melnichuk. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–8344. Tablas *v.* California. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 14–8350. Papol *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8370. Dongsheng Huang *v.* Department of Labor, Administrative Review Board, et al. C. A. 5th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 228.

No. 14–8378. Maharaj *v.* Holder, Attorney General. C. A. 2d Cir. Certiorari denied.

No. 14–8467. Lee *v.* Benuelos et al. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 743.

No. 14–8485. Richard *v.* Texas. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 14–8495. Sledge *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120094–U.

No. 14–8523. Carroll *v.* Kelley, Director, Arkansas Department of Correction. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 395, 442 S. W. 3d 834.

No. 14–8580. Leonard *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 171 So. 3d 716.

No. 14–8627. Lux *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8636. Audain *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 97.

No. 14–8674. Greene *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 280.

No. 14–8687. Coles *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 98.

No. 14–8692. Thomas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 869.

No. 14–8705. Ifenatuora *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 303.

No. 14–8738. Caudel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 339.

No. 14–8739. Caicedo-Cuero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 363.

No. 14–8741. Bamdad *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 14–8746. Rossetti *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 3d 322.

No. 14–8749. Glawson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8751. Hooser *v.* Walton, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8758. Davis *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 463.

No. 14–8764. Lopez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 14–8769. Pirpich *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 471.

No. 14–8770. Moore *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 3d 809 and 592 Fed. Appx. 544.

No. 14–8773. Bocanegra-Sanchez *v.* United States (Reported below: 606 Fed. Appx. 157); Avalos-Galvan *v.* United States (606 Fed. Appx. 172); Gonzalez-Silva *v.* United States (606 Fed. Appx. 162); and Hernandez-Gonzalez, aka Espinoza-Gonzalez *v.* United States (606 Fed. Appx. 162). C. A. 5th Cir. Certiorari denied.

No. 14–8774. Adams *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 570 Fed. Appx. 126.

No. 14–8775. Bucci *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 14–754. Territory of the Virgin Islands *v.* United Industrial, Service, Transportation, Professional and Government Workers of North America Seafarers International Union, on Behalf of Bason. C. A. 3d Cir. Motion of Office of the Territorial Public Defender for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 767 F. 3d 193.

No. 14–8524. Gooden *v.* United States et al. C. A. 6th Cir. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition.

No. 14–8737. Capoccia *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 578 Fed. Appx. 47.

Rehearing Denied

No. 14–724. Johnson *v.* City and County of San Francisco Department of Health, 574 U. S. 1156;

No. 14–737. Ford *v.* McDonald, Secretary of Veterans Affairs, 574 U. S. 1157;

No. 14–830. SHAH *v.* MOTORS LIQUIDATION COMPANY GUC TRUST, 574 U. S. 1159;

No. 14–5991. SANGSTER *v.* CALIFORNIA ET AL., 574 U. S. 1159;

No. 14–6865. SIMMONS *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 574 U. S. 1085;

No. 14–7087. YAZDCHI *v.* TEXAS, 574 U. S. 1124;

No. 14–7344. WRIGHT *v.* WASHBURN, WARDEN, ET AL., 574 U. S. 1162;

No. 14–7473. CHHIM *v.* UNIVERSITY OF HOUSTON, 574 U. S. 1165;

No. 14–7564. TORRES *v.* REYBOLD HOMES, INC., 574 U. S. 1168;

No. 14–7584. WIDEMAN *v.* THOMAS, WARDEN, 574 U. S. 1169;

No. 14–7607. ROBINSON *v.* KINGS COUNTY DISTRICT ATTORNEY'S OFFICE ET AL., 574 U. S. 1170;

No. 14–7642. FLANDERS *v.* UNITED STATES, 574 U. S. 1141; and

No. 14–8053. DUSHANE *v.* UNITED STATES, 574 U. S. 1183. Petitions for rehearing denied.

No. 14–6117. GRUBBS *v.* UNITED STATES, 574 U. S. 950; and

No. 14–7597. GAREY *v.* UNITED STATES, 574 U. S. 1132. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

APRIL 14, 2015

Miscellaneous Order

No. 14A1036 (14–9223). COLE *v.* LOMBARDI ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR and JUSTICE KAGAN would grant the application for stay of execution.

Certiorari Denied

No. 14–9165 (14A1032). COLE *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 14–9268 (14A1048). COLE *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, pre-

sented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 460 S. W. 3d 349.

No. 14–9293 (14A1060). COLE *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 783 F. 3d 707.

APRIL 17, 2015

Dismissal Under Rule 46

No. 14–418. PINPOINT IT SERVICES, LLC *v.* RIVERA, CHAPTER 7 TRUSTEE OF ATLAS IT EXPORT CORP. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 761 F. 3d 177.

Miscellaneous Orders

No. 14–185. REYES MATA *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. [Certiorari granted, 574 U. S. 1118.] Motion of respondent for divided argument granted.

No. 14–6368. KINGSLEY *v.* HENDRICKSON ET AL. C. A. 7th Cir. [Certiorari granted, 574 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

APRIL 20, 2015

Certiorari Granted—Vacated and Remanded

No. 14–839. DICKSON ET AL. *v.* RUCHO ET AL. Sup. Ct. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, *ante*, p. 254. Reported below: 367 N. C. 542, 766 S. E. 2d 238.

No. 14–976. CSR PLC ET AL. *v.* AZURE NETWORKS, LLC, ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318 (2015). Reported below: 771 F. 3d 1336.

Certiorari Dismissed

No. 14–8499. MANKO *v.* LENOX HILL HOSPITAL. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pau-*

peris denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 24 N. Y. 3d 1009, 21 N. E. 3d 564.

No. 14–8508. King *v.* McDonnell, Sheriff, Los Angeles County, California. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is 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. 14–8931. Shelton *v.* United States. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Justice Kagan took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 14A632. Warner *v.* United States. Application for certificate of appealability, addressed to Justice Kennedy and referred to the Court, denied.

No. 14M105. Lyon *v.* Wise Carter Child and Caraway, P. A., et al. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 14M106. Yuri Inoue *v.* Board of Trustees, Florida A&M University. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 14M107. In re Potts. Motion for leave to proceed as a veteran granted.

No. 14–5939. Credico *v.* Chief Executive Officer, Siemens (Nuclear Power Systems and Software), et al. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 970] denied.

No. 14–7509. Steiner *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Motion of

petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1148] denied.

No. 14–7514. Steiner *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1148] denied.

No. 14–7743. Gorbey *v.* Monongalia County, West Virginia, et al. Sup. Ct. App. W. Va. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1188] denied.

No. 14–7955. Glossip et al. *v.* Gross et al. C. A. 10th Cir. [Certiorari granted, 574 U. S. 1133.] Motion of petitioners for leave to file volume II of the joint appendix under seal with redacted copies for the public record granted.

No. 14–8355. Clewis *v.* Medco Health Solutions, Inc., et al. C. A. 5th Cir.;

No. 14–8413. Smith *v.* City of St. Martinville, Louisiana. C. A. 5th Cir.;

No. 14–8491. White *v.* Southeast Michigan Surgical Hospital et al. Ct. App. Mich.;

No. 14–8617. Horsley *v.* University of Alabama et al. C. A. 11th Cir.;

No. 14–8840. Guarascio *v.* United States. C. A. 4th Cir.; and

No. 14–8976. Gilmore *v.* United States. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 11, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9119. In re Ornelas; and

No. 14–9124. In re Condrey. Petitions for writs of habeas corpus denied.

No. 14–9026. In re Tatum. 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. 14–963. In re Wyttenbach; and

No. 14–8435. In re Shields Bey. Petitions for writs of mandamus denied.

Certiorari Denied

No. 14–534. GUPTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 747 F. 3d 111.

No. 14–668. SWEENEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 766 F. 3d 857.

No. 14–728. TORRESSO ET AL. *v.* TEREBESI. C. A. 2d Cir. Certiorari denied. Reported below: 764 F. 3d 217.

No. 14–777. MARIA CARDONA ET AL. *v.* CHIQUITA BRANDS INTERNATIONAL, INC.; and

No. 14–1011. DOE ET AL. *v.* CHIQUITA BRANDS INTERNATIONAL, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 760 F. 3d 1185.

No. 14–781. UNITED STATES *v.* CMS CONTRACT MANAGEMENT SERVICES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 745 F. 3d 1379.

No. 14–792. WISCONSIN ET AL. *v.* LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 3d 543.

No. 14–798. MCLAURIN *v.* UNITED STATES; and

No. 14–7954. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 764 F. 3d 372.

No. 14–850. BECTON, DICKINSON & CO. *v.* RETRACTABLE TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 757 F. 3d 1366.

No. 14–858. LVNV FUNDING, LLC, ET AL. *v.* CRAWFORD. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 3d 1254.

No. 14–864. HILLCREST PROPERTY, LLP *v.* PASCO COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 754 F. 3d 1279.

No. 14–866. BRILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 770 F. 3d 267.

No. 14–946. MACON *v.* J. C. PENNEY CO. C. A. 6th Cir. Certiorari denied.

No. 14–952. Vong et al. *v.* Aune, Executive Director of the Arizona Board of Cosmetology. Ct. App. Ariz. Certiorari denied. Reported below: 235 Ariz. 116, 328 P. 3d 1057.

No. 14–974. Dublin Eye Associates, P. C., et al. *v.* Massachusetts Mutual Life Insurance Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 463.

No. 14–977. Bryant *v.* Dasilva. C. A. 2d Cir. Certiorari denied. Reported below: 582 Fed. Appx. 56.

No. 14–978. EON Corp. IP Holdings, LLC *v.* Apple Inc. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 581 Fed. Appx. 886.

No. 14–984. Traylor *v.* Howard et al. C. A. 11th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 958.

No. 14–987. Central States, Southeast and Southwest Areas Health and Welfare Fund et al. *v.* Gerber Life Insurance Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 771 F. 3d 150.

No. 14–993. Thomas *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–0866 (La. App. 1 Cir. 7/15/13).

No. 14–1001. Litchfield Historic District Commission et al. *v.* Chabad Lubavitch of Litchfield County, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 183.

No. 14–1022. Partington *v.* Houck et al. C. A. D. C. Cir. Certiorari denied.

No. 14–1034. Schmude *v.* Texas. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 14–1041. Brooks *v.* South Carolina Commission of Indigent Defense et al. Sup. Ct. S. C. Certiorari denied.

No. 14–1048. National Organization for Marriage, Inc. *v.* Geiger et al. C. A. 9th Cir. Certiorari denied.

No. 14–1054. Santomenno et al. *v.* John Hancock Life Insurance Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 768 F. 3d 284.

No. 14–1067. Groves et al. *v.* BAC Home Loans Servicing, L. P. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 414.

No. 14–1075. Jarbo et ux. *v.* Bank of New York Mellon. C. A. 6th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 287.

No. 14–1086. Foster *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied.

No. 14–1089. Zinstein et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 100.

No. 14–1107. O'Shell *v.* Cline, Individually and in His Official Capacity as Commissioner, Indiana Department of Transportation, et al. C. A. 7th Cir. Certiorari denied. Reported below: 571 Fed. Appx. 487.

No. 14–1108. Yufa *v.* TSI, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 600 Fed. Appx. 747.

No. 14–1109. Lowe *v.* Daniels, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–1117. Pasternak *v.* California; and Bojeaux *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 14–1125. Botello et al. *v.* Christus Santa Rosa Health Care Corp. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 424 S. W. 3d 117.

No. 14–1126. Betsinger *v.* D. R. Horton, Inc., et al. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 842, 335 P. 3d 1230.

No. 14–1135. Wright *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 774 F. 3d 1085.

No. 14–1162. Cantrell *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 576 Fed. Appx. 439.

No. 14–7059. Smith *v.* California; and

No. 14–7386. Wheeler *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 60 Cal. 4th 335, 334 P. 3d 573.

No. 14–7119. Hernandez *v.* Holder, Attorney General. C. A. 6th Cir. Certiorari denied.

No. 14–7376. Clayton *v.* New York City Taxi & Limousine Commission et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 117 App. Div. 3d 602, 986 N. Y. S. 2d 117.

No. 14–7553. Cooper *v.* Cooper. App. Ct. Mass. Certiorari denied. Reported below: 85 Mass. App. 1110, 5 N. E. 3d 968.

No. 14–7909. Marinov *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 14–7977. Hunt *v.* Dunn, Commissioner, Alabama Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 14–7996. M. M. R. *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 14–8003. Hopper *v.* United States; and
No. 14–8550. Dunn *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 3d 690.

No. 14–8303. Eaton *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 103 A. 3d 545.

No. 14–8338. Williams *v.* Circuit Court of Wisconsin, Racine County, et al. Ct. App. Wis. Certiorari denied.

No. 14–8354. Currie *v.* Missouri. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 454 S. W. 3d 903.

No. 14–8360. Bennerman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 127.

No. 14–8365. Leary *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 302.

No. 14–8367. Perry *v.* Entertainment One et al. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 293.

No. 14–8368. Pope *v.* Public Defender Office, Crawford County. C. A. 3d Cir. Certiorari denied.

No. 14–8372. Eady *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 711.

No. 14–8375. Allen *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 121739–U.

No. 14–8376. Benedetto *v.* Broadhead, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8382. Moses *v.* Texas Workforce Commission et al. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 14–8383. Reinard *v.* New York. County Ct., Niagara County, N. Y. Certiorari denied.

No. 14–8385. Price *v.* Mitchell, Superintendent, Old Colony Correctional Center. C. A. 1st Cir. Certiorari denied.

No. 14–8390. Thornton *v.* Butler et al. C. A. 7th Cir. Certiorari denied.

No. 14–8395. Quilling *v.* Arnold, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8403. McGuire *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8404. Perry *v.* Nebraska. Ct. App. Neb. Certiorari denied. Reported below: 22 Neb. App. xviii.

No. 14–8406. Williams *v.* Russell, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8408. McKissick *v.* Deal, Governor of Georgia, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8409. Ward *v.* Price, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8411. Jaime Reyna *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–8414. Martins *v.* Kerestes, Superintendent, State Correctional Institution at Mahanoy, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8416. Carrasco *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 59 Cal. 4th 924, 330 P. 3d 859.

No. 14–8418. Adams *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8419. Taylor *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2014 IL App (4th) 120900–U.

No. 14–8422. Mermer *v.* California. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 14–8424. Jones, aka Shabazz *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8425. Urias Sanchez *v.* Shanahan, Secretary of Prisons, et al. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 278.

No. 14–8428. Logan *v.* California. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 14–8429. Toney *v.* Hakala et al. C. A. 8th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 570.

No. 14–8431. Richardson *v.* Texas Workforce Commission et al. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–8438. Perry *v.* Woods, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–8439. Clark *v.* Thompson, Interim Warden. C. A. 4th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 213.

No. 14–8440. Davis *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 14–8441. Marts *v.* Bell et al. C. A. 11th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 897.

No. 14–8443. Johnson *v.* Arnold, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8446. Twillie *v.* Erie School District et al. C. A. 3d Cir. Certiorari denied. Reported below: 575 Fed. Appx. 28.

No. 14–8447. TACKETT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 445 S. W. 3d 20.

No. 14–8448. WALTERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 14–8451. MEJIA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–8457. SITTERLY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120620–U.

No. 14–8461. NESBIT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 452 S. W. 3d 779.

No. 14–8466. KENNARD *v.* CITY OF ASHLAND, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8471. BOLTON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8477. WALKER *v.* U. S. BANK N. A. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 572 Fed. Appx. 740.

No. 14–8478. TRUSTY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8479. TANNER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 14–8480. BELTRAN *v.* MCDOWELL, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8484. MORRIS *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 14–8487. LACOY *v.* IAC. C. A. 4th Cir. Certiorari denied. Reported below: 566 Fed. Appx. 269.

No. 14–8497. STRAND *v.* FOULK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–8498. MARTINEZ *v.* BROWN, DISTRICT ATTORNEY, COUNTY OF QUEENS, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 596 Fed. Appx. 10.

No. 14–8503. Speckman *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–8509. Jackson *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 14–8511. Harris *v.* Colvin, Acting Commissioner of Social Security. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 526.

No. 14–8525. Harper *v.* Ballard, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 204.

No. 14–8527. Kinney *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: 264 Ore. App. 612, 333 P. 3d 1129.

No. 14–8529. Lester *v.* Logan's Roadhouse, Inc. C. A. 6th Cir. Certiorari denied.

No. 14–8532. Larson *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 14–8543. Dongsheng Huang *v.* Ultimo Software Solutions, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 669.

No. 14–8548. Olson *v.* Pollard, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–8551. Young *v.* Glunt, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8553. Walton *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8562. Lepre *v.* Lukus et al. C. A. 3d Cir. Certiorari denied. Reported below: 602 Fed. Appx. 864.

No. 14–8564. Riley *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 86 Mass. App. 309, 15 N. E. 3d 1165.

No. 14–8571. Johnson *v.* Folks et al. C. A. 11th Cir. Certiorari denied.

No. 14–8579. O'Dowd *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–1107 (La. App. 1 Cir. 3/24/14).

No. 14–8588. Stewart *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8592. Ross *v.* Ohio. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied. Reported below: 2014-Ohio-2867, 15 N. E. 3d 1213.

No. 14–8596. Sheley *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2014 IL App (3d) 120012, 16 N. E. 3d 857.

No. 14–8597. Alexandrette *v.* McFadden, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 80.

No. 14–8603. Smith *v.* Allison, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8606. Barker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 708.

No. 14–8613. Smith *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 158 So. 3d 584.

No. 14–8634. Trotter *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 148.

No. 14–8637. Avila *v.* Kempf, Director, Idaho Department of Correction, et al. C. A. 9th Cir. Certiorari denied.

No. 14–8650. Russo *v.* Idaho. Sup. Ct. Idaho. Certiorari denied. Reported below: 157 Idaho 299, 336 P. 3d 232.

No. 14–8657. Shatlaw *v.* Oregon. Ct. App. Ore. Certiorari denied.

No. 14–8671. Benton *v.* Clark County Jail et al. C. A. 7th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 231.

No. 14–8685. Freeman *v.* Koster, Attorney General of Missouri, et al. C. A. 8th Cir. Certiorari denied.

No. 14–8688. Mitchell *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 920.

No. 14–8689. Lawnik *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–8691. Sullivan *v.* Cartledge, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 127.

No. 14–8698. Bottorff *v.* Jones, Secretary, Florida Department of Corrections. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 152 So. 3d 566.

No. 14–8699. Lewis *v.* Davey, Acting Warden. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 561.

No. 14–8701. Sanford *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 104 A. 3d 50.

No. 14–8703. Griffith *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 14–8706. Nia *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2014-Ohio-2527, 15 N. E. 3d 892.

No. 14–8711. Katsipis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 162.

No. 14–8713. Turner *v.* Porter. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 211.

No. 14–8714. Swartzwelder *v.* Fisher, Superintendent, State Correctional Institution at Smithfield, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8718. Dorsey *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 217 Md. App. 745.

No. 14–8719. Shaw *v.* Macomber, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 346.

No. 14–8721. Abdullah *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 145.

No. 14–8722. Boykin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 809.

No. 14–8723. Berg *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 14–8724. Sykes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 223.

No. 14–8725. Sanchez-Larita *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 877.

No. 14–8726. Booker *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 3d 928.

No. 14–8730. King *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 48.

No. 14–8742. Davis *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 14–8745. Woods *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 764 F. 3d 1242.

No. 14–8750. Gewin *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 759 F. 3d 72.

No. 14–8752. Green *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 100 A. 3d 170.

No. 14–8771. McCafferty et al. *v.* Wells Fargo Bank, N. A. Sup. Ct. Del. Certiorari denied. Reported below: 105 A. 3d 989.

No. 14–8772. Ging-Hwang Tsoa *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 153.

No. 14–8776. Best *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 236 N. C. App. 505.

No. 14–8784. Lee *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 3d 692.

No. 14–8786. Okeayainneh *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 772 F. 3d 513.

No. 14–8787. Cisneros *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 353.

No. 14–8788. Zavala-Amador *v.* United States (Reported below: 586 Fed. Appx. 182); and Romero-Hernandez *v.* United States (588 Fed. Appx. 382). C. A. 5th Cir. Certiorari denied.

No. 14–8789. Duron-Rosales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 218.

No. 14–8790. Banner *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8794. Foster *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 504.

No. 14–8795. Cruz *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8797. Halbert *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 14–8798. Antonio Guevara *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 273.

No. 14–8801. Hill *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8802. Grayson *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 501.

No. 14–8803. Garner *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 360.

No. 14–8810. Johansen *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 132, 105 A. 3d 433.

No. 14–8813. Rolon-Ramos *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 645.

No. 14–8814. Bell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 3d 1253.

No. 14–8816. Mitchell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 70.

No. 14–8817. Cogswell *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 773 F. 3d 298.

No. 14–8821. Collins, aka Cline *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 25.

No. 14–8829. Ranieri *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 14–8830. Estevez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 186.

No. 14–8832. Lagrone *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 673.

No. 14–8836. Strong *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 3d 920.

No. 14–8838. Allen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 808.

No. 14–8841. McKinney *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 631.

No. 14–8843. Prat *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 921.

No. 14–8845. Esquivel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 282.

No. 14–8852. Lumpkin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 726.

No. 14–8854. Hester *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 805.

No. 14–8855. Harmon-Wright *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8857. Bong *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 607.

No. 14–8862. Coaxum *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 410 S. C. 320, 764 S. E. 2d 242.

No. 14–8863. Debolt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 574 Fed. Appx. 239.

No. 14–8865. Singh *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 14–8866. Kelly *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8870. Murray *v.* Wenerowicz, Superintendent, State Correctional Institution at Graterford, et al.

C. A. 3d Cir. Certiorari denied. Reported below: 591 Fed. Appx. 142.

No. 14–8876. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 815.

No. 14–8877. WADE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 520.

No. 14–8879. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 79.

No. 14–8880. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 14–8882. HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 71.

No. 14–8883. SMARR *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 808, 766 S. E. 2d 650.

No. 14–8885. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 276.

No. 14–8888. FLORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8895. GOMEZ-PERALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 156.

No. 14–8896. GRAVES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–8898. BURTTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–8900. ACOSTA-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 774.

No. 14–8901. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 103 A. 3d 204.

No. 14–8902. RAMEY *v.* TRAXLER, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, ET AL.

C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 260.

No. 14–8904. Reed *v.* Gavin, Superintendent, State Correctional Institution at Waymart, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8905. Tucker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 224.

No. 14–8906. Walker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 162.

No. 14–8910. Owens *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 97 A. 3d 594.

No. 14–8914. Cuevas *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–8917. Sullivan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 631.

No. 14–8924. Kennedy *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 14–8925. Thomas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 356.

No. 14–8928. Gaines *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 14–8930. Ferrufino-Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 222.

No. 14–8933. Oliver *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 Fed. Appx. 149.

No. 14–8938. Fields *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 916.

No. 14–8939. Griner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 212.

No. 14–8940. Inzano *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–8942. Fulford *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–8944. Hill *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 107 A. 3d 1119.

No. 14–8946. Hoon *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 762 F. 3d 1172.

No. 14–8952. Williams *v.* Cartledge, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 287.

No. 14–8953. Ware *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 880.

No. 14–8955. Vishnevetsky *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 14–8959. King *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 630.

No. 14–8960. Larrimore *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 168.

No. 14–8963. Brownlee *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 632.

No. 14–8968. Gastelum-Campa *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 646.

No. 14–8971. Sudduth *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 676.

No. 14–8972. Rouse *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 82.

No. 14–8973. Sanabria-Archiga *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 439.

No. 14–8974. Ealy *v.* United States District Court for the Southern District of Ohio. C. A. 6th Cir. Certiorari denied.

No. 14–8981. Flowers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 142.

No. 14–8985. BATTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 774 F. 3d 504.

No. 14–8996. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–8999. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 100 A. 3d 95.

No. 14–9000. GIBBONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 528 Fed. Appx. 771.

No. 14–9001. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 777 F. 3d 984.

No. 14–9005. BALDWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 774 F. 3d 711.

No. 14–9010. WADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 138.

No. 14–9015. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 299.

No. 14–9017. ANTONIO MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 950.

No. 14–9021. VIGIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 774 F. 3d 331.

No. 14–9034. BARSOUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 763 F. 3d 1321.

No. 14–9037. CASTRO-CAICEDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 3d 93.

No. 14–804. GAINES ET AL. *v.* FEDERAL HOME LOAN MORTGAGE CORPORATION ET AL. (Reported below: 589 Fed. Appx. 314); and BERNARD *v.* FEDERAL HOUSING FINANCE AGENCY ET AL. (587 Fed. Appx. 266). C. A. 6th Cir. Motion of Michigan Legal Services et al. for leave to file brief as *amici curiae* granted. Certiorari denied.

No. 14–965. AHMAD *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 553 Fed. Appx. 58.

No. 14–969. LANDERS *v.* QUALITY COMMUNICATIONS, INC., ET AL. C. A. 9th Cir. Motion of Civil Procedure Law Professors for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 771 F. 3d 638.

No. 14–1039. FLORIDA *v.* TEAMER. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 151 So. 3d 421.

No. 14–8189. SCOTT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BREYER and JUSTICE SOTOMAYOR dissent. Reported below: 163 So. 3d 389.

No. 14–8194. LOCKHART *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BREYER and JUSTICE SOTOMAYOR dissent. Reported below: 163 So. 3d 1088.

No. 14–8694. PAKES *v.* FRAUENHEIM, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 588 Fed. Appx. 724.

No. 14–8734. CLEAVER *v.* MAYE, WARDEN. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 773 F. 3d 230.

No. 14–8835. BEANE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 589 Fed. Appx. 805.

No. 14–8886. FULLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 14–9022. LAN NGOC TRAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–9941. ANDERSON *v.* PRIVATE CAPITAL GROUP ET AL., 571 U. S. 1023;

No. 14–644. WILLIS *v.* VIRGINIA ET AL., 574 U. S. 1154;

No. 14–822. ANORUO *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS, 574 U. S. 1191;

No. 14–919. Native Wholesale Supply *v.* Oklahoma ex rel. Pruitt, Attorney General of Oklahoma, 574 U. S. 1192;

No. 14–5500. Fourstar *v.* Decon et al., 574 U. S. 902;

No. 14–5501. Fourstar *v.* Farley, Warden, 574 U. S. 902;

No. 14–6822. Goings *v.* Sumner County District Attorney's Office et al., 574 U. S. 1137;

No. 14–6988. McGhee *v.* United States District Court for the Southern District of Mississippi et al., 574 U. S. 1088;

No. 14–7152. May *v.* Amgen, Inc., 574 U. S. 1193;

No. 14–7244. Shao *v.* Tsan-Kuen Wang, 574 U. S. 1161;

No. 14–7293. Wilcox *v.* Florida, 574 U. S. 1161;

No. 14–7395. Antonio Marroquin *v.* MacDonald, Warden, 574 U. S. 1140;

No. 14–7424. Taylor *v.* Virginia, 574 U. S. 1165;

No. 14–7520. Everett *v.* Barrow, Warden, 574 U. S. 1167;

No. 14–7545. Ramos *v.* Florida Department of Corrections, 574 U. S. 1168;

No. 14–7577. In re Smith et al., 574 U. S. 1151;

No. 14–7580. In re Bowles, 574 U. S. 1152;

No. 14–7659. Nguyen Vu *v.* Evers, 574 U. S. 1172;

No. 14–7673. In re McDonald, 574 U. S. 1072;

No. 14–7734. Price *v.* Burwell, Secretary of Health and Human Services, 574 U. S. 1174;

No. 14–7747. Howard *v.* Corrections Corporation of America et al., 574 U. S. 1195;

No. 14–7784. Perry *v.* McDonald, Secretary of Veterans Affairs, 574 U. S. 1176;

No. 14–7865. Bowling *v.* Appalachian Federal Credit Union, *ante*, p. 906;

No. 14–7924. Millis *v.* Cross, Warden, 574 U. S. 1180;

No. 14–7927. Perry *v.* United States, 574 U. S. 1180;

No. 14–7978. Sesson *v.* City of Tuscaloosa, Alabama, 574 U. S. 1197; and

No. 14–8233. Somsak Saeku *v.* United States, 574 U. S. 1201. Petitions for rehearing denied.

No. 14–7637. Hernandez *v.* United States, 574 U. S. 1185. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 14–7023. In re Ford, 574 U. S. 1073. Motion for leave to file petition for rehearing denied.

April 27, 2015

Certiorari Granted—Vacated and Remanded

No. 14–209. Illinois *v.* Cummings. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rodriguez* v. *United States*, *ante*, p. 348. Reported below: 2014 IL 115769, 6 N. E. 3d 725.

No. 14–701. Michigan Catholic Conference et al. *v.* Burwell, Secretary of Health and Human Services, et al. C. A. 6th Cir. Motion of Association of American Physicians and Surgeons et al. for leave to file brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014). Reported below: 755 F. 3d 372.

Certiorari Dismissed

No. 14–8608. Daker *v.* Warren, Sheriff, Cobb County, Georgia, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 14–8620. Stevens *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 146 So. 3d 1204.

Miscellaneous Orders

No. 14M108. Schultz *v.* Obama, President of the United States, et al.; and

No. 14M109. Patterson *v.* Illinois Department of Human Services et al. 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 Elephant Butte Irrigation District for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 574 U. S. 972.]

No. 14–6629. D'Antuono *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1022] denied.

No. 14–7959. In re Rehberger. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 911] denied.

No. 14–8118. Clark *v.* Social Security Administration. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 909] denied.

No. 14–8806. Teichmann *v.* New York. C. A. 2d Cir.; and
No. 14–8856. Bistrika et al. *v.* Oregon; and Bistrika *v.* Oregon. Ct. App. Ore. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 18, 2015, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 14–9161. In re Ornelas-Castro;
No. 14–9217. In re Ayers; and
No. 14–9230. In re Ramon. Petitions for writs of habeas corpus denied.

No. 14–1030. In re Mills;
No. 14–8493. In re Sesson;
No. 14–8521. In re Coley; and
No. 14–8818. In re Platts. Petitions for writs of mandamus denied.

No. 14–8708. In re Bradin. 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. 14–9042. In re Lewis. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–1339. Spokeo, Inc. *v.* Robins. C. A. 9th Cir. Certiorari granted. Reported below: 742 F. 3d 409.

No. 14–613. Green *v.* Brennan, Postmaster General. C. A. 10th Cir. Certiorari granted. Reported below: 760 F. 3d 1135.

Certiorari Denied

No. 14–326. Yacubian *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 750 F. 3d 100.

No. 14–646. Sai *v.* United States Postal Service. C. A. D. C. Cir. Certiorari denied.

No. 14–837. Alexander-Igbani *v.* DeKalb County School District. C. A. 11th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 803.

No. 14–874. Apel *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 767 F. 3d 800.

No. 14–884. Rosebrock *v.* Hoffman, Acting Police Chief for the Department of Veterans Affairs Greater Los Angeles Healthcare System, et al. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 3d 963.

No. 14–887. Baltimore City Police Department et al. *v.* Owens. C. A. 4th Cir. Certiorari denied. Reported below: 767 F. 3d 379.

No. 14–893. University of Texas System et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 759 F. 3d 437.

No. 14–991. Western Sky Financial et al. *v.* Jackson et al. C. A. 7th Cir. Certiorari denied. Reported below: 764 F. 3d 765.

No. 14–996. Collis *v.* Bank of America et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 739 and 741.

No. 14–998. Citizen Center *v.* Gessler, Colorado Secretary of State, et al. C. A. 10th Cir. Certiorari denied. Reported below: 770 F. 3d 900.

No. 14–1002. Ballesteros *v.* Roney. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 412, 443 S. W. 3d 548.

No. 14–1007. Stull Ranches, LLC *v.* Entek GRB, LLC. C. A. 10th Cir. Certiorari denied. Reported below: 763 F. 3d 1252.

No. 14–1012. Escamilla et al. *v.* M2 Technology, Inc. (Reported below: 589 Fed. Appx. 671); and Escamilla *v.* M2 Technology, Inc., et al. (581 Fed. Appx. 449). C. A. 5th Cir. Certiorari denied.

No. 14–1013. Segall et al. *v.* OSF Healthcare System et al. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 14–1014. Segall et al. *v.* BAC Home Loans Servicing L. P. et al. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 14–1015. Korman et ux. *v.* Schott. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 14–1017. Grogan *v.* Blooming Grove Volunteer Ambulance Corps. et al. C. A. 2d Cir. Certiorari denied. Reported below: 768 F. 3d 259.

No. 14–1018. Viewcrest Investments, LLC *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: 262 Ore. App. 666, 328 P. 3d 840.

No. 14–1023. Ioppolo *v.* Rumana et al. C. A. 5th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 321.

No. 14–1024. Cole *v.* Generations Adoptions et al. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 407 S. W. 3d 904.

No. 14–1031. Pope et al. *v.* James B. et al. Ct. App. S. C. Certiorari denied.

No. 14–1036. Holmes *v.* Cassel. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 14–1038. Nwawka *v.* Atlanta Classic Cars et al. Ct. App. Ga. Certiorari denied. Reported below: 326 Ga. App. XXVII.

No. 14–1042. Western Radio Services Co., Inc. *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 770.

No. 14–1045. Matz *v.* Klotka et al. C. A. 7th Cir. Certiorari denied. Reported below: 769 F. 3d 517.

No. 14–1046. Flander *v.* Texas Department of Public Safety et al. C. A. 5th Cir. Certiorari denied.

No. 14–1050. Nationwide Financial, LP *v.* Pobuda et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 122540–U.

No. 14–1051. Julian et al. *v.* Department of Agriculture et al. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 850.

No. 14–1059. Schutz *v.* Failla. Sup. Ct. Wash. Certiorari denied. Reported below: 181 Wash. 2d 642, 336 P. 3d 1112.

No. 14–1078. National Milk Producers Federation, aka Cooperatives Working Together, et al. *v.* Edwards, Individually and on Behalf of All Others Similarly Situated, et al. C. A. 9th Cir. Certiorari denied.

No. 14–1081. Green *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 586 Fed. Appx. 586.

No. 14–1105. Dean *v.* Slade et al. Ct. App. Miss. Certiorari denied. Reported below: 164 So. 3d 468.

No. 14–1114. Cossette *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 593 Fed. Appx. 28.

No. 14–1159. Grose *v.* Johnson, Secretary of Homeland Security, et al. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 334.

No. 14–1181. Diamond *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 603 Fed. Appx. 947.

No. 14–1185. Saoud *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 182.

No. 14–1188. Gail Vento, LLC, et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 595 Fed. Appx. 170.

No. 14–6927. Moore *v.* United States District Court for the Central District of California et al. C. A. 9th Cir. Certiorari denied.

No. 14–7593. Teran-Salas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 767 F. 3d 453.

No. 14–7676. Guevara *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 364.

No. 14–7688. Olten *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 565 Fed. Appx. 558.

No. 14–8021. Klinefelter *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 355.

No. 14–8056. Lambert *v.* City of Dana Point, California, et al. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 14–8193. Lambrix *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 3d 1246.

No. 14–8513. Ragin *v.* Circuit Court of Virginia, City of Newport News. Sup. Ct. Va. Certiorari denied.

No. 14–8517. Hawk *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–8520. Culp *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 141 So. 3d 1279.

No. 14–8522. Davidson *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 453 S. W. 3d 386.

No. 14–8528. Scott *v.* MacLaren, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–8533. Perkinson *v.* Chatman, Warden. Super. Ct. Butts County, Ga. Certiorari denied.

No. 14–8534. Ponte *v.* Discover Bank et al. Ct. App. Mich. Certiorari denied.

No. 14–8536. Revis *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8537. Lewis *v.* Brown et al. C. A. 5th Cir. Certiorari denied.

No. 14–8538. Lewis *v.* Baton Rouge Police Department et al. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 400.

No. 14–8541. Warith *v.* Amalgamated Transit Union Local Chapter 268. C. A. 6th Cir. Certiorari denied.

No. 14–8542. Reed *v.* Job Council of the Ozarks et al. C. A. 8th Cir. Certiorari denied.

No. 14–8546. Howard *v.* Nevada. Sup. Ct. Nev. Certiorari denied.

No. 14–8552. Merritt *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 14–8565. Lindensmith *v.* Wallace et al. C. A. 6th Cir. Certiorari denied.

No. 14–8567. McDowell *v.* Taylor, Warden. C. A. 11th Cir. Certiorari denied.

No. 14–8568. Nika *v.* Baker, Warden, et al. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1223.

No. 14–8572. K. R. *v.* Monterey County Department of Social and Employment Services. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 14–8578. Memmer *v.* Ludwick, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8582. Orta *v.* Biter, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8583. Ortiz *v.* Mahally, Superintendent, State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 14–8584. Pryor *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–0983 (La. App. 1 Cir. 8/15/13).

No. 14–8585. Miller *v.* Pennsylvania et al. C. A. 3d Cir. Certiorari denied. Reported below: 588 Fed. Appx. 96.

No. 14–8586. Alonzo Najera *v.* Long, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8587. BLUEFORD *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 48,823, 48,824 (La. App. 2 Cir. 3/5/14), 137 So. 3d 54.

No. 14–8598. DAVIS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 14–8611. JOHNSON *v.* HOLLOWAY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–8614. NAPOSKI *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 14–8615. MATT N. *v.* MICHELE I. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–8616. OYELAKIN *v.* RENO, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8618. SHEPPARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 151 So. 3d 1154.

No. 14–8621. LANE-EL *v.* SPEARS ET AL. Ct. App. Ind. Certiorari denied. Reported below: 13 N. E. 3d 859.

No. 14–8622. RICK *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 14–8632. WILKERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 14–8633. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2014 IL App (2d) 130015–U.

No. 14–8639. BELL *v.* LITTLEFIELD ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–8640. JARAMILLO *v.* ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–8641. CROCKETT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8642. SANDERSON *v.* ESTES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–8643. Serna *v.* Chromes. C. A. 9th Cir. Certiorari denied.

No. 14–8652. Lacy *v.* Jackson, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 309.

No. 14–8653. Johnson *v.* Farm Credit of Florida et al. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 156 So. 3d 1079.

No. 14–8654. Otworth *v.* Budnik et al. C. A. 6th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 859.

No. 14–8662. Cole *v.* Toole, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 768 F. 3d 1150.

No. 14–8690. Mazuji *v.* Colvin, Acting Commissioner of Social Security. C. A. 11th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 959.

No. 14–8696. Alford *v.* Carlton. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 438.

No. 14–8716. Allen *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–8748. Hill *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–8785. Nickerson *v.* Rhode Island. Sup. Ct. R. I. Certiorari denied. Reported below: 94 A. 3d 1116.

No. 14–8822. Campbell *v.* Paramo, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–8825. Qureshi *v.* Hughes et al. Ct. Sp. App. Md. Certiorari denied.

No. 14–8844. Miller *v.* Walt Disney Co. et al. C. A. 9th Cir. Certiorari denied.

No. 14–8849. Wardell *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 418.

No. 14–8864. Donoghue *v.* Premo, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 599.

No. 14–8887. Greer *v.* Denney, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–8918. Santibanez *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 14–8920. Perez-Gonzalez *v.* Brown, Governor of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 423.

No. 14–8926. Springer *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 2014 S.D. 80, 856 N. W. 2d 460.

No. 14–8937. Hall *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 151 So. 3d 1245.

No. 14–8958. Madad *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 666.

No. 14–8979. Galicia *v.* Baker, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–9004. Broughton *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 581 Fed. Appx. 882.

No. 14–9008. Jones *v.* Butler, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–9011. Clarke *v.* Provident Life & Accident Insurance Co. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 294.

No. 14–9029. Lorca Veras *v.* Osher. Ct. App. Colo. Certiorari denied.

No. 14–9050. Bray *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9051. Cherry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 117.

No. 14–9054. Berry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 377.

No. 14–9055. Fekrat *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 669.

No. 14–9066. Snow et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 223.

No. 14–9070. Vargas-Santillan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 369.

No. 14–9073. Robinson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 224.

No. 14–9076. Bruno-Sandoval *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 274.

No. 14–9082. Hill *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 10.

No. 14–9083. Gonzalez-Perez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 3.

No. 14–9087. Canady *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 80.

No. 14–9090. Wright *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 296.

No. 14–9091. Zuniga-Benitez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 268.

No. 14–9092. Bailey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 206.

No. 14–9094. Anderson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 119.

No. 14–9100. Wert *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 914.

No. 14–9102. Rey *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–9103. Robinson *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–9106. Lara-Renteria *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 561.

No. 14–9118. Morales-Zarate *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 739.

No. 14–9130. CHOCANO *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9132. AURELHOMME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 645.

No. 14–711. TEVA PHARMACEUTICALS USA, INC., ET AL. *v.* BENTLEY ET AL. Super. Ct. Pa. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 81 A. 3d 80.

Rehearing Denied

No. 13–8778. DIXON *v.* CALDWELL, WARDEN, 572 U. S. 1091;

No. 14–802. HATCHIGIAN *v.* STATE FARM INSURANCE CO., 574 U. S. 1158;

No. 14–6743. SANCHEZ *v.* SHERMAN, ACTING WARDEN, 574 U. S. 1082;

No. 14–6752. MCDONALD *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 574 U. S. 1083;

No. 14–7283. OKOH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 574 U. S. 1161;

No. 14–7369. FORD *v.* SURPRISE FAMILY URGENT CARE CENTER, LLC, ET AL., 574 U. S. 1163;

No. 14–7742. FLENTROY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 574 U. S. 1194;

No. 14–7746. GRENIER *v.* COLORADO, 574 U. S. 1194;

No. 14–7777. MICHAEL *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 904;

No. 14–7910. THIBODEAUX *v.* AFRICK, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, ET AL., 574 U. S. 1197;

No. 14–7923. KOKINDA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *ante*, p. 917;

No. 14–8123. SHABAZZ *v.* UNITED STATES, 574 U. S. 1185;

No. 14–8153. AMAYA *v.* UNITED STATES, 574 U. S. 1199; and

No. 14–8744. IN RE WATTS, *ante*, p. 934. Petitions for rehearing denied.

No. 14–8524. GOODEN *v.* UNITED STATES ET AL., *ante*, p. 957. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

April 28, 2015

Certiorari Denied

No. 14–8837 (14A1090). Pruett *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

No. 14–9469 (14A1091). Pruett *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 608 Fed. Appx. 182.

No. 14–9498 (14A1096). Pruett *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 784 F. 3d 287.

April 29, 2015

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. ——; and amendments to the Federal Rules of Civil Procedure, see *post*, p. ——.)