Vol. 576 (Pp. 1–472; 1001–1048)

Part 1

PRELIMINARY PRINT

VOLUME 576 U. S. - PART 1
PAGES 1–472; 1001–1048

OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 8 THROUGH JUNE 22, 2015

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

NOTICE: This preliminary print is subject to formal revision before the bound volume is published. Users are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the bound volume goes to press.

For sale by the Superintendent of Documents, U. S. Government Publishing Office
Washington, D.C. 20402

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

LORETTA E. LYNCH, Attorney General.
DONALD B. VERRILLI, Jr., Solicitor General.
SCOTT S. HARRIS, Clerk.
CHRISTINE LUCHOK FALLON, Reporter of Decisions.
PAMELA TALKIN, Marshal.
LINDA S. MASLOW, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

INDEX

(Vol. 576 U. S., Part 1)

ADMINISTRATIVE SEARCHES AND SEIZURES. See **Constitutional Law.**

AGRICULTURE. See **Constitutional Law.**

ANALOGUES TO CONTROLLED SUBSTANCES. See **Controlled Substance Analogue Enforcement Act of 1986.**

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996. See **Habeas Corpus.**

ATTORNEY'S FEES. See **Bankruptcy.**

BANKRUPTCY.

Attorney's fees for work defending fee applications.—Title 11 U. S. C. § 330(a)(1), which permits bankruptcy courts to "award . . . reasonable compensation for actual, necessary services rendered by" § 327(a) professionals, does not permit bankruptcy courts to award attorney's fees for work performed defending fee applications. Baker Botts L. L. P. v. ASARCO LLC, p. 121.

***BATSON* CLAIMS.** See **Habeas Corpus.**

CAPITAL MURDER. See **Habeas Corpus.**

CHILD ABUSE. See **Constitutional Law.**

CITIZENSHIP. See **Constitutional Law.**

CIVIL RIGHTS ACT OF 1871.

Excessive force claim—State of mind jury instruction.—To prevail on an excessive force claim under 42 U. S. C. § 1983, a pretrial detainee must show only that force purposely or knowingly used against him was objectively unreasonable; officers' state of mind jury instruction given in Kingsley's case was erroneous because it suggested a subjective inquiry. Kingsley v. Hendrickson, p. 389.

CONFEDERATE FLAG. See **Constitutional Law.**

CONFRONTATION OF WITNESSES. See **Constitutional Law.**

CONSTITUTIONAL LAW.

Confrontation of witnesses—Nontestimonial statements—Child abuse victim's statements to teachers.—Sixth Amendment's Confrontation Clause did not prohibit prosecutors from introducing statements made by a child abuse victim to his teachers, where neither child, who was unavailable for cross-examination, nor his teachers had primary purpose of creating an out-of-court substitute for trial testimony. Ohio v. Clark, p. 237.

Due process—Judicial review of visa denial—Liberty interest in marriage.—Ninth Circuit's judgment—that Din's liberty interest in her marriage entitled her to judicial review of her husband's visa denial, and that Government deprived her of that interest without due process by denying visa application without giving a more detailed explanation of its reasons—is vacated. Kerry v. Din, p. 86.

Freedom of speech—Specialty license plates—Confederate battle flag.—Because Texas' specialty license plate designs constitute government speech, Texas was entitled to refuse to issue respondents' proposed plates featuring a Confederate battle flag. Walker v. Texas Div., Sons of Confederate Veterans, Inc., p. 200.

Freedom of speech—Town sign code—Content-based speech regulations.—Sign code of town of Gilbert contains content-based regulations of speech that do not survive strict scrutiny. Reed v. Town of Gilbert, p. 155.

Searches and seizures—Administrative searches of hotel guest records—Hotel operators' punishment for noncompliance.—A provision in Los Angeles' municipal code that permits police officers to conduct administrative searches of hotel guest records is facially unconstitutional because hotel operators who fail to turn over their records are subject to punishment without first being afforded opportunity for precompliance review. Los Angeles v. Patel, p. 409.

Separation of powers—Foreign Relations Authorization Act, Fiscal Year 2003—Presidential power to recognize foreign sovereign—Jerusalem-born United States citizen's passport.—Because President has exclusive power to grant formal recognition to a foreign sovereign, Act's § 214(d)—which requires Secretary of State, upon request, to record birthplace of a Jerusalem-born United States citizen as Israel on, *inter alia,* a passport—infringes on Executive's consistent decision to withhold recognition with respect to Jerusalem. Zivotofsky v. Kerry, p. 1.

Taking of property—Crop set-aside requirement—Just compensation.—Raisin Administrative Committee's requirement that growers set aside a certain percentage of their crop for account of Government, free of charge, is a physical taking under Fifth Amendment, entitling petitioners to just compensation. Horne v. Department of Agriculture, p. 350.

CONTROLLED SUBSTANCE ANALOGUE ENFORCEMENT ACT OF 1986.

Scienter requirement—Regulated substances.—In prosecuting a violation of Analogue Act, Government must establish that defendant knew he was dealing with a substance regulated under Controlled Substances Act or Analogue Act. McFadden v. United States, p. 186.

DEATH PENALTY. See **Habeas Corpus.**

DEPORTATION. See **Jurisdiction.**

DUE PROCESS. See **Civil Rights Act of 1871; Constitutional Law.**

EQUITABLE TOLLING. See **Jurisdiction.**

EXCESSIVE FORCE CLAIMS. See **Civil Rights Act of 1871.**

EXECUTIVE BRANCH. See **Constitutional Law.**

FIFTH AMENDMENT. See **Constitutional Law.**

FIRST AMENDMENT. See **Constitutional Law.**

FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003. See **Constitutional Law.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1871.**

FOURTH AMENDMENT. See **Constitutional Law.**

FREEDOM OF SPEECH. See **Constitutional Law.**

HABEAS CORPUS.

Death penalty—Hearing on intellectual disability.—State trial court's decision to deny Brumfield a hearing on whether an intellectual disability rendered him death-penalty ineligible under *Atkins* v. *Virginia*, 536 U. S. 304, was an "unreasonable determination of the facts in light of the evidence presented," 28 U. S. C. § 2254(d)(2), entitling Brumfield to have his federal habeas claim heard on merits. Brumfield v. Cain, p. 305.

Defense counsel's exclusion from part of Batson hearing—Harmless error.—Ayala is not entitled to federal habeas relief because any federal constitutional error that may have occurred from trial judge's exclusion of defense counsel from part of a *Batson* hearing was harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619, and Antiterrorism and Effective Death Penalty Act of 1996. Davis v. Ayala, p. 257.

HARMLESS ERROR. See **Habeas Corpus.**

HOTEL RECORDS. See **Constitutional Law.**

IMMIGRANT VISAS. See **Constitutional Law.**

IMMIGRATION. See **Jurisdiction.**

JERUSALEM. See **Constitutional Law.**

JURISDICTION.

Board of Immigration Appeals' decision denying equitable tolling—Motion to reopen deportation case.—Fifth Circuit erred in declining to take jurisdiction to review Board's decision denying Mata's request for equitable tolling of time limit for filing a motion to reopen his deportation case. Reyes Mata v. Lynch, p. 143.

LIBERTY INTERESTS. See **Constitutional Law.**

LICENSE PLATES. See **Constitutional Law.**

MARRIAGE. See **Constitutional Law.**

MENTALLY RETARDED CRIMINALS. See **Habeas Corpus.**

MENTAL-STATE REQUIREMENT. See **Controlled Substance Analogue Enforcement Act of 1986.**

NATIONALITY. See **Constitutional Law.**

OUTDOOR SIGNS. See **Constitutional Law.**

PATENTS.

Patentee royalties—Sales after patent expiration.—Stare decisis requires adherence to *Brulotte* v. *Thys Co.*, 379 U. S. 29, in which Court held that a patentee cannot continue to receive royalties for sales made after his patent expires. Kimble v. Marvel Entertainment, LLC, p. 446.

PRESIDENTIAL POWERS. See **Constitutional Law.**

PROFESSIONAL SERVICES. See **Bankruptcy.**

RAISINS. See **Constitutional Law.**

REGULATORY TAKING OF PROPERTY. See **Constitutional Law.**

RIGHT TO COUNSEL. See **Habeas Corpus.**

ROYALTIES. See **Patents.**

SCIENTER. See **Controlled Substance Analogue Enforcement Act of 1986.**

SEARCHES AND SEIZURES. See **Constitutional Law.**

SEPARATION OF POWERS. See **Constitutional Law.**

SIGNAGE REGULATIONS. See **Constitutional Law.**

SIXTH AMENDMENT. See **Constitutional Law.**

STARE DECISIS. See **Patents.**

TAKING OF PROPERTY. See **Constitutional Law.**

TEXAS. See **Constitutional Law.**

WARRANTLESS SEARCHES. See **Constitutional Law.**

WITNESS TESTIMONY. See **Constitutional Law.**

WORDS AND PHRASES.

"[*R*]*easonable compensation . . . for services rendered.*" Bankruptcy Code, 11 U. S. C. § 330(a)(1). Baker Botts L. L. P. v. ASARCO LLC, p. 121.

TABLE OF CASES REPORTED

(Vol. 576 U. S., Part 1)

NOTE: All undesignated references herein to the United States Code are to the 2012 edition.

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

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

Page

ABB AG; Republic of Iraq *v.* 1028
Abbott; Nixon *v.* 1006
Abdul-Aziz *v.* Ricci 1002
Abiles *v.* United States 1012
Accord *v.* Philip Morris USA Inc. 1005
Ace American Ins. Co.; Michigan Workers' Comp. Ins. Agency *v.* 1004
Acevedo-Perez *v.* United States 1037
Adan Franco *v.* United States 1043
Adkins *v.* U. S. District Court 1007
Aguirre *v.* Montgomery 1024
Alabama; Lockhart *v.* 1031
Alabama; Scott *v.* 1031
Alan M. Cass & Assoc.; Bob *v.* 1007
Alarcon *v.* United States 1043
Alaska Community Action on Toxics; Aurora Energy Services *v.* 1004
Al-Dabagh *v.* Case Western Reserve Univ. 1006
Aledo Independent School Dist.; G. M. *v.* 1004
Allamvasutak Zrt.; Fischer *v.* 1006
Allebban *v.* United States 1023
Allegheny Ford Truck Sales, Inc. *v.* Ford Motor Co. 1037
Allstate Ins. Co. *v.* Jimenez 1028
American Bottling Co.; Potts *v.* 1036

Page
American Home Assurance Co. *v.* Tennessee 1036
Angel Mendez *v.* Stephens 1024
Annucci; Dorn *v.* 1023
Apotex Inc. *v.* UCB, Inc. 1036
Aransas Project *v.* Shaw 1035
Arbodela *v.* United States 1011
Ariegwe *v.* Kirkegard 1019
Arkansas; Canada *v.* 1038
Arlington County Dept. of Human Services; Heffernan *v.* 1037
ASARCO LLC; Baker Botts L. L. P. *v.* 121
Associated Builders & Contractors Inc. *v.* Shiu 1022
Atalese; U. S. Legal Services Group, L. P. *v.* 1004
Atkinson; Ferranti *v.* 1010
Attorney General; Esparza de Rubio *v.* 1037
Attorney General; Lucien *v.* 1018
Attorney General; Madrigal-Barcenas *v.* 1001
Attorney General; Mohamed *v.* 1005
Attorney General; Ramon Tarango *v.* 1037
Attorney General; Salado-Alva *v.* 1037
Attorney General; Yusov *v.* 1040
August *v.* Warren 1018
AU Optronics Corp.; Motorola Mobility LLC *v.* 1022
Aurora Energy Services *v.* Alaska Community Action on Toxics 1004
Ayala; Davis *v.* 257
Ayala-Medina *v.* United States 1028
Ayers, *In re* 1034
Aylor; Zhenli Ye Gon *v.* 1035
B.; M. K. *v.* 1006
B. *v.* San Diego County Health and Human Services Agency 1047
Babb *v.* Maine 1039
Bailey *v.* United States 1042
Bajat; Lavergne *v.* 1002
Bajo-Gonzalez *v.* United States 1018
Baker Botts L. L. P. *v.* ASARCO LLC 121
Bank of America, N. A. *v.* Bello 1001
Bank of America, N. A. *v.* Belotserkovsky 1019
Bank of America, N. A. *v.* Boykins 1019
Bank of America, N. A. *v.* Brown 1032
Bank of America, N. A. *v.* Corrad 1019
Bank of America, N. A. *v.* Farmer 1002
Bank of America, N. A. *v.* Garro 1019
Bank of America, N. A. *v.* Glaspie 1031
Bank of America, N. A. *v.* Hall 1001
Bank of America, N. A. *v.* Hamilton-Presha 1019

Page
Bank of America, N. A. *v.* Iest 1001
Bank of America, N. A. *v.* Johnson 1019
Bank of America, N. A. *v.* Lakhani 1019
Bank of America, N. A. *v.* Lee 1001
Bank of America, N. A. *v.* Madden 1032
Bank of America, N. A. *v.* Nemcik 1001
Bank of America, N. A. *v.* Peele 1019
Bank of America, N. A. *v.* Phillips 1001
Bank of America, N. A. *v.* Vander Iest 1001
Bank of America, N. A. *v.* Waits 1001
Bank of Baroda; Tze Wung Consultants, Ltd. *v.* 1036
Bank of N. Y. Mellon *v.* Lang 1001
Barajas, *In re* 1034
Barnes; Phillips *v.* 1025
Barreto Abiles *v.* United States 1012
Barton *v.* United States 1011
Beall *v.* United States 1026
Bean *v.* United States 1011
Beard; Reiser *v.* 1007
Beaulieu; Tomaselli *v.* 1038
Bell *v.* United States 1010,1043
Bello; Bank of America, N. A. *v.* 1001
Bellon *v.* Neven 1041
Belmont Holdings Corp. *v.* Deutsche Bank AG 1002
Belotserkovsky; Bank of America, N. A. *v.* 1019
Berger, *In re* 1033
Biter; Shelton *v.* 1003
Blackshear *v.* Florida 1025
Blaine *v.* Norman 1025
Blakeney *v.* Pennsylvania 1009
Bob *v.* Alan M. Cass & Assoc. 1007
Bolden *v.* Euclid 1035
Bottom; Roach *v.* 1007
Bouaphakeo; Tyson Foods, Inc. *v.* 1003
Boykin *v.* United States 1047
Boykins; Bank of America, N. A. *v.* 1019
Bradford *v.* Gordy 1008
Brennan; Kabir *v.* 1011
Bridges *v.* New Jersey 1025
Britton *v.* United States 1027
Broderick; Patterson *v.* 1041
Brooks *v.* United States 1009
Brown; Bank of America, N. A. *v.* 1032
Brown; Israel *v.* 1032

Page
Broz *v.* Deutsche Bank National Trust Co. 1008
Bruce *v.* Samuels 1021
Brumfield *v.* Cain 305
Bryant; Patton *v.* 1039
Budik *v.* United States 1005
Bullard; Gamble *v.* 1040
Burda *v.* Korenman 1024
Burger King Corp.; Jefferson *v.* 1026
Burgos-Ortega *v.* United States 1026
Burney *v.* United States 1043
Burns *v.* United States 1042
Burwell; Mayhew *v.* 1004
Bush, *In re* 1003
Caal *v.* United States 1043
Cabrera-Flores *v.* Oates 1039
Cain; Brumfield *v.* 305
Caleb *v.* Grier 1005
California; Chiquillo *v.* 1005
California; Cruz Meza *v.* 1003
California; King *v.* 1007
California; Leong *v.* 1008
California; M. G. *v.* 1025
California; Missud *v.* 1021
California; Palafox *v.* 1008
California; Teague *v.* 1008
California; Vieira *v.* 1031
California; Walters *v.* 1031
Camacho; Karsten *v.* 1009
Canada *v.* Arkansas 1038
Caraballo *v.* United States 1027
Cardin *v.* United States 1013
Carlson *v.* Marin General Services Authority 1005
Carlton *v.* United States 1044
Carother *v.* Mississippi 1023
Carothers *v.* Mississippi 1023
Carroll; Lavender *v.* 1040
Carrothers *v.* Mississippi 1023
Carter; Schwalier *v.* 1035
Cartledge; James *v.* 1009
Cartledge; Koon *v.* 1020
Casciola *v.* Jones 1048
Case Western Reserve Univ.; Al-Dabagh *v.* 1006
Casteel *v.* United States 1018
Castillo *v.* Johnson 1006

Page
Cathey *v.* Texas 1037
Cavazos; Fairchild-Littlefield *v.* 1009
CBS News Inc.; Moline *v.* 1007
Chance *v.* Florida 1023,1024
Chang *v.* Shanghai Commercial Bank Ltd. 1023
Chanh Minh Dang *v.* Giurbino 1038
Chapman *v.* United States 1012
Chase Home Finance, LLC; Gomez *v.* 1031
Chatman; Hittson *v.* 1028
Chicago Tribune Co.; Johnson *v.* 1022
Chicoj-Mejia *v.* United States 1043
Chiquillo *v.* California 1005
Circuit Court of Va., Newport News; Ragin *v.* 1047
Circuit Court of Wis., Racine County; Williams *v.* 1047
City. See name of city.
Cladakis *v.* Miller 1036
Clark; Ohio *v.* 237
Clark *v.* Tennessee 1026
Clarke; Greene *v.* 1038
Clarke; Henson *v.* 1040
Clarke; Steedley *v.* 1038
Cleveland Clinic Foundation; Wilson *v.* 1037
Clewis *v.* Medco Health Solutions, Inc. 1006
Coburn; Tweed *v.* 1031
Cohen *v.* United States 1023
Coleman; Turner *v.* 1024
Collins; Crisbasan *v.* 1039
Collins; Santiago *v.* 1040
Collins *v.* Steele 1041
Colorado; Trujillo *v.* 1009
Columbus Division of Police; Triplett-Fazzone *v.* 1018
Colvin; Johnson *v.* 1041
Colvin; Rangrej *v.* 1040
Colvin; Sutton *v.* 1040
Commissioner; McDowell *v.* 1033
Commissioner of Internal Revenue. See Commissioner.
Connecticut; Kwong *v.* 1009
Cooper, *In re* 1033
Cooper *v.* Cooper 1031
Cooper; Powell *v.* 1025
Corbett *v.* Transportation Security Administration 1036
Corothers *v.* Mississippi 1023
Corrad; Bank of America, N. A. *v.* 1019
Corrections Commissioner. See name of commissioner.

Page
Corrothers *v.* Mississippi 1023
Council, *In re* 1033
County. See name of county
Cox *v.* O'Brien 1032
Cox *v.* United States 1042
Crenshaw *v.* United States 1027
Crisbasan *v.* Collins 1039
Crisbasan *v.* O'Neal 1039
Crisbasan *v.* Payne 1039
Crisbasan *v.* Sweeney 1039
Crosby *v.* Ives 1032
Cruse *v.* Texas 1008
Cruz; Garcon *v.* 1020
Cruz *v.* Perry 1024
Cruz Meza *v.* California 1003
Cunningham *v.* Department of Justice 1047
Currie *v.* Missouri 1018
Da Chang *v.* Shanghai Commercial Bank Ltd. 1023
Dahlk *v.* Woomer 1009
Daker *v.* Dawes 1034
Daker *v.* Robinson 1034
Dang *v.* Giurbino 1038
Daugerdas, *In re* 1033
Davis *v.* Ayala 257
Davis; Fort Bend County *v.* 1004
Davis *v.* Kelley 1031
Davis *v.* United States 1012
Dawes; Daker *v.* 1034
Dawson *v.* United States 1013
Dean *v.* Slade 1047
DeBruce; Dunn *v.* 1021
Delk *v.* Texas 1007
Delval-Estrada *v.* United States 1010
Demouchette *v.* U. S. District Court 1026
Department of Agriculture; Horne *v.* 350
Department of Homeland Security; Floyd *v.* 1041
Department of Justice; Cunningham *v.* 1047
Department of Justice; Jolley *v.* 1003
Department of Justice; Peeples *v.* 1025
de Rubio *v.* Lynch 1037
Deutsche Bank AG; Belmont Holdings Corp. *v.* 1002
Deutsche Bank National Trust Co.; Broz *v.* 1008
Devos *v.* United States 1010
D&G, Inc.; SuperValu, Inc. *v.* 1004

Page
Diamantopoulos *v.* Ricketts 1008
Diamond *v.* Local 807 Labor-Management Pension Fund 1004
Diaz *v.* United States 1026
Diaz-Bermudez *v.* United States 1027
Diaz-Carrasquillo; Garcia-Padilla *v.* 1004
Diehl *v.* United States 1026
Din; Kerry *v.* 86
Director of penal or correctional institution. See name or title of director
District Court. See U. S. District Court.
Doe *v.* United States 1043
Dohou *v.* United States 1012
Dollar General Corp. *v.* Mississippi Band of Choctaw Indians . . . 1021
Donelson *v.* United States 1041
Dongsheng Huang *v.* Ultimo Software Solutions, Inc. 1031
Dorn *v.* Annucci 1023
Dowling *v.* Pennsylvania 1040
Duncan *v.* Sheldon 1038
Dunn *v.* DeBruce 1021
Dunn *v.* United States 1027
EDD; Perry *v.* 1034
Edgard *v.* Jones 1008
Elam *v.* Norman 1009
El-Bey *v.* United States 1010
El-Hage *v.* United States 1018
Elizalde-Ortiz *v.* United States 1027
Ellison *v.* Evans 1006
Ellison *v.* United States 1042
Entertainment One; Perry *v.* 1047
Ernesto Israel *v.* United States 1027
Escamilla *v.* M2 Technology, Inc. 1031
Escovedo; Robitschek *v.* 1024
Esparza *v.* Jenkins 1006
Esparza de Rubio *v.* Lynch 1037
Espindola-Pineda *v.* United States 1043
Espinoza *v.* United States 1012
Estate. See name of estate.
Euclid; Bolden *v.* 1035
Evans; Ellison *v.* 1006
Evans *v.* Ohio 1020
Exxon Mobil Corp.; Weidman *v.* 1036
Fairchild-Littlefield *v.* Cavazos 1009
Farmer; Bank of America, N. A. *v.* 1002
Fayson *v.* Jones 1039

Page
FCA US LLC *v.* Fox Hills Motor Sales, Inc. 1035
Fennell *v.* Jones 1039
Ferranti *v.* Atkinson 1010
Feuerstein; Simpson *v.* 1035
Fields *v.* United States 1004
First Tenn. Bank N. A.; Moorhead *v.* 1036
Fischer *v.* Allamvasutak Zrt. 1006
Flander *v.* Texas Dept. of Public Safety 1047
Florida; Blackshear *v.* 1025
Florida; Chance *v.* 1023,1024
Florida; Hodge *v.* 1039
Florida; Peterka *v.* 1024
Florida; Small *v.* 1009
Florida; Strahorn *v.* 1006
Florida; Thomas *v.* 1024
Flowers *v.* McEwen 1026
Floyd *v.* Department of Homeland Security 1041
Fong Soto *v.* Ryan 1025
Foote *v.* United States 1027
Ford Motor Co.; Allegheny Ford Truck Sales, Inc. *v.* 1037
Ford Motor Co. *v.* United States 1035
Fort *v.* Ohio 1025
Fort Bend County *v.* Davis 1004
Foster; Frey *v.* 1031
Foster; Holz *v.* 1005
Fox Hills Motor Sales, Inc.; FCA US LLC *v.* 1035
Foxx; Tadlock *v.* 1003
Franco *v.* United States 1043
Franco Alarcon *v.* United States 1043
Frazier *v.* Jenkins 1037
Freeman; Shoemaker *v.* 1041
Freeman *v.* Texas 1038
Frey *v.* Foster 1031
Fuller *v.* United States 1011
Furs-Julius *v.* Social Security Administration 1008
Futch *v.* United States 1010
G. *v.* California 1025
Gabe *v.* United States 1027
Gamble *v.* Bullard 1040
Gaon *v.* Nevada 1037
Garcia *v.* Texas 1038
Garcia *v.* United States 1003,1011,1043
Garcia-Morales *v.* United States 1027
Garcia-Padilla *v.* Diaz-Carrasquillo 1004

Page
Garcia Zelaya *v.* United States 1043
Garcon *v.* Cruz 1020
Garro; Bank of America, N. A. *v.* 1019
Gary's Foods; SuperValu, Inc. *v.* 1004
Garza *v.* United States 1031
Gatewood *v.* Stephens 1039
Gathings *v.* United States 1010
Gatson *v.* United States 1026
Gibson *v.* Wilson 1026
Giddens *v.* United States 1026
Gil *v.* United States 1027
Gilbert; Reed *v.* 155
Gilmore *v.* United States 1006
Giurbino; Chanh Minh Dang *v.* 1038
Glaspie; Bank of America, N. A. *v.* 1031
G. M. *v.* Aledo Independent School Dist. 1004
Goins *v.* United States 1027
Gomez *v.* Chase Home Finance, LLC 1031
Gon *v.* Aylor 1035
Gonzalez *v.* United States 1043
Gonzalez Caal *v.* United States 1043
Google, Inc. *v.* Vederi, LLC 1034
Gordy; Bradford *v.* 1008
Gorski *v.* United States 1036
Governor of Neb.; Diamantopoulos *v.* 1008
Governor of P. R. *v.* Diaz-Carrasquillo 1004
Governor of Tex.; Nixon *v.* 1006
Grado-Meza *v.* United States 1010
Graham; Kearney *v.* 1048
Great American Ins. Co. of N. Y. *v.* Tennessee 1036
Green *v.* United States 1010
Green Century Development, LLC; Yuan *v.* 1038
Greene *v.* Clarke 1038
Grice *v.* North Carolina 1025
Grier; Caleb *v.* 1005
Griffith *v.* New York 1018
Griffith; Strong *v.* 1019
Gwinnett County; Lawrence *v.* 1036
Haas; Pearson *v.* 1038
Hackney *v.* Woods 1023
Hakala; Toney *v.* 1047
Hall; Bank of America, N. A. *v.* 1001
Hamilton-Presha; Bank of America, N. A. *v.* 1019
Hammersley *v.* Oconto 1018

Page
Hampton *v.* Tribley 1038
Hardrick *v.* United States 1021
Harris *v.* United States 1026,1027
Hartigan *v.* Utah Transit Authority 1036
Haugabook *v.* United States 1023
Hawaii Dept. of Transportation; Motoyama *v.* 1022
Hawes *v.* Wyoming 1025
Hawthorne *v.* United States 1010
Hayashi *v.* Illinois Dept. of Financial and Professional Regulation 1036
Heffernan *v.* Arlington County Dept. of Human Services 1037
Henderson *v.* Nebraska 1025
Hendrickson; Kingsley *v.* 389
Henry *v.* United States 1009,1027
Henson *v.* Clarke 1040
Hepburn *v.* United States 1013
Hernandez-Munoz *v.* United States 1027
Hessmer *v.* Wilson County 1039
Hill, *In re* 1033
Hittson *v.* Chatman 1028
Hodge *v.* Florida 1039
Hodge *v.* United States 1026
Holder; Lucien *v.* 1018
Holloway, *In re* 1033
Holmes *v.* Washington 1008
Holz *v.* Foster 1005
Hopkins *v.* United States 1020
Horne *v.* Department of Agriculture 350
Horsley *v.* University of Ala. 1021
HSBC Bank USA; Schafler *v.* 1047
Hsiung *v.* United States 1022
Huang *v.* Ultimo Software Solutions, Inc. 1031
Hui Hsiung *v.* United States 1022
Hunter; Richardson *v.* 1040
Hutchinson *v.* Razdan 1025
Ida Fishman Rev. Trust; Picard *v.* 1044
Ida Fishman Rev. Trust; Securities Investor Protection Corp. *v.* 1044
Iest; Bank of America, N. A. *v.* 1001
Illinois; Sims *v.* 1038
Illinois; Snipes *v.* 1002
Illinois Dept. of Financial and Professional Regulation; Hayashi *v.* 1036
Ingram *v.* United States 1012
In re. See name of party.
Institute of Cetacean Research; Sea Shepherd Conserv. Society *v.* 1005
International Monetary Fund; Nyambal *v.* 1035

Page
Iowa; Yates *v.* 1024
Iraq *v.* ABB AG 1028
Israel *v.* Brown 1032
Israel *v.* United States 1027
Ives; Crosby *v.* 1032
Jackson, *In re* 1033
Jackson *v.* San Francisco 1013
Jackson *v.* United States 1011
Jaime Reyna *v.* Stephens 1018
James *v.* Cartledge 1009
Javier Barajas, *In re* 1034
Jefferson *v.* Burger King Corp. 1026
Jenkins; Esparza *v.* 1006
Jenkins; Frazier *v.* 1037
Jenkins *v.* United States 1011
Jimenez; Allstate Ins. Co. *v.* 1028
Johns *v.* United States 1042
Johnson, *In re* 1021
Johnson; Bank of America, N. A. *v.* 1019
Johnson; Castillo *v.* 1006
Johnson *v.* Chicago Tribune Co. 1022
Johnson *v.* Colvin 1041
Johnson *v.* United States 1035
Johnson; Wilkins *v.* 1002
Joling, *In re* 1021
Jolley *v.* Department of Justice 1003
Jones; Casciola *v.* 1048
Jones; Edgard *v.* 1008
Jones; Fayson *v.* 1039
Jones; Fennell *v.* 1039
Jones *v.* Pierce 1010
Joubert *v.* United States 1042
Joyner; Wilson *v.* 1006
Judge, Circuit Court of Ill., 17th Judicial Circuit; Crisbasan *v.* . . . 1039
Judy *v.* Obama 1034
K. *v.* N. B. 1006
Kabir *v.* Brennan 1011
Kaiser Foundation Health Plan; Safari *v.* 1022
Kargbo *v.* New Hampshire 1039
Karsten *v.* Camacho 1009
Kearney *v.* Graham 1048
Kelley; Davis *v.* 1031
Kelley; Simpson *v.* 1041
Kendrick *v.* Michigan 1009

Page
Kerry *v.* Din 86
Kerry; Zivotofsky *v.* 1
Kess-Lewis; Solomon *v.* 1020
Kha Thao Pham *v.* Mississippi 1007
Kieffer *v.* United States 1012
Kimble *v.* Marvel Entertainment, LLC 446
King *v.* California 1007
King *v.* United States 1009
Kingdomware Technologies, Inc. *v.* United States 1034
Kingsley *v.* Hendrickson 389
Kirkegard; Ariegwe *v.* 1019
Kivisto *v.* Soifer 1006
Knight; Richardson *v.* 1007
Koch *v.* Thomas 1042
Koon *v.* Cartledge 1020
Kopp *v.* United States 1043
Korenman; Burda *v.* 1024
Koro AR, S. A. *v.* Universal Leather, LLC 1035
Kugler *v.* Wisconsin 1022
Kung Da Chang *v.* Shanghai Commercial Bank Ltd. 1023
Kwong *v.* Connecticut 1009
Lackey; Scott *v.* 1003
Lagona *v.* United States 1013
Lakhani; Bank of America, N. A. *v.* 1019
Lam *v.* San Francisco 1035
Lamb, *In re* 1003
Landon *v.* United States 1042
Lang; Bank of N. Y. Mellon *v.* 1001
Laracuent *v.* United States 1042
Lavender *v.* Carroll 1040
Lavergne *v.* Bajat 1002
Lawrence *v.* Gwinnett County 1036
L. B. *v.* San Diego County Health and Human Services Agency 1047
Leaks *v.* United States 1022
Ledezma-Rodriguez *v.* United States 1043
Lee; Bank of America, N. A. *v.* 1001
Lee; Stewart *v.* 1008
Lenox Hill Hospital; Manko *v.* 1021
Leong *v.* California 1008
Lewis, *In re* 1033
Lewis *v.* United States 1011
Leyva *v.* Wells Fargo Bank, N. A. 1036
Lima Castro *v.* Tanner 1038
Limon-Juvera *v.* United States 1011

Page
Lizarraga; Sanchez *v.* 1023
Local. For labor union, see name of trade.
Local 807 Labor-Management Pension Fund; Diamond *v.* 1004
Lockhart *v.* Alabama 1031
Loma Linda Univ. Medical Center; Prince *v.* 1018
Lombardi; Strong *v.* 1018
Los Angeles *v.* Patel 409
Louisiana; Ross *v.* 1039
Louisiana; Scott *v.* 1008
Louisiana; Warner *v.* 1007
Louisiana Dept. of Revenue; Stone *v.* 1005
Lowry *v.* United States 1013
Lucien *v.* Holder 1018
Lucree *v.* United States 1037
Luis *v.* United States 1003
Lumpkins *v.* United States 1043
Luna-Soto *v.* United States 1043
Lynch; Esparza de Rubio *v.* 1037
Lynch; Madrigal-Barcenas *v.* 1001
Lynch; Mohamed *v.* 1005
Lynch; Ramon Tarango *v.* 1037
Lynch; Reyes Mata *v.* 143
Lynch; Salado-Alva *v.* 1037
Lynch *v.* United States 1012
Lynch; Yusov *v.* 1040
M. *v.* Aledo Independent School Dist. 1004
Mable *v.* U. S. District Court 1040
Macak *v.* McDonald 1034
Machen *v.* Rackley 1041
Mack; Shapiro *v.* 1003,1033
Madden; Bank of America, N. A. *v.* 1032
Madrigal-Barcenas *v.* Lynch 1001
Mafnas; Minto *v.* 1009
Mail Handlers; Sands-Wedeward *v.* 1007
Maine; Babb *v.* 1039
Manko *v.* Lenox Hill Hospital 1021
Manley *v.* Monroe County Prosecutor 1020
Manuel Gonzalez *v.* United States 1043
Marceaux *v.* United States Marine Corps 1008
March *v.* McAllister 1010
Marin General Services Authority; Carlson *v.* 1005
Marion *v.* Soto 1024
Marshall *v.* United States 1010
Martin *v.* United States 1013

Page
Martinez *v.* United States 1001
Marvel Entertainment, LLC; Kimble *v.* 446
Maryland; Webb *v.* 1024
Masterson *v.* Stephens 1024
Mata *v.* Lynch 143
Matthews, *In re* 1034
Mattox *v.* Pryor 1041
Maxwell *v.* United States 1013
Mayhew *v.* Burwell 1004
Mazin *v.* Norwood 1039
McAllister; March *v.* 1010
McCain *v.* United States 1012
McClain; Watson *v.* 1024
McCracken *v.* United States 1011
McCulloch; Thomas *v.* 1040
McDaniels *v.* United States 1028
McDonald; Macak *v.* 1034
McDowell *v.* Comm'r 1033
McEwen; Flowers *v.* 1026
McFadden *v.* United States 186
McGee *v.* United States 1043
Means-Knaus Partners, L. P.; Sklyarsky *v.* 1037
Medco Health Solutions, Inc.; Clewis *v.* 1006
Melendez *v.* United States 1012
Melnichuk; Yegorov *v.* 1018
Mendez *v.* Stephens 1024
Mercer *v.* United States 1042
Messere *v.* White 1041
Meza *v.* California 1003
M. G. *v.* California 1025
Michigan; Duc Van *v.* 1008
Michigan; Kendrick *v.* 1009
Michigan Workers' Comp. Ins. Agency *v.* Ace American Ins. Co. 1004
Mickens *v.* United States 1012
Mill, *In re* 1003
Miller; Cladakis *v.* 1036
Mills *v.* United States 1006,1011
Minh Dang *v.* Giurbino 1038
Minto *v.* Mafnas 1009
Mississippi; Carother *v.* 1023
Mississippi; Carothers *v.* 1023
Mississippi; Carrothers *v.* 1023
Mississippi; Corothers *v.* 1023
Mississippi; Corrothers *v.* 1023

Page
Mississippi; Kha Thao Pham *v.* 1007
Mississippi Band of Choctaw Indians; Dollar General Corp. *v.* . . . 1021
Missouri; Currie *v.* 1018
Missud *v.* California 1021
M. K. *v.* N. B. 1006
Moats *v.* West Virginia Dept. of Transportation, Div. of Highways 1007
Mohamed *v.* Lynch 1005
Moline *v.* CBS News Inc. 1007
Mongelli, *In re* 1032
Monroe County Prosecutor; Manley *v.* 1020
Montgomery; Aguirre *v.* 1024
Montgomery; Solorio *v.* 1023
Moody *v.* Vozel 1005
Moore; Rucker *v.* 1020
Moorhead *v.* First Tenn. Bank N. A. 1036
Moreno-Azua *v.* United States 1010
Moses *v.* Texas Workforce Commission 1031
Moses *v.* United States 1012
Moss *v.* United States 1013
Motorola Mobility LLC *v.* AU Optronics Corp. 1022
Motoyama *v.* Hawaii Dept. of Transportation 1022
M2 Technology, Inc.; Escamilla *v.* 1031
Much Shelist, P. C.; Sweports, Ltd. *v.* 1005
Muhammad *v.* United States 1012
Murray; Smith *v.* 1038
Nassau County; Williams *v.* 1005
Nationstar Mortgage, LLC; Rugiero *v.* 1035
N. B.; M. K. *v.* 1006
Ndiagu *v.* United States 1013
Nebraska; Henderson *v.* 1025
Nemcik; Bank of America, N. A. *v.* 1001
Nevada; Gaon *v.* 1037
Neven; Bellon *v.* 1041
New Hampshire; Kargbo *v.* 1039
New Jersey; Bridges *v.* 1025
New York; Griffith *v.* 1018
New York; Teichmann *v.* 1003
New York City; Wieder *v.* 1022
New York Comm'r of Labor; Tkachyshyn *v.* 1039
Nguyen *v.* Michigan 1008
Nixon *v.* Abbott 1006
Nobach *v.* Woodland Village Nursing Center, Inc. 1002
Nolasco-Peraza *v.* United States 1043
Norman; Blaine *v.* 1025

Page
Norman; Elam *v.* 1009
Norman *v.* Stephens 1006
Norman; Young *v.* 1011
North Carolina; Grice *v.* 1025
Northern Ins. Co. of N. Y. *v.* Tennessee 1036
Norwood; Mazin *v.* 1039
Nyambal *v.* International Monetary Fund 1035
Oates; Cabrera-Flores *v.* 1039
Obama; Judy *v.* 1034
Obama; White *v.* 1041
O'Brien; Cox *v.* 1032
Ochoa Olguin *v.* United States 1010
Oconto; Hammersley *v.* 1018
Ohio *v.* Clark 237
Ohio; Evans *v.* 1020
Ohio; Fort *v.* 1025
Ohnemus *v.* Thompson 1022
Okeayainneh *v.* United States 1048
Olde Towne Medical Center; Wright *v.* 1048
Olguin *v.* United States 1010
Olten *v.* United States 1047
O'Neal; Crisbasan *v.* 1039
Oregon; Serrano *v.* 1037
Ortiz *v.* United States 1011
Palafox *v.* California 1008
Patel; Los Angeles *v.* 409
Patterson *v.* Broderick 1041
Patterson *v.* Wisconsin 1040
Patton *v.* Bryant 1039
Payne; Crisbasan *v.* 1039
Pearson *v.* Haas 1038
Peele; Bank of America, N. A. *v.* 1019
Peeples *v.* Department of Justice 1025
Penney *v.* United States 1044
Pennsylvania; Blakeney *v.* 1009
Pennsylvania; Dowling *v.* 1040
Penny *v.* United States 1044
Perez *v.* Stephens 1041
Perez-Prado *v.* United States 1013
Perry; Cruz *v.* 1024
Perry *v.* EDD 1034
Perry *v.* Entertainment One 1047
Peterka *v.* Florida 1024
Peters Township; Stiegel *v.* 1005

Page
Pham *v.* Mississippi 1007
Philip Morris USA Inc.; Accord *v.* 1005
Phillips; Bank of America, N. A. *v.* 1001
Phillips *v.* Barnes 1025
Phillips *v.* United States 1013
Picard *v.* Ida Fishman Revocable Trust 1044
Pierce; Jones *v.* 1010
Postmaster General; Kabir *v.* 1011
Potts, *In re* 1034
Potts *v.* American Bottling Co. 1036
Powell *v.* Cooper 1025
Premo; Young *v.* 1025
President of U. S.; Judy *v.* 1034
President of U. S.; White *v.* 1041
Prince *v.* Loma Linda Univ. Medical Center 1018
Pryor; Mattox *v.* 1041
Purcell, *In re* 1033
Quintero-Flores *v.* United States 1043
Rabanales-Casia *v.* United States 1043
Rackley; Machen *v.* 1041
Ragin *v.* Circuit Court of Va., Newport News 1047
Ramirez-Salazar *v.* United States 1042
Ramirez Umana *v.* United States 1035
Ramon Tarango *v.* Lynch 1037
Ramsay *v.* Tapper 1022
Ramsey *v.* Tennessee 1007
Rangrej *v.* Colvin 1040
Razdan; Hutchinson *v.* 1025
Reed *v.* Gilbert 155
Reid *v.* United States 1012
Reiser *v.* Beard 1007
Rene Diaz *v.* United States 1026
Republic of Iraq *v.* ABB AG 1028
Reyes Mata *v.* Lynch 143
Ricci; Abdul-Aziz *v.* 1002
Richardson *v.* Hunter 1040
Richardson *v.* Knight 1007
Richardson *v.* Texas Workforce Commission 1018
Rickard *v.* Swedish Match North America, Inc. 1022
Ricketts; Diamantopoulos *v.* 1008
Rivera *v.* United States 1027
Rivera Garcia *v.* United States 1011
Rivers *v.* United States 1010
Roach *v.* Bottom 1007

Page
Robbins *v.* United States 1013
Robinson; Daker *v.* 1034
Robinson *v.* Texas 1023
Robitschek *v.* Escovedo 1024
Rodriguez Gil *v.* United States 1027
Ross *v.* Louisiana 1039
Rucker *v.* Moore 1020
Rugiero *v.* Nationstar Mortgage, LLC 1035
Russell; Williams *v.* 1018
Ryan; Fong Soto *v.* 1025
Ryan; Walton *v.* 1031
Sabbur *v.* United States 1018
Saenz *v.* Stephens 1023
Safari *v.* Kaiser Foundation Health Plan 1022
Salado-Alva *v.* Lynch 1037
Samuels; Bruce *v.* 1021
Sanchez *v.* Lizarraga 1023
Sanchez *v.* United States 1010
Sanchez-Hernandez *v.* United States 1043
San Diego County Health and Human Services Agency; L. B. *v.* 1047
Sands-Wedeward *v.* Mail Handlers 1007
San Francisco; Jackson *v.* 1013
San Francisco; Lam *v.* 1035
Santiago *v.* Collins 1040
Sarvis *v.* United States 1011
Sayers *v.* Virginia 1048
Schafler *v.* HSBC Bank USA 1047
Scher, *In re* 1033
Schmude *v.* Texas 1018
Schwalier *v.* Carter 1035
Scott *v.* Alabama 1031
Scott *v.* Lackey 1003
Scott *v.* Louisiana 1008
Scripps *v.* United States 1011
Sea Shepherd Conserv. Society *v.* Institute of Cetacean Research 1005
Secretary of Defense; Schwalier *v.* 1035
Secretary of Health and Human Services; Mayhew *v.* 1004
Secretary of Homeland Security; Wilkins *v.* 1002
Secretary of Transportation; Tadlock *v.* 1003
Secretary of Veterans Affairs; Macak *v.* 1034
Securities and Exchange Commission; Ware *v.* 1002
Securities Investor Protection Corp. *v.* Ida Fishman Rev. Trust 1044
Selvan-Cupil *v.* United States 1037
Serrano *v.* Oregon 1037

Page
Severino-Batista *v.* United States 1013
Shanghai Commercial Bank Ltd.; Kung Da Chang *v.* 1023
Shapiro *v.* Mack 1003,1033
Shaw; Aransas Project *v.* 1035
Sheldon; Duncan *v.* 1038
Shelton *v.* Biter 1003
Shelton *v.* United States 1021
Shiu; Associated Builders & Contractors Inc. *v.* 1022
Shoemaker *v.* Freeman 1041
Simmons *v.* Texas 1040
Simons *v.* United States 1010
Simpson *v.* Feuerstein 1035
Simpson *v.* Kelley 1041
Sims *v.* Illinois 1038
Sklyarsky *v.* Means-Knaus Partners, L. P. 1037
Slade; Dean *v.* 1047
Small *v.* Florida 1009
Smith *v.* Murray 1038
Smith *v.* United States 1013
Snipes *v.* Illinois 1002
Social Security Administration; Furs-Julius *v.* 1008
Soifer; Kivisto *v.* 1006
Solis-Jaramillo *v.* United States 1009
Solomon *v.* Kess-Lewis 1020
Solorio *v.* Montgomery 1023
Soro *v.* Soro 1018
Soto; Marion *v.* 1024
Soto *v.* Ryan 1025
Southeast Mich. Surgical Hospital; White *v.* 1023
Spector, *In re* 1033
Speller *v.* Virginia 1038
Spencer *v.* United States 1023
State. See name of State.
Steedley *v.* Clarke 1038
Steele; Collins *v.* 1041
Stephens; Angel Mendez *v.* 1024
Stephens; Gatewood *v.* 1039
Stephens; Jaime Reyna *v.* 1018
Stephens; Masterson *v.* 1024
Stephens; Norman *v.* 1006
Stephens; Perez *v.* 1041
Stephens; Saenz *v.* 1023
Stewart *v.* Lee 1008
Stiegel *v.* Peters Township 1005

Page
Stone *v.* Louisiana Dept. of Revenue 1005
Strahorn *v.* Florida 1006
Strong *v.* Griffith 1019
Strong *v.* Lombardi 1018
Stuart; Walker-McGill *v.* 1028
Superintendent of penal or correctional institution. See name or title of superintendent.
SuperValu, Inc. *v.* D&G, Inc. 1004
SuperValu, Inc. *v.* Gary's Foods 1004
Susinka *v.* United States 1042
Sutton *v.* Colvin 1040
Swedish Match North America, Inc.; Rickard *v.* 1022
Sweeney; Crisbasan *v.* 1039
Sweports, Ltd. *v.* Much Shelist, P. C. 1005
Tadlock *v.* Foxx 1003
Tamez *v.* United States 1023
Tanner; Lima Castro *v.* 1038
Tapper; Ramsay *v.* 1022
Tarango *v.* Lynch 1037
Tarshis, *In re* 1033
Teague *v.* California 1008
Teichmann *v.* New York 1003
Tennessee; American Home Assurance Co. *v.* 1036
Tennessee; Clark *v.* 1026
Tennessee; Great American Ins. Co. of N. Y. *v.* 1036
Tennessee; Northern Ins. Co. of N. Y. *v.* 1036
Tennessee; Ramsey *v.* 1007
Tennessee; Wheetley *v.* 1047
Tennessee; Zurich American Ins. Co. *v.* 1036
Texas; Cathey *v.* 1037
Texas; Cruse *v.* 1008
Texas; Delk *v.* 1007
Texas; Freeman *v.* 1038
Texas; Garcia *v.* 1038
Texas; Robinson *v.* 1023
Texas; Schmude *v.* 1018
Texas; Simmons *v.* 1040
Texas Dept. of Public Safety; Flander *v.* 1047
Texas Div., Sons of Confederate Veterans, Inc.; Walker *v.* 200
Texas Workforce Commission; Moses *v.* 1031
Texas Workforce Commission; Richardson *v.* 1018
Thao Pham *v.* Mississippi 1007
Thomas *v.* Florida 1024
Thomas; Koch *v.* 1042

Page
Thomas *v.* McCulloch 1040
Thomas *v.* U. S. Postal Service 1041
Thompson; Ohnemus *v.* 1022
Thompson *v.* United States 1042,1043
Tirado Tamez *v.* United States 1023
Tkachyshyn *v.* New York Comm'r of Labor 1039
Tomaselli *v.* Beaulieu 1038
Toney *v.* Hakala 1047
Torres-Diaz *v.* United States 1028
Town. See name of town.
Trala *v.* United States 1011
Transportation Security Administration; Corbett *v.* 1036
Tribley; Hampton *v.* 1038
Triplett-Fazzone *v.* Columbus Division of Police 1018
Trowbridge *v.* United States 1005
Troyer *v.* United States 1006
Trujillo *v.* Colorado 1009
Tucker *v.* United States 1026
Turner *v.* Coleman 1024
Tweed *v.* Coburn 1031
Tyson Foods, Inc. *v.* Bouaphakeo 1003
Tze Wung Consultants, Ltd. *v.* Bank of Baroda 1036
UCB, Inc.; Apotex Inc. *v.* 1036
Ultimo Software Solutions, Inc.; Dongsheng Huang *v.* 1031
Umana *v.* United States 1035
United States. See name of other party.
U. S. District Court; Adkins *v.* 1007
U. S. District Court; Demouchette *v.* 1026
U. S. District Court; Mable *v.* 1040
U. S. Legal Services Group, L. P. *v.* Atalese 1004
United States Marine Corps; Marceaux *v.* 1008
U. S. Postal Service; Thomas *v.* 1041
Universal Leather, LLC; Koro AR, S. A. *v.* 1035
University of Ala.; Horsley *v.* 1021
Utah Transit Authority; Hartigan *v.* 1036
Vander Iest; Bank of America, N. A. *v.* 1001
Van Nguyen *v.* Michigan 1008
Varner *v.* United States 1042
Vasquez-Diaz *v.* United States 1012
Vederi, LLC; Google, Inc. *v.* 1034
Vieira *v.* California 1031
Viola *v.* United States 1012
Virginia; Sayers *v.* 1048
Virginia; Speller *v.* 1038

Page
Volvo Powertrain Corp. *v.* United States 1021
Vozel; Moody *v.* 1005
Waits; Bank of America, N. A. *v.* 1001
Walker *v.* Texas Div., Sons of Confederate Veterans, Inc. 200
Walker; Washington *v.* 1022
Walker-McGill *v.* Stuart 1028
Walters *v.* California 1031
Walton *v.* Ryan 1031
Warden. See name of warden.
Ware *v.* Securities and Exchange Commission 1002
Warner *v.* Louisiana 1007
Warren; August *v.* 1018
Washington; Holmes *v.* 1008
Washington *v.* United States 1026
Washington *v.* Walker 1022
Watford *v.* United States 1042
Watkins *v.* United States 1013
Watson *v.* McClain 1024
Webb *v.* Maryland 1024
Weidman *v.* Exxon Mobil Corp. 1036
Wells Fargo Bank, N. A.; Leyva *v.* 1036
West Virginia Dept. of Transportation, Div. of Highways; Moats *v.* 1007
Wheetley *v.* Tennessee 1047
White; Messere *v.* 1041
White *v.* Obama 1041
White *v.* Southeast Mich. Surgical Hospital 1023
White & Case LLP; Whitehead *v.* 1020
Whitehead *v.* White & Case LLP 1020
Wieder *v.* New York City 1022
Wilkerson *v.* United States 1012,1031
Wilkins *v.* Johnson 1002
Williams *v.* Circuit Court of Wis., Racine County 1047
Williams *v.* Nassau County 1005
Williams *v.* Russell 1018
Williams *v.* United States 1013,1032,1042
Williamsburg Area Medical Assistance Corp.; Wright *v.* 1048
Wilson *v.* Cleveland Clinic Foundation 1037
Wilson; Gibson *v.* 1026
Wilson *v.* Joyner 1006
Wilson County; Hessmer *v.* 1039
Wisconsin; Kugler *v.* 1022
Wisconsin; Patterson *v.* 1040
Woodland Village Nursing Center, Inc.; Nobach *v.* 1002
Woods; Hackney *v.* 1023

Page
Woomer; Dahlk *v.* 1009
Worsham, *In re* 1033
Wright *v.* Olde Towne Medical Center 1048
Wright *v.* United States 1011
Wright *v.* Williamsburg Area Medical Assistance Corp. 1048
Wyoming; Hawes *v.* 1025
Yacubian *v.* United States 1031
Yates *v.* Iowa 1024
Ye Gon *v.* Aylor 1035
Yegorov *v.* Melnichuk 1018
YHWHnewBN *v.* United States 1007
Young *v.* Norman 1011
Young *v.* Premo 1025
Yuan *v.* Green Century Development, LLC 1038
Yusov *v.* Lynch 1040
Zayac *v.* United States 1035
Zelaya *v.* United States 1043
Zhenli Ye Gon *v.* Aylor 1035
Zivotofsky *v.* Kerry 1
Zurich American Ins. Co. *v.* Tennessee 1036

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2014

ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ZIVOTOFSKY ET UX. *v.* KERRY, SECRETARY OF STATE

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

No. 13–628. Argued November 3, 2014—Decided June 8, 2015

Petitioner Zivotofsky was born to United States citizens living in Jerusalem. Pursuant to § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, his mother asked American Embassy officials to list his place of birth as "Israel" on, *inter alia*, his passport. Section 214(d) states for "purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." The Embassy officials refused to list Zivotofsky's place of birth as "Israel" on his passport, citing the Executive Branch's longstanding position that the United States does not recognize any country as having sovereignty over Jerusalem. Zivotofsky's parents brought suit on his behalf in federal court, seeking to enforce § 214(d). Ultimately, the D. C. Circuit held the statute unconstitutional, concluding that it contradicts the Executive Branch's exclusive power to recognize foreign sovereigns.

Held:

1. The President has the exclusive power to grant formal recognition to a foreign sovereign. Pp. 10–28.

(a) Where, as here, the President's action is "incompatible with the expressed or implied will of Congress," the President "can rely [for his

authority] only upon his own constitutional powers minus any constitutional powers of Congress over the matter," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (Jackson, J., concurring). His asserted power must be both "exclusive" and "conclusive" on the issue, *id.*, at 637–638, and he may rely solely on powers the Constitution grants to him alone, *id.*, at 638. To determine whether the President's power of recognition is exclusive, this Court examines the Constitution's text and structure and relevant precedent and history. P. 10.

(b) The Constitution's text and structure grant the President the power to recognize foreign nations and governments. The Reception Clause directs that the President "shall receive Ambassadors and other public Ministers," Art. II, § 3. And at the time of the founding, receiving an ambassador was considered tantamount to recognizing the sending state's sovereignty. It is thus logical and proper to infer that the Reception Clause would be understood to acknowledge the President's power to recognize other nations. This inference is further supported by the President's additional Article II powers: to negotiate treaties and to nominate the Nation's ambassadors and dispatch other diplomatic agents. Though ratifying a treaty and confirming an ambassador require congressional approval, Congress lacks authority to initiate the actions without the President's involvement. The President, unlike Congress, also has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President, not Congress, means to effect recognition on his own initiative.

Functional considerations also suggest that the President's recognition power is exclusive. The Nation must "speak . . . with one voice" regarding which governments are legitimate in the eyes of the United States and which are not, *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 424, and only the Executive has the characteristic of unity at all times. Unlike Congress, the President is also capable of engaging in the delicate and often secret diplomatic contacts that may lead to a recognition decision, see, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 229, and is better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. The President has also exercised unilateral recognition power since the founding, a practice endorsed by this Court, see, *e. g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410.

Under basic separation-of-powers principles, Congress, which has the central role in making laws, see Art. I, § 8, cl. 18, does have substantial authority regarding many policy determinations that precede and follow an act of recognition. The President's recognition determination is thus only one part of a political process. Pp. 11–17.

(c) A fair reading of relevant precedent illustrates that this Court has long considered recognition to be the exclusive prerogative of the Executive. See, *e. g.*, *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *United States* v. *Belmont*, 301 U. S. 324, 330; *United States* v. *Pink*, *supra*, at 229; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, at 410; *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320, does not support a broader definition of the Executive's power over foreign relations that would permit the President alone to determine the whole content of the Nation's foreign policy. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, *e. g.*, *Medellín* v. *Texas*, 552 U. S. 491, 523–532. Nonetheless, it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, and his position must be clear. Pp. 17–23.

(d) The weight of historical evidence also indicates Congress has accepted that the recognition power is exclusive to the Presidency. Cf. *NLRB* v. *Noel Canning*, 573 U. S. 513. Since the first administration, the President has claimed unilateral authority to recognize foreign sovereigns. And Congress, for the most part, has acquiesced, generally respecting the Executive's policies and positions on formal recognition and even defending the President's constitutional prerogative. Pp. 23–28.

2. Because the power to recognize foreign states resides in the President alone, § 214(d) infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443. The provision forces the President, through the Secretary of State, to identify, upon request, citizens born in Jerusalem as being born in Israel when, as a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem.

If the recognition power is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also may maintain that determination in his and his agent's statements. Under international law, recognition may be effected by written or oral declaration. In addition, an act of recognition must leave no doubt as to the intention to grant it. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power. An "exclusive" Presidential power "disabl[es] the Congress from acting upon the subject." *Youngstown*, *supra*, at 637–638 (Jackson, J., concurring). If Congress may not pass a law, speaking in its own voice, effecting formal recognition, then it may not force the Presi-

dent, through § 214(d), to contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 698.

Section 214(d)'s flaw is further underscored by the fact that the statute's purpose was to infringe on the President's exclusive recognition power. While Congress may have power to enact passport legislation of wide scope, it may not "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict an earlier recognition determination in an official Executive Branch document. *Freytag* v. *Commissioner*, 501 U. S. 868, 878. Pp. 28–32.

725 F. 3d 197, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 32. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 32. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 61. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and ALITO, J., joined, *post*, p. 67.

Alyza D. Lewin argued the cause for petitioner. With her on the briefs were *Nathan Lewin* and *Chaim Z. Kagedan*.

Solicitor General Verrilli argued the cause for respondent. With him on the brief were *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Kneedler*, *Ginger D. Anders*, *Douglas N. Letter*, and *Dana Kaersvang*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Texas by *Greg Abbott*, Attorney General, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Andrew S. Oldham*, Deputy Solicitor General, and *Evan S. Greene* and *Douglas D. Geyser*, Assistant Solicitors General; for the American Jewish Committee by *Marc D. Stern* and *Gregory E. Ostfeld*; for the Anti-Defamation League et al. by *Michael S. Gardener*, *Jeffrey S. Robbins*, and *Steven M. Freeman*; for the Endowment for Middle East Truth by *Paul Kujawsky*; for the International Association of Jewish Lawyers and Jurists by *Sarah B. Biser* and *Robert N. Kravitz*; for the Louis D. Brandeis Center for Human Rights Under Law et al. by *Alan Gura*; for Members of the United States House of Representatives by *Theodore B. Olson* and *Randy M. Mastro*; for Public Citizen, Inc., by *Alan B. Morrison*, *Scott L. Nelson*, and *Allison M. Zieve*; for the United States Senate by *Morgan J. Frankel*, *Patricia Mack*

JUSTICE KENNEDY delivered the opinion of the Court.

A delicate subject lies in the background of this case. That subject is Jerusalem. Questions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary. As a result, in this opinion the Court does no more, and must do no more, than note the existence of international debate and tensions respecting Jerusalem. Those matters are for Congress and the President to discuss and consider as they seek to shape the Nation's foreign policies.

The Court addresses two questions to resolve the interbranch dispute now before it. First, it must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign. Second, if he has that power, the Court must determine whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition. The statement in question here is a congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is "Israel."

I

A

Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy,

---

Bryan, *Grant R. Vinik*, and *Thomas E. Caballero*; and for the Zionist Organization of America by *Susan B. Tuchman* and *David I. Schoen*.

Briefs of *amici curiae* urging affirmance were filed for the American-Arab Anti-Discrimination Committee by *Abed A. Ayoub*; and for David Boyle by *Mr. Boyle*, *pro se*.

Briefs of *amici curiae* were filed for True Torah Jews Inc. by *Philip Fertik*; and for Louis Fisher by *Charles Tiefer*.

and indeed it is one of the most delicate issues in current international affairs. In 1948, President Truman formally recognized Israel in a signed statement of "recognition." See Statement by the President Announcing Recognition of the State of Israel, Public Papers of the Presidents, May 14, 1948, p. 258 (1964). That statement did not recognize Israeli sovereignty over Jerusalem. Over the last 60 years, various actors have sought to assert full or partial sovereignty over the city, including Israel, Jordan, and the Palestinians. Yet, in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem. Instead, the Executive Branch has maintained that " 'the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned.' " United Nations Gen. Assembly Official Records, 5th Emergency Sess., 1554th Plenary Meetings, United Nations Doc. No. 1 A/PV.1554, p. 10 (July 14, 1967); see, *e. g.*, Remarks by President Obama in Address to the United Nations Gen. Assembly (Sept. 21, 2011), 2011 Daily Comp. of Pres. Doc. No. 00661, p. 4 ("Ultimately, it is the Israelis and the Palestinians, not us, who must reach agreement on the issues that divide them," including "Jerusalem"). In a letter to Congress then-Secretary of State Warren Christopher expressed the Executive's concern that "[t]here is no issue related to the Arab-Israeli negotiations that is more sensitive than Jerusalem." See 141 Cong. Rec. 28967 (1995) (letter to Robert Dole, Majority Leader (June 20, 1995)). He further noted the Executive's opinion that "any effort . . . to bring it to the forefront" could be "very damaging to the success of the peace process." *Ibid.*

The President's position on Jerusalem is reflected in State Department policy regarding passports and consular reports of birth abroad. Understanding that passports will be construed as reflections of American policy, the State Depart-

ment's Foreign Affairs Manual instructs its employees, in general, to record the place of birth on a passport as the "country [having] present sovereignty over the actual area of birth." Dept. of State, 7 Foreign Affairs Manual (FAM) § 1383.4 (1987). If a citizen objects to the country listed as sovereign by the State Department, he or she may list the city or town of birth rather than the country. See *id.*, § 1383.6. The FAM, however, does not allow citizens to list a sovereign that conflicts with Executive Branch policy. See generally *id.*, § 1383. Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as "Jerusalem." *Id.*, § 1383.5–6 (emphasis deleted).

In 2002, Congress passed the Act at issue here, the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." *Id.*, at 1365. The subsection that lies at the heart of this case, § 214(d), addresses passports. That subsection seeks to override the FAM by allowing citizens born in Jerusalem to list their place of birth as "Israel." Titled "Record of Place of Birth as Israel for Passport Purposes," § 214(d) states "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.*, at 1366.

When he signed the Act into law, President George W. Bush issued a statement declaring his position that § 214 would, "if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." Statement on Signing the Foreign Relations Authorization

Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). The President concluded, "U. S. policy regarding Jerusalem has not changed." *Ibid.*

Some parties were not reassured by the President's statement. A cable from the United States Consulate in Jerusalem noted that the Palestine Liberation Organization Executive Committee, Fatah Central Committee, and the Palestinian Authority Cabinet had all issued statements claiming that the Act "'undermines the role of the U. S. as a sponsor of the peace process.'" App. 231. In the Gaza Strip and elsewhere residents marched in protest. See The Associated Press and Reuters, Palestinians Stone Police Guarding Western Wall, The Seattle Times, Oct. 5, 2002, p. A7.

In response the Secretary of State advised diplomats to express their understanding of "Jerusalem's importance to both sides and to many others around the world." App. 228. He noted his belief that America's "policy towards Jerusalem" had not changed. *Ibid.*

B

In 2002, petitioner Menachem Binyamin Zivotofsky was born to United States citizens living in Jerusalem. App. 24–25. In December 2002, Zivotofsky's mother visited the American Embassy in Tel Aviv to request both a passport and a consular report of birth abroad for her son. *Id.*, at 25. She asked that his place of birth be listed as "'Jerusalem, Israel.'" *Ibid.* The Embassy clerks explained that, pursuant to State Department policy, the passport would list only "Jerusalem." *Ibid.* Zivotofsky's parents objected and, as his guardians, brought suit on his behalf in the United States District Court for the District of Columbia, seeking to enforce § 214(d).

Pursuant to § 214(d), Zivotofsky claims the right to have "Israel" recorded as his place of birth in his passport. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 193 (2012) ("[W]hile Zi-

votofsky had originally asked that 'Jerusalem, Israel' be recorded on his passport, '[b]oth sides agree that the question now is whether § 214(d) entitles [him] to have just "Israel" listed' "). The arguments in Zivotofsky's brief center on his passport claim, as opposed to the consular report of birth abroad. Indeed, in the court below, Zivotofsky waived any argument that his consular report of birth abroad should be treated differently than his passport. *Zivotofsky* v. *Secretary of State*, 725 F. 3d 197, 203, n. 3 (CADC 2013). He has also waived the issue here by failing to differentiate between the two documents. As a result, the Court addresses Zivotofsky's passport arguments and need not engage in a separate analysis of the validity of § 214(d) as applied to consular reports of birth abroad.

After Zivotofsky brought suit, the District Court dismissed his case, reasoning that it presented a nonjusticiable political question and that Zivotofsky lacked standing. App. 28–39. The Court of Appeals for the District of Columbia Circuit reversed on the standing issue, *Zivotofsky* v. *Secretary of State*, 444 F. 3d 614, 617–619 (2006), but later affirmed the District Court's political question determination. See *Zivotofsky* v. *Secretary of State*, 571 F. 3d 1227, 1228 (2009).

This Court granted certiorari, vacated the judgment, and remanded the case. Whether § 214(d) is constitutional, the Court held, is not a question reserved for the political branches. In reference to Zivotofsky's claim the Court observed "the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional"—not whether Jerusalem is, in fact, part of Israel. *Zivotofsky* v. *Clinton*, *supra*, at 196.

On remand the Court of Appeals held the statute unconstitutional. It determined that "the President exclusively holds the power to determine whether to recognize a foreign sovereign," 725 F. 3d, at 214, and that "section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power," *id.*, at 217.

This Court again granted certiorari. 572 U. S. 1059 (2014).

II

In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635–638 (1952) (concurring opinion). The framework divides exercises of Presidential power into three categories: First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.*, at 635. Second, "in absence of either a congressional grant or denial of authority" there is a "zone of twilight in which he and Congress may have concurrent authority," and where "congressional inertia, indifference or quiescence may" invite the exercise of executive power. *Id.*, at 637. Finally, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Ibid.* To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue. *Id.*, at 637–638.

In this case the Secretary contends that § 214(d) infringes on the President's exclusive recognition power by "requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns." Brief for Respondent 48. In so doing the Secretary acknowledges the President's power is "at its lowest ebb." *Youngstown*, 343 U. S., at 637. Because the President's refusal to implement § 214(d) falls into Justice Jackson's third category, his claim must be "scrutinized with caution," and he may rely solely on powers the Constitution grants to him alone. *Id.*, at 638.

To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question.

A

Recognition is a "formal acknowledgement" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a state." Restatement (Third) of Foreign Relations Law of the United States § 203, Comment *a*, p. 84 (1986). It may also involve the determination of a state's territorial bounds. See 2 M. Whiteman, Digest of International Law § 1, p. 1 (1963) (Whiteman) ("[S]tates may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other states"). Recognition is often effected by an express "written or oral declaration." 1 J. Moore, Digest of International Law § 27, p. 73 (1906) (Moore). It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents. *Ibid.*; I. Brownlie, Principles of Public International Law 93 (7th ed. 2008) (Brownlie).

Legal consequences follow formal recognition. Recognized sovereigns may sue in United States courts, see *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137 (1938), and may benefit from sovereign immunity when they are sued, see *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358–359 (1955). The actions of a recognized sovereign committed within its own territory also receive deference in domestic courts under the act of state doctrine. See *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302–303 (1918). Recognition at international law, furthermore, is a precondition of regular diplomatic relations. 1 Moore § 27, at 72. Recognition is thus "useful, even necessary," to the existence of a state. *Ibid.*

Despite the importance of the recognition power in foreign relations, the Constitution does not use the term "recognition," either in Article II or elsewhere. The Secretary asserts that the President exercises the recognition power based on the Reception Clause, which directs that the President "shall receive Ambassadors and other public Ministers."

Art. II, § 3. As Zivotofsky notes, the Reception Clause received little attention at the Constitutional Convention. See Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich. L. Rev. 801, 860–862 (2011). In fact, during the ratification debates, Alexander Hamilton claimed that the power to receive ambassadors was "more a matter of dignity than of authority," a ministerial duty largely "without consequence." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961).

At the time of the founding, however, prominent international scholars suggested that receiving an ambassador was tantamount to recognizing the sovereignty of the sending state. See E. de Vattel, The Law of Nations § 78, p. 461 (1758) (J. Chitty ed. 1853) ("[E]very state, truly possessed of sovereignty, has a right to send ambassadors" and "to contest their right in this instance" is equivalent to "contesting their sovereign dignity"); see also 2 C. van Bynkershoek, On Questions of Public Law 156–157 (1737) (T. Frank ed. 1930) ("Among writers on public law it is usually agreed that only a sovereign power has a right to send ambassadors"); 2 H. Grotius, On the Law of War and Peace 440–441 (1625) (F. Kelsey ed. 1925) (discussing the duty to admit ambassadors of sovereign powers). It is a logical and proper inference, then, that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.

This in fact occurred early in the Nation's history when President Washington recognized the French Revolutionary Government by receiving its ambassador. See A. Hamilton, Pacificus No. 1, in The Letters of Pacificus and Helvidius 5, 13–14 (1845) (reprint 1976) (President "acknowledged the republic of France, by the reception of its minister"). After this incident the import of the Reception Clause became clear—causing Hamilton to change his earlier view. He wrote that the Reception Clause "includes th[e power] of

judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." See *id.*, at 12; see also 3 J. Story, Commentaries on the Constitution of the United States § 1560, p. 416 (1833) ("If the executive receives an ambassador, or other minister, as the representative of a new nation . . . it is an acknowledgment of the sovereign authority *de facto* of such new nation, or party"). As a result, the Reception Clause provides support, although not the sole authority, for the President's power to recognize other nations.

The inference that the President exercises the recognition power is further supported by his additional Article II powers. It is for the President, "by and with the Advice and Consent of the Senate," to "make Treaties, provided two thirds of the Senators present concur." Art. II, § 2, cl. 2. In addition, "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" as well as "other public Ministers and Consuls." *Ibid.*

As a matter of constitutional structure, these additional powers give the President control over recognition decisions. At international law, recognition may be effected by different means, but each means is dependent upon Presidential power. In addition to receiving an ambassador, recognition may occur on "the conclusion of a bilateral treaty," or the "formal initiation of diplomatic relations," including the dispatch of an ambassador. Brownlie 93; see also 1 Moore § 27, at 73. The President has the sole power to negotiate treaties, see *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936), and the Senate may not conclude or ratify a treaty without Presidential action. The President, too, nominates the Nation's ambassadors and dispatches other diplomatic agents. Congress may not send an ambassador without his involvement. Beyond that, the President himself has the power to open diplomatic channels simply by

engaging in direct diplomacy with foreign heads of state and their ministers. The Constitution thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation. Because these specific Clauses confer the recognition power on the President, the Court need not consider whether or to what extent the Vesting Clause, which provides that the "executive Power" shall be vested in the President, provides further support for the President's action here. Art. II, § 1, cl. 1.

The text and structure of the Constitution grant the President the power to recognize foreign nations and governments. The question then becomes whether that power is exclusive. The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in Congress—suggest that it is. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.

Recognition is a topic on which the Nation must "'speak . . . with one voice.'" *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 424 (2003) (quoting *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 381 (2000)). That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, "[d]ecision, activity, secrecy, and dispatch." The Federalist No. 70, p. 424 (A. Hamilton). The President is

capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. See, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 229 (1942). He is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law. 1 Oppenheim's International Law § 50, p. 169 (R. Jennings & A. Watts eds., 9th ed. 1992) (act of recognition must "leave no doubt as to the intention to grant it"). These qualities explain why the Framers listed the traditional avenues of recognition—receiving ambassadors, making treaties, and sending ambassadors—as among the President's Article II powers.

As described in more detail below, the President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410 (1964); *Pink*, *supra*, at 229; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839). Texts and treatises on international law treat the President's word as the final word on recognition. See, *e. g.*, Restatement (Third) of Foreign Relations Law § 204, at 89 ("Under the Constitution of the United States the President has exclusive authority to recognize or not to recognize a foreign state or government"); see also L. Henkin, Foreign Affairs and the U. S. Constitution 43 (2d ed. 1996) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government"). In light of this authority all six judges who considered this case in the Court of Appeals agreed that the President holds the exclusive recognition power. See 725 F. 3d, at 214 ("[W]e conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign"); *Zivotofsky*, 571 F. 3d, at 1231 ("That this power belongs solely to the President has been clear from the earliest days of the

Republic"); *id.*, at 1240 (Edwards, J., concurring) ("The Executive has exclusive and unreviewable authority to recognize foreign sovereigns").

It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action. Congress may "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8. In addition, the President cannot make a treaty or appoint an ambassador without the approval of the Senate. Art. II, § 2, cl. 2. The President, furthermore, could not build an American Embassy abroad without congressional appropriation of the necessary funds. Art. I, § 8, cl. 1. Under basic separation-of-powers principles, it is for the Congress to enact the laws, including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government. § 8, cl. 18.

In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U. S., at 635 (Jackson, J., concurring). Although the President alone effects the formal act of recognition, Congress' powers, and its central role in making laws, give it substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself. If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties. And those decisions require action by the Senate or the whole Congress.

In practice, then, the President's recognition determination is just one part of a political process that may require Congress to make laws. The President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds. Albeit limited, the exclusive recognition power is essential to the conduct of Presidential duties. The formal act of recognition is an executive power that Congress may not qualify. If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question.

A clear rule that the formal power to recognize a foreign government subsists in the President therefore serves a necessary purpose in diplomatic relations. All this, of course, underscores that Congress has an important role in other aspects of foreign policy, and the President may be bound by any number of laws Congress enacts. In this way ambition counters ambition, ensuring that the democratic will of the people is observed and respected in foreign affairs as in the domestic realm. See The Federalist No. 51, p. 322 (J. Madison).

B

No single precedent resolves the question whether the President has exclusive recognition authority and, if so, how far that power extends. In part that is because, until today, the political branches have resolved their disputes over questions of recognition. The relevant cases, though providing important instruction, address the division of recognition power between the Federal Government and the States, see, *e. g.*, *Pink*, 315 U. S. 203, or between the courts and the political branches, see, *e. g.*, *Banco Nacional de Cuba*, 376 U. S., at 410—not between the President and Congress. As the parties acknowledge, some isolated statements in those cases lend support to the position that Congress has a role in the

recognition process. In the end, however, a fair reading of the cases shows that the President's role in the recognition process is both central and exclusive.

During the administration of President Van Buren, in a case involving a dispute over the status of the Falkland Islands, the Court noted that "when the executive branch of the government" assumes "a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams*, 13 Pet., at 420. Once the President has made his determination, it "is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." *Ibid.*

Later, during the 1930's and 1940's, the Court addressed issues surrounding President Roosevelt's decision to recognize the Soviet Government of Russia. In *United States* v. *Belmont*, 301 U. S. 324 (1937), and *Pink*, *supra*, New York state courts declined to give full effect to the terms of executive agreements the President had concluded in negotiations over recognition of the Soviet regime. In particular the state courts, based on New York public policy, did not treat assets that had been seized by the Soviet Government as property of Russia and declined to turn those assets over to the United States. The Court stated that it "may not be doubted" that "recognition, establishment of diplomatic relations, . . . and agreements with respect thereto" are "within the competence of the President." *Belmont*, 301 U. S., at 330. In these matters, "the Executive ha[s] authority to speak as the sole organ of th[e] government." *Ibid.* The Court added that the President's authority "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink*, *supra*, at 229; see also *Guaranty Trust Co.*, 304 U. S., at 137–138 (The "political department['s] . . . action in recognizing a for-

eign government and in receiving its diplomatic representatives is conclusive on all domestic courts"). Thus, New York state courts were required to respect the executive agreements.

It is true, of course, that *Belmont* and *Pink* are not direct holdings that the recognition power is exclusive. Those cases considered the validity of executive agreements, not the initial act of recognition. The President's determination in those cases did not contradict an Act of Congress. And the primary issue was whether the executive agreements could supersede state law. Still, the language in *Pink* and *Belmont*, which confirms the President's competence to determine questions of recognition, is strong support for the conclusion that it is for the President alone to determine which foreign governments are legitimate.

Banco Nacional de Cuba contains even stronger statements regarding the President's authority over recognition. There, the status of Cuba's Government and its acts as a sovereign were at issue. As the Court explained, "Political recognition is exclusively a function of the Executive." 376 U. S., at 410. Because the Executive had recognized the Cuban Government, the Court held that it should be treated as sovereign and could benefit from the "act of state" doctrine. See also *Baker* v. *Carr*, 369 U. S. 186, 213 (1962) ("[I]t is the executive that determines a person's status as representative of a foreign government"); *National City Bank of N. Y.*, 348 U. S., at 358 ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court"). As these cases illustrate, the Court has long considered recognition to be the exclusive prerogative of the Executive.

The Secretary now urges the Court to define the executive power over foreign relations in even broader terms. He contends that under the Court's precedent the President has "exclusive authority to conduct diplomatic relations," along with "the bulk of foreign-affairs powers." Brief for Re-

spondent 18, 16. In support of his submission that the President has broad, undefined powers over foreign affairs, the Secretary quotes *United States* v. *Curtiss-Wright Export Corp.*, which described the President as "the sole organ of the federal government in the field of international relations." 299 U. S., at 320. This Court declines to acknowledge that unbounded power. A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.

The *Curtiss-Wright* case does not extend so far as the Secretary suggests. In *Curtiss-Wright*, the Court considered whether a congressional delegation of power to the President was constitutional. Congress had passed a joint resolution giving the President the discretion to prohibit arms sales to certain militant powers in South America. The resolution provided criminal penalties for violation of those orders. *Id.*, at 311–312. The Court held that the delegation was constitutional, reasoning that Congress may grant the President substantial authority and discretion in the field of foreign affairs. *Id.*, at 315–329. Describing why such broad delegation may be appropriate, the opinion stated:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' [10 Annals of Cong.] 613." *Id.*, at 319.

This description of the President's exclusive power was not necessary to the holding of *Curtiss-Wright*—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, *Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments, as then-Congressman John Marshall acknowledged. See 10 Annals of Cong. 613 (1800) (cited in *Curtiss-Wright*, *supra*, at 319). But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.

In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. See, *e. g.*, *Medellín* v. *Texas*, 552 U. S. 491, 523–532 (2008); *Youngstown*, 343 U. S., at 589; *Little* v. *Barreme*, 2 Cranch 170, 177–179 (1804); Glennon, Two Views of Presidential Foreign Affairs Power: *Little* v. *Barreme* or *Curtiss-Wright*? 13 Yale J. Int'l L. 5, 19–20 (1988); cf. *Dames & Moore* v. *Regan*, 453 U. S. 654, 680–681 (1981). It is not for the President alone to determine the whole content of the Nation's foreign policy.

That said, judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations. Recognition is an act with immediate and powerful significance for international relations, so the President's position must be clear. Congress cannot require him to contradict his own statement regarding a determination of formal recognition.

Zivotofsky's contrary arguments are unconvincing. The decisions he relies upon are largely inapposite. This Court's cases do not hold that the recognition power is shared. *Jones* v. *United States*, 137 U. S. 202 (1890), and *Boumediene* v. *Bush*, 553 U. S. 723 (2008), each addressed the status of territories controlled or acquired by the United States—not whether a province ought to be recognized as part of a foreign country. See also *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380 (1948) ("[D]etermination of [American] sovereignty over an area is for the legislative and executive departments"). And no one disputes that Congress has a role in determining the status of United States territories. See U. S. Const., Art. IV, § 3, cl. 2 (Congress may "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign countries. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

To be sure, the Court has mentioned both of the political branches in discussing international recognition, but it has done so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations. See *Oetjen*, 246 U. S., at 302 ("'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges'" (quoting *Jones*, *supra*, at 212)); *United States* v. *Palmer*, 3 Wheat. 610, 643 (1818) ("[T]he courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States"). This is consistent with the fact that Congress, in the ordinary course, does support the President's recognition policy, for instance by confirming an ambassador to the recognized foreign government. Those cases do not cast doubt on the view that the Executive

Branch determines whether the United States will recognize foreign states and governments and their territorial bounds.

C

Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often "put significant weight upon historical practice." *NLRB* v. *Noel Canning*, 573 U. S. 513, 524 (2014) (emphasis deleted). Here, history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone. As Zivotofsky argues, certain historical incidents can be interpreted to support the position that recognition is a shared power. But the weight of historical evidence supports the opposite view, which is that the formal determination of recognition is a power to be exercised only by the President.

The briefs of the parties and *amici*, which have been of considerable assistance to the Court, give a more complete account of the relevant history, as do the works of scholars in this field. See, *e. g.*, Brief for Respondent 26–39; Brief for Petitioner 34–57; Brief for American Jewish Committee as *Amicus Curiae* 6–24; J. Goebel, The Recognition Policy of the United States 97–170 (1915) (Goebel); 1 Moore §§28–58, 74–164; Reinstein, Is the President's Recognition Power Exclusive? 86 Temp. L. Rev. 1, 3–50 (2013). But even a brief survey of the major historical examples, with an emphasis on those said to favor Zivotofsky, establishes no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power.

From the first administration forward, the President has claimed unilateral authority to recognize foreign sovereigns. For the most part, Congress has acquiesced in the Executive's exercise of the recognition power. On occasion, the President has chosen, as may often be prudent, to consult

and coordinate with Congress. As Judge Tatel noted in this case, however, "the most striking thing" about the history of recognition "is what is absent from it: a situation like this one," where Congress has enacted a statute contrary to the President's formal and considered statement concerning recognition. 725 F. 3d, at 221 (concurring opinion).

The first debate over the recognition power arose in 1793, after France had been torn by revolution. See Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 312 (2001). Once the Revolutionary Government was established, Secretary of State Jefferson and President Washington, without consulting Congress, authorized the American Ambassador to resume relations with the new regime. See Letter to G. Morris (Mar. 12, 1793), in 25 Papers of Thomas Jefferson 367, 367–368 (J. Catanzariti ed. 1992); Goebel 99–104. Soon thereafter, the new French Government proposed to send an ambassador, Citizen Genet, to the United States. See *id.*, at 105. Members of the President's Cabinet agreed that receiving Genet would be a binding and public act of recognition. See Opinion on the Treaties With France (Apr. 28, 1793), in 25 Papers of Thomas Jefferson, at 608, 612 ("The reception of the Minister at all . . . is an ackno[w]le[d]gement of the legitimacy of their government"); see also Letter from A. Hamilton to G. Washington (Cabinet Paper) (Apr. 1793), in 4 Works of Alexander Hamilton 369, 369–396 (H. Lodge ed. 1904). They decided, however, both that Genet should be received and that consultation with Congress was not necessary. See T. Jefferson, Anas (Apr. 18, 1793), in 1 Writings of Thomas Jefferson 226, 227 (P. Ford ed. 1892); Cabinet Opinion on Washington's Questions on Neutrality and the Alliance With France (Apr. 19, 1793), in 25 Papers of Thomas Jefferson, at 570. Congress expressed no disagreement with this position, and Genet's reception marked the Nation's first act of recognition—one made by the President alone. See Prakash, *supra*, at 312–313.

The recognition power again became relevant when yet another revolution took place—this time, in South America, as several colonies rose against Spain. In 1818, Speaker of the House Henry Clay announced he "intended moving the recognition of Buenos Ayres and probably of Chile." Goebel 121. Clay thus sought to appropriate money "'[f]or one year's salary'" for "'a Minister'" to present-day Argentina. 32 Annals of Cong. 1500 (1818). President Monroe, however, did not share that view. Although Clay gave "one of the most remarkable speeches of his career," his proposed bill was defeated. Goebel 123; 32 Annals of Cong. 1655. That action has been attributed, in part, to the fact that Congress agreed the recognition power rested solely with the President. Goebel 124; see, *e. g.*, 32 Annals of Cong. 1570 (statement of Rep. Alexander Smyth) ("[T]he acknowledgment of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation"). Four years later, after the President had decided to recognize the South American republics, Congress did pass a resolution, on his request, appropriating funds for "such missions to the independent nations on the American continent, as the President of the United States may deem proper." Act of May 4, 1822, ch. 52, 3 Stat. 678.

A decade later, President Jackson faced a recognition crisis over Texas. In 1835, Texas rebelled against Mexico and formed its own government. See Goebel 144–147. But the President feared that recognizing the new government could ignite a war. See A. Jackson, To the Senate and House of Representatives of the United States (Dec. 21, 1836), in 3 Messages and Papers of the Presidents 265, 266–267 (J. Richardson ed. 1899). After Congress urged him to recognize Texas, see Cong. Globe, 24th Cong., 1st Sess., 453 (1836); H. R. Rep. No. 854, 24th Cong., 1st Sess. (1836), the President delivered a message to the Legislature. He concluded there had not been a "deliberate inquiry" into whether the Presi-

dent or Congress possessed the recognition power. See A. Jackson, in 3 Messages and Papers of the Presidents, at 267. He stated, however, "on the ground of expediency, I am disposed to concur" with Congress' preference regarding Texas. *Ibid.* In response Congress appropriated funds for a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister." Act of Mar. 3, 1837, 5 Stat. 170. Thus, although he cooperated with Congress, the President was left to execute the formal act of recognition.

President Lincoln, too, sought to coordinate with Congress when he requested support for his recognition of Liberia and Haiti. In his first annual message to Congress he said he could see no reason "why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia." Lincoln's First Annual Message to Congress (Dec. 3, 1861), in 6 Messages and Papers of the Presidents 44, 47. Nonetheless, he was "[u]nwilling" to "inaugurate a novel policy in regard to them without the approbation of Congress." *Ibid.* In response Congress concurred in the President's recognition determination and enacted a law appropriating funds to appoint diplomatic representatives to the two countries—leaving, as usual, the actual dispatch of ambassadors and formal statement of recognition to the President. Act of June 5, 1862, 12 Stat. 421.

Three decades later, the branches again were able to reach an accord, this time with regard to Cuba. In 1898, an insurgency against the Spanish colonial government was raging in Cuba. President McKinley determined to ask Congress for authorization to send armed forces to Cuba to help quell the violence. See 31 Cong. Rec. 3699–3702 (1898). Although McKinley thought Spain was to blame for the strife, he opposed recognizing either Cuba or its insurgent government. *Id.*, at 3701. At first, the House proposed a resolution consistent with McKinley's wishes. *Id.*, at 3810. The Senate countered with a resolution that authorized the use

of force but that did recognize both Cuban independence and the insurgent government. *Id.*, at 3993. When the Senate's version reached the House, the House again rejected the language recognizing Cuban independence. *Id.*, at 4017. The resolution went to Conference, which, after debate, reached a compromise. See Reinstein, 86 Temp. L. Rev., at 40–41. The final resolution stated "the people of the Island of Cuba are, and of right ought to be, free and independent," but made no mention of recognizing a new Cuban Government. Act of Apr. 20, 1898, 30 Stat. 738. Accepting the compromise, the President signed the joint resolution. See Reinstein, 86 Temp. L. Rev., at 41.

For the next 80 years, "[P]residents consistently recognized new states and governments without any serious opposition from, or activity in, Congress." *Ibid.*; see 2 Whiteman §§ 6–60, at 133–242 (detailing over 50 recognition decisions made by the Executive). The next debate over recognition did not occur until the late 1970's. It concerned China.

President Carter recognized the People's Republic of China (PRC) as the government of China, and derecognized the Republic of China, located on Taiwan. See S. Kan, Cong. Research Serv., China/Taiwan: Evolution of the "One China" Policy—Key Statements from Washington, Beijing, and Taipei 1, 10 (Oct. 10, 2014). As to the status of Taiwan, the President "acknowledge[d] the Chinese position" that "Taiwan is part of China," *id.*, at 39 (text of U. S.–PRC Joint Communique on the Establishment of Diplomatic Relations (Jan. 1, 1979)), but he did not accept that claim. The President proposed a new law defining how the United States would conduct business with Taiwan. See Hearings on Taiwan Legislation before the House Committee on Foreign Affairs, 96th Cong., 1st Sess., 2–6 (1979) (statement of Warren Christopher, Deputy Secretary of State). After extensive revisions, Congress passed, and the President signed, the Taiwan Relations Act, 93 Stat. 14 (1979) (codified as amended at 22 U. S. C. §§ 3301–3316). The Act (in a simpli-

fied summary) treated Taiwan as if it were a legally distinct entity from China—an entity with which the United States intended to maintain strong ties. See, *e. g.*, §§ 3301, 3303(a), (b)(1), (b)(7).

Throughout the legislative process, however, no one raised a serious question regarding the President's exclusive authority to recognize the PRC—or to decline to grant formal recognition to Taiwan. See, *e. g.*, 125 Cong. Rec. 6709 (1979) (statement of Sen. Jacob Javits) ("Neither bill [proposed by either Chamber] sought to reestablish official relations between the United States and the Republic of China on Taiwan; Congress . . . does not have the authority to do that even if it wanted to do so"). Rather, Congress accepted the President's recognition determination as a completed, lawful act; and it proceeded to outline the trade and policy provisions that, in its judgment, were appropriate in light of that decision.

This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone. For the most part, Congress has respected the Executive's policies and positions as to formal recognition. At times, Congress itself has defended the President's constitutional prerogative. Over the last 100 years, there has been scarcely any debate over the President's power to recognize foreign states. In this respect the Legislature, in the narrow context of recognition, on balance has acknowledged the importance of speaking "with one voice." *Crosby*, 530 U. S., at 381. The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.

III

As the power to recognize foreign states resides in the President alone, the question becomes whether § 214(d) infringes on the Executive's consistent decision to withhold

recognition with respect to Jerusalem. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977) (action unlawful when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions").

Section 214(d) requires that, in a passport or consular report of birth abroad, "the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel" for a "United States citizen born in the city of Jerusalem." 116 Stat. 1366. That is, § 214(d) requires the President, through the Secretary, to identify citizens born in Jerusalem who so request as being born in Israel. But according to the President, those citizens were not born in Israel. As a matter of United States policy, neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. In this way, § 214(d) "directly contradicts" the "carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem." 725 F. 3d, at 217, 216.

If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements. This conclusion is a matter of both common sense and necessity. If Congress could command the President to state a recognition position inconsistent with his own, Congress could override the President's recognition determination. Under international law, recognition may be effected by "written or oral declaration of the recognizing state." 1 Moore § 27, at 73. In addition an act of recognition must "leave no doubt as to the intention to grant it." 1 Oppenheim's International Law § 50, at 169. Thus, if Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.

As Justice Jackson wrote in *Youngstown*, when a Presidential power is "exclusive," it "disabl[es] the Congress from

acting upon the subject." 343 U. S., at 637–638 (concurring opinion). Here, the subject is quite narrow: The Executive's exclusive power extends no further than his formal recognition determination. But as to that determination, Congress may not enact a law that directly contradicts it. This is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision.

If Congress may not pass a law, speaking in its own voice, that effects formal recognition, then it follows that it may not force the President himself to contradict his earlier statement. That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations.

Although the statement required by § 214(d) would not itself constitute a formal act of recognition, it is a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State. See *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835) (a passport "from its nature and object, is addressed to foreign powers" and "is to be considered . . . in the character of a political document"). As a result, it is unconstitutional. This is all the more clear in light of the longstanding treatment of a passport's place-of-birth section as an official executive statement implicating recognition. See 725 F. 3d, at 224 (Tatel, J., concurring). The Secretary's position on this point has been consistent: He will not place information in the place-of-birth section of a passport that contradicts the President's recognition policy. See 7 FAM § 1383. If a citizen objects to the country listed as sovereign over his place of birth, then the Secretary will accommodate him by listing the city or town of birth rather than the country. See *id.*, § 1383.6. But the Secretary will not list a sovereign that contradicts the President's recognition policy in a passport.

Thus, the Secretary will not list "Israel" in a passport as the country containing Jerusalem.

The flaw in § 214(d) is further underscored by the undoubted fact that the purpose of the statute was to infringe on the recognition power—a power the Court now holds is the sole prerogative of the President. The statute is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." § 214, 116 Stat. 1365. The House Conference Report proclaimed that § 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." H. R. Conf. Rep. No. 107–671, p. 123 (2002). And, indeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region. See *supra*, at 8. From the face of § 214, from the legislative history, and from its reception, it is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem. This Congress may not do.

It is true, as Zivotofsky notes, that Congress has substantial authority over passports. See *Haig* v. *Agee*, 453 U. S. 280 (1981); *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Kent* v. *Dulles*, 357 U. S. 116 (1958). The Court does not question the power of Congress to enact passport legislation of wide scope. In *Kent* v. *Dulles*, for example, the Court held that if a person's " 'liberty' " to travel "is to be regulated" through a passport, "it must be pursuant to the law-making functions of the Congress." See *id.*, at 129. Later cases, such as *Zemel* v. *Rusk* and *Haig* v. *Agee*, also proceeded on the assumption that Congress must authorize the grounds on which passports may be approved or denied. See *Zemel*, *supra*, at 7–13; *Haig*, *supra*, at 289–306. This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs.

The problem with § 214(d), however, lies in how Congress exercised its authority over passports. It was an improper act for Congress to "aggrandiz[e] its power at the expense of

another branch" by requiring the President to contradict an earlier recognition determination in an official document issued by the Executive Branch. *Freytag* v. *Commissioner*, 501 U. S. 868, 878 (1991). To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself. As a result, the statute is unconstitutional.

* * *

In holding § 214(d) invalid the Court does not question the substantial powers of Congress over foreign affairs in general or passports in particular. This case is confined solely to the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds. Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports.

The judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

JUSTICE BREYER, concurring.

I continue to believe that this case presents a political question inappropriate for judicial resolution. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 212 (2012) (BREYER, J., dissenting). But because precedent precludes resolving this case on political question grounds, see *id.*, at 191 (majority opinion), I join the Court's opinion.

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

Our Constitution allocates the powers of the Federal Government over foreign affairs in two ways. First, it expressly identifies certain foreign affairs powers and vests them in particular branches, either individually or jointly.

Second, it vests the residual foreign affairs powers of the Federal Government—*i. e.*, those not specifically enumerated in the Constitution—in the President by way of Article II's Vesting Clause.

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, ignores that constitutional allocation of power insofar as it directs the President, contrary to his wishes, to list "Israel" as the place of birth of Jerusalem-born citizens on their passports. The President has long regulated passports under his residual foreign affairs power, and this portion of § 214(d) does not fall within any of Congress' enumerated powers.

By contrast, § 214(d) poses no such problem insofar as it regulates consular reports of birth abroad. Unlike passports, these reports were developed to effectuate the naturalization laws, and they continue to serve the role of identifying persons who need not be naturalized to obtain U. S. citizenship. The regulation of these reports does not fall within the President's foreign affairs powers, but within Congress' enumerated powers under the Naturalization and Necessary and Proper Clauses.

Rather than adhere to the Constitution's division of powers, the Court relies on a distortion of the President's recognition power to hold both of these parts of § 214(d) unconstitutional. Because I cannot join this faulty analysis, I concur only in the portion of the Court's judgment holding § 214(d) unconstitutional as applied to passports. I respectfully dissent from the remainder of the Court's judgment.

I

A

The Constitution specifies a number of foreign affairs powers and divides them between the political branches. Among others, Article I allocates to Congress the powers "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," "[t]o define and pun-

ish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Art. I, § 8. For his part, the President has certain express powers relating to foreign affairs, including the powers, "by and with the Advice and Consent of the Senate," to "appoint Ambassadors," and "to make Treaties, provided two thirds of the Senators present concur." Art. II, § 2. He is also assigned certain duties with respect to foreign affairs, including serving as "Commander in Chief of the Army and Navy of the United States," *ibid.*, and "receiv[ing] Ambassadors and other public Ministers," Art. II, § 3.

These specific allocations, however, cannot account for the entirety of the foreign affairs powers exercised by the Federal Government. Neither of the political branches is expressly authorized, for instance, to communicate with foreign ministers, to issue passports, or to repel sudden attacks. Yet the President has engaged in such conduct, with the support of Congress, since the earliest days of the Republic. Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 298–346 (2001) (Prakash & Ramsey).

The President's longstanding practice of exercising unenumerated foreign affairs powers reflects a constitutional directive that "the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 580 (2004) (THOMAS, J., dissenting). Specifically, the Vesting Clause of Article II provides that "[t]he executive Power shall be vested in a President of the United States." Art. II, § 1. This Clause is notably different from the Vesting Clause of Article I, which provides only that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States," Art. I, § 1 (emphasis added). By omitting the words "herein granted" in Article

II, the Constitution indicates that the "executive Power" vested in the President is not confined to those powers expressly identified in the document. Instead, it includes all powers originally understood as falling within the "executive Power" of the Federal Government.

B

Founding-era evidence reveals that the "executive Power" included the foreign affairs powers of a sovereign State. See Prakash & Ramsey 253. John Locke's 17th-century writings laid the groundwork for this understanding of executive power. Locke described foreign affairs powers—including the powers of "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth"—as "federative" power. Second Treatise of Civil Government § 146, p. 73 (J. Gough ed. 1947). He defined the "executive" power as "comprehending the execution of the municipal laws of the society within itself upon all that are parts of it." *Id.*, § 147, at 73. Importantly, however, Locke explained that the federative and executive powers must be lodged together, lest "disorder and ruin" erupt from the division of the "force of the public." *Id.*, § 148, at 73–74.

Subsequent thinkers began to refer to both of these powers as aspects of "executive power." William Blackstone, for example, described the executive power in England as including foreign affairs powers, such as the "power of sending embassadors to foreign states, and receiving embassadors at home"; making "treaties, leagues, and alliances with foreign states and princes"; "making war and peace"; and "issu[ing] letters of marque and reprisal." 1 Commentaries on the Laws of England 245, 249, 250, 242–252 (1765) (Blackstone). Baron de Montesquieu similarly described executive power as including the power to "mak[e] peace or war, sen[d] or receiv[e] embassies, establis[h] the public

security, and provid[e] against invasions." The Spirit of the Laws bk. XI, ch. 6, p. 151 (O. Piest ed., T. Nugent transl. 1949). In fact, "most writers of [Montesquieu's] tim[e] w[ere] inclined to think of the executive branch of government as being concerned nearly entirely with foreign affairs." W. Gwyn, The Meaning of the Separation of Powers 103 (1965).

That understanding of executive power prevailed in America. Following independence, Congress assumed control over foreign affairs under the Articles of Confederation. See, *e. g.*, Articles of Confederation, Art. IX, cl. 1. At that time, many understood that control to be an exercise of executive power. See Prakash & Ramsey 272, 275–278. Letters among Members of the Continental Congress, for instance, repeatedly referred to the Department of Foreign Affairs, established under the control of the Continental Congress, as an "Executive departmen[t]" and to its officers as "'Executives or Ministers.'" *Id.*, at 276, and nn. 194–196. Similarly, the Essex Result of 1778—an influential report on the proposed Constitution for Massachusetts—described executive power as including both "external" and "internal" powers: The external executive power "comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state," while the internal executive power "is employed in the peace, security and protection of the subject and his property." Essex Result, in The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, pp. 324, 337 (O. Handlin & M. Handlin eds. 1966).

This view of executive power was widespread at the time of the framing of the Constitution. Thomas Rutherforth's Institutes of Natural Law—a treatise routinely cited by the Founders, McDowell, The Limits of Natural Law: Thomas Rutherforth and the American Legal Tradition, 37 Am. J. Juris. 57, 59, and n. 10 (1992)—explained that "external exec-

utive power" includes "not only what is properly called military power, but the power likewise of making war or peace, the power of engaging in alliances for an encrease of strength, . . . the power of entering into treaties, and of making leagues to restore peace . . . and the power of adjusting the rights of a nation in respect of navigation, trade, etc.," 2 Institutes of Natural Law 55–56, 54–61 (1756). During the ratification debates, James Wilson likewise referred to the "executive powers of government" as including the external powers of a nation. 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 500–502 (1863). And Alexander Hamilton, writing as Publius, asserted that "[t]he actual conduct of foreign negotiations," "the arrangement of the army and navy, the directions of the operations of war . . . and other matters of a like nature" are "executive details" that "fal[l] peculiarly within the province of the executive department." The Federalist No. 72, pp. 435–436 (C. Rossiter ed. 1961).

Given this pervasive view of executive power, it is unsurprising that those who ratified the Constitution understood the "executive Power" vested by Article II to include those foreign affairs powers not otherwise allocated in the Constitution. James Iredell, for example, told the North Carolina ratifying convention that, under the new Constitution, the President would "regulate all intercourse with foreign powers" and act as the "primary agent" of the United States, though no specific allocation of foreign affairs powers in the document so provided. 4 Elliot, *supra*, at 127, 128. And Alexander Hamilton presumed as much when he argued that the "[e]nergy" created in the Constitution's Executive would be "essential to the protection of the community against foreign attacks," even though no specific allocation of foreign affairs powers provided for the Executive to repel such assaults. See The Federalist No. 70, p. 423. These statements confirm that the "executive Power" vested in the President by Article II includes the residual foreign affairs

powers of the Federal Government not otherwise allocated by the Constitution.[1]

C

Early practice of the founding generation also supports this understanding of the "executive Power." Upon taking office, President Washington assumed the role of chief diplomat; began to direct the Secretary of Foreign Affairs who, under the Articles of Confederation, had reported to the Congress; and established the foreign policy of the United States. Prakash & Ramsey 296–297. At the same time, he respected Congress' prerogatives to declare war, regulate foreign commerce, and appropriate funds. *Id.*, at 296.

For its part, Congress recognized a broad Presidential role in foreign affairs. *Id.*, at 297–298. It created an "Executive department" called the "Department of Foreign Affairs," with a Secretary wholly subordinate to the President. An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28. The enabling Act provided that the Secretary was to "perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President," including those "relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs." § 1, *id.*, at 29. By referring to those duties as those "the President of the United States shall assign to the said department," *ibid.*, the Act presumed the President inherently possessed power to engage in those tasks.

---

[1] This discussion of the allocation of *federal* foreign affairs powers should not be understood to address the allocation of foreign affairs powers between the Federal Government and the States. The extent to which the States retained foreign affairs powers following ratification is not before us today.

Subsequent interactions between President Washington and Congress indicated that the parties involved believed the Constitution vested the President with authority to regulate dealings with foreign nations. In his first State of the Union Address, President Washington told Congress that "[t]he interests of the United States require, that our intercourse with other nations should be facilitated by such provisions as will enable me to fulfil my duty in that respect." First Annual Message (Jan. 8, 1790), in George Washington: A Collection 467, 468 (W. Allen ed. 1988). To that end, he asked for compensation for employees and a fund designated for "defraying the expenses incident to the conduct of our foreign affairs." *Ibid.* Congress responded by passing "An Act providing the means of intercourse between the United States and foreign nations." Ch. 22, 1 Stat. 128.

During the congressional debate over that bill, the President sought an opinion from Thomas Jefferson—at that time, Secretary of State—about the scope of the Senate's power in this area. Jefferson responded that "[t]he transaction of business with foreign nations is executive altogether." Opinion on the Powers of the Senate (Apr. 24, 1790), in 5 Writings of Thomas Jefferson 161 (P. Ford ed. 1895). As such, Jefferson concluded that it properly belonged "to the head" of the executive department, "except as to such portions of it as are specially submitted to the senate." *Ibid.* According to Washington's diaries, he received similar advice from John Jay and James Madison about "the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls." 6 The Diaries of George Washington 68 (D. Jackson & D. Twohig eds. 1979). All agreed that the Senate lacked a "Constitutional right to interfere with either, & that it might be impolitic to draw it into a precedent their powers extending no farther than to an approbation or disapprobation of the person nominated by the President all the rest being

Executive and vested in the President by the Constitution." *Ibid.*

Washington followed this advice. He corresponded directly with U. S. ministers, moved them among countries, and removed them from their positions at will. Prakash & Ramsey 308–309. He also corresponded with foreign leaders, representing that his role as the "'supreme executive authority'" authorized him to receive and respond to their letters on behalf of the United States. *Id.*, at 317. When foreign ministers addressed their communications to Congress, he informed them of their error. *Id.*, at 321.

Washington's control over foreign affairs extended beyond communications with other governments. When confronted with the question whether to recognize the French Republic as the lawful government of France, he received the French Republic's emissary without the involvement of Congress. *Id.*, at 312. When he later concluded that the emissary had acted inappropriately, he again acted without the involvement of Congress to ask the French executive to recall him. *Id.*, at 314–315. Washington also declared neutrality on behalf of the United States during the war between England and France in 1793, see Proclamation of Neutrality (Apr. 22, 1793), an action Hamilton pseudonymously defended as a proper exercise of the power vested in the President by the "general grant" of executive power in the Vesting Clause. Pacificus No. 1 (June 29, 1793), Letters of Pacificus and Helvidius 10 (1845); *id.*, at 3. For its part, Congress applauded the President's decision. 4 Annals of Cong. 18, 138 (1793).

In short, the practices of the Washington administration and First Congress confirm that Article II's Vesting Clause was originally understood to include a grant of residual foreign affairs power to the Executive.

II

The statutory provision at issue implicates the President's residual foreign affairs power. Section 214(d) instructs the Secretary of State, upon request of a citizen born in Jerusa-

lem (or that citizen's legal guardian), to list that citizen's place of birth as Israel on his passport and consular report of birth abroad, even though it is the undisputed position of the United States that Jerusalem is not a part of Israel. The President argues that this provision violates his foreign affairs powers generally and his recognition power specifically. Zivotofsky rejoins that Congress passed § 214(d) pursuant to its enumerated powers and its action must therefore take precedence.

Neither has it quite right. The President is not constitutionally compelled to implement § 214(d) as it applies to passports because passport regulation falls squarely within his residual foreign affairs power and Zivotofsky has identified no source of congressional power to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen's passport. Section 214(d) can, however, be constitutionally applied to consular reports of birth abroad because those documents do not fall within the President's foreign affairs authority but do fall within Congress' enumerated powers over naturalization.[2]

A

1

In the Anglo-American legal tradition, passports have consistently been issued and controlled by the body exercising executive power—in England, by the King; in the Colonies,

[2] The majority asserts that Zivotofsky "waived any argument that his consular report of birth abroad should be treated differently than his passport" in the court below and in this Court because he "fail[ed] to differentiate between the two documents." *Ante*, at 9. But at every stage of the proceedings, Zivotofsky has pressed his claim that he is entitled to have his place of birth listed as "Israel" on *both* his passport and his consular report of birth abroad, and the consular report issue is fairly included in the question presented. Parties cannot waive the correct interpretation of the law simply by failing to invoke it. See, *e. g.*, *EEOC* v. *FLRA*, 476 U. S. 19, 23 (1986) (*per curiam*). That the parties have argued the case as if the same analysis should apply to both documents does not relieve this Court of its responsibility to interpret the law correctly.

by the Continental Congress; and in the United States, by President Washington and every President since.

Historically, "passports were classed with those documents known as safe conducts or letters of protection, by which the person of an enemy might be rendered safe and inviolable." Dept. of State, G. Hunt, The American Passport: Its History 3 (1898). Letters of safe conduct and passports performed different functions in England, but both grew out of the King's prerogative to regulate the "nation's intercourse with foreign nations," see 1 Blackstone 251–253. The King issued letters of safe conduct during times of war, *id.*, at 252, whereas passports were heirs to a tradition of requiring the King's license to depart the country, see, *e. g.*, Richard II, Feb. 26, 1383, 2 Calendar of Close Rolls, pp. 281–282 (1920); 1 E. Turner, The Privy Council of England in the Seventeenth and Eighteenth Centuries 1603–1784, p. 151 (1927); see also K. Diplock, Passports and Protection in International Law, in 32 The Grotius Society, Transactions for the Year 1946, Problems of Public and Private International Law 42, 44 (1947).

Both safe conducts and passports were in use at the time of the founding. Passports were given "for . . . greater security" "on ordinary occasions [to] persons who meet with no special interference in going and coming," whereas "safe-conduct[s]" were "given to persons who could not otherwise enter with safety the dominions of the sovereign granting it." 3 E. de Vattel, The Law of Nations § 265, p. 331 (1758 ed. C. Fenwick transl. 1916) (emphasis deleted). Both were issued by the person exercising the external sovereign power of a state. See *id.*, §§ 162, 275, at 69, 332. In the absence of a separate executive branch of government, the Continental Congress issued passports during the American Revolution, see, *e. g.*, Resolution (May 9, 1776), in 4 Journals of the Continental Congress 340–341; Resolution (May 24, 1776), in *id.*, at 385; as did the Congress under the Articles of Confederation, see, *e. g.*, 25 *id.*, at 859 (Jan. 24, 1783) (dis-

cussing its authority to issue passports under the war power).

After the ratification of the Constitution, President Washington immediately took responsibility for issuing passports. Hunt, *supra*, at 3. Although "'[p]ast practice does not, by itself, create power,'" "a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic . . . should guide our interpretation of an ambiguous constitutional provision." *NLRB* v. *Noel Canning*, 573 U. S. 513, 572–573 (2014) (SCALIA, J., concurring in judgment) (alteration in original; some internal quotation marks omitted). The history of the President's passport regulation in this country is one such practice. From the ratification until the end of the Civil War, the President issued passports without any authorization from Congress. As the Department of State later remarked, "In the absence of any law upon the subject, the issuing of passports to Americans going abroad naturally fell to the Department of State, as one of its manifestly proper functions." Hunt, *supra*, at 37. To that end, the Secretary's authority was "entirely discretionary." *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699 (1835). Congress acted in support of that authority by criminalizing the "violat[ion] [of] any safe-conduct or passport duly obtained and issued under the authority of the United States." An Act for the Punishment of certain Crimes against the United States, § 28, 1 Stat. 118.[3] Congress only purported to authorize the President to issue such passports in 1856 and, even under that statute, it provided that passports should be issued "under such rules as the President shall designate and prescribe for and on behalf of the United States." An Act to regulate the Diplomatic and Consular Systems of the United States, § 23, 11 Stat. 60. The President has continued to designate and prescribe the rules for passports ever since.

[3] Until 1978, passports were not generally required to enter or exit the country except during wartime. § 707, 92 Stat. 993.

2

That the President has the power to regulate passports under his residual foreign affairs powers does not, however, end the matter, for Congress has repeatedly legislated on the subject of passports. These laws have always been narrow in scope. For example, Congress enacted laws prohibiting the issuance of passports to noncitizens, *id.*, at 61, created an exception to that rule for "persons liable to military duty," Act of Mar. 3, 1863, § 23, 12 Stat. 754, and then eliminated that exception, Act of May 30, 1866, ch. 102, 14 Stat. 54. It passed laws regulating the fees that the State Department should impose for issuance of the passports. Act of May 16, 1932, ch. 187, 47 Stat. 157; Act of June 4, 1920, § 1, 41 Stat. 750; Act of June 15, 1917, ch. 30, Title IX, § 1, 40 Stat. 227; Act of Aug. 18, 1856, § 23, 11 Stat. 60; Act of Mar. 1, 1855, § 12, 10 Stat. 624. It also enacted legislation addressing the duration for which passports may remain valid. § 116, 96 Stat. 279; Pub. L. 90–428, 82 Stat. 446; Pub. L. 86–267, 73 Stat. 552; Act of July 3, 1926, 44 Stat. 887. And it passed laws imposing criminal penalties for false statements made when applying for passports, along with misuse of passports and counterfeiting or forgery of them. Act of June 25, 1948, 62 Stat. 771; Act of Mar. 28, 1940, § 7, 54 Stat. 80; 40 Stat. 227.[4]

As with any congressional action, however, such legislation is constitutionally permissible only insofar as it is promulgated pursuant to one of Congress' enumerated powers. I must therefore address whether Congress had constitutional authority to enact § 214(d)'s regulation of passports.

a

Zivotofsky and congressional *amici* identify three potential sources of congressional power to enact the portion of

[4] JUSTICE SCALIA, in his dissent, faults me for failing to identify the enumerated power under which these laws were permissible, but the question presented in *this* case is whether § 214(d) is a constitutional exercise of Congress' power, and that is the question I address.

§ 214(d) dealing with passports. Zivotofsky first argues that it falls within Congress' power "to regulate the issuance and content of United States passports." Brief for Petitioner 17. The U. S. Senate, as *amicus curiae*, likewise contends that it can be justified under Congress' "plenary authority over passports," which it derives from the penumbras of its powers "'[t]o regulate Commerce with foreign Nations'" and "'[t]o establish an uniform Rule of Naturalization.'" Brief for United States Senate 3 (quoting U. S. Const., Art. I, § 8, cls. 3, 4). None of these arguments withstands scrutiny.

The Constitution contains no Passport Clause, nor does it explicitly vest Congress with "plenary authority over passports." Because our Government is one of enumerated powers, "Congress has no power to act unless the Constitution authorizes it to do so." *United States* v. *Comstock*, 560 U. S. 126, 159 (2010) (THOMAS, J., dissenting). And "[t]he Constitution plainly sets forth the 'few and defined' powers that Congress may exercise." *Ibid.* A "passport power" is not one of them.

Section 214(d)'s passport directive fares no better under those powers actually included in Article I. To start, it does not fall within the power "[t]o regulate Commerce with foreign Nations." "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States* v. *Lopez*, 514 U. S. 549, 585 (1995) (THOMAS, J., concurring). The listing of the place of birth of an applicant—whether born in Jerusalem or not—does not involve selling, buying, bartering, or transporting for those purposes. Cf. *United States* v. *Morrison*, 529 U. S. 598, 613 (2000) ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity [under the power to regulate commerce among the several States] only where that activity is economic in nature").

True, a passport is frequently used by persons who may intend to engage in commerce abroad, but that use is insuffi-

cient to bring § 214(d)'s passport directive within the scope of this power. The specific conduct at issue here—the listing of the birthplace of a U. S. citizen born in Jerusalem on a passport by the President—is not a commercial activity. Any commercial activities subsequently undertaken by the bearer of a passport are yet further removed from that regulation.

The power "[t]o establish an uniform Rule of Naturalization" is similarly unavailing. At the founding, the word "naturalization" meant "[t]he act of investing aliens with the privileges of native subjects." 2 S. Johnson, A Dictionary of the English Language 1293 (4th ed. 1773); see also T. Dyche & W. Pardon, A New General English Dictionary (1771) ("the making a foreigner or alien, a denizen or freeman of any kingdom or city, and so becoming, as it were, both a subject and a native of a king or country, that by nature he did not belong to"). A passport has never been issued as part of the naturalization process. It is—and has always been—a "travel document," Dept. of State, 7 Foreign Affairs Manual (or FAM) § 1311(b) (2013), issued for the same purpose it has always served: a request from one sovereign to another for the protection of the bearer. See *supra*, at 41–43.

b

For similar reasons, the Necessary and Proper Clause gives Congress no authority here. That Clause provides, "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U. S. Const., Art. I, § 8, cl. 18. As an initial matter, "Congress lacks authority to legislate [under this provision] if the objective is anything other than 'carrying into Execution' one or more of the Federal Government's enumerated powers." *Comstock*, *supra*, at 161 (THOMAS, J., dissenting). The "end [must] be legiti-

mate" under our constitutional structure. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819).

But even if the objective of a law is carrying into execution one of the Federal Government's enumerated powers, the law must be both necessary and proper to that objective. The "Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power." *Gonzales* v. *Raich*, 545 U. S. 1, 60 (2005) (THOMAS, J., dissenting). Instead, "there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." *Comstock*, 560 U. S., at 160 (THOMAS, J., dissenting). The "means" chosen by Congress "will be deemed 'necessary' if they are 'appropriate' and 'plainly adapted' to the exercise of an enumerated power, and 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *Id.*, at 160–161 (alteration in original).

The argument that § 214(d), as applied to passports, could be an exercise of Congress' power to carry into execution its foreign commerce or naturalization powers falters because this aspect of § 214(d) is directed at neither of the ends served by these powers. Although at a high level of generality, a passport could be related to foreign commerce and naturalization, that attenuated relationship is insufficient. The law in question must be "directly link[ed]" to the enumerated power. *Id.*, at 169, n. 8. As applied to passports, § 214(d) fails that test because it does not "'carr[y] into Execution'" Congress' foreign commerce or naturalization powers. *Id.*, at 160. At most, it bears a tertiary relationship to an activity Congress is permitted to regulate: It directs the President's formulation of a document, which, in turn, may be used to facilitate travel, which, in turn, may facilitate foreign commerce. And the distinctive history of the passport as a travel rather than citizenship document makes its connection to naturalization even more tenuous.

Nor can this aspect of § 214(d) be justified as an exercise of Congress' power to enact laws to carry into execution the President's residual foreign affairs powers. Simply put, § 214(d)'s passport directive is not a "proper" means of carrying this power into execution.

To be "proper," a law must fall within the peculiar competence of Congress under the Constitution. Though "proper" was susceptible of several definitions at the time of the founding, only two are plausible candidates for use in the Necessary and Proper Clause—(1) "[f]it; accommodated; adapted; suitable; qualified" and (2) "[p]eculiar; not belonging to more; not common." See 2 Johnson, *supra*, at 1537. Because the former would render the word "necessary" superfluous, *McCulloch*, *supra*, at 413, and we ordinarily attempt to give effect "to each word of the Constitution," *Knowlton* v. *Moore*, 178 U. S. 41, 87 (1900), the latter is the more plausible. That is particularly true because the Constitution elsewhere uses the term "proper" by itself, Art. I, § 9, Art. II, §§ 2, 3; the term "necessary" by itself, Art. I, § 7; Art. V; and the term "necessary" as part of the phrase "necessary and expedient," Art. II, § 3. Thus, the best interpretation of "proper" is that a law must fall within the peculiar jurisdiction of Congress.

Our constitutional structure imposes three key limitations on that jurisdiction: It must conform to (1) the allocation of authority within the Federal Government, (2) the allocation of power between the Federal Government and the States, and (3) the protections for retained individual rights under the Constitution. See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 291, 297 (1993). In other words, to be "proper," a law "must be consistent with principles of separation of powers, principles of federalism, and individual rights." *Id.*, at 297.

Commentators during the ratification debates treated "proper" as having this meaning. Writing as Publius, Ham-

ilton posed the question who would "judge . . . the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union" and responded that "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." The Federalist No. 33, pp. 203–204. For example, a law that "exceeded [Congress'] jurisdiction" and invaded the authority of the States would not meet that standard. *Id.*, at 204. Similarly, an "impartial citizen" wrote in a Virginia newspaper that, even if the governmental powers could not "be executed without the aid of a law, granting commercial monopolies, inflicting unusual punishments, creating new crimes, or commanding any unconstitutional act," thus making the law necessary to the execution of a power, "such a law would be manifestly not proper," and not "warranted by this clause, without absolutely departing from the usual acceptation of words." An Impartial Citizen V, Petersburg, Va., Gazette, Feb. 28, 1788, in 8 Documentary History of the Ratification of the Constitution 428, 431 (J. Kaminski & G. Saladino eds. 1988) (emphasis deleted).

Early interpretations of the Clause following ratification largely confirm that view. Lawson & Granger, *supra*, at 298–308. During debate on the Bank of the United States in the First Congress, for example, Representative Ames declared that the correct construction of the Necessary and Proper Clause "promotes the good of the society, and the ends for which the Government was adopted, without impairing the rights of any man, or the powers of any State." 2 Annals of Cong. 1906 (1791). During the Second Congress, Representative Niles railed against a bill that would have authorized federal mail carriers to transport passengers for hire in order to reduce the cost of the mails. He said that such a law would not be "proper" to the power to establish post offices and post roads because some States had "an exclusive right of carrying passengers for hire" and an interpretation of the word "proper" that would allow the bill

would render "as nugatory, all [the States'] deliberations on the Constitution" and effectively vest Congress with "general authority to legislate on every subject." 3 *id.*, at 308–310 (1792) (emphasis deleted). Each of these comments presumed that the word "proper" imposed a jurisdictional limit on congressional activity.

This evidence makes sense in light of the Framers' efforts to ensure a separation of powers, reinforced by checks and balances, as "practical and real protectio[n] for individual liberty in the new Constitution." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 118 (2015) (THOMAS, J., concurring in judgment). If Congress could rely on the Necessary and Proper Clause to exercise power expressly allocated to the other branches or to prevent the exercise of such power by other branches, it could undermine the constitutional allocation of powers.

That the evidence thus points to a definition of "proper" that protects the separation of powers does not fully explain the way that the "proper" requirement operates when Congress seeks to facilitate the exercise of a power allocated to another branch. I can see two potential mechanisms, either or both of which may accurately reflect the original understanding of the Clause. First, a law could be "improper" if it purports to direct another branch's exercise of its power. See Calabresi & Prakash, The President's Power To Execute the Laws, 104 Yale L. J. 541, 591 (1994) ("[T]he Clause . . . does [not] allow Congress to tell constitutionally empowered actors how they can implement their exclusive powers"). Second, a law could be "improper" if it takes one of those actions *and* the branch to which the power is allocated objects to the action. See Prakash & Ramsey 255–256 ("Congress has the general power to legislate in support of the President's foreign policy goals. But . . . [s]ince it is derivative of the President's power, it must be exercised in coordination with, and not in opposition to, the President").

I need not resolve that question today, as the application of § 214(d) to passports would be improper under either approach. The President has made a determination that the "place of birth" on a passport should list the country of present sovereignty. 7 FAM § 1300, App. D, § 1330 (2014). And the President has determined that no country is presently exercising sovereignty over the area of Jerusalem. Thus, the President has provided that passports for persons born in Jerusalem should list "Jerusalem" as the place of birth in the passport. *Id.*, § 1360(f). Section 214(d) directs the President to exercise his power to issue and regulate the content of passports in a particular way, and the President has objected to that direction. Under either potential mechanism for evaluating the propriety of a law under the separation-of-powers limitation, this law would be improper.[5]

c

In support of his argument that the President must enforce § 214(d), Zivotofsky relies heavily on a similar statute addressing the place of birth designation for persons born in Taiwan. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 132, 108 Stat. 395. That statute provided, "For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." *Ibid.* The President has adopted that practice.

The President's decision to adopt that practice, however, says nothing about the constitutionality of the Taiwan provision in the first place. The constitutional allocation of powers "does not depend on the views of individual Presidents, nor on whether the encroached upon branch approves the encroachment." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 497 (2010) (citation

[5] Because § 214(d) is not proper, I need not resolve whether such a law could be understood to "carry into execution" the President's power.

and internal quotation marks omitted).[6] And the argument from Presidential acquiescence here is particularly weak, given that the Taiwan statute is consistent with the President's longstanding policy on Taiwan. At the time Congress enacted the statute, the Foreign Affairs Manual permitted consular officials to list "the city or area of birth" on a passport "[w]here the birthplace of the applicant is located in territory disputed by another country," 7 FAM § 1383.5–2 (1987), and to list "the city or town, rather than the country," of an applicant's birth "when there are objections to the listing shown on the birthplace guide," *id.*, § 1383.6. Because the President otherwise treats Taiwan as a geographical area within the People's Republic of China, listing Taiwan as the place of birth did not directly conflict with the President's prevailing practices. Section 214(d) *does* so conflict, as it requires the President to list citizens born in Jerusalem as born in "Israel," even though the Foreign Affairs Manual has long prohibited that action.

d

JUSTICE SCALIA would locate Congress' power to enact the passport directive of § 214(d) in Congress' power under the Necessary and Proper Clause to bring into effect its enumerated power over naturalization. *Post*, at 69–70 (dissenting opinion). As an initial matter, he asserts that "[t]he naturalization power . . . enables Congress to furnish the people it makes citizens with papers verifying their citizenship," *post*, at 69, yet offers no support for this interpretation of a clause that, by its terms, grants Congress only the "Power . . . To

[6] This principle is not necessarily inconsistent with the second mechanism for evaluating congressional action under the Necessary and Proper Clause discussed above. Although that mechanism would tie the propriety of congressional action to the objection (or nonobjection) of another branch, the point of that tying feature is to determine whether, in fact, Congress has encroached upon another branch, not whether such encroachment is acceptable.

establish an uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4. He then concludes that, if Congress can grant such documents, "it may also require these [documents] to record his birthplace as 'Israel' " pursuant to its power under the Necessary and Proper Clause, *post*, at 69. But this theory does not account for the President's power to act in this area, nor does it confront difficult questions about the application of the Necessary and Proper Clause in the case of conflict among the branches.

JUSTICE SCALIA disapproves of my "assertion of broad, unenumerated 'residual powers' in the President," *post*, at 84, but offers no response to my interpretation of the words "executive Power" in the Constitution. Instead, he claims that I have argued for "Presidential primacy over passports" and then rejects that position based on two postratification English statutes, the early practice of nonfederal actors issuing passports in this country, and the same congressional statutes that I have already discussed, most of which were enacted after the Civil War. *Post*, at 81–83; *supra*, at 44, and n. 4. But I do not argue that the President possesses primary power over passports. I need not argue that. I argue only that Congress did not act according to any of the powers granted to it in the Constitution and, in such circumstances, the question of primacy does not arise.

In any event, the historical evidence cited in JUSTICE SCALIA's dissent does not conflict with my analysis of the President's power in this area. The two postratification English statutes implicitly acknowledged that passports are issued by executive officers in the exercise of executive power, see 38 Geo. III, ch. 50, § 8, in 41 Eng. Stat. at Large 684; 33 Geo. III, ch. 4, § 8, in 39 Eng. Stat. at Large 12, and the practice of executive officials in the States of this country confirms that relationship. In addition, neither piece of historical evidence speaks to the scope of *Congress*' power to regulate passports under our federal system. JUSTICE

SCALIA's final piece of historical support—the increased congressional regulation of passports following the Civil War—is perhaps more on point from an institutional perspective, but still does not resolve the issue. Those regulations were, as I have already described, narrow in scope and continued to leave primary regulation of the content of passports to the President. To draw an inference from these "late-arising historical practices that are ambiguous at best"—and that might conflict with the original meaning of the "executive Power" and the "proper" requirement in the Necessary and Proper Clause—is a dubious way to undertake constitutional analysis. See *Noel Canning*, 573 U. S., at 570 (SCALIA, J., concurring in judgment).

Even more dubious, however, is the cursory treatment of the Necessary and Proper Clause in JUSTICE SCALIA's dissent. He asserts that, in acting pursuant to that Clause, "Congress . . . may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution." *Post*, at 70. But he offers no explanation for what those implied limits might be or how they would operate. Does he, for example, agree that the word "proper" requires Congress to act in a manner " 'consistent with principles of separation of powers, principles of federalism, and individual rights' "? *Supra*, at 48 (quoting Lawson & Grainger, 43 Duke L. J., at 297). If so, then why does he find that requirement satisfied in this case? Is it because he views the President as having no constitutional authority to act in this area? Or is it because he views Congress' directive to the President as consistent with the separation of powers, irrespective of the President's authority? If the latter, is that because he perceives no separation-of-powers limitations on Congress when it acts to carry into execution one of *its* enumerated powers, as opposed to the enumerated powers of *another* branch? And if that is the case, what textual, structural, or historical evidence exists for that interpretation? JUSTICE SCALIA's dissent raises more questions than it answers.

JUSTICE SCALIA's dissent *does* at least answer how, in his view, the Constitution would resolve a conflict between the political branches, each acting pursuant to the powers granted them under the Constitution. He believes that congressional power should trump in any such conflict. *Post*, at 83–84. I see nothing in the Constitution that clearly mandates that solution to a difficult separation-of-powers question, and I need not opine on it. I find no power under which Congress could lawfully have enacted the passport directive of § 214(d), apart from its power under the Necessary and Proper Clause to carry into effect the President's powers. And I have offered textual and historical support for my conclusion that the Clause does not include the power to direct the President's exercise of his passport power.

Finally, JUSTICE SCALIA faults me for failing to consider a number of potential sources of congressional power for § 214(d) not argued by any of the parties, ranging from the Fourteenth Amendment; to the Migration or Importation Clause, Art. I, § 9, cl. 1; to the Territories Clause, Art. IV, § 3, cl. 2. *Post*, at 80–81. But no one—not even JUSTICE SCALIA—has seriously contended that those provisions would afford a basis for the passport provision of § 214(d).

In the end, JUSTICE SCALIA characterizes my interpretation of the executive power, the naturalization power, and the Necessary and Proper Clause as producing "a presidency more reminiscent of George III than George Washington." *Post*, at 84. But he offers no competing interpretation of either the Article II Vesting Clause or the Necessary and Proper Clause. And his decision about the Constitution's resolution of conflict among the branches could itself be criticized as creating a supreme legislative body more reminiscent of the Parliament in England than the Congress in America.

* * *

Because the President has residual foreign affairs authority to regulate passports and because there appears to be

no congressional power that justifies § 214(d)'s application to passports, Zivotofsky's challenge to the Executive's designation of his place of birth on his passport must fail.

B

Although the consular report of birth abroad shares some features with a passport, it is historically associated with naturalization, not foreign affairs. In order to establish a "uniform Rule of Naturalization," Congress must be able to identify the categories of persons who are eligible for naturalization, along with the rules for that process. Congress thus has always regulated the "acquisition of citizenship by being born abroad of American parents . . . in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 688 (1898); see also *Miller* v. *Albright*, 523 U. S. 420, 456 (1998) (SCALIA, J., concurring in judgment) (recognizing that "Congress has the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States"). It has determined that children born abroad to U. S. parents, subject to some exceptions, are natural-born citizens who do not need to go through the naturalization process. 8 U. S. C. §§ 1401(c), (d), (g).

The consular report of birth abroad is well suited to carrying into execution the power conferred on Congress in the Naturalization Clause. The report developed in response to Congress' requirement that children born abroad to U. S. citizens register with the consulate or lose their citizenship. And it continues to certify the acquisition of U. S. citizenship at birth by a person born abroad to a U. S. citizen. See 22 U. S. C. § 2705(2).

Although such persons have possessed a statutory right to citizenship at birth for much of this country's history,[7] the

[7] The First Congress passed a law recognizing citizenship at birth for children born abroad to U. S. citizens. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 104. An 1802 amendment to the provision rendered the availability

process by which that citizenship is evidenced has varied over time. Under the 1870 consular regulations, for instance, children born abroad to U. S. citizens were issued no certificates. If they applied for a U. S. passport, then they were issued one "qualified by the obligations and duties" that attached to those citizens by virtue of their residence in a foreign nation. Regulations Prescribed for the Use of the Consular Service of the United States, App. No. IV, p. 288 (1870); see also *id.*, § 109, at 38–39. Congress acted in 1907 to require children residing abroad to register with their local consulate at the age of 18. Act of Mar. 2, 1907, § 6, 34 Stat. 1229. Because of the importance of this registration requirement, consular officials began to issue reports to citizens confirming their registration. See generally National Archives, General Records of the Dept. of State, Record Group 59, Passport Office, Decimal File, 1910–1949.

In 1919, the Department of State acted to standardize the consular registration of children born abroad. Report of Birth of Children to American Citizens Residing Abroad, General Instruction No. 652. It urged consulates to impress upon U. S. citizens abroad the need to record the birth of their children within two years. *Id.*, at 2. To encourage that effort, the Department permitted consular officials to issue reports attesting that the parents of U. S. citizens born abroad had presented sufficient evidence of citizenship for their children. *Ibid.*

The 1960's brought additional regulations of consular reports of birth abroad, 31 Fed. Reg. 13538 (1966), which continue in a substantially similar form to this day. See 22 CFR §§ 50.5, 50.7 (2014). As currently issued, the consular report of birth abroad includes the applicant's name, sex,

---

of this citizenship uncertain. Binney, The Alienigenae of the United States, 2 Am. L. Reg. 193 (1854). But Congress acted to clarify the availability of such citizenship in 1855, Act of Feb. 10, 1855, ch. 71, 10 Stat. 604, and it continues to exist to this day, see Immigration and Nationality Act, § 301(a), 66 Stat. 235.

place of birth, date of birth, and parents. It has had the "same force and effect as proof of United States citizenship as [a] certificat[e] of naturalization" since 1982. § 117, 96 Stat. 279.

Thus, although registration is no longer required to maintain birthright citizenship, the consular report of birth abroad remains the primary means by which children born abroad may obtain official acknowledgment of their citizenship. See 22 CFR § 51.43. Once acknowledged as U. S. citizens, they need not pursue the naturalization process to obtain the rights and privileges of citizenship in this country. Regulation of the report is thus "appropriate" and "plainly adapted" to the exercise of the naturalization power. See *Comstock*, 560 U. S., at 161 (THOMAS, J., dissenting).

By contrast, regulation of the report bears no relationship to the President's residual foreign affairs power. It has no historical pedigree uniquely associated with the President, contains no communication directed at a foreign power, and is primarily used for domestic purposes. To the extent that a citizen born abroad seeks a document to use as evidence of his citizenship abroad, he must obtain a passport. See generally 7 FAM § 1311.

Because regulation of the consular report of birth abroad is justified as an exercise of Congress' powers under the Naturalization and Necessary and Proper Clauses and does not fall within the President's foreign affairs powers, § 214(d)'s treatment of that document is constitutional.[8]

III

The majority does not perform this analysis, but instead relies on a variation of the recognition power. That power is among the foreign affairs powers vested in the President by Article II's Vesting Clause, as is confirmed by Article II's ex-

[8] As the issue is not presented, I need not decide how a direct conflict between action pursuant to an enumerated power of Congress and action pursuant to the residual foreign affairs power of the President should be resolved.

press assignment to the President of the duty of receiving foreign Ambassadors, Art. II, § 3. But I cannot join the majority's analysis because no act of recognition is implicated here.[9]

Under international law, "recognition of a state signifies acceptance of its position within the international community and the possession by it of the full range of rights and obligations which are the normal attributes of statehood." 1 Oppenheim's International Law § 47, p. 158 (R. Jennings & A. Watts eds., 9th ed. 1992) (footnote omitted) (Oppenheim).[10] It can be accomplished expressly or implicitly, but the key is to discern a clear intention on the part of one state to recognize another. *Id.*, § 50, at 169. Important consequences are understood to flow from one state's recognition of another: The new state, for instance, acquires the capacity to engage in diplomatic relations, including the negotiation of treaties, with the recognizing state. *Id.*, § 47, at 158. The new state is also entitled to sue in, invoke sovereign immunity from, and demand acceptance of official acts in the courts of the recognizing state. *Ibid.*; see also I. Brownlie, Principles of Public International Law 95–96 (7th ed. 2008).

---

[9] I assume, as the majority does, that the recognition power conferred on the President by the Constitution is the power to accomplish the act of recognition as that act is defined under international law. It is possible, of course, that the Framers had a fixed understanding of the act of recognition that is at odds with the definition of that act under international law. But the majority does not make that argument, nor does the majority even specifically address how consular reports of birth abroad are related to recognition. Lacking any evidence that the modern practice of recognition deviates in any relevant way from the historical practice, or that the original understanding of the recognition power was something other than the power to take part in that practice, I proceed on the same assumption as the majority.

[10] Scholars have long debated the extent to which official recognition by the sovereign states that make up the international community is necessary to bring a new "state" into the international community and thereby subject it to international law. Oppenheim § 39, at 128–129. Resolving this debate is not necessary to resolve the issue at hand, so I describe the modern view of recognition without endorsing it.

Changes in territory generally do not affect the status of a state as an international person. Oppenheim § 57, at 204–205. France, for example, "has over the centuries retained its identity although it acquired, lost and regained parts of its territory, changed its dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now once more a republic." *Ibid.* "Even such loss of territory as occasions the reduction of a major power to a lesser status does not affect the state as an international person." *Id.*, § 57, at 205. Changes that *would* affect the status as an international person include the union of two separate international persons or a partial loss of independence. *Id.*, § 58, at 206.

Assuming for the sake of argument that listing a nonrecognized foreign sovereign as a citizen's place of birth on a U. S. passport could have the effect of recognizing that sovereign under international law, no such recognition would occur under the circumstances presented here. The United States has recognized Israel as a foreign sovereign since May 14, 1948. Statement by the President Announcing the Recognition of the State of Israel, Public Papers of the Presidents, Harry S. Truman, p. 258 (1964). That the United States has subsequently declined to acknowledge Israel's sovereignty over Jerusalem has not changed its recognition of Israel as a sovereign state. And even if the United States were to acknowledge Israel's sovereignty over Jerusalem, that action would not change its recognition of Israel as a sovereign state. That is because the United States has already afforded Israel the rights and responsibilities attendant to its status as a sovereign state. Taking a different position on the Jerusalem question will have no effect on that recognition.[11]

---

[11] The analysis might look different if § 214(d) required the President to list as a "place of birth" a country that the United States has never officially recognized. That is not the case here.

Perhaps recognizing that a formal recognition is not implicated here, the majority reasons that, if the Executive's exclusive recognition power "is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements." *Ante*, at 29. By "alter[ing] the President's statements on matters of recognition or forc[ing] him to contradict them," the majority reasons, "Congress in effect would exercise the recognition power." *Ibid.* This argument stretches the recognition power beyond all recognition. Listing a Jerusalem-born citizen's place of birth as "Israel" cannot amount to recognition because the United States already recognizes Israel as an international person. Rather than adopt a novel definition of the recognition power, the majority should have looked to other foreign affairs powers in the Constitution to resolve this dispute.

* * *

Adhering to the Constitution's allocation of powers leads me to reach a different conclusion in this case from my colleagues: Section 214(d) can be constitutionally applied to consular reports of birth abroad, but not passports. I therefore respectfully concur in the judgment in part and dissent in part.

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

Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring).

JUSTICE SCALIA's principal dissent, which I join in full, refutes the majority's unprecedented holding in detail. I write separately to underscore the stark nature of the Court's error on a basic question of separation of powers.

The first principles in this area are firmly established. The Constitution allocates some foreign policy powers to the Executive, grants some to the Legislature, and enjoins the President to "take Care that the Laws be faithfully executed." Art. II, § 3. The Executive may disregard "the expressed or implied will of Congress" only if the Constitution grants him a power "at once so conclusive and preclusive" as to "disabl[e] the Congress from acting upon the subject." *Youngstown*, 343 U. S., at 637–638 (Jackson, J., concurring).

Assertions of exclusive and preclusive power leave the Executive "in the least favorable of possible constitutional postures," and such claims have been "scrutinized with caution" throughout this Court's history. *Id.*, at 640, 638; see *Dames & Moore* v. *Regan*, 453 U. S. 654, 668–669 (1981). For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs. See *Medellín* v. *Texas*, 552 U. S. 491, 524–532 (2008); *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 590–595, 613–625 (2006); *Youngstown*, 343 U. S., at 587–589 (majority opinion); *Little* v. *Barreme*, 2 Cranch 170, 177–179 (1804).

In this case, the President claims the exclusive and preclusive power to recognize foreign sovereigns. The Court devotes much of its analysis to accepting the Executive's contention. *Ante*, at 10–28. I have serious doubts about that position. The majority places great weight on the Reception Clause, which directs that the Executive "shall receive Ambassadors and other public Ministers." Art. II, § 3. But that provision, framed as an obligation rather than an authorization, appears alongside the *duties* imposed on the President by Article II, Section 3, not the *powers* granted to him by Article II, Section 2. Indeed, the People ratified the Constitution with Alexander Hamilton's assur-

ance that executive reception of ambassadors "is more a matter of dignity than of authority" and "will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (C. Rossiter ed. 1961). In short, at the time of the founding, "there was no reason to view the reception clause as a source of discretionary authority for the president." Adler, The President's Recognition Power: Ministerial or Discretionary? 25 Presidential Studies Q. 267, 269 (1995).

The majority's other asserted textual bases are even more tenuous. The President does have power to make treaties and appoint ambassadors. Art. II, § 2. But those authorities are *shared* with Congress, *ibid.*, so they hardly support an inference that the recognition power is *exclusive*.

Precedent and history lend no more weight to the Court's position. The majority cites dicta suggesting an exclusive executive recognition power, but acknowledges contrary dicta suggesting that the power is shared. See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 643 (1818) ("the courts of the union must view [a] newly constituted government as it is viewed by *the legislative and executive departments* of the government of the United States" (emphasis added)). When the best you can muster is conflicting dicta, precedent can hardly be said to support your side.

As for history, the majority admits that it too points in both directions. Some Presidents have claimed an exclusive recognition power, but others have expressed uncertainty about whether such preclusive authority exists. Those in the skeptical camp include Andrew Jackson and Abraham Lincoln, leaders not generally known for their cramped conceptions of Presidential power. Congress has also asserted its authority over recognition determinations at numerous points in history. The majority therefore falls short of demonstrating that "Congress has accepted" the President's exclusive recognition power. *Ante*, at 28. In any event, we have held that congressional acquiescence is only "pertinent"

when the President acts in the absence of express congressional authorization, not when he asserts power to disregard a statute, as the Executive does here. *Medellín*, 552 U. S., at 528; see *Dames & Moore*, 453 U. S., at 678–679.

In sum, although the President has authority over recognition, I am not convinced that the Constitution provides the "conclusive and preclusive" power required to justify defiance of an express legislative mandate. *Youngstown*, 343 U. S., at 638 (Jackson, J., concurring). As the leading scholar on this issue has concluded, the "text, original understanding, post-ratification history, and structure of the Constitution do not support the . . . expansive claim that this executive power is plenary." Reinstein, Is the President's Recognition Power Exclusive? 86 Temp. L. Rev. 1, 60 (2013).

But even if the President does have exclusive recognition power, he still cannot prevail in this case, because the statute at issue *does not implicate recognition*. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 210 (2012) (ALITO, J., concurring in judgment); *post*, at 71–76 (SCALIA, J., dissenting). The relevant provision, § 214(d), simply gives an American citizen born in Jerusalem the option to designate his place of birth as Israel "[f]or purposes of" passports and other documents. Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1366. The State Department itself has explained that "identification"—not recognition—"is the principal reason that U. S. passports require 'place of birth.'" App. 42. Congress has not disputed the Executive's assurances that § 214(d) does not alter the longstanding United States position on Jerusalem. And the annals of diplomatic history record no examples of official recognition accomplished via optional passport designation.

The majority acknowledges both that the "Executive's exclusive power extends no further than his formal recognition determination" and that § 214(d) does "not itself constitute a formal act of recognition." *Ante*, at 30. Taken together, these statements come close to a confession of error. The

majority attempts to reconcile its position by reconceiving § 214(d) as a "mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." *Ante*, at 30. But as just noted, neither Congress nor the Executive Branch regards § 214(d) as a recognition determination, so it is hard to see how the statute could contradict any such determination.

At most, the majority worries that there may be a *perceived* contradiction based on a *mistaken* understanding of the effect of § 214(d), insisting that some "observers interpreted § 214 as altering United States policy regarding Jerusalem." *Ante*, at 31. To afford controlling weight to such impressions, however, is essentially to subject a duly enacted statute to an international heckler's veto.

Moreover, expanding the President's purportedly exclusive recognition power to include authority to avoid potential misunderstandings of legislative enactments proves far too much. Congress could validly exercise its enumerated powers in countless ways that would create more severe perceived contradictions with Presidential recognition decisions than does § 214(d). If, for example, the President recognized a particular country in opposition to Congress's wishes, Congress could declare war or impose a trade embargo on that country. A neutral observer might well conclude that these legislative actions had, to put it mildly, created a perceived contradiction with the President's recognition decision. And yet each of them would undoubtedly be constitutional. See *ante*, at 30. So too would statements by nonlegislative actors that might be seen to contradict the President's recognition positions, such as the declaration in a political party platform that "Jerusalem is and will remain the capital of Israel." Landler, Pushed by Obama, Democrats Alter Platform Over Jerusalem, N. Y. Times, Sept. 6, 2012, p. A14.

Ultimately, the only power that could support the President's position is the one the majority purports to reject: the "exclusive authority to conduct diplomatic relations." Brief

for Respondent 18. The Government offers a single citation for this allegedly exclusive power: *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320 (1936). But as the majority rightly acknowledges, *Curtiss-Wright* did not involve a claim that the Executive could contravene a statute; it held only that he could act pursuant to a legislative delegation. *Ante*, at 20.

The expansive language in *Curtiss-Wright* casting the President as the "sole organ" of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. The Solicitor General invokes the case no fewer than ten times in his brief. Brief for Respondent 9, 10, 18, 19, 23, 24, 53, 54. But our precedents have never accepted such a sweeping understanding of executive power. See *Hamdan*, 548 U. S., at 591–592; *Dames & Moore*, 453 U. S., at 661–662; *Youngstown*, 343 U. S., at 587 (majority opinion); *id.*, at 635, n. 2 (Jackson, J., concurring); cf. *Little*, 2 Cranch, at 179 (Marshall, C. J.) ("I confess the first bias of my mind was very strong in favour of . . . the executive . . . [b]ut I have been convinced that I was mistaken.").

Just a few Terms ago, this Court rejected the President's argument that a broad foreign relations power allowed him to override a state court decision that contradicted U. S. international law obligations. *Medellín*, 552 U. S., at 523–532. If the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action, it surely does not authorize him to disregard an express statutory directive enacted by Congress, which—unlike the States—has extensive foreign relations powers of its own. Unfortunately, despite its protest to the contrary, the majority today allows the Executive to do just that.

Resolving the status of Jerusalem may be vexing, but resolving this case is not. Whatever recognition power the President may have, exclusive or otherwise, is not implicated by § 214(d). It has not been necessary over the past 225 years to definitively resolve a dispute between Congress

and the President over the recognition power. Perhaps we could have waited another 225 years. But instead the majority strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation at issue in this case. And in the process, the Court takes the perilous step—for the first time in our history—of allowing the President to defy an Act of Congress in the field of foreign affairs.

I respectfully dissent.

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

Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. The royal prerogative included the "sole power of sending ambassadors to foreign states, and receiving them at home," the sole authority to "make treaties, leagues, and alliances with foreign states and princes," "the sole prerogative of making war and peace," and the "sole power of raising and regulating fleets and armies." 1 W. Blackstone, Commentaries *253, *257, *262. The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.

The People therefore adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments. The Constitution gave the President the "executive Power," authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§ 1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, § 8. "Fully eleven of the powers that Ar-

ticle I, § 8 grants Congress deal in some way with foreign affairs." 1 L. Tribe, American Constitutional Law § 5–18, p. 965 (3d ed. 2000).

This case arises out of a dispute between the Executive and Legislative Branches about whether the United States should treat Jerusalem as a part of Israel. The Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views. That is just what has happened here.

I

The political branches of our Government agree on the real-world fact that Israel controls the city of Jerusalem. See Jerusalem Embassy Act of 1995, 109 Stat. 398; Brief for Respondent 3. They disagree, however, about how official documents should record the birthplace of an American citizen born in Jerusalem. The Executive does not accept any state's claim to sovereignty over Jerusalem, and it maintains that the birthplace designation "Israel" would clash with this stance of neutrality. But the National Legislature has enacted a statute that provides: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." Foreign Relations Authorization Act, Fiscal Year 2003, § 214(d), 116 Stat. 1366. Menachem Zivotofsky's parents seek enforcement of this statutory right in the issuance of their son's passport and consular report of birth abroad. They regard their son's birthplace as a part of Israel and insist as "a matter of conscience" that his Israeli nativity "not be erased" from his identity documents. App. 26.

Before turning to Presidential power under Article II, I think it well to establish the statute's basis in congressional power under Article I. Congress's power to "establish an uniform Rule of Naturalization," Art. I, § 8, cl. 4, enables it to grant American citizenship to someone born abroad. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 702–703 (1898). The naturalization power also enables Congress to furnish the people it makes citizens with papers verifying their citizenship—say a consular report of birth abroad (which certifies citizenship of an American born outside the United States) or a passport (which certifies citizenship for purposes of international travel). As the Necessary and Proper Clause confirms, every congressional power "carries with it all those incidental powers which are necessary to its complete and effectual execution." *Cohens* v. *Virginia*, 6 Wheat. 264, 429 (1821). Even on a miserly understanding of Congress's incidental authority, Congress may make grants of citizenship "effectual" by providing for the issuance of certificates authenticating them.

One would think that if Congress may grant Zivotofsky a passport and a birth report, it may also require these papers to record his birthplace as "Israel." The birthplace specification promotes the document's citizenship-authenticating function by identifying the bearer, distinguishing people with similar names but different birthplaces from each other, helping authorities uncover identity fraud, and facilitating retrieval of the Government's citizenship records. See App. 70. To be sure, recording Zivotofsky's birthplace as "Jerusalem" rather than "Israel" would fulfill these objectives, but when faced with alternative ways to carry its powers into execution, Congress has the "discretion" to choose the one it deems "most beneficial to the people." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). It thus has the right to decide that recording birthplaces as "Israel" makes for better foreign policy. Or that regardless of international politics,

a passport or birth report should respect its bearer's conscientious belief that Jerusalem belongs to Israel.

No doubt congressional discretion in executing legislative powers has its limits; Congress's chosen approach must be not only "necessary" to carrying its powers into execution, but also "proper." Congress thus may not transcend boundaries upon legislative authority stated or implied elsewhere in the Constitution. But as we shall see, § 214(d) does not transgress any such restriction.

II

The Court frames this case as a debate about recognition. Recognition is a sovereign's official acceptance of a status under international law. A sovereign might recognize a foreign entity as a state, a regime as the other state's government, a place as part of the other state's territory, rebel forces in the other state as a belligerent power, and so on. 2 M. Whiteman, Digest of International Law § 1 (1963) (hereinafter Whiteman). President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel's (or any other state's) sovereign territory.

The Court holds that the Constitution makes the President alone responsible for recognition and that § 214(d) invades this exclusive power. I agree that the Constitution *empowers* the President to extend recognition on behalf of the United States, but I find it a much harder question whether it makes that power exclusive. The Court tells us that "the weight of historical evidence" supports exclusive executive authority over "the formal determination of recognition." *Ante*, at 23. But even with its attention confined to formal recognition, the Court is forced to admit that "history is not all on one side." *Ibid.* To take a stark example, Congress legislated in 1934 to grant independence to the Philippines, which were then an American colony. 48 Stat. 456. In the course of doing so, Congress directed the President to "rec-

ognize the independence of the Philippine Islands as a separate and self-governing nation" and to "acknowledge the authority and control over the same of the government instituted by the people thereof." § 10, *id.*, at 463. Constitutional? And if Congress may control recognition when exercising its power "to dispose of . . . the Territory or other Property belonging to the United States," Art. IV, § 3, cl. 2, why not when exercising other enumerated powers? Neither text nor history nor precedent yields a clear answer to these questions. Fortunately, I have no need to confront these matters today—nor does the Court—because § 214(d) plainly does not concern recognition.

Recognition is more than an announcement of a policy. Like the ratification of an international agreement or the termination of a treaty, it is a formal legal act with effects under international law. It signifies acceptance of an international status, and it makes a commitment to continued acceptance of that status and respect for any attendant rights. See, *e. g.*, Convention on the Rights and Duties of States, Art. 6, Dec. 26, 1933, 49 Stat. 3100, T. S. No. 881. "Its legal effect is to create an estoppel. By granting recognition, [states] debar themselves from challenging in future whatever they have previously acknowledged." 1 G. Schwarzenberger, International Law 127 (3d ed. 1957). In order to extend recognition, a state must perform an act that unequivocally manifests that intention. Whiteman § 3. That act can consist of an express conferral of recognition, or one of a handful of acts that by international custom imply recognition—chiefly, entering into a bilateral treaty, and sending or receiving an ambassador. *Ibid.*

To know all this is to realize at once that § 214(d) has nothing to do with recognition. Section 214(d) does not require the Secretary to make a formal declaration about Israel's sovereignty over Jerusalem. And nobody suggests that international custom infers acceptance of sovereignty from the birthplace designation on a passport or birth report, as it

does from bilateral treaties or exchanges of ambassadors. Recognition would preclude the United States (as a matter of international law) from later contesting Israeli sovereignty over Jerusalem. But making a notation in a passport or birth report does not encumber the Republic with any international obligations. It leaves the Nation free (so far as international law is concerned) to change its mind in the future. That would be true even if the statute required *all* passports to list "Israel." But in fact it requires only those passports to list "Israel" for which the citizen (or his guardian) *requests* "Israel"; all the rest, under the Secretary's policy, list "Jerusalem." It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition.

Section 214(d) performs a more prosaic function than extending recognition. Just as foreign countries care about what our Government has to say about their borders, so too American citizens often care about what our Government has to say about their identities. Cf. *Bowen* v. *Roy*, 476 U. S. 693 (1986). The State Department does not grant or deny recognition in order to accommodate these individuals, but it does make exceptions to its rules about how it records birthplaces. Although normal protocol requires specifying the bearer's country of birth in his passport, Dept. of State, 7 Foreign Affairs Manual (FAM) § 1300, App. D, § 1330(a) (2014), the State Department will, if the bearer protests, specify the city of birth instead—so that an Irish nationalist may have his birthplace recorded as "Belfast" rather than "United Kingdom," *id.*, § 1380(a). And although normal protocol requires specifying the country with *present* sovereignty over the bearer's place of birth, *id.*, § 1330(b), a special exception allows a bearer born before 1948 in what was then Palestine to have his birthplace listed as "Palestine," *id.*, § 1360(g). Section 214(d) requires the State Department to make a further accommodation. Even though the Department normally refuses to specify a country that lacks recog-

nized sovereignty over the bearer's birthplace, it must suspend that policy upon the request of an American citizen born in Jerusalem. Granting a request to specify "Israel" rather than "Jerusalem" does not recognize Israel's sovereignty over Jerusalem, just as granting a request to specify "Belfast" rather than "United Kingdom" does not derecognize the United Kingdom's sovereignty over Northern Ireland.

The best indication that § 214(d) does not concern recognition comes from the State Department's policies concerning Taiwan. According to the Solicitor General, the United States "acknowledges the Chinese position" that Taiwan is a part of China, but "does not take a position" of its own on that issue. Brief for Respondent 51–52. Even so, the State Department has for a long time recorded the birthplace of a citizen born in Taiwan as "China." It indeed *insisted* on doing so until Congress passed a law (on which § 214(d) was modeled) giving citizens the option to have their birthplaces recorded as "Taiwan." See § 132, 108 Stat. 395, as amended by § 1(r), 108 Stat. 4302. The Solicitor General explains that the designation "China" "involves a geographic description, not an assertion that Taiwan is . . . part of sovereign China." Brief for Respondent 51–52. Quite so. Section 214(d) likewise calls for nothing beyond a "geographic description"; it does not require the Executive even to assert, never mind formally recognize, that Jerusalem is a part of sovereign Israel. Since birthplace specifications in citizenship documents are matters within Congress's control, Congress may treat Jerusalem as a part of Israel when regulating the recording of birthplaces, even if the President does not do so when extending recognition. Section 214(d), by the way, expressly directs the Secretary to "record the place of birth as Israel" "*[f]or purposes of* the registration of birth, certification of nationality, or issuance of a passport." (Emphasis added.) And the law bears the caption, "Record of Place of Birth as Israel *for Passport Purposes*." (Emphasis added.)

Finding recognition in this provision is rather like finding admission to the Union in a provision that treats American Samoa as a State for purposes of a federal highway safety program, 23 U. S. C. § 401.

III

The Court complains that § 214(d) requires the Secretary of State to issue official documents implying that Jerusalem is a part of Israel; that it appears in a section of the statute bearing the title "United States Policy with Respect to Jerusalem as the Capital of Israel"; and that foreign "observers interpreted [it] as altering United States policy regarding Jerusalem." *Ante*, at 31. But these features do not show that § 214(d) recognizes Israel's sovereignty over Jerusalem. They show only that the law displays symbolic support for Israel's territorial claim. That symbolism may have tremendous significance as a matter of international diplomacy, but it makes no difference as a matter of constitutional law.

Even if the Constitution gives the President sole power to extend recognition, it does not give him sole power to make all decisions relating to foreign disputes over sovereignty. To the contrary, a fair reading of Article I allows Congress to decide for itself how its laws should handle these controversies. Read naturally, power to "regulate Commerce with foreign Nations," § 8, cl. 3, includes power to regulate imports from Gibraltar as British goods or as Spanish goods. Read naturally, power to "regulate the Value . . . of foreign Coin," § 8, cl. 5, includes power to honor (or not) currency issued by Taiwan. And so on for the other enumerated powers. These are not airy hypotheticals. A trade statute from 1800, for example, provided that "the whole of the island of Hispaniola"—whose status was then in controversy—"shall for purposes of [the] act be considered as a dependency of the French Republic." § 7, 2 Stat. 10. In 1938, Congress allowed admission of the Vatican City's public records in federal courts, decades before the United States extended formal recognition. Ch. 682, 52 Stat. 1163; Whiteman § 68.

The Taiwan Relations Act of 1979 grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state. 22 U. S. C. § 3303(b)(7). Section 214(d) continues in the same tradition.

The Constitution likewise does not give the President exclusive power to determine which claims to statehood and territory "are legitimate in the eyes of the United States," *ante*, at 14. Congress may express its own views about these matters by declaring war, restricting trade, denying foreign aid, and much else besides. To take just one example, in 1991, Congress responded to Iraq's invasion of Kuwait by enacting a resolution authorizing use of military force. 105 Stat. 3. No doubt the resolution reflected Congress's views about the legitimacy of Iraq's territorial claim. The preamble referred to Iraq's "illegal occupation" and stated that "the international community has demanded . . . that Kuwait's independence and legitimate government be restored." *Ibid.* These statements are far more categorical than the caption "United States Policy with Respect to Jerusalem as the Capital of Israel." Does it follow that the authorization of the use of military force invaded the President's exclusive powers? Or that it would have done so had the President recognized Iraqi sovereignty over Kuwait?

History does not even support an exclusive Presidential power to make what the Court calls "formal statements" about "the legitimacy of a state or government and its territorial bounds," *ante*, at 32. For a long time, the Houses of Congress have made formal statements announcing their own positions on these issues, again without provoking constitutional objections. A recent resolution expressed the House of Representatives' "strong support for the legitimate, democratically-elected Government of Lebanon" and condemned an "illegitimate" and "unjustifiable" insurrection by "the terrorist group Hizballah." H. Res. 1194, 110th Cong, 2d Sess., 1, 4 (2008). An earlier enactment declared "the sense of the Congress that . . . Tibet . . . is an occupied

country under the established principles of international law" and that "Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile." § 355, 105 Stat. 713 (1991). After Texas won independence from Mexico, the Senate resolved that "the State of Texas having established and maintained an independent Government, . . . it is expedient and proper . . . that the independent political existence of the said State be acknowledged by the Government of the United States." Cong. Globe, 24th Cong., 2d Sess., 83 (1837); see *id.*, at 270.

In the final analysis, the Constitution may well deny Congress power to recognize—the power to make an international commitment accepting a foreign entity as a state, a regime as its government, a place as a part of its territory, and so on. But whatever else § 214(d) may do, it plainly does not make (or require the President to make) a commitment accepting Israel's sovereignty over Jerusalem.

IV

The Court does not try to argue that § 214(d) extends recognition; nor does it try to argue that the President holds the exclusive power to make all nonrecognition decisions relating to the status of Jerusalem. As just shown, these arguments would be impossible to make with a straight face.

The Court instead announces a rule that is blatantly gerrymandered to the facts of this case. It concludes that, in addition to the exclusive power to make the "formal recognition determination," the President holds an ancillary exclusive power "to control . . . formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds." *Ante*, at 32. It follows, the Court explains, that Congress may not "requir[e] the President to contradict an earlier recognition determination in an official document issued by the Executive Branch." *Ibid.* So requiring imports from Jerusalem to be taxed like goods from Israel is fine, but requiring Customs to issue an official invoice to that effect is not? Nonsense.

Recognition is a type of legal act, not a type of statement. It is a leap worthy of the Mad Hatter to go from exclusive authority over making legal commitments about sovereignty to exclusive authority over making statements or issuing documents about national borders. The Court may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles.

No consistent or coherent theory supports the Court's decision. At times, the Court seems concerned with the possibility of congressional interference with the President's ability to extend or withhold legal recognition. The Court concedes, as it must, that the notation required by § 214(d) "would not itself constitute a formal act of recognition." *Ante*, at 30. It still frets, however, that Congress *could* try to regulate the President's "statements" in a way that "override[s] the President's recognition determination." *Ante*, at 29. But "[t]he circumstance, that . . . [a] power may be abused, is no answer. All powers may be abused." 2 J. Story, Commentaries on the Constitution of the United States § 921, p. 386 (1833). What matters is whether *this* law interferes with the President's ability to withhold recognition. It would be comical to claim that it does. The Court identifies no reason to believe that the United States—or indeed any other country—uses the place-of-birth field in passports and birth reports as a forum for performing the act of recognition. That is why nobody thinks the United States withdraws recognition from Canada when it accommodates a Quebec nationalist's request to have his birthplace recorded as "Montreal."

To the extent doubts linger about whether the United States recognizes Israel's sovereignty over Jerusalem, § 214(d) leaves the President free to dispel them by issuing a disclaimer of intent to recognize. A disclaimer always suffices to prevent an act from effecting recognition. Restatement (Second) of Foreign Relations Law of the United States § 104(1) (1962). Recall that an earlier law grants citizens born in Taiwan the right to have their birthplaces recorded

as "Taiwan." The State Department has complied with the law, but states in its Foreign Affairs Manual: "The United States does not officially recognize Taiwan as a 'state' or 'country,' although passport issuing officers may enter 'Taiwan' as a place of birth." 7 FAM § 1300, App. D, § 1340(d)(6). Nothing stops a similar disclaimer here.

At other times, the Court seems concerned with Congress's failure to give effect to a recognition decision that the President has already made. The Court protests, for instance, that § 214(d) "directly contradicts" the President's refusal to recognize Israel's sovereignty over Jerusalem. *Ante*, at 30. But even if the Constitution empowers the President alone to extend recognition, it nowhere obliges Congress to align its laws with the President's recognition decisions. Because the President and Congress are "perfectly co-ordinate by the terms of their common commission," The Federalist No. 49, p. 314 (C. Rossiter ed. 1961) (Madison), the President's use of the recognition power does not constrain Congress's use of its legislative powers.

Congress has legislated without regard to recognition for a long time and in a range of settings. For example, responding in 1817 and 1818 to revolutions in Latin America, Congress amended federal neutrality laws—which originally prohibited private military action for or against *recognized* states—to prohibit private hostilities against *unrecognized* states too. Ch. 58, 3 Stat. 370; ch. 88, 3 Stat. 447; see *The Three Friends*, 166 U. S. 1, 52–59 (1897). Legislation from 90 years ago provided for the revision of national immigration quotas upon one country's surrender of territory to another, even if "the transfer . . . has not been recognized by the United States." § 12(c), 43 Stat. 161 (1924). Federal law today prohibits murdering a foreign government's officials, 18 U. S. C. § 1116, counterfeiting a foreign government's bonds, § 478, and using American vessels to smuggle goods in violation of a foreign government's laws, § 546—all "irrespective of recognition by the United States," §§ 11, 1116.

Just as Congress may legislate independently of recognition in all of those areas, so too may it legislate independently of recognition when regulating the recording of birthplaces.

The Court elsewhere objects that § 214(d) interferes with the autonomy and unity of the Executive Branch, setting the branch against itself. The Court suggests, for instance, that the law prevents the President from maintaining his neutrality about Jerusalem in "his and his agent's statements." *Ante*, at 29. That is of no constitutional significance. As just shown, Congress has power to legislate without regard to recognition, and where Congress has the power to legislate, the President has a duty to "take Care" that its legislation "be faithfully executed," Art. II, § 3. It is likewise "the duty of the secretary of state to conform to the law"; where Congress imposes a responsibility on him, "he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." *Marbury* v. *Madison*, 1 Cranch 137, 158, 166 (1803). The Executive's involvement in carrying out this law does not affect its constitutionality; the Executive carries out every law.

The Court's error could be made more apparent by applying its reasoning to the President's power "to make Treaties," Art. II, § 2, cl. 2. There is no question that Congress may, if it wishes, pass laws that openly flout treaties made by the President. *Head Money Cases*, 112 U. S. 580, 597 (1884). Would anyone have dreamt that the President may refuse to carry out such laws—or, to bring the point closer to home, refuse to execute federal courts' judgments under such laws—so that the Executive may "speak with one voice" about the country's international obligations? To ask is to answer. Today's holding puts the implied power to recognize territorial claims (which the Court infers from the power to recognize states, which it infers from the responsibility to receive ambassadors) on a higher footing than the express power to make treaties. And this, even though the

Federalist describes the making of treaties as a "delicate and important prerogative," but the reception of ambassadors as "more a matter of dignity than of authority," "a circumstance which will be without consequence in the administration of the government." The Federalist No. 69, p. 420 (Hamilton).

In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to "functional considerations"—principally the Court's perception that the Nation "must speak with one voice" about the status of Jerusalem. *Ante*, at 14 (ellipsis and internal quotation marks omitted). The vices of this mode of analysis go beyond mere lack of footing in the Constitution. Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.

V

JUSTICE THOMAS's concurrence deems § 214(d) constitutional to the extent it regulates birth reports, but unconstitutional to the extent it regulates passports. *Ante*, at 41 (opinion concurring in judgment in part and dissenting in part). The concurrence finds no congressional power that would extend to the issuance or contents of passports. Including the power to regulate foreign commerce—even though passports facilitate the transportation of passengers, "a part of our commerce with foreign nations," *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270 (1876). Including the power over naturalization—even though passports issued to citizens, like birth reports, "have the same force and effect as proof of United States citizenship as certificates of naturalization," 22 U. S. C. § 2705. Including the power to enforce the Fourteenth Amendment's guarantee that "[a]ll per-

sons born or naturalized in the United States . . . are citizens of the United States"—even though a passport provides evidence of citizenship and so helps enforce this guarantee abroad. Including the power to exclude persons from the territory of the United States, see Art. I, § 9, cl. 1—even though passports are the principal means of identifying citizens entitled to entry. Including the powers under which Congress has restricted the ability of various people to leave the country (fugitives from justice, for example, see 18 U. S. C. § 1073)—even though passports are the principal means of controlling exit. Including the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," Art. IV, § 3, cl. 2—even though "[a] passport remains at all times the property of the United States," 7 FAM § 1317 (2013). The concurrence's stingy interpretation of the enumerated powers forgets that the Constitution does not "partake of the prolixity of a legal code," that "only its great outlines [are] marked, its important objects designated, and the minor ingredients which compose those objects [left to] be deduced from the nature of the objects themselves." *McCulloch*, 4 Wheat., at 407. It forgets, in other words, "that it is a *constitution* we are expounding." *Ibid.*

Defending Presidential primacy over passports, the concurrence says that the royal prerogative in England included the power to issue and control travel documents akin to the modern passport. *Ante*, at 42. Perhaps so, but that power was assuredly not exclusive. The Aliens Act 1793, for example, enacted almost contemporaneously with our Constitution, required an alien traveling within England to obtain "a passport from [a] mayor or . . . [a] justice of [the] peace," "in which passport shall be expressed the name and rank, occupation or description, of such alien." 33 Geo. III, ch. 4, § 8, in 39 Eng. Stat. at Large 12. The Aliens Act 1798 prohibited aliens from leaving the country without "a passport . . . first obtained from one of his Majesty's principal

secretaries of state," and instructed customs officers to mark, sign, and date passports before allowing their bearers to depart. 38 Geo. III, ch. 50, § 8, in 41 Eng. Stat. at Large 684. These and similar laws discredit any claim that, in the "Anglo-American legal tradition," travel documents have "consistently been issued *and controlled* by the body exercising executive power," *ante*, at 41 (emphasis added).

Returning to this side of the Atlantic, the concurrence says that passports have a "historical pedigree uniquely associated with the President." *Ante*, at 58. This statement overlooks the reality that, until Congress restricted the issuance of passports to the State Department in 1856, "passports were also issued by governors, mayors, and even . . . notaries public." Assn. of the Bar of the City of New York, Special Committee to Study Passport Procedures, Freedom to Travel 6 (1958). To be sure, early Presidents granted passports without express congressional authorization. *Ante*, at 43. But this point establishes Presidential authority over passports in the face of congressional *silence*, not Presidential authority in the face of congressional *opposition*. Early in the Republic's history, Congress made it a crime for a consul to "grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States." § 8, 2 Stat. 205 (1803). Closer to the Civil War, Congress expressly authorized the granting of passports, regulated passport fees, and prohibited the issuance of passports to foreign citizens. § 23, 11 Stat. 60–61 (1856). Since then, Congress has made laws about eligibility to receive passports, the duration for which passports remain valid, and even the type of paper used to manufacture passports. 22 U. S. C. §§ 212, 217a; § 617(b), 102 Stat. 1755. (The concurrence makes no attempt to explain how these laws were supported by congressional powers other than those it rejects in the present case.) This Court has held that the President may not curtail a citizen's travel by withholding a passport, *except on grounds approved by Congress*.

Kent v. *Dulles*, 357 U. S. 116, 129 (1958). History and precedent thus refute any suggestion that the Constitution disables Congress from regulating the President's issuance and formulation of passports.

The concurrence adds that a passport "contains [a] communication directed at a foreign power." *Ante*, at 58. The "communication" in question is a message that traditionally appears in each passport (though no statute, to my knowledge, expressly requires its inclusion): "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." App. 22. I leave it to the reader to judge whether a request to "all whom it may concern" qualifies as a "communication directed at a foreign power." Even if it does, its presence does not affect § 214(d)'s constitutionality. Requesting protection is only a "subordinate" function of a passport. *Kent*, *supra*, at 129. This subordinate function has never been thought to invalidate other laws regulating the contents of passports; why then would it invalidate this one?

That brings me, in analytic crescendo, to the concurrence's suggestion that *even if* Congress's enumerated powers otherwise encompass § 214(d), and *even if* the President's power to regulate the contents of passports is not exclusive, the law might *still* violate the Constitution, because it "conflict[s]" with the President's passport policy. *Ante*, at 55. It turns the Constitution upside-down to suggest that in areas of shared authority, it is the executive policy that preempts the law, rather than the other way around. Congress *may* make laws necessary and proper for carrying into execution the President's powers, Art. I, § 8, cl. 18, but the President *must* "take Care" that Congress's legislation "be faithfully executed," Art. II, § 3. And Acts of Congress made in pursuance of the Constitution are the "supreme Law of the Land";

acts of the President (apart from treaties) are not. Art. VI, cl. 2. That is why Chief Justice Marshall was right to think that a law prohibiting the seizure of foreign ships trumped a military order requiring it. *Little* v. *Barreme*, 2 Cranch 170, 178–179 (1804). It is why Justice Jackson was right to think that a President who "takes measures incompatible with the expressed or implied will of Congress" may "rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (concurring opinion) (emphasis added). And it is why JUSTICE THOMAS is wrong to think that even if § 214(d) operates in a field of shared authority the President might still prevail.

Whereas the Court's analysis threatens congressional power over foreign affairs with gradual erosion, the concurrence's approach shatters it in one stroke. The combination of (a) the concurrence's assertion of broad, unenumerated "residual powers" in the President, see *ante*, at 33–40; (b) its parsimonious interpretation of Congress's enumerated powers, see *ante*, at 44–48; and (c) its even more parsimonious interpretation of Congress's authority to enact laws "necessary and proper for carrying into Execution" the President's executive powers, see *ante*, at 48–51; produces (d) a presidency more reminiscent of George III than George Washington.

* * *

International disputes about statehood and territory are neither rare nor obscure. Leading foreign debates during the 19th century concerned how the United States should respond to revolutions in Latin America, Texas, Mexico, Hawaii, Cuba. During the 20th century, attitudes toward Communist governments in Russia and China became conspicuous subjects of agitation. Disagreements about Taiwan, Kashmir, and Crimea remain prominent today. A President empowered to decide all questions relating to these matters, immune from laws embodying congressional

disagreement with his position, would have uncontrolled mastery of a vast share of the Nation's foreign affairs.

That is not the chief magistrate under which the American People agreed to live when they adopted the national charter. They believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (Madison). For this reason, they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies. Under the Constitution they approved, Congress may require Zivotofsky's passport and birth report to record his birthplace as Israel, even if that requirement clashes with the President's preference for neutrality about the status of Jerusalem.

I dissent.

Syllabus

KERRY, SECRETARY OF STATE, ET AL. *v.* DIN

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

No. 13–1402. Argued February 23, 2015—Decided June 15, 2015

Respondent Fauzia Din petitioned to have her husband, Kanishka Berashk, a resident citizen of Afghanistan and former civil servant in the Taliban regime, classified as an "immediate relative" entitled to priority immigration status. Din's petition was approved, but Berashk's visa application was ultimately denied. A consular officer informed Berashk that he was inadmissible under 8 U. S. C. § 1182(a)(3)(B), which excludes aliens who have engaged in "[t]errorist activities," but the officer provided no further information. Unable to obtain a more detailed explanation for Berashk's visa denial, Din filed suit in Federal District Court, which dismissed her complaint. The Ninth Circuit reversed, holding that Din had a protected liberty interest in her marriage that entitled her to review of the denial of Berashk's visa. It further held that the Government deprived her of that liberty interest without due process when it denied Berashk's visa application without providing a more detailed explanation of its reasons.

Held: The judgment is vacated, and the case is remanded.

718 F. 3d 856, vacated and remanded.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded that the Government did not deprive Din of any constitutional right entitling her to due process of law. Pp. 90–101.

(a) Under a historical understanding of the Due Process Clause, Din cannot possibly claim that the denial of Berashk's visa application deprived her of life, liberty, or property. Pp. 91–92.

(b) Even accepting the textually unsupportable doctrine of implied fundamental rights, nothing in that line of cases establishes a free-floating and categorical liberty interest sufficient to trigger constitutional protection whenever a regulation touches upon any aspect of the marital relationship. Even if those cases could be so broadly construed, the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice," *Washington* v. *Glucksberg*, 521 U. S. 702, 723–724. Here, the Government's long practice of regulating immigration, which has included erecting serious impediments to a person's ability to bring a spouse into the United States, precludes Din's claim. And this Court has consistently recognized its

lack of "judicial authority to substitute [its] political judgment for that of Congress" with regard to the various distinctions in immigration policy. *Fiallo* v. *Bell*, 430 U. S. 787, 798. Pp. 92–97.

JUSTICE KENNEDY, joined by JUSTICE ALITO, concluded that there is no need to decide whether Din has a protected liberty interest, because, even assuming she does, the notice she received satisfied due process. Pp. 101–106.

(a) This conclusion is dictated by the reasoning of *Kleindienst* v. *Mandel*, 408 U. S. 753. There the Court declined to balance the asserted First Amendment interest of college professors seeking a nonimmigrant visa for a revolutionary Marxist speaker against "Congress' 'plenary power to make rules for the admission of aliens,'" *id.*, at 766, and limited its inquiry to whether the Government had provided a "facially legitimate and bona fide" reason for its action, *id.*, at 770. *Mandel*'s reasoning has particular force here, where national security is involved. Pp. 102–104.

(b) Assuming that Din's rights were burdened directly by the visa denial, the consular officer's citation of § 1182(a)(3)(B) satisfies *Mandel*'s "facially legitimate and bona fide" standard. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543, the Government's decision to exclude Berashk because he did not satisfy a statutory condition for admissibility is facially legitimate. Supporting this conclusion is the fact that, by Din's own admission, Berashk worked for the Taliban government. These considerations lend to the conclusion that there was a bona fide factual basis for exclusion, absent an affirmative showing of bad faith on the consular officer's part, which Din has not plausibly alleged. Pp. 104–106.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and THOMAS, J., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which ALITO, J., joined, *post*, p. 101. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 107.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Attorney General Verrilli*, *Acting Assistant Attorney General Branda*, *Elaine J. Goldenberg*, and *Stacey I. Young.*

Mark E. Haddad argued the cause for respondent. With him on the brief were *Geoffrey D. DeBoskey*, *David R. Car-*

penter, *Heidi Larson Howell*, *Kathleen M. Mueller*, *Anoop Prasad*, *Jenny Zhao*, *Nasrina Bargzie*, and *Winfred Kao.**

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

Fauzia Din is a citizen and resident of the United States. Her husband, Kanishka Berashk, is an Afghan citizen and former civil servant in the Taliban regime who resides in that country. When the Government declined to issue an immigrant visa to Berashk, Din sued.

The state action of which Din complains is the denial of *Berashk's* visa application. Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission. See *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). So, Din attempts to bring suit on his behalf, alleging that the Government's denial of her *husband's* visa application violated *her* constitutional rights. See App. 36–37, Complaint ¶56. In particular, she claims that the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse. There is no such constitutional right. What JUSTICE BREYER's dissent strangely describes as a "deprivation of her freedom to live together with her spouse in America," *post*, at 110, is, in any world other than the artificial world of ever-expanding

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Steven R. Shapiro*, *Jameel Jaffer*, and *Hina Shamsi*; for the California Women's Law Center by *Theane Evangelis*; for Former Consular Officers by *Ira J. Kurban* and *Trina Realmuto*; for Law School Professors by *Robert Pauw*; for the National Immigrant Justice Center et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Charles Roth*; and for National Justice for Our Neighbors by *Brian J. Murray* and *John M. Gore*.

constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America.

For the reasons given in this opinion and in the opinion concurring in the judgment, we vacate and remand.

I

A

Under the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by "immediate relatives" in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. See §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. See §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. § 1361.

One ground for inadmissibility, § 1182(a)(3)(B), covers "[t]errorist activities." In addition to the violent and destructive acts the term immediately brings to mind, the INA defines "terrorist activity" to include providing material support to a terrorist organization and serving as a terrorist organization's representative. § 1182(a)(3)(B)(i), (iii)–(vi).

B

Fauzia Din came to the United States as a refugee in 2000, and became a naturalized citizen in 2007. She filed a petition to have Kanishka Berashk, whom she married in 2006, classified as her immediate relative. The petition was granted, and Berashk filed a visa application. The U. S. Embassy in Islamabad, Pakistan, interviewed Berashk and de-

nied his application. A consular officer informed Berashk that he was inadmissible under § 1182(a)(3)(B) but provided no further explanation.

Din then brought suit in Federal District Court seeking a writ of mandamus directing the United States to properly adjudicate Berashk's visa application; a declaratory judgment that 8 U. S. C. § 1182(b)(2)–(3), which exempts the Government from providing notice to an alien found inadmissible under the terrorism bar, is unconstitutional as applied; and a declaratory judgment that the denial violated the Administrative Procedure Act. App. 36–39, Complaint ¶¶55–68. The District Court granted the Government's motion to dismiss, but the Ninth Circuit reversed. The Ninth Circuit concluded that Din "has a protected liberty interest in marriage that entitles [her] to review of the denial of [her] spouse's visa," 718 F. 3d 856, 860 (2013), and that the Government's citation of § 1182(a)(3)(B) did not provide Din with the "limited judicial review" to which she was entitled under the Due Process Clause, *id.*, at 868. This Court granted certiorari. 573 U. S. 990 (2014).

II

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Although the amount and quality of process that our precedents have recognized as "due" under the Clause has changed considerably since the founding, see *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28–36 (1991) (SCALIA, J., concurring in judgment), it remains the case that *no* process is due if one is not deprived of "life, liberty, or property," *Swarthout* v. *Cooke*, 562 U. S. 216, 219 (2011) (*per curiam*). The first question that we must ask, then, is whether the denial of Berashk's visa application deprived Din of any of these interests. Only if we answer in the affirmative must we proceed to consider whether the Government's explanation afforded sufficient process.

A

The Due Process Clause has its origin in Magna Carta. As originally drafted, the Great Charter provided that "[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or *by the law of the land*." Magna Carta, ch. 29, in 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797) (emphasis added). The Court has recognized that at the time of the Fifth Amendment's ratification, the words "due process of law" were understood "to convey the same meaning as the words 'by the law of the land'" in Magna Carta. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856). Although the terminology associated with the guarantee of due process changed dramatically between 1215 and 1791, the general scope of the underlying rights protected stayed roughly constant.

Edward Coke, whose Institutes "were read in the American Colonies by virtually every student of the law," *Klopfer* v. *North Carolina*, 386 U. S. 213, 225 (1967), thoroughly described the scope of the interests that could be deprived only pursuant to "the law of the land." Magna Carta, he wrote, ensured that, without due process, "no man [may] be taken or imprisoned"; "disseised of his lands, or tenements, or dispossessed of his goods, or chattels"; "put from his livelihood without answer"; "barred to have the benefit of the law"; denied "the franchises, and priviledges, which the subjects have of the gift of the king"; "exiled"; or "fore-judged of life, or limbe, disherited, or put to torture, or death." 1 Coke, *supra*, at 46–48. Blackstone's description of the rights protected by Magna Carta is similar, although he discusses them in terms much closer to the "life, liberty, or property" terminology used in the Fifth Amendment. He described first an interest in "personal security," "consist[ing] in a person's legal and uninterrupted enjoyment of his life, his limbs, his

body, his health, and his reputation." 1 W. Blackstone, Commentaries on the Laws of England 125 (1765). Second, the "personal liberty of individuals" "consist[ed] in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint." *Id.*, at 130. And finally, a person's right to property included "the free use, enjoyment, and disposal of all his acquisitions." *Id.*, at 134.

Din, of course, could not conceivably claim that the denial of Berashk's visa application deprived her—or for that matter even Berashk—of life or property; and under the above described historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not "taken or imprisoned" Din, nor has it "confine[d]" her, either by "keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street." *Id.*, at 132. Indeed, not even Berashk has suffered a deprivation of liberty so understood.

B

Despite this historical evidence, this Court has seen fit on several occasions to expand the meaning of "liberty" under the Due Process Clause to include certain implied "fundamental rights." (The reasoning presumably goes like this: If you have a right to do something, you are free to do it, and deprivation of freedom is a deprivation of "liberty"—never mind the original meaning of that word in the Due Process Clause.) These implied rights have been given *more* protection than "life, liberty, or property" properly understood. While one may be dispossessed of property, thrown in jail, or even executed so long as proper procedures are followed, the enjoyment of implied constitutional rights cannot be limited at all, except by provisions that are "narrowly tailored to serve a compelling state interest." *Reno* v. *Flores*, 507 U. S. 292, 301–302 (1993). Din does not explicitly argue that the Government has violated this absolute

prohibition of the *substantive* component of the Due Process Clause, likely because it is obvious that a law barring aliens engaged in terrorist activities from entering this country *is* narrowly tailored to serve a compelling state interest. She nevertheless insists that, because enforcement of the law affects her enjoyment of an implied fundamental liberty, the Government must first provide her a full battery of procedural-due-process protections.

I think it worth explaining why, *even if* one accepts the textually unsupportable doctrine of implied fundamental rights, Din's arguments would fail. Because "extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action," *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997), and because the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992), "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field," *ibid.* Accordingly, before conferring constitutional status upon a previously unrecognized "liberty," we have required "a careful description of the asserted fundamental liberty interest," as well as a demonstration that the interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." *Glucksberg*, *supra*, at 720–721 (citations and internal quotation marks omitted).

Din describes the denial of Berashk's visa application as implicating, alternately, a "liberty interest in her marriage," Brief for Respondent 28, a "right of association with one's spouse," *id.*, at 18, "a liberty interest in being reunited with certain blood relatives," *id.*, at 22, and "the liberty interest of a U. S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse," *ibid.* To be sure, this Court has at times indulged

a propensity for grandiloquence when reviewing the sweep of implied rights, describing them so broadly that they would include not only the interests Din asserts but many others as well. For example: "Without doubt, [the liberty guaranteed by the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). But this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases. And the actual holdings of the cases Din relies upon hardly establish the capacious right she now asserts.

Unlike the States in *Loving* v. *Virginia*, 388 U. S. 1 (1967), *Zablocki* v. *Redhail*, 434 U. S. 374 (1978), and *Turner* v. *Safley*, 482 U. S. 78 (1987), the Federal Government here has not attempted to forbid a marriage. Although Din and the dissent borrow language from those cases invoking a fundamental right to marriage, they both implicitly concede that no such right has been infringed in this case. Din relies on the "associational interests in marriage that necessarily are protected by the right to marry," and that are "presuppose[d]" by later cases establishing a right to marital privacy. Brief for Respondent 16, 18. The dissent supplements the fundamental right to marriage with a fundamental right to live in the United States in order to find an affected liberty interest. *Post*, at 108 (BREYER, J., dissenting).

Attempting to abstract from these cases some liberty interest that might be implicated by Berashk's visa denial, Din draws on even more inapposite cases. *Meyer*, for example, invalidated a state statute proscribing the teaching of foreign language to children who had not yet passed the eighth grade, reasoning that it violated the teacher's "right thus to teach and the right of parents to engage him so to instruct their children." 262 U. S., at 400. *Pierce* v. *Society of Sis-*

ters, 268 U. S. 510, 534–535 (1925), extended *Meyer*, finding that a law requiring children to attend public schools "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Moore* v. *East Cleveland*, 431 U. S. 494, 505–506 (1977), extended this interest in raising children to caretakers in a child's extended family, striking down an ordinance that limited occupancy of a single-family house to members of a nuclear family on the ground that "[d]ecisions concerning child rearing . . . long have been shared with grandparents or other relatives." And *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965), concluded that a law criminalizing the use of contraceptives by married couples violated "penumbral rights of 'privacy and repose'" protecting "the sacred precincts of the marital bedroom"—rights which do not plausibly extend into the offices of our consulates abroad.

Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship. Even if our cases could be construed so broadly, the relevant question is not whether the asserted interest "is consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice." *Glucksberg*, 521 U. S., at 723–724 (emphasis deleted). Even if we might "imply" a liberty interest in marriage generally speaking, that must give way when there is a tradition denying the specific application of that general interest. Thus, *Glucksberg* rejected a claimed liberty interest in "self-sovereignty" and "personal autonomy" that extended to assisted suicide when there was a longstanding tradition of outlawing the practice of suicide. *Id.*, at 724, 727–728 (internal quotation marks omitted).

Here, a long practice of regulating spousal immigration precludes Din's claim that the denial of Berashk's visa application has deprived her of a fundamental liberty interest.

Although immigration was effectively unregulated prior to 1875, as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States. See Abrams, What Makes the Family Special? 80 U. Chi. L. Rev. 7, 10–16 (2013).

Most strikingly, perhaps, the Expatriation Act of 1907 provided that "any American woman who marries a foreigner shall take the nationality of her husband." Ch. 2534, 34 Stat. 1228. Thus, a woman in Din's position not only lacked a liberty interest that might be affected by the Government's disposition of her husband's visa application, she lost her *own* rights as a citizen upon marriage. When Congress began to impose quotas on immigration by country of origin less than 15 years later, with the Immigration Act of 1921, it omitted fiances and husbands from the family relations eligible for preferred status in the allocation of quota spots. § 2(d), 42 Stat. 6. Such relations were similarly excluded from the relations eligible for nonquota status, when that status was expanded three years later. Immigration Act of 1924, § 4(a), 43 Stat. 155.

To be sure, these early regulations were premised on the derivative citizenship of women, a legacy of the law of coverture that was already in decline at the time. C. Bredbenner, A Nationality of Her Own 5 (1998). Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order. Nevertheless, this all-too-recent practice repudiates any contention that Din's asserted liberty interest is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." *Glucksberg*, *supra*, at 721 (citations and internal quotations marks omitted).

Indeed, the law showed little more solicitude for the marital relationship when it was a male resident or citizen seek-

ing admission for his fiancee or wife. The Immigration Act of 1921 granted nonquota status only to unmarried, minor children of citizens, § 2(a), while granting fiancees and wives preferred status *within* the allocation of quota spots, § 2(d). In other words, a citizen could move his spouse forward in the line, but once all the quota spots were filled for the year, the spouse was barred without exception. This was not just a theoretical possibility: As one commentator has observed, "[f]or many immigrants, the family categories did little to help, because the quotas were so small that the number of family members seeking slots far outstripped the number available." Abrams, *supra*, at 13.

Although Congress has tended to show "a continuing and kindly concern . . . for the unity and the happiness of the immigrant family," E. Hutchinson, Legislative History of American Immigration Policy 1798–1965, p. 518 (1981), this has been a matter of legislative grace rather than fundamental right. Even where Congress has provided special privileges to promote family immigration, it has also "written in careful checks and qualifications." *Ibid.* This Court has consistently recognized that these various distinctions are "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo* v. *Bell*, 430 U. S. 787, 798 (1977). Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of Berashk's visa application implicates any of Din's fundamental liberty interests.

C

JUSTICE BREYER suggests that procedural due process rights attach to liberty interests that either are (1) created by nonconstitutional law, such as a statute, or (2) "sufficiently important" so as to "flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Post*, at 108.

The first point is unobjectionable, at least given this Court's case law. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 262, and n. 8 (1970); *Collins* 503 U. S., at 129. But it is unhelpful to Din, who does not argue that a statute confers on her a liberty interest protected by the Due Process Clause. JUSTICE BREYER attempts to make this argument for Din, latching onto language in *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005), saying that a liberty interest "may arise from an expectation or interest created by state laws or policies." Such an "expectation" has been created here, he asserts, because "the law . . . surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure," *post*, at 108–109. But what *Wilkinson* meant by an "expectation or interest" was not that sort of judicially unenforceable substantial hope, but a present and legally recognized substantive entitlement.* As sole support for its conclusion that nonconstitutional law can create constitutionally protected liberty interests, *Wilkinson* cited *Wolff* v. *McDonnell*, 418 U. S. 539, 556–558 (1974), which held that a prisoner could not be deprived of statutory good-time credit without procedural due process. That was not because a prisoner might have "a strong expectation" that the government would not deprive him of good-time credit "without strong reasons" or "fair procedure," but because "the State itself has not only provided a statutory *right* to good time [credit] but also specifies that it is to be forfeited *only* for serious misbehavior," *id.*, at 557 (emphasis added). The legal benefits afforded to marriages and the preferential treatment accorded to visa applicants with

---

*JUSTICE BREYER characterizes this as a reintroduction of "the rights/privilege distinction that this Court rejected almost five decades ago." *Post*, at 109. Not so. All I insist upon (and all that our cases over the past five decades require) is that the privilege be one to which the claimant has been given an entitlement.

citizen-relatives are insufficient to confer on Din a right that can be deprived only pursuant to procedural due process.

JUSTICE BREYER's second point—that procedural due process rights attach even to some nonfundamental liberty interests that have *not* been created by statute—is much more troubling. He relies on the implied-fundamental-rights cases discussed above to divine a "right of spouses to live together and to raise a family," along with "a citizen's right to live within this country." *Post*, at 108. But perhaps recognizing that our established methodology for identifying fundamental rights cuts against his conclusion, see Part II–B, *supra*, he argues that the term "liberty" in the Due Process Clause includes implied rights that, although not so fundamental as to deserve substantive-due-process protection, are important enough to deserve procedural-due-process protection. *Post*, at 108. In other words, there are two categories of implied rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as procedural due process is observed.

The dissent fails to cite a single case supporting its novel theory of implied nonfundamental rights. It is certainly true that *Vitek* v. *Jones*, 445 U. S. 480 (1980), and *Washington* v. *Harper*, 494 U. S. 210 (1990), do not entail implied *fundamental* rights, but this is because they do not entail *implied* rights at all. *Vitek* concerned the involuntary commitment of a prisoner, deprivation of the expressly protected right of liberty under the original understanding of the term, see Part II–A, *supra*. "'Among the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" *Vitek*, *supra*, at 492. The same is true of *Harper*, which concerned forced administration of psychotropic drugs to an inmate. 494 U. S., at 214. Arguably, *Paul* v. *Davis*, 424 U. S. 693 (1976), also addressed an

interest expressly contemplated within the meaning of "liberty." See 1 W. Blackstone, Commentaries on the Laws of England 125 ("The right of personal security consists in a person's . . . reputation"). But that case is of no help to the dissent anyway, since it found no liberty interest entitled to the Due Process Clause's protection. *Paul*, *supra*, at 713–714. Finally, the dissent points to *Goss* v. *Lopez*, 419 U. S. 565, 574 (1975), a case that "recognize[d] . . . as a property interest" a student's right to a public education conferred by Ohio's express statutory creation of a public school system; and further concluded that the student's 10-day suspension implicated the constitutionally grounded liberty interest in "'a person's good name, reputation, honor, or integrity.'"

Ultimately, the dissent identifies no case holding that there is an implied nonfundamental right protected by procedural due process, and only one case even *suggesting* that there is. That suggestion, in *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816 (1977), is contained in dictum in a footnote, *id.*, at 842, n. 48. The holding of the case was that "the procedures provided by New York State . . . and by New York Cit[y] . . . are adequate to protect *whatever* liberty interests appellees *may* have." *Id.*, at 856 (emphasis added).

The footnoted dictum that JUSTICE BREYER proposes to elevate to constitutional law is a dangerous doctrine. It vastly expands the scope of our implied-rights jurisprudence by setting it free from the requirement that the liberty interest be "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty," *Glucksberg*, 521 U. S., at 720–721 (citations and internal quotation marks omitted). Even shallow-rooted liberties would, thanks to this new procedural-rights-only notion of quasi-fundamental rights, qualify for judicially imposed procedural requirements. Moreover, JUSTICE BREYER gives no basis for distinguishing the fundamental rights recognized in the cases he depends on from the *nonfundamental* right he believes they give rise to in the present case.

Neither Din's right to live with her spouse nor her right to live within this country is implicated here. There is a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally." *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 788 (1980). The Government has not refused to recognize Din's marriage to Berashk, and Din remains free to live with her husband anywhere in the world that both individuals are permitted to reside. And the Government has not expelled Din from the country. It has simply determined that Kanishka Berashk engaged in terrorist activities within the meaning of the Immigration and Nationality Act, and has therefore denied him admission into the country. This might, indeed, deprive Din of something "important," *post*, at 108, but if that is the criterion for JUSTICE BREYER's new pairing of substantive and procedural due process, we are in for quite a ride.

* * *

Because Fauzia Din was not deprived of "life, liberty, or property" when the Government denied Kanishka Berashk admission to the United States, there is no process due to her under the Constitution. To the extent that she received any explanation for the Government's decision, this was more than the Due Process Clause required. The judgment of the Ninth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, concurring in the judgment.

The respondent, Fauzia Din, is a citizen and resident of the United States. She asserts that petitioner Government officials (collectively, Government) violated her own constitutional right to live in this country with her husband, an alien now residing in Afghanistan. She contends this violation

occurred when the Government, through State Department consular officials, denied her spouse's immigrant visa application with no explanation other than that the denial was based on 8 U. S. C. §1182 (a)(3)(B), the statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities.

The plurality is correct that the case must be vacated and remanded. But rather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband's visa denial satisfied due process.

Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse. The Court need not decide that issue, for this Court's precedents instruct that, even assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar, § 1182(a)(3)(B). See *ante*, at 89–90.

I

The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court's decision in *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972). There, college professors—all of them citizens—had invited Dr. Ernest Mandel, a self-described "'revolutionary Marxist,'" to speak at a conference at Stanford University. *Id.*, at 756. Yet when Mandel applied for a temporary nonimmigrant visa to enter the country, he was denied. At the time, the immigration laws deemed aliens "who advocate[d] the economic, international, and governmental doctrines of World communism" ineligible for visas. § 1182(a)(28)(D) (1964 ed.). Aliens ineligible under this provision did have one opportunity for recourse: The Attorney General was given discretion to waive the prohibition and grant individual exceptions, allowing the alien to obtain a temporary visa.

§ 1182(d)(3). For Mandel, however, the Attorney General, acting through the Immigration and Naturalization Service (INS), declined to grant a waiver. In a letter regarding this decision, the INS explained Mandel had exceeded the scope and terms of temporary visas on past trips to the United States, which the agency deemed a "'flagrant abuse of the opportunities afforded him to express his views in this country.'" 408 U. S., at 759.

The professors who had invited Mandel to speak challenged the INS' decision, asserting a First Amendment right to "'hear his views and engage him in a free and open academic exchange.'" *Id.*, at 760. They claimed the Attorney General infringed this right when he refused to grant Mandel relief. See *ibid.*

The Court declined to balance the First Amendment interest of the professors against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Id.*, at 766, 768. To do so would require "courts in each case . . . to weigh the strength of the audience's interest against that of the Government in refusing a [visa] to the particular applicant," a nuanced and difficult decision Congress had "properly . . . placed in the hands of the Executive." *Id.*, at 769.

Instead, the Court limited its inquiry to the question whether the Government had provided a "facially legitimate and bona fide" reason for its action. *Id.*, at 770. Finding the Government had proffered such a reason—Mandel's abuse of past visas—the Court ended its inquiry and found the Attorney General's action to be lawful. See *ibid.* The Court emphasized it did not address "[w]hat First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced." *Ibid.*

The reasoning and the holding in *Mandel* control here. That decision was based upon due consideration of the con-

gressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field. *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made "on the basis of a facially legitimate and bona fide reason." *Ibid.* Once this standard is met, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" the constitutional interests of citizens the visa denial might implicate. *Ibid.* This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.

II

Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely, her husband. And as in *Mandel*, the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under § 1182(a)(3)(B)'s terrorism bar. Even assuming Din's rights were burdened directly by the visa denial, the remaining question is whether the reasons given by the Government satisfy *Mandel*'s "facially legitimate and bona fide" standard. I conclude that they do.

Here, the consular officer's determination that Din's husband was ineligible for a visa was controlled by specific statutory factors. The provisions of § 1182(a)(3)(B) establish specific criteria for determining terrorism-related inadmissibility. The consular officer's citation of that provision suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States*

ex rel. Knauff v. *Shaughnessy*, 338 U. S. 537, 543 (1950), it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*.

The Government's citation of § 1182(a)(3)(B) also indicates it relied upon a bona fide factual basis for denying a visa to Berashk. Cf. *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926). Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis. It is true the Attorney General there disclosed the facts motivating his decision to deny Dr. Mandel a waiver, and that the Court cited those facts as demonstrating "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." 408 U. S., at 769. But unlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa. Din, moreover, admits in her complaint that Berashk worked for the Taliban government, App. 27–28, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity. Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed. See 408 U. S., at 770.

The Government, furthermore, was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B). To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on

which the consular officer relied. Congress understood this problem, however. The statute generally requires the Government to provide an alien denied a visa with the "specific provision or provisions of law under which the alien is inadmissible," § 1182(b)(1); but this notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns, § 1182(b)(3). Notably, the Government is not prohibited from offering more details when it sees fit, but the statute expressly refrains from requiring it to do so.

Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. See *Fiallo* v. *Bell*, 430 U. S. 787, 795–796 (1977); see also *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 425 (1999). And even if Din is correct that sensitive facts could be reviewed by courts *in camera*, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). By requiring the Government to provide more, the Court of Appeals erred in adjudicating Din's constitutional claims.

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

Fauzia Din, an American citizen, wants to know why the State Department denied a visa to her husband, a noncitizen. She points out that, without a visa, she and her husband will have to spend their married lives separately or abroad. And she argues that the Department, in refusing to provide an adequate reason for the denial, has violated the constitutional requirement that "[n]o person . . . be deprived of life, liberty, or property, without due process of law." U. S. Const., Amdt. 5.

In my view, Ms. Din should prevail on this constitutional claim. She possesses the kind of "liberty" interest to which the Due Process Clause grants procedural protection. And the Government has failed to provide her with the procedure that is constitutionally "due." See *Swarthout* v. *Cooke*, 562 U. S. 216, 219 (2011) (*per curiam*) (setting forth the Court's two-step inquiry for procedural due process claims). Accordingly, I would affirm the judgment of the Ninth Circuit.

I

The plurality opinion (which is not controlling) concludes that Ms. Din lacks the kind of liberty interest to which the Due Process Clause provides procedural protections. *Ante*, at 90–101. Justice Kennedy's opinion "*assum[es]*" that Ms. Din possesses that kind of liberty interest. *Ante*, at 102 (opinion concurring in judgment) (emphasis added). I agree with Justice Kennedy's assumption. More than that, I believe that Ms. Din possesses that kind of constitutional interest.

The liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural*, not *substantive*, protection for this freedom. Compare *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005) (Due Process Clause requires compli-

ance with fair *procedures* when the government deprives an individual of certain "liberty" or "property" interests), with *Reno* v. *Flores*, 507 U. S. 292, 302 (1993) (Due Process Clause limits the extent to which government can *substantively* regulate certain "fundamental" rights, "no matter what process is provided"). Cf. *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 842, n. 48 (1977) (liberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection).

Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow "implicit[ly]" from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates "an expectation" that a person will not be deprived of that kind of liberty without fair procedures. *Wilkinson*, *supra*, at 221.

The liberty for which Ms. Din seeks protection easily satisfies both standards. As this Court has long recognized, the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' "orderly pursuit of happiness." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). See also, *e. g.*, *Griswold* v. *Connecticut*, 381 U. S. 479, 485–486 (1965); *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978); *Moore* v. *East Cleveland*, 431 U. S. 494, 500–503 (1977) (plurality opinion); *Smith*, *supra*, at 843. Similarly, the Court has long recognized that a citizen's right to live within this country, being fundamental, enjoys basic procedural due process protection. See *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–285 (1922); *Baumgartner* v. *United States*, 322 U. S. 665, 670 (1944).

At the same time, the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not de-

prive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure. Cf. *Turner* v. *Safley*, 482 U. S. 78, 95–96 (1987) (noting various legal benefits of marriage); 8 U. S. C. § 1151(b)(2)(A)(i) (special visa preference for spouse of an American citizen). JUSTICE SCALIA's response—that nonconstitutional law creates an "expectation" that merits procedural protection under the Due Process Clause only if there is an unequivocal statutory right, *ante*, at 98–99—is sorely mistaken. His argument rests on the rights/privilege distinction that this Court rejected almost five decades ago, in the seminal case of *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). See generally *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights"); *id.*, at 572 ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed").

JUSTICE SCALIA's more general response—claiming that I have created a new category of constitutional rights, *ante*, at 99–101—misses the mark. I break no new ground here. Rather, this Court has *already* recognized that the Due Process Clause guarantees that the government will not, without fair procedure, deprive individuals of a host of rights, freedoms, and liberties that are no more important, and for which the state has created no greater expectation of continued benefit, than the liberty interest at issue here. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 556–557 (1974) (prisoner's right to maintain "good time" credits shortening term of imprisonment; procedurally protected liberty interest based on nonconstitutional law); *Paul* v. *Davis*, 424 U. S. 693, 701 (1976) (right to certain aspects of reputation; procedurally protected liberty interest arising under the Constitution); *Goss* v. *Lopez*, 419 U. S. 565, 574–575 (1975) (student's right not to be suspended from school class; procedurally

protected liberty interest arising under the Constitution); *Vitek* v. *Jones*, 445 U. S. 480, 491–495 (1980) (prisoner's right against involuntary commitment; procedurally protected liberty interest arising under the Constitution); *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990) (mentally ill prisoner's right not to take psychotropic drugs; procedurally protected liberty interest arising under the Constitution); see generally *Goldberg*, *supra*, at 262–263 (right to welfare benefits; procedurally protected property interest based on nonconstitutional law). But cf. *ante*, at 99–100 (plurality opinion) (making what I believe are unsuccessful efforts to distinguish these cases). How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? As compared to reputational harm, for example, how is Ms. Din's liberty interest any less worthy of due process protections?

II

A

The more difficult question is the nature of the procedural protection required by the Constitution. After all, sometimes, as with the military draft, the law separates spouses with little individualized procedure. And sometimes, as with criminal convictions, the law provides procedure to one spouse but not to the other. Unlike criminal convictions, however, neither spouse here has received any procedural protection. Cf. *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (availability of alternative procedures can satisfy due process). Compare *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 213 (1953) (no due process protections for aliens outside United States), with *Zadvydas* v. *Davis*, 533 U. S. 678, 693 (2001) (such protections are available for aliens inside United States). And, unlike the draft (justified by a classic military threat), the deprivation does not apply simi-

larly to hundreds of thousands of American families. Cf. *Bi-Metallic Investment Co.* v. *State Bd. of Equalization of Colo.*, 239 U. S. 441, 445 (1915).

Rather, here, the Government makes individualized visa determinations through the application of a legal rule to particular facts. Individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. *Londoner* v. *City and County of Denver*, 210 U. S. 373, 385–386 (1908). And those procedures normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decisionmaking. See *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 533 (2004) (plurality opinion); see also Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1278–1281 (1975). These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect. *Hurtado* v. *California*, 110 U. S. 516, 527 (1884).

Here, we need not consider all possible procedural due process elements. Rather we consider only the minimum procedure that Ms. Din has requested—namely, a statement of reasons, some kind of explanation, as to why the State Department denied her husband a visa.

We have often held that this kind of statement, permitting an individual to understand *why* the government acted as it did, is a fundamental element of due process. See, *e. g.*, *Goldberg*, 397 U. S., at 267–268; *Perry* v. *Sindermann*, 408 U. S. 593, 603 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471, 485, 489 (1972); *Wolff*, *supra*, at 563–564; *Goss*, *supra*, at 581; *Mathews* v. *Eldridge*, 424 U. S. 319, 345–346 (1976); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 546 (1985); *Wilkinson*, 545 U. S., at 224; *Hamdi*, *supra*, at 533 (plurality opinion).

That is so in part because a statement of reasons, even one provided after a visa denial, serves much the same function as a "notice" of a proposed action. It allows Ms. Din, who suffered a "serious loss," a fair "opportunity to meet" "the case" that has produced separation from her husband. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 171–172 (1951) (Frankfurter, J., concurring); see also *Hamdi*, *supra*, at 533 (plurality opinion); *Wolff*, *supra*, at 563; Friendly, *supra*, at 1280 ("notice" must provide "the grounds for" the relevant action). Properly apprised of the grounds for the Government's action, Ms. Din can then take appropriate action—whether this amounts to an appeal, internal agency review, or (as is likely here) an opportunity to submit additional evidence and obtain reconsideration, 22 CFR § 42.81(e) (2014).

I recognize that our due process cases often determine the constitutional insistence upon a particular procedure by balancing, with respect to that procedure, the "private interest" at stake, "the risk of an erroneous deprivation" absent the sought-after protection, and the Government's interest in not providing additional procedure. *Eldridge*, *supra*, at 335; but cf. *Hamdi*, *supra*, at 533 (plurality opinion) (suggesting minimal due process requirements cannot be balanced away). Here "balancing" would not change the result. The "private interest" is important, the risk of an "erroneous deprivation" is significant, and the Government's interest in not providing a reason is normally small, at least administratively speaking. Indeed, Congress requires the State Department to provide a reason for a visa denial in most contexts. 8 U. S. C. § 1182(b)(1). Accordingly, in the absence of some highly unusual circumstance (not shown to be present here, see *infra*, at 115), the Constitution requires the Government to provide an adequate reason why it refused to grant Ms. Din's husband a visa. That reason, in my view, could be either the factual basis for the Government's decision or a

sufficiently specific statutory subsection that conveys effectively the same information.

B

1

JUSTICE KENNEDY, without denying that Ms. Din was entitled to a reason, believes that she received an adequate reason here. According to the complaint, however, the State Department's denial letter stated only that the visa "had been denied under . . . 8 U. S. C. § 1182(a)." App. 30. In response to requests for further explanation, the State Department sent an e-mail stating that the visa "had been denied under . . . 8 U. S. C. § 1182(a)(3)(B)—the terrorism and national security bars to admissibility." *Id.*, at 31. I do not see how either statement could count as adequate.

For one thing, the statutory provision to which it refers, § 1182(a)(3)(B), sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. See Appendix, *infra*. Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. §§ 1182(a)(3)(B)(iii)(I), (IV). Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled "terrorist." One set of cross-referenced subsections, for example, brings within the section's visa prohibition any individual who has "transfer[red] . . . [any] material financial benefit" to "a group of two or more individuals, whether organized or not, which . . . has a subgroup which engages" in "afford[ing] material support . . . for . . . any individual who . . . plans" "[t]he use of any . . . weapon . . . with intent . . . to cause substantial damage to property." §§ 1182(a)(3)(B)(iv)(VI), (vi)(III), (iv)(VI)(bb), (iii)(V). At the same time, some subsections provide the visa applicant with a defense; others do not. See, *e. g.*, § 1182(a)(3)(B)(iv)(VI)(dd) (permitting applicant to show "by clear and convincing evidence that

the actor did not know, and should not reasonably have known, that the organization was a terrorist organization"). Taken together the subsections, directly or through cross-reference, cover a vast waterfront of human activity potentially benefiting, sometimes in major ways, sometimes hardly at all, sometimes directly, sometimes indirectly, sometimes a few people, sometimes many, sometimes those with strong links, sometimes those with hardly a link, to a loosely or strongly connected group of individuals, which, through many different kinds of actions, might fall within the broad statutorily defined term "terrorist." See, *e. g.*, *Daneshvar* v. *Ashcroft*, 355 F. 3d 615, 628 (CA6 2004) (alleging material support for selling newspapers); *Singh* v. *Wiles*, 747 F. Supp. 2d 1223, 1227 (WD Wash. 2010) (alleging material support for letting individuals sleep on a temple floor).

For another thing, the State Department's reason did not set forth any factual basis for the Government's decision. Cf., *e. g.*, *Wilkinson*, *supra*, at 225–226 (prison administrators must inform prisoners of "factual basis" for extreme solitary confinement). Perhaps the Department denied the visa because Ms. Din's husband at one point was a payroll clerk for the Afghan Government when that government was controlled by the Taliban. See *ante*, at 105 (opinion of KENNEDY, J.). But there is no way to know if that is so.

The generality of the statutory provision cited and the lack of factual support mean that here, the reason given is analogous to telling a criminal defendant only that he is accused of "breaking the law"; telling a property owner only that he cannot build because environmental rules forbid it; or telling a driver only that police pulled him over because he violated traffic laws. As such, the reason given cannot serve its procedural purpose. It does not permit Ms. Din to assess the correctness of the State Department's conclusion; it does not permit her to determine what kinds of facts she might provide in response; and it does not permit her to learn whether, or what kind of, defenses might be available. In short,

any "reason" that Ms. Din received is not constitutionally adequate.

2

Seemingly aware that he cannot deny these basic legal principles, JUSTICE KENNEDY rests his conclusions upon two considerations that, in his view, provide sufficient grounds for an exception. *Ante*, at 106. Most importantly, he says that ordinary rules of due process must give way here to national security concerns. But just what are those concerns? And how do they apply here? Ms. Din's counsel stated at oral argument that there were no such concerns in this case. Tr. of Oral Arg. 35. And the Solicitor General did not deny that statement.

In other cases, such concerns may exist. But, when faced with the need to provide public information without compromising security interests, the Government has found ways to do so, for example, by excising sensitive portions of documents requested by the press, members of the public, or other public officials. See, *e. g.*, 5 U. S. C. § 552(b)(1). Moreover, agencies and courts have found ways to conduct proceedings in private, through internal review or *in camera* proceedings, and thereby protect sensitive information. See *Webster* v. *Doe*, 486 U. S. 592, 604 (1988); Brief for Respondent 48–52, and n. 20; Brief for American Civil Liberties Union as *Amicus Curiae* 23–28. Would these (or other) methods prove adequate in other cases where a citizen's freedom to live in America with her spouse is at issue? Are they even necessary here? The Government has not explained.

I do not deny the importance of national security, the need to keep certain related information private, or the need to respect the determinations of the other branches of Government in such matters. But protecting ordinary citizens from arbitrary government action is fundamental. Thus, the presence of security considerations does not suspend the Constitution. *Hamdi*, 542 U. S., at 527–537 (plurality opinion). Rather, it requires us to take security needs into ac-

count when determining, for example, what "process" is "due." *Ibid.*

Yet how can we take proper account of security considerations without knowing what they are, without knowing how and why they require modification of traditional due process requirements, and without knowing whether other, less restrictive alternatives are available? How exactly would it harm important security interests to give Ms. Din a better explanation? Is there no way to give Ms. Din such an explanation while also maintaining appropriate secrecy? I believe we need answers to these questions before we can accept as constitutional a major departure from the procedural requirements that the Due Process Clause ordinarily demands.

JUSTICE KENNEDY also looks for support to the fact that Congress specifically exempted the section here at issue, § 1182(a)(3)(B), from the statutory provision requiring the State Department to provide a reason for visa denials. § 1182(b)(3). An exception from a statutory demand for a reason, however, is not a command to do the opposite; rather, at most, it leaves open the question whether other law requires a reason. Here that other law is the Constitution, not a statute. In my view, the Due Process Clause requires the Department to provide an adequate reason. And, I believe it has failed to do so.

* * *

For these reasons, with respect, I dissent.

APPENDIX

Title 8 U. S. C. § 1182(a)(3) provides:

"**(B) Terrorist activities**

"**(i) In general**

"Any alien who—

"(I) has engaged in a terrorist activity;

"(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

"(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

"(IV) is a representative (as defined in clause (v)) of—

"(aa) a terrorist organization (as defined in clause (vi)); or

"(bb) a political, social, or other group that endorses or espouses terrorist activity;

"(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

"(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

"(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

"(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

"(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

"is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

"**(ii) Exception**

"Subclause (IX) of clause (i) does not apply to a spouse or child—

"(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

"(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

"**(iii) 'Terrorist activity' defined**

"As used in this chapter, the term 'terrorist activity' means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

"(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

"(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

"(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

"(IV) An assassination.

"(V) The use of any—

"(a) biological agent, chemical agent, or nuclear weapon or device, or

"(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

"with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

"(VI) A threat, attempt, or conspiracy to do any of the foregoing.

"**(iv) 'Engage in terrorist activity' defined**

"As used in this chapter, the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization—

"(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

"(II) to prepare or plan a terrorist activity;

"(III) to gather information on potential targets for terrorist activity;

"(IV) to solicit funds or other things of value for—

"(aa) a terrorist activity;

"(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

"(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

"(V) to solicit any individual—

"(aa) to engage in conduct otherwise described in this subsection;

"(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

"(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

"(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

"(aa) for the commission of a terrorist activity;

"(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

"(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

"(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

"**(v) 'Representative' defined**

"As used in this paragraph, the term 'representative' includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

"**(vi) 'Terrorist organization' defined**

"As used in this section, the term 'terrorist organization' means an organization—

"(I) designated under section 1189 of this title;

"(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

"(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)."

BAKER BOTTS L. L. P. ET AL. *v.* ASARCO LLC

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

No. 14–103. Argued February 25, 2015—Decided June 15, 2015

Respondent ASARCO LLC hired petitioner law firms pursuant to § 327(a) of the Bankruptcy Code to assist it in carrying out its duties as a Chapter 11 debtor in possession. See 11 U. S. C. § 327(a). When ASARCO emerged from bankruptcy, the law firms filed fee applications requesting fees under § 330(a)(1), which permits bankruptcy courts to "award . . . reasonable compensation for actual, necessary services rendered by" § 327(a) professionals. ASARCO challenged the applications, but the Bankruptcy Court rejected ASARCO's objections and awarded the law firms fees for time spent defending the applications. ASARCO appealed to the District Court, which held that the law firms could be awarded fees for defending their fee applications. The Fifth Circuit reversed, holding that § 330(a)(1) did not authorize fee awards for defending fee applications.

Held: Section 330(a)(1) does not permit bankruptcy courts to award fees to § 327(a) professionals for defending fee applications. Pp. 126–135.

(a) The American Rule provides the "'basic point of reference'" for awards of attorney's fees: "'Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.'" *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 252–253. Because the rule is deeply rooted in the common law, see, *e. g.*, *Arcambel* v. *Wiseman*, 3 Dall. 306, this Court will not deviate from it "'absent explicit statutory authority,'" *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 602. Departures from the American Rule have been recognized only in "specific and explicit provisions," *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260, usually containing language that authorizes the award of "a reasonable attorney's fee," "fees," or "litigation costs," and referring to a "prevailing party" in the context of an adversarial "action," see generally *Hardt*, *supra*, at 253, and nn. 3–7. Pp. 126–127.

(b) Congress did not depart from the American Rule in § 330(a)(1) for fee-defense litigation. Section 327(a) professionals are hired to serve an estate's administrator for the benefit of the estate, and § 330(a)(1) authorizes "reasonable compensation for actual, necessary services rendered." The word "services" ordinarily refers to "labor performed for another," Webster's New International Dictionary 2288. Thus, the

phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client, *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268. Time spent litigating a fee application against the bankruptcy estate's administrator cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator. Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1), it could have done so, as it has done in other Bankruptcy Code provisions, *e. g.*, § 110(i)(1)(C). Pp. 127–129.

(c) Neither the law firms nor the United States, as *amicus curiae*, offers a persuasive theory for why § 330(a)(1) should override the American Rule in this context. Pp. 129–135.

(1) The law firms' view—that fee-defense litigation is part of the "services rendered" to the estate administrator—not only suffers from an unnatural interpretation of the term "services rendered," but would require a particularly unusual deviation from the American Rule, as it would permit attorneys to be awarded fees for unsuccessfully defending fee applications when most fee-shifting provisions permit awards only to "a 'prevailing party,' " *Hardt*, *supra*, at 253. P. 130.

(2) The Government's argument is also unpersuasive. Its theory—that fees for fee-defense litigation must be understood as a component of the "reasonable compensation for [the underlying] services rendered" so that compensation for the "actual . . . services rendered" will not be diluted by unpaid time spent litigating fees—cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation," but "reasonable compensation for *actual, necessary services rendered*," and the Government properly concedes that litigation in defense of a fee application is not a "service." And § 330(a)(6), which presupposes compensation "for the preparation of a fee application," does not suggest that time spent defending a fee application must also be compensable. *Commissioner* v. *Jean*, 496 U. S. 154, distinguished.

The Government's theory ultimately rests on the flawed policy argument that a "judicial exception" is needed to compensate fee-defense litigation and safeguard Congress' aim of ensuring that talented attorneys take on bankruptcy work. But since no attorneys are entitled to such fees absent express statutory authorization, requiring bankruptcy attorneys to bear the costs of their fee-defense litigation under § 330(a)(1) creates no disincentive to bankruptcy practice. And even if this Court believed that uncompensated fee-defense litigation would fall particularly hard on the bankruptcy bar, it has no "roving authority . . . to allow counsel fees . . . whenever [it] might deem them warranted," *Alyeska Pipeline*, *supra*, at 260. Pp. 131–135.

751 F. 3d 291, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined, and in which SOTOMAYOR, J., joined as to all but Part III–B–2. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 135. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 135.

Aaron M. Streett argued the cause for petitioners. With him on the briefs were *G. Irvin Terrell*, *Shane Pennington*, *Wm. Bradford Reynolds*, *Evan A. Young*, *Omar J. Alaniz*, and *Shelby A. Jordan*.

Brian H. Fletcher 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*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, *Sydney Foster*, *Ramona D. Elliott*, *P. Matthew Sutko*, and *Robert J. Schneider*, *Jr.*

Jeffrey L. Oldham argued the cause for respondent. With him on the brief were *Bryan S. Dumesnil*, *Bradley J. Benoit*, *Heath A. Novosad*, *Paul D. Clement*, and *Jeffrey M. Harris*.*

---

*Briefs of *amici curiae* urging reversal were filed for Bankruptcy Law Scholars by *Susan M. Freeman*; for the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York et al. by *Christopher Landau* and *James H. M. Sprayregen*; for Former Bankruptcy Judge Leif M. Clark et al. by *James P. Sullivan* and *Ashley C. Parrish*; for the National Association of Bankruptcy Trustees by *Catherine Steege*, *Barry Levenstam*, and *Melissa M. Hinds*; for the National Association of Chapter Thirteen Trustees by *Henry E. Hildebrand III*; for the National Association of Consumer Bankruptcy Attorneys by *Jeffrey T. Green*, *David R. Kuney*, *Tara Twomey*, and *Sarah O'Rourke Schrup*; for Neutral Fee Examiners by *Brady C. Williamson* and *Patricia L. Wheeler*; and for the State Bar of Texas Bankruptcy Law Section by *John P. Elwood*, *William L. Wallander*, and *Katherine Drell Grissel*.

Richard Lieb filed a brief for Richard Aaron et al. as *amici curiae* urging affirmance.

JUSTICE THOMAS delivered the opinion of the Court.

Section 327(a) of the Bankruptcy Code allows bankruptcy trustees to hire attorneys, accountants, and other professionals to assist them in carrying out their statutory duties. 11 U. S. C. § 327(a). Another provision, § 330(a)(1), states that a bankruptcy court "may award . . . reasonable compensation for actual, necessary services rendered by" those professionals. The question before us is whether § 330(a)(1) permits a bankruptcy court to award attorney's fees for work performed in defending a fee application in court. We hold that it does not and therefore affirm the judgment of the Court of Appeals.

I

In 2005, respondent ASARCO LLC, a copper mining, smelting, and refining company, found itself in financial trouble. Faced with falling copper prices, debt, cashflow deficiencies, environmental liabilities, and a striking work force, ASARCO filed for Chapter 11 bankruptcy. As in many Chapter 11 bankruptcies, no trustee was appointed and ASARCO—the "'debtor in possession'"—administered the bankruptcy estate as a fiduciary for the estate's creditors. §§ 1101(1), 1107(a).

Relying on § 327(a) of the Bankruptcy Code, which permits trustees to employ attorneys and other professionals to assist them in their duties, ASARCO obtained the Bankruptcy Court's permission to hire two law firms, petitioners Baker Botts L. L. P. and Jordan, Hyden, Womble, Culbreth & Holzer, P. C., to provide legal representation during the bankruptcy.[1] Among other services, the firms prosecuted fraudulent-transfer claims against ASARCO's parent company and ultimately obtained a judgment against it worth between $7 and $10 billion. This judgment contributed to a

[1] Although § 327(a) directly applies only to trustees, § 1107(a) gives Chapter 11 debtors in possession the same authority as trustees to retain § 327(a) professionals. For the sake of simplicity, we refer to § 327(a) alone throughout this opinion.

successful reorganization in which all of ASARCO's creditors were paid in full. After over four years in bankruptcy, ASARCO emerged in 2009 with $1.4 billion in cash, little debt, and resolution of its environmental liabilities.

The law firms sought compensation under § 330(a)(1), which provides that a bankruptcy court "may award . . . reasonable compensation for actual, necessary services rendered by" professionals hired under § 327(a). As required by the bankruptcy rules, the two firms filed fee applications. Fed. Rule Bkrtcy. Proc. 2016(a). ASARCO, controlled once again by its parent company, challenged the compensation requested in the applications. After extensive discovery and a 6-day trial on fees, the Bankruptcy Court rejected ASARCO's objections and awarded the firms approximately $120 million for their work in the bankruptcy proceeding plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications.

ASARCO appealed various aspects of the award to the District Court. As relevant here, the court held that the firms could recover fees for defending their fee application.

The Court of Appeals for the Fifth Circuit reversed. It reasoned that the American Rule—the rule that each side must pay its own attorney's fees—"applies absent explicit statutory . . . authority" to the contrary and that "the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application." *In re ASARCO, L. L. C.*, 751 F. 3d 291, 301 (2014) (internal quotation marks omitted). It observed that § 330(a)(1) provides "that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration." *Id.*, at 299. Because "[t]he primary beneficiary of a professional fee application, of course, is the professional," compensation for litigation defending that application does not fall within § 330(a)(1). *Ibid.*

We granted certiorari, 573 U. S. 991 (2014), and now affirm.

II

A

"Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 252–253 (2010) (internal quotation marks omitted). The American Rule has roots in our common law reaching back to at least the 18th century, see *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796), and "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar [legal] principles," *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 534 (1994) (internal quotation marks and ellipsis omitted). We consequently will not deviate from the American Rule "'absent explicit statutory authority.'" *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 602 (2001) (quoting *Key Tronic Corp.* v. *United States*, 511 U. S. 809, 814 (1994)).

We have recognized departures from the American Rule only in "specific and explicit provisions for the allowance of attorneys' fees under selected statutes." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260 (1975). Although these "[s]tatutory changes to [the American Rule] take various forms," *Hardt*, *supra*, at 253, they tend to authorize the award of "a reasonable attorney's fee," "fees," or "litigation costs," and usually refer to a "prevailing party" in the context of an adversarial "action," see, *e. g.*, 28 U. S. C. § 2412(d)(1)(A); 42 U. S. C. §§ 1988(b), 2000e–5(k); see generally *Hardt*, *supra*, at 253, and nn. 3–7 (collecting examples).

The attorney's fees provision of the Equal Access to Justice Act offers a good example of the clarity we have required to deviate from the American Rule. See 28 U. S. C. § 2412(d)(1)(A). That section provides that "a court shall

award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States" under certain conditions. *Ibid.* As our decision in *Commissioner* v. *Jean*, 496 U. S. 154 (1990), reveals, there could be little dispute that this provision—which mentions "fees," a "prevailing party," and a "civil action"—is a "fee-shifting statut[e]" that trumps the American Rule, *id.*, at 161.

B

Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings. Section 327(a) authorizes the employment of such professionals, providing that a "trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist [him] in carrying out [his] duties." In other words, § 327(a) professionals are hired to serve the administrator of the estate for the benefit of the estate.

Section 330(a)(1) in turn authorizes compensation for these professionals as follows:

> "After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
>
> "(A) *reasonable compensation for actual, necessary services rendered by* the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

> "(B) reimbursement for actual, necessary expenses." (Emphasis added.)

This text cannot displace the American Rule with respect to fee-defense litigation. To be sure, the phrase "reasonable compensation for actual, necessary services rendered" permits courts to award fees to attorneys for work done to assist the administrator of the estate, as the Bankruptcy Court did here when it ordered ASARCO to pay roughly $120 million for the firms' work in the bankruptcy proceeding. No one disputes that § 330(a)(1) authorizes an award of attorney's fees for that kind of work. See *Alyeska Pipeline*, *supra*, at 260, and n. 33 (listing § 330(a)(1)'s predecessor as an example of a provision authorizing attorney's fees). But the phrase "reasonable compensation for actual, necessary services rendered" neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do.

Instead, § 330(a)(1) provides compensation for all § 327(a) professionals—whether accountant, attorney, or auctioneer—for all manner of work done *in service of* the estate administrator. More specifically, § 330(a)(1) allows "reasonable compensation" only for "*actual, necessary services rendered*." (Emphasis added.) That qualification is significant. The word "services" ordinarily refers to "labor performed for another." Webster's New International Dictionary 2288 (def. 4) (2d ed. 1934); see also Black's Law Dictionary 1607 (3d ed. 1933) ("duty or labor to be rendered by one person to another"); Oxford English Dictionary 517 (def. 19) (1933) ("action of serving, helping or benefiting; conduct tending to the welfare or advantage of another").[2] Thus, in

[2] Congress added the phrase "reasonable compensation for the services rendered" to federal bankruptcy law in 1934. Act of June 7, 1934, § 77B(c)(9), 48 Stat. 917. We look to the ordinary meaning of those words at that time.

a case addressing § 330(a)'s predecessor, this Court concluded that the phrase " 'reasonable compensation for services rendered' necessarily implies loyal and disinterested service in the interest of" a client. *Woods* v. *City Nat. Bank & Trust Co. of Chicago*, 312 U. S. 262, 268 (1941); accord, *American United Mut. Life Ins. Co.* v. *Avon Park*, 311 U. S. 138, 147 (1940). Time spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as "labor performed for"—let alone "disinterested service to"—that administrator.

This legislative decision to limit "compensation" to "services rendered" is particularly telling given that other provisions of the Bankruptcy Code expressly transfer the costs of litigation from one adversarial party to the other. Section 110(i), for instance, provides that "[i]f a bankruptcy petition preparer . . . commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any)," the bankruptcy court must "order the bankruptcy petition preparer to pay the debtor . . . reasonable attorneys' fees and costs in moving for damages under this subsection." § 110(i)(1)(C). Had Congress wished to shift the burdens of fee-defense litigation under § 330(a)(1) in a similar manner, it easily could have done so. We accordingly refuse "to invade the legislature's province by redistributing litigation costs" here. *Alyeska Pipeline*, 421 U. S., at 271.

III

The law firms, the United States as *amicus curiae*, and the dissent resist this straightforward interpretation of the statute. The law firms and the Government each offer a theory for why § 330(a)(1) expressly overrides the American Rule in the context of litigation in defense of a fee application, and the dissent embraces the latter. Neither theory is persuasive.

A

We begin with the law firms' approach. According to the firms, fee-defense litigation is part of the "services rendered" to the estate administrator under § 330(a)(1). See Brief for Petitioners 23–30. As explained above, that reading is untenable. The term "services" in this provision cannot be read to encompass adversarial fee-defense litigation. See Part II–B, *supra*. Even the dissent agrees on this point. See *post*, at 136 (opinion of BREYER, J.).

Indeed, reading "services" in this manner could end up compensating attorneys for the *unsuccessful* defense of a fee application. The firms insist that "estates *do* benefit from fee defenses"—and thus receive a "service" under § 330(a)(1)—because "the estate has an interest in obtaining a just determination of the amount it should pay its professionals." Brief for Petitioners 25–26 (internal quotation marks omitted). But that alleged interest—and hence the supposed provision of a "service"—exists whether or not a § 327(a) professional prevails in his fee dispute. We decline to adopt a reading of § 330(a)(1) that would allow courts to pay professionals for arguing for fees they were found never to have been entitled to in the first place. Such a result would not only require an unnatural interpretation of the term "services rendered," but a particularly unusual deviation from the American Rule as well, as "[m]ost fee-shifting provisions permit a court to award attorney's fees only to a 'prevailing party,'" a "'substantially prevailing' party," or "a 'successful' litigant," *Hardt*, 560 U. S., at 253 (footnote omitted). There is no indication that Congress departed from the American Rule in § 330(a)(1) with respect to fee-defense litigation, let alone that it did so in such an unusual manner.

B

The Government's theory, embraced by the dissent, fares no better. Although the United States agrees that "the defense of a fee application does not *itself* qualify as an inde-

pendently compensable service," it nonetheless contends that "compensation for such work is properly viewed as part of the compensation *for the underlying services* in the bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. According to the Government, if an attorney is not repaid for his time spent successfully litigating fees, his compensation for his actual "services rendered" to the estate administrator in the underlying proceeding will be diluted. *Id.*, at 18. The United States thus urges us to treat fees for fee-defense work "as a component of 'reasonable compensation.'" *Id.*, at 33; accord, *post*, at 136 (BREYER, J., dissenting). We refuse to do so for several reasons.

1

First and foremost, the Government's theory cannot be reconciled with the relevant text. Section 330(a)(1) does not authorize courts to award "reasonable compensation" *simpliciter*, but "reasonable compensation *for actual, necessary services rendered by*" the § 327(a) professional. § 330(a)(1)(A) (emphasis added). Here, the contested award was tied to the firms' work on the fee-defense litigation and is correctly understood only as compensation for that work. The Government and the dissent properly concede that litigation in defense of a fee application is not a "service" within the meaning of § 330(a)(1); it follows that the contested award was not "compensation" for a "service." Thus, the only way to reach their reading of the statute would be to excise the phrase "for actual, necessary services rendered" from the statute.[3]

Contrary to the Government's assertion, § 330(a)(6) does not presuppose that courts are free to award compensation based on work that does not qualify as a service to the estate

[3] The dissent's focus on reasonable compensation is therefore a red herring. See *post*, at 140. The question is not whether an award for fee-defense work would be "reasonable," but whether such work is compensable in the first place.

administrator. That provision specifies that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." The Government argues that because time spent *preparing* a fee application is compensable, time spent *defending* it must be too. But the provision cuts the other way. A § 327(a) professional's preparation of a fee application is best understood as a "servic[e] rendered" to the estate administrator under § 330(a)(1), whereas a professional's defense of that application is not. By way of analogy, it would be natural to describe a car mechanic's preparation of an itemized bill as part of his "services" to the customer because it allows a customer to understand—and, if necessary, dispute—his expenses. But it would be less natural to describe a subsequent court battle over the bill as part of the "services rendered" to the customer.

The Government used to understand that time spent preparing a fee application was different from time spent defending one for the purposes of § 330(a)(1). Just a few years ago, the U. S. Trustee explained that "[r]easonable charges for preparing . . . fee applications . . . are compensable . . . because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." 78 Fed. Reg. 36250 (2013) (emphasis deleted). By contrast, "time spent . . . defending . . . fee applications" is ordinarily "not compensable," the Trustee observed, as such time can be "properly characterized as work that is for the benefit of the professional and not the estate." *Ibid.*

To support its broader interpretation of § 330(a)(6), the Government, echoed by the dissent, relies on our remark in *Jean* that "[w]e find no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application." 496 U. S., at 162; see *post*, at 142. But that use of *Jean* begs the question. *Jean* addressed a statutory provision that

everyone agreed authorized court-awarded fees for fee-defense litigation. 496 U. S., at 162. The "only dispute" in that context was over what "finding [was] necessary to support such an award." *Ibid.* In resolving that issue, the Court declined to treat fee-application and fee-litigation work differently given that the relevant statutory text—"a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action"—could not support such a distinction. *Id.*, at 158. Here, by contrast, the operative language—"reasonable compensation for actual, necessary services rendered"—reaches only the fee-application work. The fact that the provision at issue in *Jean* "did not mention fee-defense work," *post*, at 140, is thus irrelevant.

In any event, the Government's textual foothold for its argument is too insubstantial to support a deviation from the American Rule. The open-ended phrase "reasonable compensation," standing alone, is not the sort of "specific and explicit provisio[n]" that Congress must provide in order to alter this default rule. *Alyeska Pipeline*, 421 U. S., at 260.

2

Ultimately, the Government's theory rests on a flawed and irrelevant policy argument. The United States contends that awarding fees for fee-defense litigation is a "judicial exception" necessary to the proper functioning of the Bankruptcy Code. Brief for United States as *Amicus Curiae* 15, n. 7 (internal quotation marks omitted). Absent this exception, it warns, fee-defense litigation will dilute attorney's fees and result in bankruptcy lawyers receiving less compensation than nonbankruptcy lawyers, thereby undermining the congressional aim of ensuring that talented attorneys will take on bankruptcy work. Accord, *post*, at 137–138.

As an initial matter, we find this policy argument unconvincing. In our legal system, *no* attorneys, regardless of whether they practice in bankruptcy, are entitled to receive

fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers.[4]

The United States nonetheless contends that uncompensated fee litigation in bankruptcy will be particularly costly because multiple parties in interest may object to fee applications, whereas nonbankruptcy fee litigation typically involves just a lawyer and his client. But this argument rests on unsupported predictions of how the statutory scheme will operate in practice, and the Government's conduct in this case reveals the perils associated with relying on such prognostications to interpret statutes: The United States took the opposite view below, asserting that "requiring a professional to bear the normal litigation costs of litigating a contested request for payment . . . dilutes a bankruptcy fee award no more than any litigation over professional fees." Reply Brief for Appellant United States Trustee in No. 11–290 (SD Tex.), p. 15. The speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text.

More importantly, we would lack the authority to rewrite the statute even if we believed that uncompensated fee litigation would fall particularly hard on the bankruptcy bar. "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding," and that is no less true in bankruptcy than it is elsewhere. *Lamie* v. *United States Trustee*, 540 U. S. 526, 538 (2004). Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us

---

[4] To the extent the United States harbors any concern about the possibility of frivolous objections to fee applications, we note that "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct, which may include 'an order directing payment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.'" *Law* v. *Siegel*, 571 U. S. 415, 427 (2014).

"roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted." *Alyeska Pipeline*, *supra*, at 260. Our job is to follow the text even if doing so will supposedly "undercut a basic objective of the statute," *post*, at 137. Section 330(a)(1) itself does not authorize the award of fees for defending a fee application, and that is the end of the matter.

* * *

As we long ago observed, "The general practice of the United States is in opposition" to forcing one side to pay the other's attorney's fees, and "even if that practice [is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel*, 3 Dall., at 306 (emphasis deleted). We follow that approach today. Because § 330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

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

As the Court's opinion explains, there is no textual, contextual, or other support for reading 11 U. S. C. § 330(a)(1) in the way advocated by petitioners and the United States. Given the clarity of the statutory language, it would be improper to allow policy considerations to undermine the American Rule in this case. On that understanding, I join all but Part III–B–2 of the Court's opinion.

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

The Bankruptcy Code authorizes a court to award "*reasonable compensation* for actual, necessary services rendered by" various "professional person[s]," including "attorneys," whom a bankruptcy "trustee [has] employ[ed] . . . to

represent or assist the trustee in carrying out the trustee's duties." 11 U. S. C. §§ 327(a), 330(a) (emphasis added). I agree with the Court that a professional's defense of a fee application is not a "service" within the meaning of the Code. See *ante*, at 129. But I agree with the Government that compensation for fee-defense work "is properly viewed as part of the compensation *for the underlying services* in [a] bankruptcy proceeding." Brief for United States as *Amicus Curiae* 25. In my view, when a bankruptcy court determines "reasonable compensation," it may take into account the expenses that a professional has incurred in defending his or her application for fees.

I

The Bankruptcy Code affords courts broad discretion to decide what constitutes "reasonable compensation." The Code provides that a "court shall consider the nature, the extent, and the value of . . . services [rendered], taking into account *all relevant factors*." § 330(a)(3) (emphasis added). Cf. *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983) ("reemphasiz[ing a trial court's] discretion in determining the amount of a fee award," which "is appropriate in view of the [trial] court's superior understanding of the litigation"). I would hold that it is within a bankruptcy court's discretion to consider as "relevant factors" the cost and effort that a professional has reasonably expended in order to recover his or her fees.

Where a statute provides for reasonable fees, a court may take into account factors other than hours and hourly rates. *Perdue* v. *Kenny A.*, 559 U. S. 542, 551–557 (2010). For instance, "an enhancement" to attorney's fees "may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.*, at 555. And "there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees" that justify addi-

tional compensation. *Id.*, at 556. These examples demonstrate that increased compensation is sometimes warranted to reflect exceptional effort or resources expended in order to attain one's fees.

In that vein, work performed in defending a fee application may, in some cases, be a relevant factor in calculating "reasonable compensation." Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court's discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not "reasonable."

Indeed, this Court has previously acknowledged that work performed in defending a fee application is relevant to a determination of attorney's fees. In *Commissioner* v. *Jean*, 496 U. S. 154, 160–166 (1990), the Court held that fee-defense work is compensable under the Equal Access to Justice Act, 28 U. S. C. § 2412(d)(1)(A). The Court quoted with approval the Second Circuit's statement that "[d]enying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." 496 U. S., at 162 (quoting *Gagne* v. *Maher*, 594 F. 2d 336, 344 (1979); internal quotation marks omitted).

A contrary interpretation of "reasonable compensation" would undercut a basic objective of the statute. Congress intended to ensure that high-quality attorneys and other professionals would be available to assist trustees in representing and administering bankruptcy estates. To that end, Congress directed bankruptcy courts to consider "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under" the Bankruptcy Code.

§ 330(a)(3)(F). Congress recognized that comparable compensation was necessary to ensure that professionals would "remain in the bankruptcy field." H. R. Rep. No. 95–595, p. 330 (1977). Cf. *Perdue*, *supra*, at 552 ("[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case").

In some cases, the extensive process through which a bankruptcy professional defends his or her fees may be so burdensome that additional fees are necessary in order to maintain comparability of compensation. In order to be paid, a professional assisting a trustee must file with the court a detailed application seeking compensation. Fed. Rule Bkrtcy. Proc. 2016(a). The application will not be granted until after the court has conducted a hearing on the matter. § 330(a)(1). And "[t]he court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested." § 330(a)(2).

By contrast, an attorney representing a private party, or a professional working outside of the bankruptcy context, generally faces fee objections made only by his or her client—and those objections typically are made outside of court, at least initially. This process is comparatively simple, involves fewer parties in interest, and does not necessarily impose litigation costs. Consequently, in order to maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid "reasonable compensation."

II

The majority rests its conclusion upon an interpretation of the statutory language that I find neither legally necessary nor convincing. The majority says that Congress, in writing

the reasonable-compensation statute, did not "displace the American Rule with respect to fee-defense litigation." *Ante*, at 128. The American Rule normally requires "[e]ach litigant" to "pa[y] his own attorney's fees, win or lose." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U. S. 242, 253 (2010).

But the American Rule is a default rule that applies only where "a statute or contract" does not "provid[e] otherwise." *Ibid.* And here, the statute "provides otherwise." *Ibid.* Section 330(a)(1)(A) permits a "court [to] award . . . reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person." This Court has recognized that through § 330(a), Congress "ma[d]e specific and explicit [its] provisio[n] for the allowance of attorneys' fees," and thus displaced the American Rule. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 260, and n. 33 (1975) (listing § 330(a)'s predecessor among examples of provisions authorizing attorney's fees).

The majority suggests that the American Rule is not displaced with respect to fee-defense work in bankruptcy because § 330(a) does not specifically authorize fees for that particular type of work. See *ante*, at 127 ("Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings"). To the extent that the majority intends to impose a requirement that a statute must explicitly mention fee defense in order to provide compensation for that work, this requirement is difficult to reconcile with the Court's decision in *Jean*. There, the Court held that the Equal Access to Justice Act authorizes compensation for fee-defense work. See 496 U. S., at 160–166. The fee provision of the Equal Access to Justice Act, as enacted at the time, permitted an "award to a prevailing party . . . [of] fees and other expenses . . . incurred by that

party in any civil action . . . brought by or against the United States." *Id.*, at 158 (quoting 28 U. S. C. § 2412(d)(1)(A) (1988 ed.)). The provision did not mention fee-defense work—but the Court nonetheless held that such work was compensable. See *Jean*, *supra*, at 160–166. I would do the same here.

The majority focuses on particular words that appear in the Equal Access to Justice Act: "fees," "prevailing party," and "civil action." See *ante*, at 127. But neither the term "fees" nor the phrase "prevailing party" relates specifically to fee-defense work. And even assuming that the phrase "civil action" is more easily read to cover fee litigation than the phrase "actual, necessary services," that difference here is beside the point. I find the necessary authority in the words "reasonable compensation," not the words "actual, necessary services." In order to ensure that each professional is paid *reasonably* for compensable services, a court must have the discretion to authorize pay reflecting fee-defense work.

The majority asserts that by interpreting the phrase "reasonable compensation," I have effectively "excise[d] the phrase 'for actual, necessary services rendered' from the statute." *Ante*, at 131. But the majority misunderstands my views. The statute permits compensation for fee-defense work as a part of compensation *for the underlying services*. Thus, where fee-defense work is not necessary to ensure reasonable compensation for some underlying service, then under my reading of the statute, a court should not consider that work when calculating compensation.

Indeed, to the extent that the majority bases its decision on the specific words of § 330(a), its argument seems weak. The majority disregards direct statutory evidence that Congress intended to give courts the authority to account for reasonable fee-litigation costs. Section 330(a)(6) states that "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This provision does not

authorize compensation, but rather *assumes* (through the words "[a]ny compensation awarded") pre-existing authorization under § 330(a). And the majority cannot convincingly explain why, under its reading of the statute, fee application is a compensable "actual, necessary servic[e] rendered" to the estate.

The majority asserts that a fee application, unlike fee defense, can be construed as a "service" to the bankruptcy estate. See *ante*, at 131–132. The majority draws an analogy between a fee application and an itemized bill prepared by a car mechanic. See *ante*, at 132. It argues that, like an itemized bill, a fee application is a "service" to the customer. But customers do not generally pay their mechanics for time spent preparing the bill. A mechanic's bill is not a separate "service," but rather is a medium through which the mechanic conveys what he or she wants to be paid. Similarly, a legal bill is not a "service" rendered to a client. In fact, ASARCO concedes that attorneys do not charge their clients for time spent preparing legal bills. See Tr. of Oral Arg. 33. A bill prepared by an attorney, or another bankruptcy professional, is not a "service" to the bankruptcy estate.

The majority suggests that a fee application *must* be a service " 'because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid.' " *Ante*, at 132 (quoting 78 Fed. Reg. 36250 (2013)). But if the existence of a legal requirement specific to bankruptcy were sufficient to make an activity a compensable service, then the time that a professional spends at a hearing defending his or her fees would also be compensable. After all, the statute permits a court to award compensation only after "a hearing" with respect to the issue. § 330(a)(1). And there is no such requirement for most attorneys, who simply bill their clients and are paid their fees. But the majority does not believe that preparing for or appearing at such a hearing—an integral part of fee-defense work—is compensable. The majority simply cannot

reconcile its narrow interpretation of "reasonable compensation" with § 330(a)(6)'s provision for fee-application preparation fees.

In my view, the majority is wrong to distinguish between the costs of fee preparation and the costs of fee litigation. Cf. *Jean*, 496 U. S., at 162 ("We find no textual or logical argument for treating . . . differently a party's preparation of a fee application and its ensuing efforts to support that same application"). And the majority should not distinguish between the compensability of fee litigation under the Equal Access to Justice Act and fee litigation under the Bankruptcy Code. Its decision to do so creates anomalies and undermines the basic purpose of the Bankruptcy Code's fee award provision.

For these reasons, I respectfully dissent.

REYES MATA *v.* LYNCH, ATTORNEY GENERAL

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

No. 14–185. Argued April 29, 2015—Decided June 15, 2015

After petitioner Noel Reyes Mata, an unlawful resident alien, was convicted of assault in a Texas court, an Immigration Judge ordered him removed to Mexico. Mata's attorney filed a notice of appeal with the Board of Immigration Appeals (BIA or Board), but never filed a brief, and the appeal was dismissed. Acting through different counsel, Mata filed a motion to reopen his removal proceedings, as authorized by statute. See 8 U. S. C. § 1229a(c)(7)(A). Acknowledging that he had missed the 90-day deadline for such motions, see § 1229a(c)(7)(C)(i), Mata argued that his previous counsel's ineffective assistance was an exceptional circumstance entitling him to equitable tolling of the time limit. But the BIA disagreed and dismissed the motion as untimely. The BIA also declined to reopen Mata's removal proceedings *sua sponte* based on its separate regulatory authority. See 8 CFR § 1003.2(a). On appeal, the Fifth Circuit construed Mata's equitable tolling claim as an invitation for the Board to exercise its regulatory authority to reopen the proceedings *sua sponte*, and—because circuit precedent forbids the court to review BIA decisions not to exercise that authority—dismissed Mata's appeal for lack of jurisdiction.

Held: The Fifth Circuit erred in declining to take jurisdiction over Mata's appeal. A court of appeals has jurisdiction to review the BIA's rejection of an alien's motion to reopen. *Kucana* v. *Holder*, 558 U. S. 233, 253. Nothing about that jurisdiction changes where the Board rejects a motion as untimely, or when it rejects a motion requesting equitable tolling of the time limit. That jurisdiction likewise remains unchanged if the BIA's denial also contains a separate decision not to exercise its *sua sponte* authority. So even assuming the Fifth Circuit is correct that courts of appeals lack jurisdiction to review BIA decisions not to reopen cases *sua sponte*, that lack of jurisdiction does not affect jurisdiction over the decision on the alien's motion to reopen. It thus follows that the Fifth Circuit had jurisdiction over this case.

The Fifth Circuit's contrary decision rested on its construing Mata's motion as an invitation for the Board to exercise its *sua sponte* discretion. Court-appointed *amicus* asserts that the Fifth Circuit's recharacterization was based on the premise that equitable tolling in Mata's situation is categorically forbidden. In *amicus*'s view, the court's construal was therefore an example of the ordinary practice of recharacterizing a

doomed request as one for relief that may be available. But even if equitable tolling is prohibited, the Fifth Circuit's action was not justified. If Mata is not entitled to relief on the merits, then the correct disposition is to take jurisdiction and affirm the BIA's denial of his motion. For a court retains jurisdiction even if a litigant's request for relief lacks merit, see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89, and a federal court has a "virtually unflagging obligation," *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817, to assert jurisdiction where it has that authority. Nor can the established practice of recharacterizing pleadings so as to offer the possibility of relief justify an approach that, as here, renders relief impossible and sidesteps the judicial obligation to assert jurisdiction. Pp. 147–151.

558 Fed. Appx. 366, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 151.

Mark C. Fleming argued the cause for petitioner. With him on the briefs were *Raed Gonzalez*, *Naimeh Salem*, *Bruce Godzina*, *Sydenham B. Alexander III*, *Jason D. Hirsch*, *Brian K. Bates*, and *Alexander I. Afanassiev.*

Anthony A. Yang argued the cause for respondent. With him on the briefs were *Solicitor General Verrilli*, *Acting Assistant Attorney General Branda*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, and *Patrick J. Glen*.

William R. Peterson, by invitation of the Court, 574 U. S. 1118, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Charles R. Flores*.*

JUSTICE KAGAN delivered the opinion of the Court.

An alien ordered to leave the country has a statutory right to file a motion to reopen his removal proceedings. See 8 U. S. C. § 1229a(c)(7)(A). If immigration officials deny that

---

**Ira J. Kurzban*, *Beth Werlin*, and *Trina Realmuto* filed a brief for the American Immigration Council et al. as *amici curiae* urging reversal.

Chris Roth filed a brief for the National Immigrant Justice Center as *amicus curiae.*

motion, a federal court of appeals has jurisdiction to consider a petition to review their decision. See *Kucana* v. *Holder*, 558 U. S. 233, 242, 253 (2010). Notwithstanding that rule, the court below declined to take jurisdiction over such an appeal because the motion to reopen had been denied as untimely. We hold that was error.

I

The Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.*, and its implementing regulations set out the process for removing aliens from the country. An immigration judge (IJ) conducts the initial proceedings; if he orders removal, the alien has the opportunity to appeal that decision to the Board of Immigration Appeals (BIA or Board). §§ 1229a(a)(1), (c)(5). "[E]very alien ordered removed" also "has a right to file one motion" with the IJ or Board to "reopen his or her removal proceedings." *Dada* v. *Mukasey*, 554 U. S. 1, 4–5 (2008); see § 1229a(c)(7)(A). Subject to exceptions not relevant here, that motion to reopen "shall be filed within 90 days" of the final removal order. § 1229a(c)(7)(C)(i). Finally, the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings "on its own motion"—or, in Latin, *sua sponte*—at any time. 8 CFR § 1003.2(a) (2015).

Petitioner Noel Reyes Mata is a Mexican citizen who entered the United States unlawfully almost 15 years ago. In 2010, he was convicted of assault under the Texas Penal Code. The federal Department of Homeland Security (DHS) immediately initiated removal proceedings against him, and in August 2011 an IJ ordered him removed. See App. 6–13. Mata's lawyer then filed a notice of appeal with the BIA, indicating that he would soon submit a written brief stating grounds for reversing the IJ's decision. But the attorney never filed the brief, and the BIA dismissed the appeal in September 2012. See *id.*, at 4–5.

More than a hundred days later, Mata (by then represented by new counsel) filed a motion with the Board to reopen his case. DHS opposed the motion, arguing in part that Mata had failed to file it, as the INA requires, within 90 days of the Board's decision. Mata responded that the motion was "not time barred" because his first lawyer's "ineffective assistance" counted as an "exceptional circumstance[ ]" excusing his lateness. Certified Administrative Record in No. 13–60253 (CA5, Aug. 2, 2013), p. 69. In addressing those arguments, the Board reaffirmed prior decisions holding that it had authority to equitably toll the 90-day period in certain cases involving ineffective representation. See App. to Pet. for Cert. 7; see also, *e. g.*, *In re Santa Celenia Diaz*, 2009 WL 2981747 (BIA, Aug. 21, 2009). But the Board went on to determine that Mata was not entitled to equitable tolling because he could not show prejudice from his attorney's deficient performance; accordingly, the Board found Mata's motion untimely. See App. to Pet. for Cert. 7–8. And in closing, the Board decided as well that Mata's case was not one "that would warrant reopening as an exercise of" its *sua sponte* authority. *Id.*, at 9 (stating that "the power to reopen on our own motion is not meant to be used as a general cure for filing defects" (internal quotation marks omitted)).

Mata petitioned the Court of Appeals for the Fifth Circuit to review the BIA's denial of his motion to reopen, arguing that he was entitled to equitable tolling. The Fifth Circuit, however, declined to "address the merits of Mata's equitable-tolling . . . claim[ ]." *Reyes Mata* v. *Holder*, 558 Fed. Appx. 366, 367 (2014) (*per curiam*). It stated instead that "[i]n this circuit, an alien's request [to the BIA] for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*." *Ibid.* And circuit precedent held that courts have no jurisdiction to review the BIA's refusal to exercise its *sua sponte* power to

reopen cases. See *ibid.* The Court of Appeals thus dismissed Mata's appeal for lack of jurisdiction.

Every other Circuit that reviews removal orders has affirmed its jurisdiction to decide an appeal, like Mata's, that seeks equitable tolling of the statutory time limit to file a motion to reopen a removal proceeding.[1] We granted certiorari to resolve this conflict. 574 U. S. 1118 (2015). And because the Federal Government agrees with Mata that the Fifth Circuit had jurisdiction over his appeal, we appointed an *amicus curiae* to defend the judgment below.[2] We now reverse.

II

As we held in *Kucana* v. *Holder*, circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding. See 558 U. S., at 242, 253. The INA, in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review "final order[s] of removal." 8 U. S. C. § 1252(a)(1); 28 U. S. C. § 2342. That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen or reconsider such orders. See 8 U. S. C. § 1252(b)(6) ("[A]ny review sought of a motion to reopen or reconsider [a

---

[1] See, *e. g.*, *Da Silva Neves* v. *Holder*, 613 F. 3d 30, 33 (CA1 2010) (*per curiam*) (exercising jurisdiction over such a petition); *Iavorski* v. *INS*, 232 F. 3d 124, 129–134 (CA2 2000) (same); *Borges* v. *Gonzales*, 402 F. 3d 398, 406 (CA3 2005) (same); *Kuusk* v. *Holder*, 732 F. 3d 302, 305–306 (CA4 2013) (same); *Barry* v. *Mukasey*, 524 F. 3d 721, 724–725 (CA6 2008) (same); *Pervaiz* v. *Gonzales*, 405 F. 3d 488, 490 (CA7 2005) (same); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496, 499–500 (CA8 2005) (same); *Valeriano* v. *Gonzales*, 474 F. 3d 669, 673 (CA9 2007) (same); *Riley* v. *INS*, 310 F. 3d 1253, 1257–1258 (CA10 2002) (same); *Avila-Santoyo* v. *United States Atty. Gen.*, 713 F. 3d 1357, 1359, 1362–1364 (CA11 2013) (*per curiam*) (same). Except for *Da Silva Neves*, which did not resolve the issue, all those decisions also held, on the merits, that the INA allows equitable tolling in certain circumstances. See *infra*, at 151.

[2] We appointed William R. Peterson to brief and argue the case, 574 U. S. 1118 (2015), and he has ably discharged his responsibilities.

removal] order shall be consolidated with the review of the [underlying] order"). Indeed, as we explained in *Kucana*, courts have reviewed those decisions for nearly a hundred years; and even as Congress curtailed other aspects of courts' jurisdiction over BIA rulings, it left that authority in place. See 558 U. S., at 242–251.

Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision.

Similarly, that jurisdiction remains unchanged if the Board, in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case. See *supra*, at 145. In *Kucana*, we declined to decide whether courts have jurisdiction to review the BIA's use of that discretionary power. See 558 U. S., at 251, n. 18. Courts of Appeals, including the Fifth Circuit, have held that they generally lack such authority. See, *e. g.*, *Enriquez-Alvarado* v. *Ashcroft*, 371 F. 3d 246, 249–250 (CA5 2004); *Tamenut* v. *Mukasey*, 521 F. 3d 1000, 1003–1004 (CA8 2008) (en banc) (*per curiam*) (citing other decisions). Assuming *arguendo* that is right, it means only that judicial review ends after the court has evaluated the Board's ruling on the alien's motion. That courts lack jurisdiction over one matter (the *sua sponte* decision) does not affect their jurisdiction over another (the decision on the alien's request).

It follows, as the night the day, that the Court of Appeals had jurisdiction over this case. Recall: As authorized by the INA, Mata filed a motion with the Board to reopen his removal proceeding. The Board declined to grant Mata his proposed relief, thus conferring jurisdiction on an appellate

court under *Kucana*. The Board did so for timeliness reasons, holding that Mata had filed his motion after 90 days had elapsed and that he was not entitled to equitable tolling. But as just explained, the reason the Board gave makes no difference: Whenever the Board denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision. In addition, the Board determined not to exercise its *sua sponte* authority to reopen. But once again, that extra ruling does not matter. The Court of Appeals did not lose jurisdiction over the Board's denial of Mata's motion just because the Board also declined to reopen his case *sua sponte*.

Nonetheless, the Fifth Circuit dismissed Mata's appeal for lack of jurisdiction. That decision, as described earlier, hinged on "constru[ing]" Mata's motion as something it was not: "an invitation for the BIA to exercise" its *sua sponte* authority. 558 Fed. Appx., at 367; *supra*, at 146. *Amicus*'s defense of that approach centrally relies on a merits-based premise: that the INA forbids equitable tolling of the 90-day filing period in any case, no matter how exceptional the circumstances. See Brief for *Amicus Curiae* by Invitation of the Court 14–35. Given that is so, *amicus* continues, the court acted permissibly in "recharacteriz[ing]" Mata's pleadings. *Id.*, at 36. After all, courts often treat a request for "categorically unavailable" relief as instead "seeking relief [that] may be available." *Id.*, at 35, 38. And here (*amicus* concludes) that meant construing Mata's request for equitable tolling as a request for *sua sponte* reopening—even though that caused the Fifth Circuit to lose its jurisdiction.

But that conclusion is wrong even on the assumption—and it is only an assumption—that its core premise about equitable tolling is true.[3] If the INA precludes Mata from getting

[3] We express no opinion as to whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen. Moreover, we are not certain what the Fifth Circuit itself thinks about that question. Perhaps, as *amicus* asserts, the court believes the INA cate-

the relief he seeks, then the right course on appeal is to take jurisdiction over the case, explain why that is so, and affirm the BIA's decision not to reopen. The jurisdictional question (whether the court has power to decide if tolling is proper) is of course distinct from the merits question (whether tolling is proper). See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998) ("[T]he absence of a valid . . . cause of action does not implicate subject-matter jurisdiction"). The Fifth Circuit thus retains jurisdiction even if Mata's appeal lacks merit. And when a federal court has jurisdiction, it also has a "virtually unflagging obligation . . . to exercise" that authority. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976). Accordingly, the Court of Appeals should have asserted jurisdiction over Mata's appeal and addressed the equitable tolling question.

Contrary to *amicus*'s view, the practice of recharacterizing pleadings so as to offer the possibility of relief cannot justify the Court of Appeals' alternative approach. True enough (and a good thing too) that courts sometimes construe one kind of filing as another: If a litigant misbrands a motion, but could get relief under a different label, a court will often make the requisite change. See, *e. g.*, 12 J. Moore, Moore's Federal Practice § 59.11[4] (3d ed. 2015) (explaining how courts treat untimely Rule 59 motions as Rule 60 motions

---

gorically precludes equitable tolling: It is hard to come up with any other reason why the court construes every argument for tolling as one for *sua sponte* relief. See Brief for *Amicus Curiae* by Invitation of the Court 2, 10, 14, n. 2. But the Fifth Circuit has stated that position in only a single sentence in a single unpublished opinion, which (according to the Circuit) has no precedential force. See *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (2008) (*per curiam*); Rule 47.5.4 (2015). And another unpublished decision cuts in the opposite direction, "hold[ing] that the doctrine of equitable tolling applies" when exceptional circumstances excuse an alien's failure to meet the 90-day reopening deadline. *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (CA5 2006) (*per curiam*). So, in the end, it is hard to say.

because the latter have no time limit). But that established practice does not entail sidestepping the judicial obligation to exercise jurisdiction. And it results in identifying a route to relief, not in rendering relief impossible. That makes all the difference between a court's generously reading pleadings and a court's construing away adjudicative authority.

And if, as *amicus* argues, that construal rests on an underlying merits decision—that the INA precludes any equitable tolling—then the Court of Appeals has effectively insulated a circuit split from our review. Putting the Fifth Circuit to the side, all appellate courts to have addressed the matter have held that the Board may sometimes equitably toll the time limit for an alien's motion to reopen. See n. 1, *supra*. Assuming the Fifth Circuit thinks otherwise, that creates the kind of split of authority we typically think we need to resolve. See this Court's Rule 10(a). But the Fifth Circuit's practice of recharacterizing appeals like Mata's as challenges to the Board's *sua sponte* decisions and then declining to exercise jurisdiction over them prevents that split from coming to light. Of course, the Court of Appeals may reach whatever conclusion it thinks best as to the availability of equitable tolling; we express no opinion on that matter. See n. 3, *supra*. What the Fifth Circuit may not do is to wrap such a merits decision in jurisdictional garb so that we cannot address a possible division between that court and every other.

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Court's opinion in this case elides an important distinction between construing a court filing and recharacterizing it. See *Castro* v. *United States*, 540 U. S. 375, 386 (2003) (SCALIA, J., concurring in part and concurring in judgment)

(discussing this distinction). Courts routinely construe ambiguous filings to make sense out of them, as parties—both counseled and uncounseled—sometimes submit documents lacking even rudimentary clarity. See, *e. g.*, *Alabama Legislative Black Caucus* v. *Alabama*, 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) ("The filings and arguments made by the plaintiffs on these claims were mystifying at best"). Recharacterization is something very different: It occurs when a court treats an unambiguous filing as something it is not. That practice is an unusual one, and should be used, if at all, with caution. See *Castro*, 540 U. S., at 385–386 (opinion of SCALIA, J.). Courts should not approach recharacterization with a freewheeling attitude, but with "regard to the exceptional nature of recharacterization within an adversarial system." *Ibid.* Recharacterization has, for example, been used "deliberately to override the *pro se* litigant's choice of procedural vehicle." *Id.*, at 386 (disapproving of the practice). But it is not the role of courts to "create a 'better correspondence' between the substance of a claim and its underlying procedural basis." *Ibid.*

In my view, then, it makes all the difference whether the Court of Appeals here properly construed an ambiguous motion or recharacterized an unambiguous motion contrary to Mata's stated choice of procedural vehicle. Although the majority's opinion does not address this point, Mata's motion to reopen does not expressly state whether he was invoking statutory relief under 8 U. S. C. § 1229a(c)(7)(A) or instead requesting *sua sponte* reopening under the Board of Immigration Appeals' (BIA) asserted inherent authority. Had the Court of Appeals engaged in the discretionary action of construing that ambiguous filing, it might not have abused its discretion by concluding that Mata really meant to ask for *sua sponte* reopening rather than equitable tolling of the statutory time bar.

The Court of Appeals, however, did not purport to construe an ambiguous motion. Instead, it applied what ap-

pears to be a categorical rule that all motions to reopen that would be untimely under § 1229a(c)(7)(A) must be construed as motions for *sua sponte* reopening of the proceedings. See *Reyes Mata* v. *Holder*, 558 Fed. Appx. 366, 367 (CA5 2014) (*per curiam*) ("In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*"). That rule would appear to foreclose a litigant from ever filing an untimely statutory motion to reopen removal proceedings seeking equitable tolling, as well as to invite improper recharacterization in the event any such a motion is filed. The Court of Appeals should have assessed Mata's motion on its own terms. It erred in not doing so.

The reason it erred, though, has nothing to do with its fidelity to our precedents discussing "the judicial obligation to exercise jurisdiction," *ante*, at 151. That obligation does not allow evasion of constitutional and statutory jurisdictional prerequisites. It is true that "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation to . . . exercise' that authority." *Ante*, at 150 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976)). But that "unflagging obligation" arises only if a court actually has jurisdiction. Federal courts have no obligation to seek out jurisdiction, nor should they misconstrue filings to satisfy jurisdictional requirements. Rather, federal courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342, n. 3 (2006). And they should apply the ordinary rule that the party asserting federal jurisdiction bears the burden of proving that jurisdictional prerequisites are met. *Ibid.* The practice of construing filings does not alter the usual rules of establishing jurisdiction in federal court.

I would vacate and remand for the Court of Appeals to consider the BIA's judgment without the burden of what ap-

pears to be a categorical rule demanding that Mata's motion be construed (or recharacterized) as a request for *sua sponte* reopening. Because the majority does more than this by reversing the judgment below, I respectfully dissent.

REED ET AL. *v.* TOWN OF GILBERT, ARIZONA, ET AL.

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

No. 13–502. Argued January 12, 2015—Decided June 18, 2015

Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held: The Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny. Pp. 163–174.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E. g.*, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 395. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–565.

And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.*, at 564. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be " 'justified without reference to the content of the regulated speech,' " or were adopted by the government "because of disagreement with the message" conveyed. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791. Pp. 163–164.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. Pp. 164–165.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 429. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829, but "[t]he First Amendment's hostility to content-based regulation [also] extends . . . to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. This same analysis applies to event-based distinctions. Pp. 165–171.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 734. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network*, *supra*, at 425. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 171–172.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 817. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e. g.*, warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny. Pp. 172–173.

707 F. 3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined, *post*, p. 174. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 175. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 179.

David A. Cortman argued the cause for petitioners. With him on the briefs were *Rory T. Gray*, *Kevin H. Theriot*, and *Jeremy D. Tedesco*.

Eric Feigin 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*, *Deputy Solicitor General Gershengorn*, *Michael S. Raab*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, and *Christopher S. Perry*.

Philip W. Savrin argued the cause for respondents. With him on the brief were *Dana K. Maine* and *William H. Buechner, Jr.**

---

*Briefs of *amici curiae* urging reversal were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of West Virginia, *Elbert Lin*, Solicitor General, *Misha Tseytlin*, Deputy Attorney General, and *Julie Marie Blake* and *J. Zak Ritchie*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Samuel S. Olens* of Georgia, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Greg Abbott* of Texas, and *Sean D. Reyes* of Utah; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan A. Sekulow*, *Colby M. May*, *Walter M. Weber*, and *Geoffrey R. Surtees*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, and *Diana M. Verm*; for the Christian Legal Society et al. by *Kimberlee Wood Colby* and *Thomas C. Berg*; for the Christian Life Commission of the Missouri Baptist Convention by *Jonathan R. Whitehead* and *Michael K. Whitehead*; for the Family Research Council by *John P. Tuskey* and *Travis Weber*; for the General Conference of Seventh-day Adventists by *Gene C. Schaerr* and *Todd R. McFarland*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Liberty Counsel et al. by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; and for the Pacific Legal Foundation by *Deborah J. La Fetra*.

William D. Brinton, *Susan L. Trevarthen*, *Lisa Soronen*, and *Randal R. Morrison* filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

William H. Mellor, *Robert P. Frommer*, and *Erica J. Smith* filed a brief for Robert Wilson et al. as *amici curiae*.

JUSTICE THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005).[1] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. § 4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square

[1] The Town's Sign Code is available online at http://www.gilbertaz.gov/departments/development-services/planning-development/land-development-code (as visited June 16, 2015, and available in Clerk of Court's case file).

feet in area and to be placed in all "zoning districts" without time limits. § 4.402(J).

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." Glossary 23.[2] The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on non-residential property, undeveloped municipal property, and "rights-of-way." § 4.402(I).[3] These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" Glossary 25 (emphasis deleted). A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional signs even less favorably than political signs.[4] Temporary directional signs may be

---

[2] A "Temporary Sign" is a "sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." Glossary 25.

[3] The Code defines "Right-of-Way" as a "strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." *Id.*, at 18.

[4] The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Direction Signs." App. 75. The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. *Id.*, at 75–76. In 2008, the Town redefined the category as "Temporary Directional Signs Related to a Qualifying Event," and it expanded the time limit to 12 hours before and 1 hour after the "qualifying event." *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.*, at 89.

no larger than six square feet. § 4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Ibid.*

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F. 3d 966, 979 (2009). It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the "'kind of cursory examination'" that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." *Id.*, at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs . . . are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." 707 F. 3d 1057, 1069 (CA9 2013). Relying on this Court's decision in *Hill* v. *Colorado*, 530 U. S. 703 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F. 3d, at 1071–1072. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Ibid.* Accordingly, the court believed that the Code was

"content-neutral as that term [has been] defined by the Supreme Court." *Id.*, at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.*, at 1073–1076.

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

II

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U. S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 395 (1992); *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 115, 118 (1991).

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–565 (2011); *Carey* v. *Brown*, 447 U. S. 455, 462 (1980); *Mosley*, *supra*, at 95. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell*, *supra*, at 564. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinc-

tions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." Glossary 25. It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id.*, at 23. And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. *Ibid.* It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to con-

sider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F. 3d, at 1071–1072. In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the regulated speech.'" Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward*, *supra*, at 791; emphasis deleted).

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati* v. *Discovery Network*, *Inc.*, 507 U. S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster*, *supra*, at 117. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary."

Turner Broadcasting System, Inc. v. *FCC*, 512 U. S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, *e. g.*, *Sorrell*, *supra*, at 563–565 (statute was content based "on its face," and there was also evidence of an impermissible legislative motive); *United States* v. *Eichman*, 496 U. S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression" (internal quotation marks omitted)); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States* v. *O'Brien*, 391 U. S. 367, 375, 377 (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved

a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U. S., at 787, and n. 2. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" *Id.*, at 791. But *Ward*'s framework "applies only if a statute is content neutral." *Hill*, 530 U. S., at 766 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.*, at 765.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i. e.*, the "abridg[ment] of speech"—rather than merely the motives of those who enacted them. U. S. Const., Amdt. 1. "'The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Hill*, *supra*, at 743 (SCALIA, J., dissenting).

For instance, in *NAACP* v. *Button*, 371 U. S. 415 (1963), the Court encountered a State's attempt to use a statute prohibiting "'improper solicitation'" by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.*, at 438. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Id.*, at 438–439. Likewise, one could easily imagine a Sign Code compliance man-

ager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Discovery Network*, *supra*, at 429. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." 587 F. 3d, at 977. It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." 707 F. 3d, at 1069.

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." Brief for Respondents 22. In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" *id.*, at 27, and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories, *id.*, at 37.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*,

515 U. S. 819, 829 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network*, 507 U. S., at 428. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'" 707 F. 3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far

larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner*, 512 U. S., at 658. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United*, *supra*, at 340–341. Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). Glossary 23. That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i. e.*, an election) is involved.

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court

supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra*, at 163–164. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 60 (1994) (O'Connor, J., concurring).

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,'" *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 734 (2011) (quoting *Citizens United*, *supra*, at 340). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. See 558 U. S., at 340.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network*, 507 U. S., at 425, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a "'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,'" *Republican Party of Minn.* v. *White*, 536 U. S. 765, 780 (2002), the Sign Code fails strict scrutiny.

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "'absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," Brief for Respondents 34–35, but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark*, 468 U. S., at 295.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. See, *e. g.*, § 4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent*, 466 U. S., at 817 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, *e. g.*, *Solantic, LLC* v. *Neptune Beach*, 410 F. 3d 1250, 1264–1269 (CA11 2005) (sign categories similar to the town of Gilbert's were content based and subject to strict scrutiny); *Matthews* v. *Needham*, 764 F. 2d 58, 59–60 (CA1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue*, 512 U. S., at 48. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

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

It is so ordered.

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

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between freestanding signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.*

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–469 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.

JUSTICE BREYER, concurring in the judgment.

I join JUSTICE KAGAN's separate opinion. Like JUSTICE KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as

---

*Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 798 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

"content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828–829 (1995); see also *Boos* v. *Barry*, 485 U. S. 312, 318–319 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993). I also concede that, whenever government disfa-

vors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e. g.*, 15 U. S. C. § 78*l* (requirements for content that must be included in a registration statement); of energy conservation labeling practices, *e. g.*, 42 U. S. C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e. g.*, 21 U. S. C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e. g.*, 38 U. S. C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e. g.*, 26 U. S. C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e. g.*, 14 CFR § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos,

e. g., N. Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit "'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area'"); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened "strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 580 (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust* v. *Sullivan*, 500 U. S. 173, 193–194 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where

viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. See, *e. g.*, *United States* v. *Alvarez*, 567 U. S. 709, 730–732 (2012) (BREYER, J., concurring in judgment); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 400–403 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that JUSTICE KAGAN sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting

certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e. g.*, City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§ 11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. See, *e. g.*, Code of Athens-Clarke County, Ga., Pt. III, § 7–4–7(1) (1993). Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. See, *e. g.*, Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, § 4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee. See 23 U. S. C. §§ 131(b), (c)(1), (c)(5).

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. See *ante*, at 171 (acknowledging that "entirely reasonable" sign laws "will sometimes be struck down" under its approach (internal quotation marks omitted)). Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante*, at 169, 173. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, *ante*, at 173, the likelihood is that most will be struck down. After all, it is the "rare case[ ] in which a speech restriction withstands strict scrutiny." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 444 (2015). To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers'*

Project, Inc. v. *Ragland*, 481 U. S. 221, 231 (1987). So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.*

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, *ante*, at 171, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen* v. *Coakley*, 573 U. S. 464, 476 (2014) (internal quotation marks omitted). The second is to ensure that the government has not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 386 (1992). Yet the subject-

*Even in trying (commendably) to limit today's decision, JUSTICE ALITO's concurrence highlights its far-reaching effects. According to JUSTICE ALITO, the majority does not subject to strict scrutiny regulations of "signs advertising a one-time event." *Ante*, at 175 (ALITO, J., concurring). But of course it does. On the majority's view, a law with an exception for such signs "singles out specific subject matter for differential treatment" and "defin[es] regulated speech by particular subject matter." *Ante*, at 163, 169 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that "the Code singles out signs bearing a particular message: the time and location of a specific event." *Ante*, at 171.

matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *Davenport* v. *Washington Ed. Assn.*, 551 U. S. 177, 189 (2007) (quoting *R. A. V.*, 505 U. S., at 390). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537, 539–540 (1980) (invalidating a limitation on speech about nuclear power). We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Id.*, at 537–538 (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785 (1978); accord, *ante*, at 174 (ALITO, J., concurring) (limiting all speech on one topic "favors those who do not want to disturb the status quo"). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most demand-

ing constitutional test. *R. A. V.*, 505 U. S., at 387 (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. *Ante*, at 171. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when "that risk is inconsequential, . . . strict scrutiny is unwarranted." *Davenport*, 551 U. S., at 188; see *R. A. V.*, 505 U. S., at 388 (approving certain content-based distinctions when there is "no significant danger of idea or viewpoint discrimination"). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. See *Davenport*, 551 U. S., at 188 (noting that "we have identified numerous situations in which [the] risk" attached to content-based laws is "attenuated"). In *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. *Id.*, at 792, n. 1 (listing exemptions); see *id.*, at 804–810 (upholding ordinance under intermediate scrutiny). After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship."

Id., at 804; see also *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was "designed to prevent crime, protect the city's retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views"). And another decision involving a similar law provides an alternative model. In *City of Ladue* v. *Gilleo*, 512 U. S. 43 (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.*, at 46–47, and n. 6 (listing exemptions); *id.*, at 53 (noting this assumption). We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante*, at 171–172 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§ 4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§ 4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations.

Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." *Ante*, at 171. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

Syllabus

McFADDEN *v.* UNITED STATES

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

No. 14–378. Argued April 21, 2015—Decided June 18, 2015

Petitioner McFadden was arrested and charged with distributing controlled substance analogues in violation of the federal Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U. S. C. § 802(32)(A), and instructs courts to treat those analogues as schedule I controlled substances if they are intended for human consumption, § 813. Arguing that he did not know the "bath salts" he was distributing were regulated as controlled substance analogues, McFadden sought an instruction that would have prevented the jury from finding him guilty unless it found that he knew the substances he distributed had chemical structures and effects on the central nervous system substantially similar to those of controlled substances. Instead, the District Court instructed the jury that it need only find that McFadden knowingly and intentionally distributed a substance with substantially similar effects on the central nervous system as a controlled substance and that he intended that substance to be consumed by humans. McFadden was convicted. The Fourth Circuit affirmed, holding that the Analogue Act's intent element required only proof that McFadden intended the substance to be consumed by humans.

Held: When a controlled substance is an analogue, § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act (CSA) or Analogue Act. Pp. 191–198.

(a) In addressing the treatment of controlled substance analogues under federal law, one must look to the CSA, which, as relevant here, makes it "unlawful for any person knowingly" to "distribute . . . a controlled substance." § 841(a)(1). The ordinary meaning of that provision requires a defendant to know only that the substance he is distributing is some unspecified substance listed on the federal drug schedules. Thus, the Government must show either that the defendant knew he was distributing a substance listed on the schedules, even if he did not know which substance it was, or that the defendant knew the identity of the substance he was distributing, even if he did not know it was listed on the schedules.

Because the Analogue Act extends that framework to analogous substances, the CSA's mental-state requirement applies when the controlled substance is, in fact, an analogue. It follows that the Government must prove that a defendant knew that the substance he was distributing was "a controlled substance," even in prosecutions dealing with analogues. That knowledge requirement can be established in two ways: by evidence that a defendant knew that the substance he was distributing is controlled under the CSA or Analogue Act, regardless of whether he knew the substance's identity; or by evidence that the defendant knew the specific analogue he was distributing, even if he did not know its legal status as a controlled substance analogue. A defendant with knowledge of the features defining a substance as a controlled substance analogue, § 802(32)(A), knows all of the facts that make his conduct illegal. Pp. 191–195.

(b) The Fourth Circuit did not adhere to § 813's command to treat a controlled substance analogue as a controlled substance listed in schedule I by applying § 841(a)(1)'s mental-state requirement. Instead, it concluded that the only mental-state requirement for analogue prosecutions is the one in § 813—that an analogue be "intended for human consumption." That conclusion is inconsistent with the text and structure of the statutes.

Neither the Government's nor McFadden's interpretation fares any better. The Government's contention that § 841(a)(1)'s knowledge requirement as applied to analogues is satisfied if the defendant knew he was dealing with a substance regulated under some law ignores § 841(a)(1)'s requirement that a defendant know he was dealing with "a controlled substance." That term includes only drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act; it is not broad enough to include all substances regulated by any law. McFadden contends that a defendant must also know the substance's features that cause it to fall within the scope of the Analogue Act. But the key fact that brings a substance within the scope of the Analogue Act is that the substance is "controlled," and that fact can be established in the two ways previously identified. *Staples* v. *United States*, 511 U. S. 600, distinguished. Contrary to McFadden's submission, the canon of constitutional avoidance "has no application" in the interpretation of an unambiguous statute such as this one. *Warger* v. *Shauers*, 574 U. S. 40, 50. But even if the statute were ambiguous, the scienter requirement adopted here "alleviate[s] vagueness concerns" under this Court's precedents. *Gonzales* v. *Carhart*, 550 U. S. 124, 149. Pp. 195–197.

(c) The Government argues that no rational jury could have concluded that McFadden was unaware that the substances he was distributing

were controlled under the CSA or Analogue Act and that any error in the jury instruction was therefore harmless. The Fourth Circuit, which did not conduct a harmless-error analysis, is to consider that issue in the first instance. P. 197.

753 F. 3d 432, vacated and remanded.

Thomas, J., delivered the opinion of the Court, in which Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 198.

Kevin K. Russell argued the cause for petitioner. With him on the briefs was *J. Lloyd Snook III*.

Sarah E. Harrington argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Gershengorn*, and *Vijay Shanker*.*

Justice Thomas delivered the opinion of the Court.

The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U. S. C. § 802(32)(A), and then instructs courts to treat those analogues, if intended for human consumption, as controlled substances listed on schedule I for purposes of federal law, § 813. The Controlled Substances Act (CSA) in turn makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. § 841(a)(1). The question presented in this case concerns the knowledge necessary for conviction under § 841(a)(1) when the controlled substance at issue is in fact an analogue.

We hold that § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with "a con-

*Briefs of *amici curiae* urging reversal were filed for Forensic Scientists by *Gerald M. Finkel*; and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green*, *Jonathan Hacker*, and *Sarah O'Rouke Schrup*.

trolled substance." When the substance is an analogue, that knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a "'controlled substance analogue.'" § 802(32)(A). Because the U. S. Court of Appeals for the Fourth Circuit approved a jury instruction that did not accurately convey this knowledge requirement, we vacate its judgment and remand for that court to determine whether the error was harmless.

I

In 2011, law enforcement officials in Charlottesville, Virginia, began investigating individuals at a Charlottesville video store for suspected distribution of "bath salts"—various recreational drugs used to produce effects similar to those of cocaine, methamphetamine, and other controlled substances. The owner of the store, Lois McDaniel, had been purchasing bath salts from petitioner Stephen McFadden for several months. McFadden had marketed the substances to her as "Alpha," "No Speed," "Speed," "Up," and "The New Up," and had compared them to cocaine and crystal meth. He had often sold those products with labels borrowing language from the Analogue Act, asserting that the contents were "not for human consumption" or stating that a particular product "does not contain any of the following compounds or analogues of the following compounds" and listing controlled substances. McDaniel purchased the bath salts for $15 per gram and resold them for $30 to $70 per gram.

After investigators had conducted two controlled buys from the store and confronted McDaniel, she agreed to cooperate in their investigation by making five controlled buys from McFadden. The Government intercepted the substances McFadden sent when they arrived at the local FedEx

store. Like the substances sold in the video store, these substances were white and off-white powders packaged in small plastic bags. Chemical analysis identified the powders as containing, among other substances, 3,4-Methylenedioxypyrovalerone, also known as MDPV; 3,4-Methylenedioxy-N-methylcathinone, also known as Methylone or MDMC; and 4-Methyl-N-ethylcathinone, also known as 4-MEC. When ingested, each of these substances is capable of producing effects on the central nervous system similar to those that controlled substances (such as cocaine, methamphetamine, and methcathinone) produce.

A federal grand jury indicted McFadden on eight counts of distribution of controlled substance analogues and one count of conspiracy. At trial, McFadden argued that he did not know the substances he was distributing were regulated as controlled substances under the Analogue Act. He and the Government also disagreed about what knowledge was required for a conviction. The Government sought an instruction requiring only "[t]hat the defendant knowingly and intentionally distributed a mixture or substance . . . [t]hat . . . was a controlled substance analogue . . . with the intent that it be consumed by humans." App. 26–27. McFadden sought a more demanding instruction requiring that he "knew that the substances that he was distributing possessed the characteristics of controlled substance analogues," including their chemical structures and effects on the central nervous system. *Id.*, at 29–30. The District Court compromised, instructing the jury that the statute required that "the defendant knowingly and intentionally distributed a mixture or substance that has" substantially similar effects on the nervous system as a controlled substance and "[t]hat the defendant intended for the mixture or substance to be consumed by humans." *Id.*, at 40.

The jury convicted McFadden on all nine counts. On appeal, McFadden insisted that the District Court "erred in refusing to instruct the jury that the government was re-

quired to prove that he knew, had a strong suspicion, or deliberately avoided knowledge that the [substances] possessed the characteristics of controlled substance analogues." 753 F. 3d 432, 443 (CA4 2014). Rejecting that argument, the Court of Appeals affirmed. *Id.*, at 444, 446. Stating that it was bound by Circuit precedent, the court concluded that the "intent element [in the Act] requires [only] that the government prove that the defendant meant for the substance at issue to be consumed by humans." *Id.*, at 441; see *id.*, at 444.

We granted a writ of certiorari, 574 U. S. 1118 (2015), and now vacate the judgment of the Court of Appeals and remand.

II

A

The Analogue Act requires a controlled substance analogue, if intended for human consumption, to be treated "as a controlled substance in schedule I" for purposes of federal law. § 1201, 100 Stat. 3207–13, 21 U. S. C. § 813. We therefore must turn first to the statute that addresses controlled substances, the CSA. The CSA makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." § 401(a)(1), 84 Stat. 1260, 21 U. S. C. § 841(a)(1). Under the most natural reading of this provision, the word "knowingly" applies not just to the statute's verbs but also to the object of those verbs—"*a* controlled substance." See *Flores-Figueroa* v. *United States*, 556 U. S. 646, 650 (2009); *id.*, at 657 (SCALIA, J., concurring in part and concurring in judgment); *id.*, at 660–661 (ALITO, J., concurring in part and concurring in judgment). When used as an indefinite article, "a" means "[s]ome undetermined or unspecified particular." Webster's New International Dictionary 1 (2d ed. 1954). And the CSA defines "controlled substance" as "a drug or other substance,

or immediate precursor, included in schedule I, II, III, IV, or V." § 802(6) (internal quotation marks omitted). The ordinary meaning of § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules. The Courts of Appeals have recognized as much. See, *e. g.*, *United States* v. *Andino*, 627 F. 3d 41, 45–46 (CA2 2010); *United States* v. *Gamez-Gonzalez*, 319 F. 3d 695, 699 (CA5 2003); *United States* v. *Martinez*, 301 F. 3d 860, 865 (CA7 2002).

That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was. Take, for example, a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is. And if so, he would be guilty of knowingly distributing "a controlled substance."

The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules, 21 CFR § 1308.11 (2014). Because ignorance of the law is typically no defense to criminal prosecution, *Bryan* v. *United* States, 524 U. S. 184, 196 (1998), this defendant would also be guilty of knowingly distributing "a controlled substance."[1]

---

[1] The Courts of Appeals have held that, as with most *mens rea* requirements, the Government can prove the requisite mental state through either direct evidence or circumstantial evidence. Direct evidence could include, for example, past arrests that put a defendant on notice of the controlled status of a substance. *United States* v. *Abdulle*, 564 F. 3d 119, 127 (CA2 2009). Circumstantial evidence could include, for example, a defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a "high"

The Analogue Act extends the framework of the CSA to analogous substances. 21 U. S. C. § 813. The Act defines a "controlled substance analogue" as a substance:

> "(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> "(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> "(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II." § 802(32)(A).

It further provides, "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." § 813.

The question in this case is how the mental-state requirement under the CSA for knowingly manufacturing, distributing, or possessing with intent to distribute "a controlled substance" applies when the controlled substance is in fact an analogue. The answer begins with § 841(a)(1), which expressly requires the Government to prove that a defendant knew he was dealing with "a controlled substance." The

---

similar to that produced by controlled substances, and knowledge that a particular substance is subject to seizure at customs. *United States* v. *Ali*, 735 F. 3d 176, 188–189 (CA4 2013). The Government presented such circumstantial evidence in this case, and neither party disputes that this was proper.

Analogue Act does not alter that provision, but rather instructs courts to treat controlled substance analogues "as . . . controlled substance[s] in schedule I." § 813. Applying this statutory command, it follows that the Government must prove that a defendant knew that the substance with which he was dealing was "a controlled substance," even in prosecutions involving an analogue.[2]

That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue by its features, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II; or which is represented or intended to have that effect with respect to a particular person. § 802(32)(A). A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct

[2] The Government has accepted for the purpose of this case that it must prove two elements to show that a substance is a controlled substance analogue under the definition in § 802(32)(A): First, that an alleged analogue is substantially similar in chemical structure to a controlled substance, § 802(32)(A)(i). Second, that an alleged analogue either has, or is represented or intended to have, a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that of a controlled substance, §§ 802(32)(A)(ii), (iii). Brief for United States 3. Because we need not decide in this case whether that interpretation is correct, we assume for the sake of argument that it is.

illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that he was dealing with "a controlled substance."

B

The Court of Appeals did not adhere to § 813's command to treat a controlled substance analogue "as a controlled substance in schedule I," and, accordingly, it did not apply the mental-state requirement in § 841(a)(1). Instead, it concluded that the only mental-state requirement for prosecutions involving controlled substance analogues is the one in § 813—that the analogues be "intended for human consumption." 753 F. 3d, at 436 (citing *United States* v. *Klecker*, 348 F. 3d 69, 71 (CA4 2003)). Because that interpretation is inconsistent with the text and structure of the statutes, we decline to adopt it.

Unsurprisingly, neither the Government nor McFadden defends the Court of Appeals' position. But their alternative interpretations fare no better. The Government agrees that the knowledge requirement in § 841(a)(1) applies to prosecutions involving controlled substance analogues, yet contends that it is met if the "defendant knew he was dealing with an illegal or regulated substance" under some law. Brief for United States 15. Section 841(a)(1), however, requires that a defendant knew he was dealing with "a controlled substance." That term includes only those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act. §§ 802(6), 813. It is not broad enough to include all substances regulated by any law.[3]

---

[3] Although the Government must prove that a defendant knew that the substance in question was "a controlled substance" under federal law, the Government need not introduce direct evidence of such knowledge. As with prosecutions involving substances actually listed on the drug schedules, the Government may offer circumstantial evidence of that knowledge. See n. 1, *supra*. In such cases, it will be left to the trier of fact to deter-

For his part, McFadden contends that, in the context of analogues, knowledge of "a controlled substance" can *only* be established by knowledge of the characteristics that make a substance an "analogue" under the Act. In support of that argument, he relies heavily on our conclusion in *Staples* v. *United States*, 511 U. S. 600 (1994), that a statute making it "'unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record,'" *id.*, at 605 (quoting 26 U. S. C. § 5861(d)), required proof that a defendant "knew of the features of his AR–15 that brought it within the scope of the Act," 511 U. S., at 619. McFadden reasons by analogy that a defendant convicted under § 841(a)(1) must also know the features of the substance that brought it within the scope of the Analogue Act. But that position ignores an important textual distinction between § 841(a)(1) and the statute at issue in *Staples*. The statute at issue in *Staples* defined "a firearm" by its physical features such as the length of its barrel and its capacity to shoot more than one shot with a single function of the trigger. Unlike those physical features that brought the firearm "within the scope of" that statute, the feature of a substance "that br[ings] it within the scope of" § 841(a)(1) is the fact that it is "'controlled.'" § 802(6). Knowledge of *that* fact can be established in the two ways previously discussed: either by knowledge that a substance is listed or treated as listed by operation of the Analogue Act, §§ 802(6), 813, or by knowledge of the physical characteristics that give rise to that treatment. *Supra*, at 194.

McFadden also invokes the canon of constitutional avoidance, arguing that we must adopt his interpretation of the statute lest it be rendered unconstitutionally vague. But

---

mine whether the circumstantial evidence proves that the defendant knew that the substance was a controlled substance under the CSA or Analogue Act, as opposed to under any other federal or state laws.

that argument fails on two grounds. Under our precedents, this canon "is a tool for choosing between competing plausible interpretations of a provision." *Warger* v. *Shauers*, 574 U. S. 40, 50 (2014) (internal quotation marks omitted). It "has no application" in the interpretation of an unambiguous statute such as this one. See *ibid.* (internal quotation marks omitted). Even if this statute were ambiguous, McFadden's argument would falter. Under our precedents, a scienter requirement in a statute "alleviate[s] vagueness concerns," "narrow[s] the scope of [its] prohibition[,] and limit[s] prosecutorial discretion." *Gonzales* v. *Carhart*, 550 U. S. 124, 149, 150 (2007). The scienter requirement in this statute does not, as McFadden suggests, render the statute vague. Moreover, to the extent McFadden suggests that the substantial similarity test for defining analogues is itself indeterminate, his proposed alternative scienter requirement would do nothing to cure that infirmity.

III

The District Court's instructions to the jury did not fully convey the mental state required by the Analogue Act. The jury was instructed only that McFadden had to "knowingly and intentionally distribut[e] a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system" substantially similar to that of a controlled substance. App. 40.

The Government contends that any error in the jury instructions was harmless because no rational jury could have concluded that McFadden was unaware that the substances he was distributing were controlled. We have recognized that even the omission of an element from a jury charge is subject to harmless-error analysis. *Neder* v. *United States*, 527 U. S. 1, 15 (1999). Because the Court of Appeals did not address that issue, we remand for that court to consider it in the first instance.

* * *

For the foregoing reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice Roberts, concurring in part and concurring in the judgment.

I join the Court's opinion, except to the extent that it says the Government can satisfy the mental state requirement of Section 841(a)(1) "by showing that the defendant knew the identity of the substance he possessed." *Ante*, at 192. Section 841(a)(1) makes it "unlawful for any person knowingly . . . to manufacture, distribute, or dispense . . . a controlled substance." As the Court points out, the word "knowingly" applies "not just to the statute's verbs, but also to the object of those verbs—'a controlled substance.' " *Ante*, at 191 (emphasis deleted). That suggests that a defendant needs to know more than the identity of the substance; he needs to know that the substance is *controlled*. See, *e. g.*, *United States* v. *Howard*, 773 F. 3d 519, 526 (CA4 2014); *United States* v. *Washington*, 596 F. 3d 926, 944 (CA8 2010); *United States* v. *Rogers*, 387 F. 3d 925, 935 (CA7 2004).

In cases involving well-known drugs such as heroin, a defendant's knowledge of the identity of the substance can be compelling evidence that he knows the substance is controlled. See *United States* v. *Turcotte*, 405 F. 3d 515, 525 (CA7 2005). But that is not necessarily true for lesser known drugs. A pop quiz for any reader who doubts the point: Two drugs—dextromethorphan and hydrocodone—are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?*

The Court says that knowledge of the substance's identity suffices because "ignorance of the law is typically no defense

---

*The answer is hydrocodone.

to criminal prosecution." *Ante*, at 192. I agree that is "typically" true. But when "there is a legal element in the definition of the offense," a person's lack of knowledge regarding that legal element *can* be a defense. *Liparota* v. *United States*, 471 U. S. 419, 425, n. 9 (1985). And here, there is arguably a legal element in Section 841(a)(1)—that the substance be "controlled."

The analogy the Court drew in *Liparota* was to a charge of receipt of stolen property: It is no defense that the defendant did not know such receipt was illegal, but it is a defense that he did not know the property was stolen. Here, the argument goes, it is no defense that a defendant did not know it was illegal to possess a controlled substance, but it is a defense that he did not know the substance was controlled.

Ultimately, the Court's statements on this issue are not necessary to its conclusion that the District Court's jury instructions "did not fully convey the mental state required by the Analogue Act." *Ante*, at 197. Those statements should therefore not be regarded as controlling if the issue arises in a future case.

Syllabus

WALKER, CHAIRMAN, TEXAS DEPARTMENT OF MOTOR VEHICLES BOARD, ET AL. *v.* TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

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

No. 14–144. Argued March 23, 2015—Decided June 18, 2015

Texas offers automobile owners a choice between general-issue and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas. Here, the Texas Division of the Sons of Confederate Veterans and its officers (collectively SCV) filed suit against the chairman and members of the Board (collectively Board), arguing that the Board's rejection of SCV's proposal for a specialty plate design featuring a Confederate battle flag violated the Free Speech Clause. The District Court entered judgment for the Board, but the Fifth Circuit reversed, holding that Texas' specialty license plate designs are private speech and that the Board engaged in constitutionally forbidden viewpoint discrimination when it refused to approve SCV's design.

Held: Texas' specialty license plate designs constitute government speech, and thus Texas was entitled to refuse to issue plates featuring SCV's proposed design. Pp. 207–220.

(a) When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468. A government is generally entitled to promote a program, espouse a policy, or take a position. Were the Free Speech Clause interpreted otherwise, "it is not easy to imagine how government would function." *Id.*, at 468. That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech, and the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. Pp. 207–208.

(b) This Court's precedents regarding government speech provide the appropriate framework through which to approach the case. Pp. 208–219.

(1) The same analysis the Court used in *Summum*—to conclude that a city "accepting a privately donated monument and placing it on city property" was engaging in government speech, 555 U. S., at 464—leads to the conclusion that government speech is at issue here. First, history shows that States, including Texas, have long used license plates to convey government speech, *e. g.*, slogans urging action, promoting tourism, and touting local industries. Cf. *id.*, at 470. Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Id.*, at 472. Each plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters across the top of every plate. Texas also requires Texas vehicle owners to display license plates, issues every Texas plate, and owns all of the designs on its plates. The plates are, essentially, government IDs, and ID issuers "typically do not permit" their IDs to contain "message[s] with which they do not wish to be associated," *id.*, at 471. Third, Texas maintains direct control over the messages conveyed on its specialty plates, by giving the Board final approval over each design. Like the city government in *Summum*, Texas "has effectively controlled the messages [conveyed] by exercising final approval authority over their selection." *Id.*, at 473. These considerations, taken together, show that Texas' specialty plates are similar enough to the monuments in *Summum* to call for the same result. Pp. 209–214.

(2) Forum analysis, which applies to government restrictions on purely private speech occurring on government property, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800, is not appropriate when the State is speaking on its own behalf. The parties agree that Texas' specialty license plates are not a traditional public forum. Further, Texas' policies and the nature of its license plates indicate that the State did not intend its specialty plates to serve as either a designated public forum—where "government property . . . not traditionally . . . a public forum is intentionally opened up for that purpose," *Summum*, *supra*, at 469—or a limited public forum—where a government "reserv[es a forum] for certain groups or for the discussion of certain topics," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829. The State exercises final authority over the messages that may be conveyed by its specialty plates, it takes ownership of each specialty plate design, and it has traditionally used its plates for govern-

ment speech. These features of Texas specialty plates militate against a determination that Texas has created a public forum. Finally, the plates are not a nonpublic forum, where the "government is . . . a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678–679. The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider. See *Summum*, *supra*, at 470–471. Nor does Texas' requirement that vehicle owners pay annual fees for specialty plates mean that the plates are a forum for private speech. And this case does not resemble other nonpublic forum cases. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 48–49; *Lehman* v. *Shaker Heights*, 418 U. S. 298; and *Cornelius*, *supra*, at 804–806, distinguished. Pp. 214–219.

(c) The determination that Texas' specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. The Court has acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley* v. *Maynard*, 430 U. S. 705, 717, n. 15. The Court has also recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. Just as Texas cannot require SCV to convey "the State's ideological message," *id.*, at 715, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates. P. 219.

759 F. 3d 388, reversed.

BREYER, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 221.

Scott A. Keller, Solicitor General of Texas, argued the cause for petitioners. With him on the briefs were *Ken Paxton*, Attorney General, *Charles E. Roy*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, *Erika M. Kane*, Assistant Attorney General, *Bill Davis*, *Evan S. Greene*, and *Alex Potapov*, Assistant Solicitors General, *Greg Abbott*, former Attorney General, *Jonathan F. Mitchell*, former Solicitor General,

Daniel T. Hodge, former First Assistant Attorney General, and *Arthur C. D'Andrea*, former Assistant Solicitor General.

R. James George, Jr., argued the cause for respondents. With him on the brief was *John R. McConnell*.*

JUSTICE BREYER delivered the opinion of the Court.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Consti-

---

*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Michael DeWine*, Attorney General of Ohio, and *Eric E. Murphy*, Solicitor General; and for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *Christopher A. Brook*; for Americans United for Separation of Church and State by *Ayesha N. Khan* and *Gregory M. Lipper*; for the Becket Fund for Religious Liberty by *Eugene Volokh*, *Mark Rienzi*, and *Eric Rassbach*; for the Cato Institute et al. by *Ilya Shapiro* and *Robert Corn-Revere*; for the Children First Foundation, Inc., by *Jonathan D. Christman* and *Randall L. Wenger*; for the Foundation for Individual Rights in Education by *Greg Lukianoff*; and for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*.

Briefs of *amici curiae* were filed for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Jordan A. Sekulow*, and *Kimberlee Wood Colby*; for Choose Life, Wisconsin, Inc., et al. by *Stephen M. Crampton*, *Thomas L. Brejcha*, and *Michael D. Dean*; and for Phil Berger et al. by *Scott W. Gaylord*.

tution's free speech guarantees. See Amdts. 1, 14. We conclude that it did not.

I

A

Texas law requires all motor vehicles operating on the State's roads to display valid license plates. See Tex. Transp. Code Ann. §§ 502.001 (West Supp. 2014), 504.001 (2013), 504.943 (Supp. 2014). And Texas makes available several kinds of plates. Drivers may choose to display the State's general-issue license plates. See Texas Dept. of Motor Vehicles, Motor Vehicle Registration Manual 9.1 (Apr. 2015). Each of these plates contains the word "Texas," a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan "The Lone Star State." Texas Dept. of Motor Vehicles, The Texas Classic FAQs (July 16, 2012), online at http://www.txdmv.gov/motorists/license-plates (all Internet materials as visited June 16, 2015, and available in Clerk of Court's case file). In the alternative, drivers may choose from an assortment of specialty license plates. § 504.008(b) (West 2013). Each of these plates contains the word "Texas," a license plate number, and one of a selection of designs prepared by the State. See *ibid.*; Specialty License Plates, http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (displaying available Texas specialty plates); Create a Plate: Your Design, http://www.myplates.com/BackgroundOnly (same). Finally, Texas law provides for personalized plates (also known as vanity plates). 43 Tex. Admin. Code § 217.45(c)(7) (2015). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as "BOB" or "TEXPL8."

Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. See

§ 217.45(b)(2). And Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate. See Tex. Transp. Code §§ 504.602–504.663 (West 2013 and Supp. 2014). The legislature has enacted statutes authorizing, for example, plates that say "Keep Texas Beautiful" and "Mothers Against Drunk Driving," plates that "honor" the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words "Fight Terrorism." See §§ 504.602, 504.608, 504.626, 504.647.

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. See §§ 504.6011(a), 504.851(a); 43 Tex. Admin. Code § 217.52(b). Among the plates created through the private-vendor process are plates promoting the "Keller Indians" and plates with the slogan "Get it Sold with RE/MAX."

Third, the Board "may create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A nonprofit must include in its application "a draft design of the specialty license plate." 43 Tex. Admin. Code § 217.45(i)(2)(C). And Texas law vests in the Board authority to approve or to disapprove an application. See § 217.45(i)(7). The relevant statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c). Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

B

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV's application included a draft plate design. See Appendix, *infra*. At the bottom of the proposed plate were the words "SONS OF CONFEDERATE VETERANS." At the side was the organization's logo, a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State's name and silhouette. The Board's predecessor denied this application.

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found "it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable." App. 64. The Board added "that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Id.*, at 65.

In 2012, SCV and two of its officers (collectively SCV) brought this lawsuit against the chairman and members of the Board (collectively Board). SCV argued that the Board's decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. *Texas Div.*,

Sons of Confederate Veterans, Inc., v. *Vandergriff*, 759 F. 3d 388 (2014). It held that Texas' specialty license plate designs are private speech and that the Board, in refusing to approve SCV's design, engaged in constitutionally forbidden viewpoint discrimination. The dissenting judge argued that Texas' specialty license plate designs are government speech, the content of which the State is free to control.

We granted the Board's petition for certiorari, and we now reverse.

II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468 (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 235 (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. See *Johanns* v. *Livestock Marketing Assn.*, 544 U. S. 550, 559 (2005). Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate. See *Stromberg* v. *California*, 283 U. S. 359, 369 (1931) (observing that "our constitutional system" seeks to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people").

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state gov-

ernment effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? "[I]t is not easy to imagine how government could function if it lacked th[e] freedom" to select the messages it wishes to convey. *Summum*, *supra*, at 468.

We have therefore refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Rust* v. *Sullivan*, 500 U. S. 173, 194 (1991). We have pointed out that a contrary holding "would render numerous Government programs constitutionally suspect." *Ibid.* Cf. *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 12–13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed"). And we have made clear that "the government can speak for itself." *Southworth*, *supra*, at 229.

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. *Summum*, *supra*, at 468. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

III

In our view, specialty license plates issued pursuant to Texas' statutory scheme convey government speech. Our

reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case. See 555 U. S., at 464.

A

In *Summum*, we considered a religious organization's request to erect in a 2.5-acre city park a monument setting forth the organization's religious tenets. See *id.*, at 464–465. In the park were 15 other permanent displays. *Id.*, at 464. At least 11 of these—including a wishing well, a September 11 monument, a historic granary, the city's first fire station, and a Ten Commandments monument—had been donated to the city by private entities. *Id.*, at 464–465. The religious organization argued that the Free Speech Clause required the city to display the organization's proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments. Brief for Respondent in *Pleasant Grove City* v. *Summum*, O. T. 2008, No. 07–665, pp. 2–3, 30–36.

This Court rejected the organization's argument. We held that the city had not "provid[ed] a forum for private speech" with respect to monuments. *Summum*, 555 U. S., at 470. Rather, the city, even when "accepting a privately donated monument and placing it on city property," had "engage[d] in expressive conduct." *Id.*, at 476. The speech at issue, this Court decided, was "best viewed as a form of government speech" and "therefore [was] not subject to scrutiny under the Free Speech Clause." *Id.*, at 464.

We based our conclusion on several factors. First, history shows that "[g]overnments have long used monuments to speak to the public." *Id.*, at 470. Thus, we observed that "[w]hen a government entity arranges for the construction

of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Ibid.*

Second, we noted that it "is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.*, at 471. As a result, "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Ibid.* And "observers" of such monuments, as a consequence, ordinarily "appreciate the identity of the speaker." *Ibid.*

Third, we found relevant the fact that the city maintained control over the selection of monuments. We thought it "fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Ibid.* And we observed that the city government in *Summum* "'effectively controlled' the messages sent by the monuments in the [p]ark by exercising 'final approval authority' over their selection." *Id.*, at 473.

In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. See *id.*, at 470–472. And, in reaching that conclusion, the Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park. See *id.*, at 470–471. Cf. *Rust*, *supra*, at 192–196 (upholding a federal regulation limiting speech in a Government-funded program where the program was established and administered by private parties).

B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have

conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. Cf. 555 U. S., at 470 ("Governments have long used monuments to speak to the public"). In 1917, Arizona became the first State to display a graphic on its plates. J. Fox, License Plates of the United States 15 (1997) (Fox); J. Minard & T. Stentiford, A Moving History 56 (2004) (Minard). The State presented a depiction of the head of a Hereford steer. Fox 15; Minard 56. In the years since, New Hampshire plates have featured the profile of the "Old Man of the Mountain," Massachusetts plates have included a representation of the Commonwealth's famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco. *Id.*, at 60, 61, 66.

In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed "Idaho Potatoes" and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. *Id.*, at 61. The brown potato did not catch on, but slogans on license plates did. Over the years, state plates have included the phrases "North to the Future" (Alaska), "Keep Florida Green" (Florida), "Hoosier Hospitality" (Indiana), "The Iodine Products State" (South Carolina), "Green Mountains" (Vermont), and "America's Dairyland" (Wisconsin). Fox 13, 29, 39, 91, 101, 109. States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Texas, too, has selected various messages to communicate through its license plate designs. By 1919, Texas had begun to display the Lone Star emblem on its plates. Texas Department of Transportation, The History of Texas License Plates 9, 11 (1999). In 1936, the State's general-issue plates featured the first slogan on Texas license plates: the word "Centennial." *Id.*, at 20. In 1968, Texas plates promoted a San Antonio event by including the phrase "Hemisfair 68." *Id.*, at 46. In 1977, Texas replaced the Lone Star with a

small silhouette of the State. *Id.*, at 63. And in 1995, Texas plates celebrated "150 Years of Statehood." *Id.*, at 101. Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, "Read to Succeed," "Houston Livestock Show and Rodeo," "Texans Conquer Cancer," and "Girl Scouts." Tex. Transp. Code Ann. §§ 504.607, 504.613, 504.620, 504.622. This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Summum*, *supra*, at 472. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. See § 504.002(3). And Texas dictates the manner in which drivers may dispose of unused plates. See § 504.901(c). See also § 504.008(g) (requiring that vehicle owners return unused specialty plates to the State).

Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." *Summum*, 555 U. S., at 471. Consequently, "persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf." *Ibid.*

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individ-

ual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas' license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." § 504.005. The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. 43 Tex. Admin. Code §§ 217.45(i)(7)–(8), 217.52(b). And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Reply Brief 10; Tr. of Oral Arg. 49–51. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection." 555 U. S., at 473 (quoting *Johanns*, 544 U. S., at 560–561).

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. See Tex. Transp. Code Ann. § 504.615. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. See § 504.626. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." See § 504.647. But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited

number of permanent monuments." 555 U. S., at 464, 470, 478. We believed that the speech at issue was government speech rather than private speech in part because we found it "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." *Id.*, at 479. Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. *Id.*, at 478. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas' specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. "The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.*, at 472.

C

SCV believes that Texas' specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech

by making license plates available to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985). But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas' specialty license plates are not a "traditional public forum," such as a street or a park, "which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983) (internal quotation marks omitted). "The Court has rejected the view that traditional public forum status extends beyond its historic confines." *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666, 678 (1998). And state-issued specialty license plates lie far beyond those confines.

It is equally clear that Texas' specialty plates are neither a "'designated public forum,'" which exists where "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose," *Summum*, *supra*, at 469, nor a "limited public forum," which exists where a government has "reserv[ed a forum] for certain groups or for the discussion of certain topics," *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995). A government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U. S., at 802. And in order "to ascertain whether [a government] intended to designate a place not traditionally open to assembly and debate as a public

forum," this Court "has looked to the policy and practice of the government" and to "the nature of the property and its compatibility with expressive activity." *Ibid.*

Texas' policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. See *id.*, at 803–804 (explaining that a school mail system was not a public forum because "[t]he practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted"). Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State's name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas' specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678–679 (1992). With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas' specialty license plate designs "are meant to convey and have the effect of conveying a government message." *Summum*, 555 U. S., at 472. They "constitute government speech." *Ibid.*

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum provider. In *Summum*, private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." *Id.*, at 470–471. Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the "government entity may exercise [its] freedom to express its views" even "when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.*, at 468. And in this case, as in *Summum*, forum analysis is inapposite. See *id.*, at 480.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park. Indeed, we indicated that the permanent displays in New York City's Central Park also constitute government speech. See *id.*, at 471–472. And an *amicus* brief had informed us that there were, at the time, 52 such displays. See Brief for City of New York in *Pleasant Grove City* v. *Summum*, O. T. 2008, No. 07–665, p. 2. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas' desire to communicate numerous messages does not mean that the messages conveyed are not Texas' own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, see, *e. g.*, *Lehman* v. *Shaker Heights*, 418 U. S. 298, 299 (1974) (plurality opinion), the existence of government profit alone is insufficient to

trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Finally, we note that this case does not resemble other cases in which we have identified a nonpublic forum. This case is not like *Perry Ed. Assn.*, where we found a school district's internal mail system to be a nonpublic forum for private speech. See 460 U. S., at 48–49. There, it was undisputed that a number of private organizations, including a teachers' union, had access to the mail system. See *id.*, at 39–40. It was therefore clear that private parties, and not only the government, used the system to communicate. Here, by contrast, each specialty license plate design is formally approved by and stamped with the *imprimatur* of Texas.

Nor is this case like *Lehman*, where we found the advertising space on city buses to be a nonpublic forum. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 390, n. 6 (1992) (identifying *Lehman* as a case about a nonpublic forum). There, the messages were located in a context (advertising space) that is traditionally available for private speech. And the advertising space, in contrast to license plates, bore no indicia that the speech was owned or conveyed by the government.

Nor is this case like *Cornelius*, where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. See 473 U. S., at 804–806. That forum lacked the kind of history present here. The fundraising drive had never been a medium for government speech. Instead, it was established "to bring order to [a] solicitation process" which had previously consisted of ad hoc solicitation by individual charitable organizations.

Id., at 792, 805. The drive "was designed to minimize . . . disruption to the [federal] workplace," *id.*, at 805, not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government's name. In contrast to the instant case, there was no reason for employees to "interpret [the solicitation] as conveying some message on the [government's] behalf." *Summum*, 555 U. S., at 471.

IV

Our determination that Texas' specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. See *Wooley* v. *Maynard*, 430 U. S. 705, 717, n. 15, 715 (1977) (observing that a vehicle "is readily associated with its operator" and that drivers displaying license plates "use their private property as a 'mobile billboard' for the State's ideological message"). And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. See *id.*, at 715; *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943). But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey "the State's ideological message," *Wooley*, *supra*, at 715, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

* * *

For the reasons stated, we hold that Texas' specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates fea-

turing SCV's proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

Reversed.

[Appendix to opinion of the Court follows this page.]

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

The Court's decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment "does not regulate government speech," and therefore when government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467–468 (2009). By contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995).

Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not

those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 a.m. on a Monday morning, would you think: "This is the official policy of the State—better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR – 24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina)[1] is the official favorite of the state government?

The Court says that all of these messages are government speech. It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? *Ante*, at 207–208. So when Texas issues a "Rather Be Golfing" plate, but not a "Rather Be Playing Tennis" or "Rather Be Bowling" plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State's coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e. g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the re-

[1] Elliot, Shifting Gears, Forbes Life, Oct. 2013, pp. 55, 57.

maining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

I

A

Specialty plates like those involved in this case are a recent development. License plates originated solely as a means of identifying vehicles. In 1901, New York became the first State to require automobiles to be licensed, but rather than issue license plates itself, New York required drivers to display their initials on their cars. J. Minard & T. Stentiford, A Moving History 50 (2004). Two years later, Massachusetts became the first State to issue license plates. The plates said "Mass. Automobile Register" and displayed

the vehicle's registration number. *Id.*, at 51. Plates of this type—featuring a registration number, the name of the State, and sometimes the date—were the standard for decades thereafter. See *id.*, at 52–94; see also generally, J. Fox, License Plates of the United States 10–99 (1997).

Texas license plates initially followed this pattern. When the first official state plate appeared in 1917, it featured a number and the abbreviation "TEX." Texas Department of Transportation, The History of Texas License Plates 9 (1999) (History). In 1925, the year of issue was added, and the State began issuing plates that identified certain vehicle types, *e. g.*, "C-M" for commercial trucks (1925), *id.*, at 14–15; "FARM" for farm trucks (1935), *id.*, at 22; "Overwidth" (1949), *id.*, at 32; "House Trailer" (1951), *id.*, at 36. In 1936, a special plate with the word "CENTENNIAL" was created to mark the State's 100th birthday, and the first plate identifying the owner as a "State Official" appeared two years later. *Id.*, at 20, 25. Starting in the 1950's, Texas began issuing plates to identify some other registrants, such as "Amateur Radio Operator" (1954), *id.*, at 38; "State Judge" (1970), *id.*, at 64; and "Disabled Veteran" (1972), *id.*, at 79.

A sesquicentennial plate appeared in 1985, and two years later, legislation was introduced to create a bronze license plate with 14-karat gold-plated lettering, available for a fee of $1,000. *Id.*, at 81. The proposal aimed to make the State a profit, but it failed to pass. *Ibid.*

It was not until 1989 that anything that might be considered a message was featured regularly on Texas plates. The words "The Lone Star State" were added "as a means of bringing favorable recognition to Texas." *Id.*, at 82.

Finally, in the late 1990's, license plates containing a small variety of messages, selected by the State, became available for the first time. *Id.*, at 101. These messages included slogans like "Read to Succeed," "Keep Texas Beautiful," "Animal Friendly," "Big Bend National Park," "Houston Livestock Show and Rodeo," and "Lone Star Proud." *Id.*, at 101,

113. Also issued in the 1990's were plates bearing the names of colleges and universities, and some plates (*e. g.*, "State of the Arts," "State Capitol Restoration") were made available to raise funds for special purposes. *Id.*, at 101.

Once the idea of specialty plates took hold, the number of varieties quickly multiplied, and today, we are told, Texas motorists can choose from more than 350 messages, including many designs proposed by nonprofit groups or by individuals and for-profit businesses through the State's third-party vendor. Brief for Respondents 2; see also Texas Department of Motor Vehicles, online at http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (all Internet materials as visited June 12, 2015, and available in Clerk of Court's case file); http://www.myplates.com.

Drivers can select plates advertising organizations and causes like 4–H, the Boy Scouts, the American Legion, Be a Blood Donor, the Girl Scouts, Insure Texas Kids, Mothers Against Drunk Driving, Marine Mammal Recovery, Save Texas Ocelots, Share the Road, Texas Reads, Texas Realtors ("I am a Texas Realtor"), the Texas State Rifle Association ("WWW.TSRA.COM"), the Texas Trophy Hunters Association, the World Wildlife Fund, the YMCA, and Young Lawyers.[2]

There are plates for fraternities and sororities and for in-state schools, both public (like Texas A&M and Texas Tech) and private (like Trinity University and Baylor). An even larger number of schools from out of State are honored: Arizona State, Brigham Young, Florida State, Michigan State, Alabama, and South Carolina, to name only a few.

There are political slogans, like "Come and Take It" and "Don't Tread on Me," and plates promoting the citrus industry and the "Cotton Boll." Commercial businesses can have specialty plates, too. There are plates advertising Remax

[2] The Appendix, *infra*, reproduces the available specialty plates mentioned throughout this opinion in order of first reference. When categories are referenced, examples from the category have been included.

("Get It Sold with RE/MAX"), Dr Pepper ("Always One of a Kind"), and Mighty Fine Burgers.

B

The Texas Division of Sons of Confederate Veterans (SCV) is an organization composed of descendants of Confederate soldiers. The group applied for a Texas specialty license plate in 2009 and again in 2010. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. App. 29. The Texas Department of Motor Vehicles Board (or Board) invited public comments and considered the plate design at a meeting in April 2011. At that meeting, one board member was absent, and the remaining eight members deadlocked on whether to approve the plate. The Board thus reconsidered the plate at its meeting in November 2011. This time, many opponents of the plate turned out to voice objections. The Board then voted unanimously against approval and issued an order stating:

> "The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." *Id.*, at 64–65.

The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue." *Id.*, at 65. And it thought that the public interest required rejection of the plate design because the contro-

versy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous." *Ibid.*

At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated primarily to preserving the legacy and honor of the African American soldier." Buffalo Soldier National Museum, online at http://www.buffalosoldiermuseum.com. "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War, and the name was later used to describe other black soldiers. W. Leckie & S. Leckie, The Buffalo Soldiers: A Narrative of the Black Cavalry in the West 21, 26–27 (2003). The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt "'the same way about the Buffalo Soldiers'" as African-Americans felt about the Confederate flag. Scharrer, Specialty License Plates Can Bring in Revenue, But Some Stir Up Controversy, Houston Chronicle, Nov. 26, 2011, p. B2. "'When we see the U. S. Cavalry uniform,'" he explained, "'we are forced to relive an American holocaust.'" *Ibid.*

II

A

Relying almost entirely on one precedent—*Pleasant Grove City* v. *Summum*, 555 U. S. 460—the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. The Court badly misunderstands *Summum*.

In *Summum*, a private group claimed the right to erect a large stone monument in a small city park. *Id.*, at 464. The 2.5-acre park contained 15 permanent displays, 11 of which

had been donated by private parties. *Ibid.* The central question concerned the nature of the municipal government's conduct when it accepted privately donated monuments for placement in its park: Had the city created a forum for private speech, or had it accepted donated monuments that expressed a government message? We held that the monuments represented government speech, and we identified several important factors that led to this conclusion.

First, governments have long used monuments as a means of expressing a government message. As we put it, "[s]ince ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power." *Id.*, at 470. Here in the United States, important public monuments like the Statue of Liberty, the Washington Monument, and the Lincoln Memorial express principles that inspire and bind the Nation together. Thus, long experience has led the public to associate public monuments with government speech.

Second, there is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey. See *id.*, at 471. While "[a] great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties," "cities and other jurisdictions take some care in accepting donated monuments" and select those that "conve[y] a government message." *Id.*, at 471–472. We were not presented in *Summum* with any examples of public parks that had been thrown open for private groups or individuals to put up whatever monuments they desired.

Third, spatial limitations played a prominent part in our analysis. See *id.*, at 478–479. "[P]ublic parks can accommodate only a limited number of permanent monuments," and consequently permanent monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Ibid.* Because

only a limited number of monuments can be built in any given space, governments do not allow their parks to be cluttered with monuments that do not serve a government purpose, a point well understood by those who visit parks and view the monuments they contain.

These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas's specialty plate program.

B

1

I begin with history. As we said in *Summum*, governments have used monuments since time immemorial to express important government messages, and there is no history of governments giving equal space to those wishing to express dissenting views. In 1775, when a large gilded equestrian statue of King George III dominated Bowling Green, a small park in lower Manhattan,[3] the colonial governor surely would not have permitted the construction on that land of a monument to the fallen at Lexington and Concord. When the United States accepted the Third French Republic's gift of the Statue of Liberty in 1877, see *id.*, at 477, Congress, it seems safe to say, would not have welcomed a gift of a Statue of Authoritarianism if one had been offered by another country. Nor is it likely that the National Park Service today would be receptive if private groups, pointing to the Lincoln Memorial, the Martin Luther King, Jr., Memorial, and the Vietnam Veterans Memorial on the National Mall, sought permission to put up monuments to Jefferson Davis, Orval Faubus, or the North Vietnamese Army. Governments have always used public monuments to express a government message, and members of the public understand this.

---

[3] The Statue That Was Made Into Bullets, N. Y. Times Magazine, July 21, 1901, p. 6.

The history of messages on license plates is quite different. After the beginning of motor vehicle registration in 1917, more than 70 years passed before the proliferation of specialty plates in Texas. It was not until the 1990's that motorists were allowed to choose from among 10 messages, such as "Read to Succeed" and "Keep Texas Beautiful." History, at 101.

Up to this point, the words on the Texas plates can be considered government speech. The messages were created by the State, and they plausibly promoted state programs.[4] But when, at some point within the last 20 years or so, the State began to allow private entities to secure plates conveying their own messages, Texas crossed the line.

The contrast between the history of public monuments, which have been used to convey government messages for centuries, and the Texas license plate program could not be starker.

In an attempt to gather historical support for its position, the Court relies on plates with the mottos or symbols of other States. As the Court notes, some of these were issued well before "The Lone Star State" made its debut in Texas in 1991. *Id.*, at 82. But this history is irrelevant for present purposes. Like the 1991 Texas plate, these out-of-state plates were created by the States that issued them, and motorists generally had no choice but to accept them. For example, the State of New Hampshire made it a crime to cover up the words "Live Free or Die" on its plates. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977).

The words and symbols on plates of this sort were and are government speech, but plates that are essentially commissioned by private entities (at a cost that exceeds $8,000) and that express a message chosen by those entities are very different—and quite new. Unlike in *Summum*, history here

[4] This opinion does not address whether the unique combination of letters and/or numbers assigned to each vehicle, even when selected by the motorist, is private speech.

does not suggest that the messages at issue are government speech.

2

The Texas specialty plate program also does not exhibit the "selective receptivity" present in *Summum*. 555 U. S., at 471. To the contrary, Texas's program is *not* selective by design. The Board's chairman, who is charged with approving designs, explained that the program's purpose is "to encourage private plates" in order to "generate additional revenue for the state." App. 58. And most of the time, the Board "base[s] [its] decisions on rules that primarily deal with reflectivity and readability." *Ibid.* A department brochure explains: "Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards." *Id.*, at 67.b.

Pressed to come up with any evidence that the State has exercised "selective receptivity," Texas (and the Court) rely primarily on sketchy information not contained in the record, specifically that the Board's predecessor (might have) rejected a "pro-life" plate and perhaps others on the ground that they contained messages that were offensive. See *ante*, at 212 (citing Reply Brief 10 and Tr. of Oral Arg. 49–51). But even if this happened, it shows only that the present case may not be the only one in which the State has exercised viewpoint discrimination.

Texas's only other (also extrarecord) evidence of selectivity concerns a proposed plate that was thought to create a threat to the fair enforcement of the State's motor vehicle laws. Reply Brief 9–10 (citing publicly available Transcript of Texas Department of Motor Vehicles Board Meeting, Aug. 9, 2012, p. 112, online at http://www.txdmv.gov/reports-and-data/doc_download/450-2012-tran-aug9). This proposed plate was a Texas DPS Troopers Foundation (Troopers) plate, proposed in 2012. The Board considered that proposed plate at an August 2012 meeting, at which it approved six other plate designs without discussion, but it rejected the

Troopers plate in a deadlocked vote due to apparent concern that the plate could give the impression that those displaying it would receive favored treatment from state troopers. *Id.*, at 109–112. The constitutionality of this Board action does not necessarily turn on whether approval of this plate would have made the message government speech. If, as I believe, the Texas specialty plate program created a limited public forum, private speech may be excluded if it is inconsistent with the purpose of the forum. *Rosenberger*, 515 U. S., at 829.

Thus, even if Texas's extrarecord information is taken into account, the picture here is different from that in *Summum*. Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. *Ante*, at 212–213. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech. Many private speakers in a forum would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint over another. *Rosenberger*, *supra*, at 828.

3

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. Often large and made of stone, monuments can last for centuries and are difficult to move. License plates, on the other hand, are small, light, mobile, and designed to last

for only a relatively brief time. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?

In sum, the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee. See http://www.dmv.org/tx-texas/license-plates.php. How many groups or individuals would clamor to pay $8,000 (the cost of the deposit required to create a new plate) in order to broadcast the government's message as opposed to their own? And if Texas really wants to speak out in support of, say, Iowa State University (but not the University of Iowa) or "Young Lawyers" (but not old ones), why must it be paid to say things that it really wants to say? The fees Texas collects pay for much more than merely the administration of the program.

States have not adopted specialty license plate programs like Texas's because they are now bursting with things they want to say on their license plates. Those programs were adopted because they bring in money. Texas makes public the revenue totals generated by its specialty plate program, and it is apparent that the program brings in many millions of dollars every year. See http://www.txdmv.gov/reports-and-data/doc_download/5050-specialty-plates-revenue-fy-1994-2014.

Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

III

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i. e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Cf. *Good News Club* v. *Milford Central School*, 533 U. S. 98, 106–107 (2001). Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. See *Rosenberger*, 515 U. S., at 829 (quoting *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985)). But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." App. 64. These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas SCV, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. See *id.*, at 15–16. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because the message " '[is] so incredibly divisive,' " and the Second Circuit recently sustained that decision. *Children First Foundation, Inc.* v. *Fiala*, 790 F. 3d 328, 352 (2015). Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board's decision cannot be saved by its suggestion that the plate, if allowed, "could distract or disturb some drivers to the point of being unreasonably dangerous." App. 65. This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag,[5] and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express. Cf. *Good News Club*, *supra*, at 111–112.

* * *

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government

---

[5] See http://www.dmv.virginia.gov/vehicles/#splates/category.asp?category=SCITTexas.

speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

[Appendix to opinion of ALITO, J., follows this page.]

Syllabus

OHIO *v.* CLARK

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 13–1352. Argued March 2, 2015—Decided June 18, 2015

Respondent Darius Clark sent his girlfriend away to engage in prostitution while he cared for her 3-year-old son L. P. and 18-month-old daughter A. T. When L. P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. The trial court denied Clark's motion to exclude the statements under the Sixth Amendment's Confrontation Clause. A jury convicted Clark on all but one count. The state appellate court reversed the conviction on Confrontation Clause grounds, and the Supreme Court of Ohio affirmed.

Held: The introduction of L. P.'s statements at trial did not violate the Confrontation Clause. Pp. 243–251.

(a) This Court's decision in *Crawford* v. *Washington*, 541 U. S. 36, 54, held that the Confrontation Clause generally prohibits the introduction of "testimonial" statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Michigan* v. *Bryant*, 562 U. S. 344, 358. In making that "primary purpose" determination, courts must consider "all of the relevant circumstances." *Id.*, at 369. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at 359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. The Court has recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359; *Crawford*, *supra*, at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause. Pp. 243–246.

(b) Considering all the relevant circumstances, L. P.'s statements were not testimonial. L. P.'s statements were not made with the primary purpose of creating evidence for Clark's prosecution. They oc-

curred in the context of an ongoing emergency involving suspected child abuse. L. P.'s teachers asked questions aimed at identifying and ending a threat. They did not inform the child that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation was informal and spontaneous. L. P.'s age further confirms that the statements in question were not testimonial because statements by very young children will rarely, if ever, implicate the Confrontation Clause. As a historical matter, moreover, there is strong evidence that statements made in circumstances like these were regularly admitted at common law. Finally, although statements to individuals other than law enforcement officers are not categorically outside the Sixth Amendment's reach, the fact that L. P. was speaking to his teachers is highly relevant. Statements to individuals who are not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than those given to law enforcement officers. Pp. 246–249.

(c) Clark's arguments to the contrary are unpersuasive. Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial. Pp. 249–251.

137 Ohio St. 3d 346, 2013-Ohio-4731, 999 N. E. 2d 592, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 251. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 254.

Matthew E. Meyer argued the cause for petitioner. With him on the briefs were *Michael DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor, *Samuel Peterson*, Deputy Solicitor, *Timothy J. McGinty*, and *Katherine E. Mulin*.

Ilana H. Eisenstein argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *David M. Lieberman*.

Jeffrey L. Fisher argued the cause for respondent. With him on the brief were *Brian Wolfman*, *Erika Cunliffe*, *Jeffrey M. Gamso*, and *Donald B. Ayer*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of New Mexico et al. by *Gary K. King*, Attorney General of New Mexico, *Joel Jacobsen*, Assistant Attorney General, and *Kay Chopard Cohen*; for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah G. Purcell*, Solicitor General, *Anne E. Egeler*, Deputy Solicitor General, and *Dan Schweitzer*, by *John Hoffman*, Acting Attorney General of New Jersey, by *Eugene A. Adams*, Interim Attorney General of the District of Columbia, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Kamala D. Harris* of California, *John William Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pam Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Buddy Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Joseph A. Foster* of New Hampshire, *Mr. King* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Greg Abbott* of Texas, *William H. Sorrell* of Vermont, *Patrick Morrisey* of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; for the American Professional Society on the Abuse of Children by *Daniel B. Levin* and *Jeremy A. Lawrence*; for Child Justice, Inc., by *Elizabeth L. Ritter*, *Victoria A. Bruno*, and *Paul D. Schmitt*; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; for the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) by *John S. Moot*, *Boris Bershteyn*, *Daniele Schiffman*, and *Joan S. Meier*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Lisa Powell*,

JUSTICE ALITO delivered the opinion of the Court.

Darius Clark sent his girlfriend hundreds of miles away to engage in prostitution and agreed to care for her two young children while she was out of town. A day later, teachers discovered red marks on her 3-year-old son, and the boy identified Clark as his abuser. The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited prosecutors from introducing those statements when the child was not available to be cross-examined. Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial.

I

Darius Clark, who went by the nickname "Dee," lived in Cleveland, Ohio, with his girlfriend, T. T., and her two children: L. P., a 3-year-old boy, and A. T., an 18-month-old girl.[1] Clark was also T. T.'s pimp, and he would regularly send her on trips to Washington, D. C., to work as a prostitute. In March 2010, T. T. went on one such trip, and she left the children in Clark's care.

David J. Strom, and *Francisco M. Negrón, Jr.*; and for the Ohio Prosecuting Attorneys Association et al. by *Douglas Dumolt*.

Briefs of *amici curiae* urging affirmance were filed for Arizona Attorneys for Criminal Justice et al. by *Joseph N. Roth*, *Kathleen E. Brody*, *David J. Euchner*, *Vicki H. Hutchinson*, *John B. Whiston*, *Emily Hughes*, and *Robert Rigg*; for the Family Defense Center et al. by *Tacy F. Flint*; for the Innocence Network by *Felicia H. Ellsworth*; for the National Association of Criminal Defense Lawyers by *Stephen A. Miller* and *David M. Porter*; for Bernadette M. Bolan et al. by *Norman M. Garland*, and *Michael M. Epstein*, both *pro se*; and for Richard D. Friedman et al. by *Mr. Friedman*, *pro se*.

A brief of *amici curiae* was filed for Fern L. Nesson et al. by *Ms. Nesson* and *Charles R. Nesson*, both *pro se*.

[1] Like the Ohio courts, we identify Clark's victims and their mother by their initials.

The next day, Clark took L. P. to preschool. In the lunchroom, one of L. P.'s teachers, Ramona Whitley, observed that L. P.'s left eye appeared bloodshot. She asked him "'[w]hat happened,'" and he initially said nothing. 137 Ohio St. 3d 346, 347, 2013-Ohio-4731, 999 N. E. 2d 592, 594. Eventually, however, he told the teacher that he "'fell.'" *Ibid.* When they moved into the brighter lights of a classroom, Whitley noticed "'[r]ed marks, like whips of some sort,'" on L. P.'s face. *Ibid.* She notified the lead teacher, Debra Jones, who asked L. P., "'Who did this? What happened to you?'" *Id.*, at 348, 999 N. E. 2d, at 595. According to Jones, L. P. "'seemed kind of bewildered'" and "'said something like, Dee, Dee.'" *Ibid.* Jones asked L. P. whether Dee is "big or little," to which L. P. responded that "Dee is big." App. 60, 64. Jones then brought L. P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse.

When Clark later arrived at the school, he denied responsibility for the injuries and quickly left with L. P. The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse. L. P. had a black eye, belt marks on his back and stomach, and bruises all over his body. A. T. had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.

A grand jury indicted Clark on five counts of felonious assault (four related to A. T. and one related to L. P.), two counts of endangering children (one for each child), and two counts of domestic violence (one for each child). At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. Under Ohio law, children younger than 10 years old are incompetent to testify if they "appear incapable of receiving just impres-

sions of the facts and transactions respecting which they are examined, or of relating them truly." Ohio Rule Evid. 601(A) (Lexis 2010). After conducting a hearing, the trial court concluded that L. P. was not competent to testify. But under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L. P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.

Clark moved to exclude testimony about L. P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L. P.'s responses were not testimonial statements covered by the Sixth Amendment. The jury found Clark guilty on all counts except for one assault count related to A. T., and it sentenced him to 28 years' imprisonment. Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L. P.'s out-of-court statements violated the Confrontation Clause.

In a 4-to-3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L. P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning "was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution." 137 Ohio St. 3d, at 350, 999 N. E. 2d, at 597. The court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. See *id.*, at 349–350, 999 N. E. 2d, at 596–597. In the court's view, the teachers acted as agents of the State under the mandatory reporting law and "sought facts concerning past criminal activity to identify the person responsible, eliciting statements that 'are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.'" *Id.*, at 355, 999

N. E. 2d, at 600 (quoting *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 310–311 (2009); some internal quotation marks omitted).

We granted certiorari, 573 U. S. 991 (2014), and we now reverse.

II

A

The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980), we interpreted the Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.'" Such indicia are present, we held, if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Ibid.*

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), we adopted a different approach. We explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and we defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*, at 51 (internal quotation marks and alteration omitted). The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*, at 54. Applying that definition to the facts in *Crawford*, we held that statements by a witness during police questioning at the station house were testimonial and thus could not be admitted. But our decision in *Crawford* did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a pre-

liminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*, at 68.

Our more recent cases have labored to flesh out what it means for a statement to be "testimonial." In *Davis* v. *Washington* and *Hammon* v. *Indiana*, 547 U. S. 813 (2006), which we decided together, we dealt with statements given to law enforcement officers by the victims of domestic abuse. The victim in *Davis* made statements to a 911 emergency operator during and shortly after her boyfriend's violent attack. In *Hammon*, the victim, after being isolated from her abusive husband, made statements to police that were memorialized in a "'battery affidavit.'" *Id.*, at 820.

We held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not. Announcing what has come to be known as the "primary purpose" test, we explained: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, at 822. Because the cases involved statements to law enforcement officers, we reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause. See *id.*, at 823, n. 2.

In *Michigan* v. *Bryant*, 562 U. S. 344 (2011), we further expounded on the primary purpose test. The inquiry, we emphasized, must consider "all of the relevant circumstances." *Id.*, at 369. And we reiterated our view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." 562 U. S., at 358. At the same

time, we noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Ibid.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." *Id.*, at 374. Instead, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*, at 366.

One additional factor is "the informality of the situation and the interrogation." *Id.*, at 377. A "formal station-house interrogation," like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused. 562 U. S., at 366, 377. And in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*, at 358–359. In the end, the question is whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." *Id.*, at 358. Applying these principles in *Bryant*, we held that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution. Because the relevant statements were made to law enforcement officers, we again declined to decide whether the same analysis applies to statements made to individuals other than the police. See *id.*, at 357, n. 3.

Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Id.*, at

359. But that does not mean that the Confrontation Clause bars every statement that satisfies the "primary purpose" test. We have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. See *Giles* v. *California*, 554 U. S. 353, 358–359 (2008); *Crawford*, 541 U. S., at 56, n. 6, 62. Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.

B

In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L. P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

L. P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. When L. P.'s teachers noticed his injuries, they rightly became worried that the 3-year-old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L. P. to his guardian at the end of the day, they needed to determine who might be abusing the child.[2]

[2] In fact, the teachers and a social worker who had come to the school *were* reluctant to release L. P. into Clark's care after the boy identified Clark as his abuser. But after a brief "stare-down" with the social

Thus, the immediate concern was to protect a vulnerable child who needed help. Our holding in *Bryant* is instructive. As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear. L. P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L. P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.

There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L. P. At no point did the teachers inform L. P. that his answers would be used to arrest or punish his abuser. L. P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L. P. and his teachers was informal and spontaneous. The teachers asked L. P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized stationhouse questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*.

L. P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young

---

worker, Clark bolted out the door with L. P., and social services were not able to locate the children until the next day. App. 92–102, 150–151.

children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." Brief for American Professional Society on the Abuse of Children as *Amicus Curiae* 7, and n. 5 (collecting sources). And Clark does not dispute those findings. Thus, it is extremely unlikely that a 3-year-old child in L. P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.

As a historical matter, moreover, there is strong evidence that statements made in circumstances similar to those facing L. P. and his teachers were admissible at common law. See Lyon & LaMagna, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030 (2007); see also *id.*, at 1041–1044 (examining child rape cases from 1687 to 1788); J. Langbein, The Origins of Adversary Criminal Trial 239 (2003) ("The Old Bailey" court in 18th-century London "tolerated flagrant hearsay in rape prosecutions involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath"). And when 18th-century courts excluded statements of this sort, see, *e. g.*, *King* v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (K. B. 1779), they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. See Lyon & LaMagna, *supra*, at 1053–1054. It is thus highly doubtful that statements like L. P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence

that was regularly admitted in criminal cases at the time of the founding. Certainly, the statements in this case are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason, which we have frequently identified as "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U. S., at 50; see also *Bryant*, 562 U. S., at 358.

Finally, although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L. P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. See *id.*, at 369. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. See, *e. g.*, *Giles*, 554 U. S., at 376. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality. In light of these circumstances, the Sixth Amendment did not prohibit the State from introducing L. P.'s statements at trial.

III

Clark's efforts to avoid this conclusion are all off base. He emphasizes Ohio's mandatory reporting obligations, in an attempt to equate L. P.'s teachers with the police and their caring questions with official interrogations. But the comparison is inapt. The teachers' pressing concern was to protect L. P. and remove him from harm's way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. The statements at issue in *Davis* and *Bryant* supported the defendants' convictions, and the police always have an obligation to ask questions to resolve ongoing emergencies. Yet, we held in those cases that the Confrontation Clause did not prohibit introduction of the statements because they were not primarily intended to be testimonial. Thus, Clark is also wrong to suggest that admitting L. P.'s statements would be fundamentally unfair given that Ohio law does not allow incompetent children to testify. In any Confrontation Clause case, the individual who provided the out-of-court statement is not available as an in-court witness, but the testimony is admissible under an exception to the hearsay rules and is probative of the defendant's guilt. The fact that the witness is unavailable because of a different rule of evidence does not change our analysis.

Finally, Clark asks us to shift our focus from the context of L. P.'s conversation with his teachers to the jury's perception of those statements. Because, in his view, the "jury treated L. P.'s accusation as the functional equivalent of testimony," Clark argues that we must prohibit its introduction. Brief for Respondent 42. Our Confrontation Clause decisions, however, do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. The logic of this argument, moreover, would lead to the conclusion that virtually all out-of-court statements offered by the prosecution are testimonial. The prosecution is unlikely to offer out-of-court statements unless they tend to support the defendant's guilt, and all such statements could be viewed as a substitute for in-court testimony. We have never suggested, however, that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the "primary purpose of creating an out-of-court substitute

for trial testimony." *Bryant*, *supra*, at 358. Here, the answer is clear: L. P.'s statements to his teachers were not testimonial.

IV

We reverse the judgment of the Supreme Court of Ohio and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins, concurring in the judgment.

I agree with the Court's holding, and with its refusal to decide two questions quite unnecessary to that holding: what effect Ohio's mandatory-reporting law has in transforming a private party into a state actor for Confrontation Clause purposes, and whether a more permissive Confrontation Clause test—one less likely to hold the statements testimonial—should apply to interrogations by private actors. The statements here would not be testimonial under the usual test applicable to informal police interrogation.

L. P.'s primary purpose here was certainly not to invoke the coercive machinery of the State against Clark. His age refutes the notion that he is capable of forming such a purpose. At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent. Lyon & LaManga, The History of Children's Hearsay: From Old Bailey to Post-*Davis*, 82 Ind. L. J. 1029, 1030–1031 (2007). The inconsistency of L. P.'s answers—making him incompetent to testify here—is hardly unusual for a child of his age. And the circumstances of L. P.'s statements objectively indicate that even if he could, as an abstract matter, form such a purpose, he did not. Nor did the teachers have the primary purpose of establishing facts for later prosecution. Instead, they sought to ensure that they did not deliver an abused child

back into imminent harm. Nor did the conversation have the requisite solemnity necessary for testimonial statements. A 3-year-old was asked questions by his teachers at school. That is far from the surroundings adequate to impress upon a declarant the importance of what he is testifying to.

That is all that is necessary to decide the case, and all that today's judgment holds.

I write separately, however, to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford* v. *Washington*, 541 U. S. 36 (2004). For several decades before that case, we had been allowing hearsay statements to be admitted against a criminal defendant if they bore "'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). Prosecutors, past and present, love that flabby test. *Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by *witnesses*—*i. e.*, statements that were *testimonial*. 541 U. S., at 51. We defined testimony as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" *ibid.*—in the context of the Confrontation Clause, a fact "potentially relevant to later criminal prosecution," *Davis* v. *Washington*, 547 U. S. 813, 822 (2006).

Crawford remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than "adopt[ing] a different approach," *ante*, at 243—as though *Crawford* is only a matter of twiddle-dum twiddle-dee preference, and the old, pre-*Crawford* "approach" remains available? The author unabashedly displays his hostility to *Crawford* and its progeny, perhaps aggravated by inability to muster the votes to overrule them. *Crawford* "does not rank on the [author of the opinion's] top-ten list of favorite precedents—and . . . the [author] could not restrain [himself] from saying (and saying and saying) so." *Harris* v. *Quinn*, 573 U. S. 616, 671 (2014) (KAGAN, J., dissenting).

But snide detractions do no harm; they are just indications of motive. Dicta on legal points, however, can do harm, because though they are not binding they can mislead. Take, for example, the opinion's statement that the primary-purpose test is merely *one* of several heretofore unmentioned conditions ("necessary, but not always sufficient") that must be satisfied before the Clause's protections apply. *Ante*, at 246. That is absolutely false, and has no support in our opinions. The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

The opinion asserts that future defendants, and future Confrontation Clause majorities, must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding." *Ante*, at 248–249. This dictum gets the burden precisely backwards—which is of course precisely the idea. Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying declarations, see *Crawford*, *supra*, at 56, n. 6, for which cross-examination was not typically necessary. A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio* v. *Roberts*.

But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta. They are enough, however, combined with the peculiar phenomenon of a Supreme Court opinion's aggressive hostility to precedent that it purports to be applying, to prevent my joining the writing for the Court. I concur only in the judgment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Ohio mandatory reporters are not agents of law enforcement, that statements made to private persons or by very young children will rarely implicate the Confrontation Clause, and that the admission of the statements at issue here did not implicate that constitutional provision. I nonetheless cannot join the majority's analysis. In the decade since we first sought to return to the original meaning of the Confrontation Clause, see *Crawford* v. *Washington*, 541 U. S. 36 (2004), we have carefully reserved consideration of that Clause's application to statements made to private persons for a case in which it was squarely presented. See, *e. g.*, *Michigan* v. *Bryant*, 562 U. S. 344, 357, n. 3 (2011).

This is that case; yet the majority does not offer clear guidance on the subject, declaring only that "the primary purpose test is a necessary, but not always sufficient, condition" for a statement to fall within the scope of the Confrontation Clause. *Ante,* at 246. The primary purpose test, however, is just as much "an exercise in fiction . . . disconnected from history" for statements made to private persons as it is for statements made to agents of law enforcement, if not more so. *Bryant*, *supra*, at 379 (THOMAS, J., concurring in judgment) (internal quotation marks omitted). I would not apply it here. Nor would I leave the resolution of this important question in doubt.

Instead, I would use the same test for statements to private persons that I have employed for statements to agents

of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. See *Crawford*, *supra*, at 51; *Davis* v. *Washington*, 547 U. S. 813, 836–837 (2006) (THOMAS, J., concurring in judgment in part and dissenting in part). This test is grounded in the history of the common-law right to confrontation, which "developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.*, at 835 (internal quotation marks omitted). Reading the Confrontation Clause in light of this history, we have interpreted the accused's right to confront "the witnesses against him," U. S. Const., Amdt. 6, as the right to confront those who "bear testimony" against him, *Crawford*, 541 U. S., at 51 (relying on the ordinary meaning of "witness"). And because "[t]estimony . . . is . . . a solemn declaration or affirmation made for the purpose of establishing or proving some fact," *ibid.* (internal quotation marks and brackets omitted), an analysis of statements under the Clause must turn in part on their solemnity, *Davis*, *supra*, at 836 (opinion of THOMAS, J.).

I have identified several categories of extrajudicial statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" easily qualify. *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., concurring in part and concurring in judgment). And statements not contained in such materials may still qualify if they were obtained in "a formalized dialogue"; after the issuance of the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966); while in police custody; or in an attempt to evade confrontation. *Davis*, *supra*, at 840 (opinion of THOMAS, J.); see also *Bryant*, 562 U. S., at 379 (same) (summarizing and applying test). That several of these factors

seem inherently inapplicable to statements made to private persons does not mean that the test is unsuitable for analyzing such statements. All it means is that statements made to private persons rarely resemble the historical abuses that the common-law right to confrontation developed to address, and it is those practices that the test is designed to identify.

Here, L. P.'s statements do not bear sufficient indicia of solemnity to qualify as testimonial. They were neither contained in formalized testimonial materials nor obtained as the result of a formalized dialogue initiated by police. Instead, they were elicited during questioning by L. P.'s teachers at his preschool. Nor is there any indication that L. P.'s statements were offered at trial to evade confrontation. To the contrary, the record suggests that the prosecution would have produced L. P. to testify had he been deemed competent to do so. His statements bear no "resemblance to the historical practices that the Confrontation Clause aimed to eliminate." *Ibid.* The admission of L. P.'s extrajudicial statements thus does not implicate the Confrontation Clause.

I respectfully concur in the judgment.

Syllabus

DAVIS, ACTING WARDEN *v.* AYALA

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

No. 13–1428. Argued March 3, 2015—Decided June 18, 2015

During jury selection in respondent Ayala's murder trial, Ayala, who is Hispanic, objected that seven of the prosecution's peremptory challenges were impermissibly race based under *Batson* v. *Kentucky*, 476 U. S. 79. The judge permitted the prosecution to disclose its reasons for the strikes outside the presence of the defense and concluded that the prosecution had valid, race-neutral reasons for the strikes. Ayala was eventually convicted and sentenced to death. On appeal, the California Supreme Court analyzed Ayala's challenge under both *Batson* and its state-law analogue, concluding that it was error, as a matter of state law, to exclude Ayala from the hearings. The court held, however, that the error was harmless under state law and that, if a federal error occurred, it too was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U. S. 18. Ayala subsequently pressed his claims in federal court. There, the District Court held that even if the *ex parte* proceedings violated federal law, the state court's harmlessness finding could not be overturned because it was not contrary to or an unreasonable application of clearly established federal law under 28 U. S. C. § 2254(d). A divided panel of the Ninth Circuit disagreed and granted Ayala habeas relief. The panel majority held that the *ex parte* proceedings violated Ayala's federal constitutional rights and that the error was not harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619, as to at least three of the seven prospective jurors.

Held: Any federal constitutional error that may have occurred by excluding Ayala's attorney from part of the *Batson* hearing was harmless. Pp. 267–286.

(a) Even assuming that Ayala's federal rights were violated, he is entitled to habeas relief only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. 21, 23. Under *Brecht*, federal habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" 507 U. S., at 637. Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. The *Brecht* standard subsumes the requirements that § 2254(d) imposes when a federal habeas petitioner contests

a state court's determination that a constitutional error was harmless under *Chapman*. *Fry* v. *Pliler*, 551 U. S. 112, 120. But *Brecht* did not abrogate the limitation on federal habeas relief that the Antiterrorism and Effective Death Penalty Act of 1996 plainly sets out. There is no dispute that the California Supreme Court held that any federal error was harmless under *Chapman*, and this decision was an "adjudication on the merits" of Ayala's claim. Accordingly, a federal court cannot grant Ayala relief unless the state court's rejection of his claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts. Pp. 267–270.

(b) Any federal constitutional error was harmless with respect to all seven prospective jurors. Pp. 270–286.

(1) The prosecution stated that it struck Olanders D., an African-American man, because it was concerned that he could not impose the death penalty and because of the poor quality of his responses. As the trial court and State Supreme Court found, the record amply supports the prosecution's concerns, and Ayala cannot establish that the *ex parte* hearing prejudiced him. The Ninth Circuit misunderstood the role of a federal court in a habeas case. That role is not to conduct *de novo* review of factual findings and substitute the federal court's own opinions for the determination made on the scene by the trial judge. Pp. 271–276.

(2) The prosecution stated that it struck Gerardo O., a Hispanic man, because he had a poor grasp of English, his answers suggested an unwillingness to impose the death penalty, and he did not appear to get along with other jurors. Each of these reasons was amply supported by the record, and there is no basis for finding that the absence of defense counsel affected the trial judge's evaluation of the strike. Ayala cannot establish that the *ex parte* hearing actually prejudiced him or that no fairminded jurist could agree with the state court's application of *Chapman*. Once again, the Ninth Circuit's decision was based on a misapplication of basic rules regarding harmless error. The inquiry is not whether the federal habeas court could definitively say that the defense could make no winning arguments, but whether the evidence in the record raised "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal* v. *McAninch*, 513 U. S. 432, 436. That standard was not met in this case. Pp. 276–281.

(3) The prosecution stated that it struck Robert M., a Hispanic man, because it was concerned that he could not impose the death penalty and because he had followed a controversial murder trial. Not only was the Ninth Circuit incorrect to suppose that the presence of Ayala's counsel at the hearing would have made a difference in the trial court's

evaluation of the strike, but the Ninth Circuit failed to mention that defense counsel specifically addressed the issue during *voir dire* and reminded the judge that Robert M. also made several statements favorable to the death penalty. Thus, the trial judge heard counsel's arguments and concluded that the record supplied a legitimate basis for the prosecution's concern. That defense counsel did not have the opportunity to repeat that argument does not create grave doubt about whether the trial court would have decided the issue differently. Pp. 281–283.

(4) With regard to Ayala's *Batson* objection about the four remaining prospective jurors who were struck, he does not come close to establishing "actual prejudice" under *Brecht* or that no fairminded jurist could agree with the California Supreme Court's decision that excluding counsel was harmless. Pp. 283–286.

756 F. 3d 656, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., *post*, p. 286, and THOMAS, J., *post*, p. 290, filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 290.

Robin Urbanski, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Kamala D. Harris*, Attorney General, *Edward C. DuMont*, Solicitor General, *Gerald A. Engler*, Chief Assistant Attorney General, *Julie L. Garland*, Senior Assistant Attorney General, *Joshua A. Klein*, Deputy Solicitor General, and *Holly D. Wilkens*, Supervising Deputy Attorney General.

Anthony J. Dain argued the cause for respondent. With him on the brief was *Robin L. Phillips*.

JUSTICE ALITO delivered the opinion of the Court.

A quarter-century after a California jury convicted Hector Ayala of triple murder and sentenced him to death, the Court of Appeals for the Ninth Circuit granted Ayala's application for a writ of habeas corpus and ordered the State to retry or release him. The Ninth Circuit's decision was based on the procedure used by the trial judge in ruling on Ayala's objections under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), to some of the prosecution's peremptory challenges of

prospective jurors. The trial judge allowed the prosecutor to explain the basis for those strikes outside the presence of the defense so as not to disclose trial strategy. On direct appeal, the California Supreme Court found that if this procedure violated any federal constitutional right, the error was harmless beyond a reasonable doubt. The Ninth Circuit, however, held that the error was harmful.

The Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error. Assuming without deciding that a federal constitutional error occurred, the error was harmless under *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d).

I

A

Ayala's conviction resulted from the attempted robbery of an automobile body shop in San Diego, California, in April 1985. The prosecution charged Ayala with three counts of murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. The prosecution also announced that it would seek the death penalty on the murder counts.

Jury selection lasted more than three months, and during this time the court and the parties interviewed the prospective jurors and then called back a subset for general *voir dire*. As part of the jury selection process, more than 200 potential jurors completed a 77-question, 17-page questionnaire. Potential jurors were then questioned in court regarding their ability to follow the law. Jurors who were not dismissed for cause were called back in groups for *voir dire*, and the parties exercised their peremptory challenges.

Each side was allowed 20 peremptories, and the prosecution used 18 of its allotment. It used seven peremptories to strike all of the African-Americans and Hispanics who were

available for service. Ayala, who is Hispanic, raised *Batson* objections to those challenges.

Ayala first objected after the prosecution peremptorily challenged two African-Americans, Olanders D. and Galileo S. The trial judge stated that these two strikes failed to establish a prima facie case of racial discrimination, but he nevertheless required the prosecution to reveal the reasons for the strikes. The prosecutor asked to do this outside the presence of the defense so as not to disclose trial strategy, and over Ayala's objection, the judge granted the request. The prosecution then offered several reasons for striking Olanders D., including uncertainty about his willingness to impose the death penalty. The prosecution stated that it dismissed Galileo S. primarily because he had been arrested numerous times and had not informed the court about all his prior arrests. After hearing and evaluating these explanations, the judge concluded that the prosecution had valid, race-neutral reasons for these strikes.

Ayala again raised *Batson* objections when the prosecution used peremptory challenges to dismiss two Hispanics, Gerardo O. and Luis M. As before, the judge found that the defense had not made out a prima facie case, but ordered the prosecution to reveal the reasons for the strikes. This was again done *ex parte*, but this time the defense did not expressly object. The prosecution explained that it had challenged Gerardo O. and Luis M. in part because it was unsure that they could impose the death penalty. The prosecution also emphasized that Gerardo O.'s English proficiency was limited and that Luis M. had independently investigated the case. The trial court concluded a second time that the prosecution had legitimate race-neutral reasons for the strikes.

Ayala raised *Batson* objections for a third and final time when the prosecution challenged Robert M., who was Hispanic; George S., whose ethnicity was disputed; and Barbara S., who was African-American. At this point, the trial court

agreed that Ayala had made a prima facie *Batson* showing. Ayala's counsel argued that the strikes were in fact based on race. Ayala's counsel contended that the challenged jurors were "not significantly different from the white jurors that the prosecution ha[d] chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence." App. 306. Ayala's counsel then reviewed the questionnaire answers and *voir dire* testimony of Barbara S. and Robert M., as well as the statements made by three of the prospective jurors who had been the subject of the prior *Batson* objections, Galileo S., Gerardo O., and Luis M. Counsel argued that their answers showed that they could impose the death penalty. The trial court stated that it would hear the prosecution's response outside the presence of the jury, and Ayala once more did not object to that ruling. The prosecution then explained that it had dismissed the prospective jurors in question for several race-neutral reasons, including uncertainty that Robert M., George S., or Barbara S. would be open to imposing the death penalty. The prosecution also emphasized (among other points) that Robert M. had followed a controversial trial, that George S. had been a holdout on a prior jury, and that Barbara S. had given the impression during *voir dire* that she was under the influence of drugs. The trial court concluded, for a third time, that the prosecution's peremptory challenges were based on race-neutral criteria.

In August 1989, the jury convicted Ayala of all the charges except one of the three attempted robberies. With respect to the three murder convictions, the jury found two special circumstances: Ayala committed multiple murders, and he killed during the course of an attempted robbery. The jury returned a verdict of death on all three murder counts, and the trial court entered judgment consistent with that verdict.

B

Ayala appealed his conviction and sentence, and counsel was appointed to represent him in January 1993. Between 1993 and 1999, Ayala filed 20 applications for an extension of time, 11 of which requested additional time to file his opening brief. After the California Supreme Court eventually ruled that no further extensions would be granted, Ayala filed his opening brief in April 1998, nine years after he was convicted. The State filed its brief in September 1998, and Ayala then asked for four extensions of time to file his reply brief. After the court declared that it would grant him no further extensions, he filed his reply brief in May 1999.

In August 2000, the California Supreme Court affirmed Ayala's conviction and death sentence. *People* v. *Ayala*, 24 Cal. 4th 243, 6 P. 3d 193. In an opinion joined by five justices, the State Supreme Court rejected Ayala's contention that the trial court committed reversible error by excluding the defense from part of the *Batson* hearing. The court understood Ayala to challenge the peremptory strikes under both *Batson* and its state-law analogue, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). The court first concluded that the prosecution had not offered matters of trial strategy at the *ex parte* hearing and that, "as a matter of state law, it was [error]" to bar Ayala's attorney from the hearing. 24 Cal. 4th, at 262, 6 P. 3d, at 203.

Turning to the question of prejudice, the court stated:

> "We have concluded that error occurred under state law, and we have noted [the suggestion in *United States* v. *Thompson*, 827 F. 2d 1254 (CA9 1987),] that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People* v. *Watson* (1956) 46 Cal. 2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U. S. 18,

> 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons." *Id.*, at 264, 6 P. 3d, at 204.

The court then reviewed the prosecution's reasons for striking the seven prospective jurors and found that "[o]n this well-developed record, . . . we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless." *Id.*, at 268, 6 P. 3d, at 207. The court concluded that the record supported the trial judge's implicit determination that the prosecution's justifications were not fabricated and were instead "grounded in fact." *Id.*, at 267, 6 P. 3d, at 206. And the court emphasized that the "trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.*, at 266–267, 6 P. 3d, at 206.

The California Supreme Court also rejected Ayala's argument that his conviction should be vacated because most of the questionnaires filled out by prospective jurors who did not serve had been lost at some point during the decade that had passed since the end of the trial. The court wrote that "the record is sufficiently complete for us to be able to conclude that [the prospective jurors who were the subject of the contested peremptories] were not challenged and excused on the basis of forbidden group bias." *Id.*, at 270, 6 P. 3d, at 208. And even if the loss of the questionnaires was error under federal or state law, the court held, the error was harmless under *Chapman* v. *California*, 386 U. S. 18 (1967), and its state-law analogue. Two justices of the State Supreme Court dissented. We then denied certiorari. 532 U. S. 1029 (2001).

C

After the California Supreme Court summarily denied a habeas petition, Ayala turned to federal court. He filed his

initial federal habeas petition in 2002, but then went back to state court to exhaust several claims. In December 2004, he filed the operative federal petition and argued, among other things, that the *ex parte* hearings and loss of the questionnaires violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

In 2006, the District Court denied Ayala relief on those claims. The District Court read the decision of the California Supreme Court to mean that the state court had not decided whether the *ex parte* proceedings violated federal law, and the District Court expressed doubt "whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law." App. to Pet. for Cert. 145a. But even if such a violation occurred, the District Court held, the state court's finding of harmlessness was not contrary to or an unreasonable application of clearly established law and thus could not be overturned under AEDPA. The District Court also rejected Ayala's argument about the lost questionnaires, concluding that, even without them, the record was sufficient to resolve Ayala's other claims.

In 2013, a divided panel of the Ninth Circuit granted Ayala federal habeas corpus relief and required California either to release or retry him. *Ayala* v. *Wong*, 756 F. 3d 656 (2014). Because Ayala's federal petition is subject to the requirements of AEDPA, the panel majority began its analysis by inquiring whether the state court had adjudicated Ayala's claims on the merits. Applying *de novo* review,[1] the panel held that the *ex parte* proceedings violated the Federal Constitution, and that the loss of the questionnaires violated Ayala's federal due process rights if that loss deprived him of "the ability to meaningfully appeal the denial of his *Batson* claim." *Id.*, at 671. The panel folded this inquiry into its

[1] The panel decided this question *de novo* because it concluded that the California Supreme Court either did not decide whether the *ex parte* proceedings violated the Federal Constitution or silently decided that question in Ayala's favor. 756 F. 3d, at 666–670.

analysis of the question whether the error regarding the *ex parte* proceedings was harmless.

Turning to the question of harmlessness, the panel identified the applicable standard of review as that set out in *Brecht* and added: "We apply the *Brecht* test without regard for the state court's harmlessness determination." 756 F. 3d, at 674 (internal quotation marks omitted).[2] The panel used the following complicated formulation to express its understanding of *Brecht*'s application to Ayala's claims: "If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ." 756 F. 3d, at 676. Applying this test, the panel majority found that the error was not harmless, at least with respect to three of the seven prospective jurors. The panel asserted that the absence of Ayala and his counsel had interfered with the trial court's ability to evaluate the prosecution's proffered justifications for those strikes and had impeded appellate review, and that the loss of the questionnaires had compounded this impairment.

Judge Callahan dissented. She explained that the California Supreme Court's decision that any federal error was harmless constituted a merits adjudication of Ayala's federal claims. She then reviewed the prosecution's explanations for its contested peremptory challenges and concluded that federal habeas relief was barred because "fairminded jurists can concur in the California Supreme Court's determination of harmless error." *Id.*, at 706.

The Ninth Circuit denied rehearing en banc, but Judge Ikuta wrote a dissent from denial that was joined by seven other judges. Like Judge Callahan, Judge Ikuta concluded

---

[2] In a footnote, however, the panel stated: "In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense." *Id.*, at 674, n. 13.

that the California Supreme Court adjudicated the merits of Ayala's federal claims. Instead of the panel's "de novo review of the record that piles speculation upon speculation," she would have found that the state court's harmlessness determination was not an unreasonable application of *Chapman*. 756 F. 3d, at 723.

We granted certiorari. 574 U. S. 958 (2014).

II

Ayala contends that his federal constitutional rights were violated when the trial court heard the prosecution's justifications for its strikes outside the presence of the defense, but we find it unnecessary to decide that question. We assume for the sake of argument that Ayala's federal rights were violated, but that does not necessarily mean that he is entitled to habeas relief. In the absence of "the rare type of error" that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness. *Glebe* v. *Frost*, 574 U. S. 21, 23 (2014) (*per curiam*). The Ninth Circuit did not hold—and Ayala does not now contend—that the error here falls into that narrow category, and therefore Ayala is entitled to relief only if the error was not harmless.

The test for whether a federal constitutional error was harmless depends on the procedural posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman*, 386 U. S. 18: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24.

In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U. S., at 637 (quoting *United States* v. *Lane*, 474 U. S. 438, 449 (1986)). Under this test, relief is proper only

if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal* v. *McAninch*, 513 U. S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, *supra*, at 637 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*).

Because Ayala seeks federal habeas corpus relief, he must meet the *Brecht* standard, but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*. In *Fry* v. *Pliler*, 551 U. S. 112, 120 (2007), we held that the *Brecht* standard "subsumes" the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*. The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out. While a federal habeas court need not "formal[ly]" apply both *Brecht* and "AEDPA/*Chapman*," AEDPA nevertheless "sets forth a precondition to the grant of habeas relief." *Fry*, *supra*, at 119–120.

Under AEDPA, 28 U. S. C. § 2254(d):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

> lished Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Section 2254(d) thus demands an inquiry into whether a prisoner's "claim" has been "adjudicated on the merits" in state court; if it has, AEDPA's highly deferential standards kick in. *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

At issue here is Ayala's claim that the *ex parte* portion of the *Batson* hearings violated the Federal Constitution. There is no dispute that the California Supreme Court held that any federal error was harmless beyond a reasonable doubt under *Chapman*, and this decision undoubtedly constitutes an adjudication of Ayala's constitutional claim "on the merits." See, *e. g.*, *Mitchell* v. *Esparza*, 540 U. S. 12, 17–18 (2003) (*per curiam*). Accordingly, a federal habeas court cannot grant Ayala relief unless the state court's rejection of his claim (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman* "in an 'objectively unreasonable' manner." 540 U. S., at 18 (quoting *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003)). When a *Chapman* decision is reviewed under AEDPA, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry*, *supra*, at 119 (emphasis in original). And a state-court decision is not unreasonable if "'fairminded jurists could disagree' on [its] correctness." *Richter*, *supra*, at 101 (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004)). Ayala therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fairminded disagreement." 562 U. S., at 103.

In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA. *Fry*, *supra*, at 119–120.

III

With this background in mind, we turn to the question whether Ayala was harmed by the trial court's decision to receive the prosecution's explanation for its challenged strikes without the defense present. In order for this argument to succeed, Ayala must show that he was actually prejudiced by this procedure, a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme Court's decision that this procedure met the *Chapman* standard of harmlessness. Evaluation of these questions requires consideration of the trial court's grounds for rejecting Ayala's *Batson* challenges.

A

Batson held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges on the basis of race. 476 U. S., at 89. When adjudicating a *Batson* claim, trial courts follow a three-step process:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder* v. *Louisiana*, 552 U. S. 472, 476–477 (2008) (internal quotation marks and alterations omitted).

The opponent of the strike bears the burden of persuasion regarding racial motivation, *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) (*per curiam*), and a trial court finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference,'" *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*) (quoting *Batson*, *supra*, at 98, n. 21). On direct appeal, those findings may be reversed only if the trial judge is shown to have committed clear error. *Rice* v. *Collins*, 546 U. S. 333, 338 (2006). Under AEDPA, even more must be shown. A federal habeas court must accept a state-court finding unless it was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). "State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.*, at 338–339 (quoting § 2254(e)(1)).

In this case, Ayala challenged seven of the prosecution's peremptory challenges. As explained above, the Ninth Circuit granted relief based on the dismissal of three potential jurors. The dissent discusses only one, Olanders D. We will devote most of our analysis to the three individuals discussed by the Ninth Circuit, but we hold that any error was harmless with respect to all seven strikes.

B

1

Ayala first contests the prosecution's decision to challenge Olanders D., an African-American man. The prosecution stated that its "primary" reason for striking Olanders D. was uncertainty about whether he could impose the death penalty, and the prosecutor noted that Olanders D. had written on his questionnaire that he did not "believe in the death penalty." 50 Reporter's Tr. on Appeal 6185 (hereinafter Tr.). Providing additional reasons for this strike, the prosecutor first stated that Olanders D.'s responses "did not make

a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well." App. 283. The prosecutor also voiced doubt that Olanders D. "could actively participate in a meaningful way in deliberations with other jurors" and might have lacked the "ability to fit in with a cohesive group of 12 people." *Ibid.*

The trial court concluded that the strike was race neutral. The judge stated: "Certainly with reference to whether or not he would get along with 12 people, it may well be that he would get along very well with 12 people. I think the other observations of counsel are accurate and borne out by the record." 50 Tr. 6186. The California Supreme Court found that the evidence of Olanders D.'s views on the death penalty provided adequate support for the trial judge's finding that the strike exercised against him was not based on race, and the court further found that defense counsel's presence would not have affected the outcome of the *Batson* hearing. The Ninth Circuit reversed, but its decision rested on a misapplication of the applicable harmless-error standards.

2

As the trial court and the State Supreme Court found, Olanders D.'s *voir dire* responses amply support the prosecution's concern that he might not have been willing to impose the death penalty. During *voir dire*, Olanders D. acknowledged that he wrote on his questionnaire, "'I don't believe in the death penalty,'" App. 179, and he agreed that he had at one time "thought that [the death penalty] was completely wrong," *id.*, at 177. Although he stated during the *voir dire* that he had reconsidered his views, it was reasonable for the prosecution and the trial court to find that he did not clearly or adequately explain the reason or reasons for this change. When asked about this, Olanders D. gave a vague and rambling reply: "Well, I think it's—one thing would be the—the—I mean, examining it more closely, I think, and becoming more familiar with the laws and the—and the behavior, I

mean, the change in the people, I think. All of those things contributed to the changes." *Id.*, at 178.

The Ninth Circuit reversed because it speculated that defense counsel, if present when the prosecution explained the basis for this strike, "could have pointed to seated white jurors who had expressed similar or greater hesitancy" in imposing the death penalty. 756 F. 3d, at 678. The Ninth Circuit wrote that a seated white juror named Ana L. was "indistinguishable from Olanders D. in this regard" and that she had "made almost precisely the same statement in her questionnaire." *Ibid.*

The responses of Olanders D. and Ana L., however, were by no means "indistinguishable." Olanders D. initially voiced unequivocal opposition to the death penalty, stating flatly: "I don't believe in the death penalty." He also revealed that he had once thought it was "completely wrong." Ana L., by contrast, wrote on the questionnaire that she "*probably* would not be able to vote for the death penalty," App. 109 (emphasis added), and she then later said at *voir dire* that she could vote for a verdict of death.

In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller-El* v. *Dretke*, 545 U. S. 231, 252 (2005) (citing *Batson*, 476 U. S., at 106 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder*, 552 U. S., at 477. A trial court is best situated to evaluate both the words and the

demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins*, 546 U. S., at 343 (BREYER, J., concurring).

The upshot is that even if "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility, . . . on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.*, at 341–342 (majority opinion). Here, any similarity between the responses of Olanders D. and Ana L. is insufficient to compel an inference of racial discrimination under *Brecht* or AEDPA.

Ayala contends that the presence of defense counsel might have made a difference because defense counsel might have been able to identify white jurors who were not stricken by the prosecution even though they had "expressed similar or greater hesitancy" about the death penalty. We see no basis for this argument. The questionnaires of all the jurors who sat and all the alternates are in the record, and Ana L., whom we just discussed, is apparently the white juror whose answers come the closest to those of Olanders D. Since neither Ayala nor the Ninth Circuit identified a white juror whose statements better support their argument, there is no reason to think that defense counsel could have pointed to a superior comparator at the *ex parte* proceeding.

3

In rejecting the argument that the prosecutor peremptorily challenged Olanders D. because of his race, the California Supreme Court appears to have interpreted the prosecutor's explanation of this strike to mean that Olanders D.'s

views on the death penalty were alone sufficient to convince him to exercise a strike, see 24 Cal. 4th, at 266, 6 P. 3d, at 206, and this was certainly an interpretation of the record that must be sustained under 28 U. S. C. § 2254(d)(2). As a result, it is not necessary for us to consider the prosecutor's supplementary reason for this strike—the poor quality of Olanders D.'s responses—but in any event, the Ninth Circuit's evaluation of this reason is also flawed.

The Ninth Circuit wrote that its independent "review of the voir dire transcript reveal[ed] nothing that supports the prosecution's claim: Olanders D.'s answers were responsive and complete." 756 F. 3d, at 679. The record, however, provides sufficient support for the trial court's determination. Olanders D.'s incoherent explanation during *voir dire* of the reasons for his change of opinion about the death penalty was quoted above. He also provided a chronology of the evolution of his views on the subject that did not hold together. He stated that he had been "completely against the death sentence" 10 years earlier but seemed to suggest that his views had changed over the course of the intervening decade. See App. 176–177. However, on the questionnaire, which he had completed just a month before the *voir dire*, he wrote unequivocally: "I don't believe in the death penalty." *Id.*, at 179. And then, at the time of the *voir dire*, he said that he would be willing to impose the death penalty in some cases. *Id.*, at 180. He explained his answer on the questionnaire as follows: "I answered that kind of fast[.] [N]ormally, I wouldn't answer that question that way, but I mean, I really went through that kind of fast. I should have done better than that." *Id.*, at 179–180. These answers during *voir dire* provide more than sufficient support for the prosecutor's observation, which the trial court implicitly credited, that Olanders D.'s statements "did not make a lot of sense," "were not thought out," and "demonstrate[d] a lack of ability to express himself well."

In ordering federal habeas relief based on their assessment of the responsiveness and completeness of Olanders D.'s answers, the members of the panel majority misunderstood the role of a federal court in a habeas case. The role of a federal habeas court is to "'guard against extreme malfunctions in the state criminal justice systems,'" *Richter*, 562 U. S., at 102–103 (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)), not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge.

C

Ayala next challenges the prosecution's use of a peremptory challenge to strike Gerardo O., a Hispanic man. The prosecution offered three reasons for this strike: Gerardo O. had a poor grasp of English; his answers during *voir dire* and on his questionnaire suggested that he might not be willing to impose the death penalty; and he did not appear to get along with the other prospective jurors. The trial judge accepted this explanation, as did the State Supreme Court.

The Ninth Circuit, however, rejected the state courts' determinations based on speculation that defense counsel, if present at the *in camera* hearing, "likely could have called into question all of the prosecution's stated reasons for striking Gerardo O." 756 F. 3d, at 680. The Ninth Circuit thought that it could grant Ayala relief simply because it "[could not] say that Ayala would not have shown that the trial court would or should have determined that the prosecution's strike of Gerardo O. violated *Batson*." *Id.*, at 682. But that is not the test. The inquiry under *Brecht* is not whether the federal habeas court could definitively say that there were no winning arguments that the defense could have made. Instead, the evidence in the record must raise "grave doubt[s]" about whether the trial judge would have ruled differently. *O'Neal*, 513 U. S., at 436. This requires much more than a "reasonable possibility" that the result of the hearing would have been different. *Brecht*, 507 U. S., at

637 (internal quotation marks omitted). And on the record in this case, Ayala cannot establish actual prejudice or that no fairminded jurist could agree with the state court's application of *Chapman*.

We begin with the prosecution's explanation that it challenged Gerardo O. because of his limited English proficiency. During *voir dire*, Gerardo O. acknowledged that someone else had written the answers for him on his questionnaire "[b]ecause I couldn't—I cannot read—I cannot spell that well." App. 163. He added that he "didn't get" some of the words on the questionnaire. *Ibid.* Gerardo O.'s testimony also revealed that he might well have been unable to follow what was said at trial. When asked whether he could understand spoken English, he responded: "It depends if you make long words. If you make—if you go—if you say it straight out, then I might understand. If you beat around the bush, I won't." *Id.*, at 166. At that point, defense counsel and Gerardo O. engaged in a colloquy that suggests that defense counsel recognized that he lacked the ability to understand words not used in basic everyday speech, "legal words," and rapid speech in English:

> "Q: I'll try not to talk—use any legal words or lawyer talk—
>
> "A: Okay.
>
> "Q: —and talk regular with you. If you don't understand anything I say, stop me and tell me, okay?
>
> "A: Okay.
>
> "Q: If you're selected as a juror during the trial, and you know you're serving as a juror and listening to witnesses, can we have your promise that if a witness uses a word you don't understand, you'll put your hand up and let us know?
>
> "A: Yeah.
>
> . . . . .
>
> "Q: There's one more problem that you're going to have with me, and that is that sometimes . . . I talk real fast . . . ." *Id.*, at 166–167.

It is understandable for a prosecutor to strike a potential juror who might have difficulty understanding English.[3] The jurors who were ultimately selected heard many days of testimony, and the instructions at both the guilt and the penalty phases included "legal words" and words not common in everyday speech. The prosecution had an obvious reason to worry that service on this jury would have strained Gerardo O.'s linguistic capability.

The Ninth Circuit reached a contrary conclusion by distorting the record and the applicable law. The Ninth Circuit first suggested that Gerardo O.'s English-language deficiencies were limited to reading and writing, 756 F. 3d, at 680, but as the portions of the *voir dire* quoted above make clear, that was not true; the record shows that his ability to understand spoken English was also limited. The Ninth Circuit then suggested that "[t]he prosecution's purported reason for striking Gerardo O. . . . was directly related to his status as someone who spoke Spanish as his first language," *ibid.*, but the prosecutor voiced no concern about Gerardo O.'s ability to speak Spanish or about the fact that Spanish was his first language. The prosecution's objection concerned Gerardo O.'s limited proficiency in *English*. The Ninth Circuit quoted the following statement from *Hernandez* v. *New York*, 500 U. S. 352, 363 (1991) (plurality opinion): "'[T]he prosecutor's frank admission that his ground for excusing th[is] juror[ ] related to [his] ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact [was a]

[3] The California Supreme Court has held that "[i]nsufficient command of the English language to allow full understanding of the words employed in instructions and full participation in deliberations clearly . . . render[s] a juror 'unable to perform his duty'" within the meaning of the California Penal Code. *People* v. *Lomax*, 49 Cal. 4th 530, 566, 234 P. 3d 377, 407 (2010). See also Cal. Civ. Proc. Code Ann. § 203(a)(6) (West 2006). The seating of jurors whose lack of English proficiency was only somewhat more pronounced than Gerardo O.'s has been held to be error. See *People* v. *Szymanski*, 109 Cal. App. 4th 1126, 135 Cal. Rptr. 2d 691 (2003).

race-based peremptory challenge[ ].' " 756 F. 3d, at 680 (alterations in original). This statement, however, did not concern a peremptory exercised due to a prospective juror's lack of English proficiency. Instead, it concerned the dismissal of Spanish-speaking members of the venire for fear that, if seated, they might not follow the English translation of testimony given in Spanish. See 500 U. S., at 360. The Ninth Circuit's decision regarding Gerardo O. was thus based on a misreading of the record and a distortion of our case law. And neither Ayala nor the Ninth Circuit has identified anything that defense counsel might have done at the *ex parte* hearing to show that the prosecutor's concern about Gerardo O.'s limited English proficiency was pretextual.

The prosecution's second proffered reason for striking Gerardo O. was concern about his willingness to impose the death penalty, and as the trial court found, this observation was also supported by the record. Indeed, when asked in *voir dire* how he felt about imposing the death penalty, Gerardo O. responded that he was "[k]ind of shaky about it. . . . I'm not too sure if I can take someone else's life in my hands and say that; say, you know, 'death,' or something." App. 168. In response to another question about his thoughts on the death penalty, he replied: "I don't know yet. It's kind of hard, you know, to pick it up like that and say how I feel about the death penalty." 15 Tr. 1052. Answering a question about whether his thoughts on the death penalty would affect how he viewed the evidence presented at trial, he responded, "I don't know, sir, to tell you the truth." App. 165. And when asked if he had "any feeling that [he] would be unable to vote for the death penalty if [he] thought it was a case that called for it," Gerardo O. responded once again, "I don't know." 15 Tr. 1043. While Gerardo O. did say at one point that he might be willing to impose the death penalty, he qualified that statement by adding that he would be comforted by the fact that "there's eleven more other persons on the jury." App. 170.

What we said above regarding jurors who express doubts about their openness to a death verdict applies as well here. The prosecution's reluctance to take a chance that Gerardo O. would ultimately be willing to consider the death penalty in accordance with state law did not compel the trial judge to find that the strike of Gerardo O. was based on race.

Nor is there a basis for finding that the absence of defense counsel affected the trial judge's evaluation of the sincerity of this proffered ground for the strike. Defense counsel had a full opportunity during *voir dire* to create a record regarding Gerardo O.'s openness to the death penalty. And defense counsel had the opportunity prior to the *ex parte* proceeding on the Gerardo O. strike to compare the minority jurors dismissed by the prosecution with white jurors who were seated. Counsel argued that the answers on the death penalty given by the minority jurors were "not significantly different from [those of] the white jurors that the prosecution ha[d] chosen to leave on the jury." *Id.*, at 306. The trial judge asked counsel for "particulars," and counsel discussed Gerardo O., albeit briefly. *Id.*, at 307–308. Thus, there is no reason to believe that counsel could have made a more persuasive argument at the *ex parte* proceeding than he made during this exchange.

The prosecution's final reason for striking Gerardo O. was that he appeared to be "a standoffish type of individual" whose "dress and . . . mannerisms . . . were not in keeping with the other jurors" and who "did not appear to be socializing or mixing with any of the other jurors." *Id.*, at 298. The trial judge did not dispute that the prosecution's reflections were borne out by the record. The California Supreme Court affirmed and also emphasized that "the trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." 24 Cal. 4th, at 266–267, 6 P. 3d, at 206.

In light of the strength of the prosecution's first two reasons for striking Gerardo O., it is not at all clear that the prosecution proffered this final reason as an essential factor in its decision to strike, but in any event, there is no support for the suggestion that Ayala's attorney, if allowed to attend the *ex parte* hearing, would have been able to convince the judge that this reason was pretextual. The Ninth Circuit, however, was content to speculate about what might have been. Mixing guesswork with armchair sociology, the Ninth Circuit mused that "[i]t is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980's Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt." 756 F. 3d, at 680–681. As for the prosecution's observation that Gerardo O. did not socialize with other jurors, the Ninth Circuit posited that, "perhaps, unbeknownst to the trial judge, Gerardo O. did 'socializ[e] or mix[ ]' with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant." *Id.*, at 681.

This is not how habeas review is supposed to work. The record provides no basis for the Ninth Circuit's flight of fancy. *Brecht* requires more than speculation about what extrarecord information defense counsel might have mentioned. And speculation of that type is not enough to show that a State Supreme Court's rejection of the argument regarding Gerardo O. was unreasonable.

D

The final prospective juror specifically discussed in the Ninth Circuit's decision was Robert M., who is Hispanic. The prosecution's primary proffered reason for striking Robert M. was concern that he would not impose the death penalty, though the prosecution added that it was troubled that he had followed the Sagon Penn case, a high-profile prosecu-

tion in San Diego in which an alleged murderer was acquitted amid allegations of misconduct by police and prosecutors. In addition, the prosecution also explained to the trial court that Robert M. scored poorly on its 10-point scale for evaluating prospective jurors. The trial court accepted the prosecutor's explanation of the strike.

With respect to the prosecution's concern that Robert M. might not be willing to impose the death penalty, the Ninth Circuit found that defense counsel, if permitted to attend the *in camera* proceeding, could have compared Robert M.'s statements about the death penalty to those of other jurors and could have reminded the judge that Robert M. had "repeatedly stated during voir dire that he believed in the death penalty and could personally vote to impose it." 756 F. 3d, at 682. But as with Olanders D. and Gerardo O., we cannot say that the prosecution had no basis for doubting Robert M.'s willingness to impose the death penalty. For example, when asked at one point whether he could vote for death, Robert M. responded: "Well, I've though[t] about that, but it's a difficult question, and yeah, it is difficult for me to say, you know, one way or the other. I believe in it, but for me to be involved in it is—is hard. It's hard to accept that aspect of it, do you know what I mean?" App. 149–150. In response to another question, he said: "It would be hard, but I think I could, yes. It's—it's hard to say, you know—and I don't care who the person is—to say that they have to put somebody away, you know. It's very hard." *Id.*, at 154. These are hardly answers that would inspire confidence in the minds of prosecutors in a capital case.

While the Ninth Circuit argued that defense counsel's absence at the *in camera* hearing prejudiced the trial judge's ability to assess this reason for the strike of Robert M., the Ninth Circuit failed to mention that defense counsel specifically addressed this issue during *voir dire*. At that time, he pointedly reminded the judge that Robert M. had made several statements during *voir dire* that were favorable to the

death penalty. *Id.*, at 307. The trial judge thus heard defense counsel's arguments but nevertheless concluded that the record supplied a basis for a legitimate concern about whether Robert M. could impose the death penalty. That Ayala's attorney did not have the opportunity to repeat this same argument once more at the *in camera* proceeding does not create grave doubt about whether the trial court would have decided the issue differently.

As for the prosecution's second proffered reason for striking Robert M.—that he had followed the Sagon Penn case[4]—the Ninth Circuit placed great emphasis on the fact that a seated white juror had followed a different murder trial, that of Robert Alton Harris.[5] But the Penn and Harris cases were quite different. Harris was convicted while Penn was acquitted; and since the Harris case was much older, the experience of following it was less likely to have an effect at the time of the trial in this case.

E

Ayala raised a *Batson* objection about the prosecution's use of peremptory challenges on four additional jurors, George S., Barbara S., Galileo S., and Luis M. The Ninth Circuit did not address these prospective jurors at length, and we need not dwell long on them. With respect to all four of these prospective jurors, we conclude that any constitutional error was harmless.

Of these four additional jurors, Ayala's brief in this Court develops an argument with respect to only two, George S. and Barbara S. And while Ayala's attorney claimed that George S. was Hispanic, the prosecutor said that he thought that George S. was Greek. In any event, the prosecution offered several reasons for striking George S. The prosecutor noted that one of his responses "was essentially, 'you probably don't want me to be a juror on this case.'" *Id.*, at

[4] See Man Acquitted of Killing Officer, N. Y. Times, July 17, 1987, p. B8.

[5] See *People* v. *Harris*, 28 Cal. 3d 935, 623 P. 2d 240 (1981).

312. The prosecutor was also concerned about whether he would vote for death or even a life sentence and whether he would follow the law as opposed to his personal religious beliefs. In addition, the prosecutor noted that George S. had previously been the sole holdout on a jury and that his prior application to be a police officer had been rejected, for reasons that were not clear. The trial court accepted these explanations.

Ayala contests only two of these justifications. He quibbles that George S. had not been a "'holdout,'" but instead had been the dissenting juror in a civil case on which unanimity was not required. This observation does not render the prosecution's proffered justification "false or pretextual." Brief for Respondent 46. The fact that George S. had been willing to dissent from a jury verdict could reasonably give a prosecutor pause in a capital case since a single holdout juror could prevent a guilty verdict or death sentence. The most that Ayala can establish is that reasonable minds can disagree about whether the prosecution's fears were well founded, but this does not come close to establishing "actual prejudice" under *Brecht*. Nor does it meet the AEDPA standard. Ayala also points out that a seated white juror, Charles C., had been rejected by a police force, but George S. admitted that he had applied to law enforcement because he was "trying to get out of the Army," App. 222, and the reasons for his rejection were not clear. Charles C., by contrast, had received a qualifying score on a law enforcement exam but was not hired because a position was not available.

As for Barbara S., the prosecution struck her because, during *voir dire*, she appeared to be "under the influence of drugs" and disconnected from the proceedings. *Id.*, at 314. The prosecution emphasized that she had "an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on." *Ibid.* It added that she appeared "somewhat angry," "manifest[ed] a great deal of nervousness," and seemed like someone who would be unlikely

to closely follow the trial. *Ibid.* The trial judge thought that Barbara S. appeared nervous rather than hostile, but he agreed that she gave incomplete answers that were sometimes "non sequiturs." *Id.*, at 315. He concluded, "I certainly cannot quarrel . . . with your subjective impression, and the use of your peremptory challenge based upon her individual manifestation, as opposed to her ethnicity." *Ibid.* Ayala points to the trial court's disagreement with the prosecutor's impression that Barbara S. was hostile, but this ruling illustrates the trial judge's recollection of the demeanor of the prospective jurors and his careful evaluation of each of the prosecutor's proffered reasons for strikes. And the fact that the trial judge's impression of Barbara S.'s demeanor was somewhat different from the prosecutor's hardly shows that the prosecutor's reasons were pretextual. It is not at all unusual for individuals to come to different conclusions in attempting to read another person's attitude or mood.

IV

The pattern of peremptory challenges in this case was sufficient to raise suspicions about the prosecution's motives and to call for the prosecution to explain its strikes. As we have held, the Fourteenth Amendment prohibits a prosecutor from striking potential jurors based on race. Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice.

In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue

were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A Federal District Judge denied federal habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fair-minded jurist could agree.

For the reasons explained above, it was the Ninth Circuit that erred. The exclusion of Ayala's attorney from part of the *Batson* hearing was harmless error. There is no basis for finding that Ayala suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent.

* * *

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

It is so ordered.

JUSTICE KENNEDY, concurring.

My join in the Court's opinion is unqualified; for, in my view, it is complete and correct in all respects. This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.

In response to a question, respondent's counsel advised the Court that, since being sentenced to death in 1989, Ayala has served the great majority of his more than 25 years in custody in "administrative segregation" or, as it is better known, solitary confinement. Tr. of Oral Arg. 43–44. Counsel for petitioner did not have a clear opportunity to enter the discussion, and the precise details of respondent's conditions of confinement are not established in the record. Yet if his solitary confinement follows the usual pattern, it is likely re-

spondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone. *Ibid.*; see also *Wilkinson* v. *Austin*, 545 U. S. 209, 218 (2005); Amnesty International, Entombed: Isolation in the U. S. Federal Prison System 2 (2014). It is estimated that 25,000 inmates in the United States are currently serving their sentence in whole or substantial part in solitary confinement, many regardless of their conduct in prison. *Ibid.*

The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. Eighteenth-century British prison reformer John Howard wrote "that criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes." The State of the Prisons in England and Wales 152 (1777). In literature, Charles Dickens recounted the toil of Dr. Manette, whose 18 years of isolation in One Hundred and Five, North Tower, caused him, even years after his release, to lapse in and out of a mindless state with almost no awareness or appreciation for time or his surroundings. A Tale of Two Cities (1859). And even Manette, while imprisoned, had a workbench and tools to make shoes, a type of diversion no doubt denied many of today's inmates.

One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears "a further terror and peculiar mark of infamy." *In re Medley*, 134 U. S. 160, 170 (1890); see also *id.*, at 168 ("A considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide"). The past centuries' experience and

consideration of this issue is discussed at length in texts such as The Oxford History of the Prison: The Practice of Punishment in Western Society (1995), a joint disciplinary work edited by law professor Norval Morris and professor of medicine and psychiatry David Rothman that discusses the deprivations attendant to solitary confinement. *Id.*, at 184.

Yet despite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, *e. g.*, *Brown* v. *Plata*, 563 U. S. 493 (2011); *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards"); *Weems* v. *United States*, 217 U. S. 349, 365–367 (1910). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: "In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference.

Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies,

while most lawyers and judges assumed these matters were for the policymakers and correctional experts.

There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular. See, *e. g.*, Gonnerman, Before the Law, The New Yorker, Oct. 6, 2014, p. 26 (detailing multiyear solitary confinement of Kalief Browder, who was held—but never tried—for stealing a backpack); Schwirtz & Winerip, Man, Held at Rikers for 3 Years Without Trial, Kills Himself, N. Y. Times, June 9, 2015, p. A18. And penology and psychology experts, including scholars in the legal academy, continue to offer essential information and analysis. See, *e. g.*, Simon & Sparks, Punishment and Society: The Emergence of an Academic Field, in The SAGE Handbook of Punishment and Society (2013); see also Venters et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 Am. J. Pub. Health 442 (Mar. 2014); Metzner & Fellner, Solitary Confinement and Mental Illness in U. S. Prisons: A Challenge for Medical Ethics, 38 J. Am. Academy Psychiatry and Law 104–108 (2010).

These are but a few examples of the expert scholarship that, along with continued attention from the legal community, no doubt will aid in the consideration of the many issues solitary confinement presents. And consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. See, *e. g.*, Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Pol'y 325 (2006) (common side effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors). In a case that presented the

issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Over 150 years ago, Dostoyevsky wrote, "The degree of civilization in a society can be judged by entering its prisons." The Yale Book of Quotations 210 (F. Shapiro ed. 2006). There is truth to this in our own time.

JUSTICE THOMAS, concurring.

I join the Court's opinion explaining why Ayala is not entitled to a writ of habeas corpus from this or any other federal court. I write separately only to point out, in response to the separate opinion of JUSTICE KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.

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

At Hector Ayala's trial, the prosecution exercised its peremptory strikes to dismiss all seven of the potential black and Hispanic jurors. In his federal habeas petition, Ayala challenged the state trial court's failure to permit his attorneys to participate in hearings regarding the legitimacy of the prosecution's alleged race-neutral reasons for its strikes. See *Batson* v. *Kentucky*, 476 U. S. 79, 97–98 (1986). The Court assumes that defense counsel's exclusion from these proceedings violated Ayala's constitutional rights, but concludes that the Ninth Circuit erred in granting habeas relief because there is insufficient reason to believe that counsel

could have convinced the trial court to reject the prosecution's proffered reasons. I respectfully dissent. Given the strength of Ayala's prima facie case and the comparative juror analysis his attorneys could have developed if given the opportunity to do so, little doubt exists that counsel's exclusion from Ayala's *Batson* hearings substantially influenced the outcome.

I

My disagreement with the Court does not stem from its discussion of the applicable standard of review, which simply restates the holding of *Fry* v. *Pliler*, 551 U. S. 112 (2007). *Fry* rejected the argument that the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. § 2254, compels federal courts to apply any standard other than that set forth in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), when assessing the harmlessness of a constitutional error on habeas review. 551 U. S., at 120. *Brecht*, in turn, held that the harmlessness standard federal courts must apply in collateral proceedings is more difficult to meet than the "'beyond a reasonable doubt'" standard applicable on direct review. 507 U. S., at 622–623 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). More specifically, under *Brecht*, a federal court can grant habeas relief only when it concludes that a constitutional error had a "'substantial and injurious effect or influence'" on either a jury verdict or a trial court decision. 507 U. S., at 623. Later, *O'Neal* v. *McAninch*, 513 U. S. 432 (1995), clarified that this standard is satisfied when a reviewing judge "is in grave doubt about whether" the error is harmless; that is, when "the matter is so evenly balanced that [a judge] feels himself in virtual equipoise as to the harmlessness of the error." *Id.*, at 435 (emphasis deleted). See also *ante*, at 268 (quoting *O'Neal*, 513 U. S., at 436). Put differently, when a federal court is in equipoise as to whether an error was actually prejudicial, it must "treat the error, not as if it were harmless, but as if it affected the

verdict (*i. e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.*, at 435.

In addition to confirming the *Brecht* standard's continued vitality, *Fry* established its exclusivity. *Fry* expressly held that federal habeas courts need not first assess whether a state court unreasonably applied *Chapman* before deciding whether that error was prejudicial under *Brecht*. Such a requirement would "mak[e] no sense . . . when the latter [standard] obviously subsumes the former." *Fry*, 551 U. S., at 120. Nothing in the Court's opinion today calls into question this aspect of *Fry*'s holding. If a trial error is prejudicial under *Brecht*'s standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable. See *ante*, at 268–270.

II

A

To apply *Brecht* to the facts of this case, it is essential to understand the contours of Ayala's underlying constitutional claim or—perhaps more importantly—to appreciate what his claim is not. Trial judges assess criminal defendants' challenges to prosecutors' use of peremptory strikes using the three-part procedure first announced in *Batson*. After a defendant makes a "prima facie showing that a peremptory challenge [was] . . . exercised on the basis of race," the prosecution is given an opportunity to "offer a race-neutral basis for striking the juror in question," *Miller-El* v. *Cockrell*, 537 U. S. 322, 328 (2003). The court then "decid[es] whether it was more likely than not that the challenge was improperly motivated." *Johnson* v. *California*, 545 U. S. 162, 169, 170 (2005). This determination is a factual one, which—as the Court correctly notes—reviewing courts must accord " 'great deference.' " *Ante*, at 271 (quoting *Felkner* v. *Jackson*, 562 U. S. 594, 598 (2011) (*per curiam*)).

Here, Ayala does not claim that the trial court wrongly rejected his *Batson* challenges based on the record before it.

Rather, Ayala's claim centers on the exclusion of his attorneys from the *Batson* hearings. Ayala contends that there is at least a grave doubt as to whether the trial or appellate court's consideration of his *Batson* challenges was substantially influenced by the trial court's erroneous refusal to permit his attorneys to appear at the hearings at which those challenges were adjudicated. Ayala's conviction must be vacated if there is grave doubt as to whether even just one of his *Batson* challenges would have been sustained had the defense been present. *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (reversing a conviction after concluding that use of one peremptory strike was racially motivated).

B

The Court's *Brecht* application begins and ends with a discussion of particular arguments the Ninth Circuit posited Ayala's lawyers could have raised had they been present at his *Batson* hearings. This approach fails to account for the basic background principle that must inform the application of *Brecht* to Ayala's procedural *Batson* claim: the "[c]ommon sense" insight "that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides." *Kaley* v. *United States*, 571 U. S. 320, 355 (2014) (ROBERTS, C. J., dissenting). Our entire criminal justice system was founded on the premise that "[t]ruth . . . is best discovered by powerful statements on both sides of the question." *United States* v. *Cronic*, 466 U. S. 648, 655 (1984) (internal quotation marks omitted). There is no reason to believe that *Batson* hearings are the rare exception to this rule. Instead, defense counsel could have played at least two critical roles had they been present at Ayala's *Batson* hearings.

First, Ayala's attorneys would have been able to call into question the credibility of the prosecution's asserted race-neutral justifications for the use of its peremptory strikes. Of course, a trial court may identify some pretextual reasons

on its own, but *Snyder* held that when assessing a claimed *Batson* error, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U. S., at 478. Absent an adversarial presentation, a diligent judge may overlook relevant facts or legal arguments in even a straightforward case. There is also great probative force to a "comparative juror analysis"—an analysis of whether the prosecution's reasons for using its peremptory strikes against nonwhite jurors apply equally to white jurors whom it would have allowed to serve. *Miller-El* v. *Dretke*, 545 U. S. 231, 241 (2005). See also *Snyder*, 552 U. S., at 483 (emphasizing importance of conducting a comparative juror analysis in the trial court). Trial courts are ill suited to perform this intensive inquiry without defense counsel's assistance.

The risk that important arguments will not be considered rises close to a certainty in a capital case like Ayala's, where jury selection spanned more than three months, involved more than 200 prospective jurors, and generated a record that is massive by any standard. See *Ayala* v. *Wong*, 756 F. 3d 656, 660, 676 (CA9 2014) (case below). It strains credulity to suggest that a court confronted with this mountain of information necessarily considered all of the facts that would have informed its credibility determination without the presence of defense counsel to help bring them to its attention.

Second, not only did the exclusion of defense counsel from Ayala's *Batson* hearings prevent him from making his strongest arguments before the person best situated to assess their merit, it also impeded his ability to raise these claims on appeal. Because Ayala's lawyers were not afforded any opportunity to respond to the prosecution's race-neutral reasons, we are left to speculate as to whether the trial court actually considered any of the points the defense would have made before it accepted the prosecution's proffered explanations. Moreover, even if we could divine which of the possible considerations the trial judge took into account, our review would still be unduly constrained by a record that lacks

whatever material facts the defense would have preserved had it been on notice of the assertions that it needed to challenge. Perhaps some of these facts, such as the jurors' appearance and demeanor, were known to the trial judge, but appellate courts "can only serve [their] function when the record is clear as to the relevant facts" or when they can rely on "defense counsel['s] fail[ure] to point out any such facts after learning of the prosecutor's reasons." *United States* v. *Thompson*, 827 F. 2d 1254, 1261 (CA9 1987). Neither of these conditions is met here.

For the reasons described above, the fact that counsel was wrongfully excluded from Ayala's *Batson* hearings on its own raises doubt as to whether the outcome of these proceedings—or the appellate courts' review of them—would have been the same had counsel been present.[1] This doubt is exacerbated by the loss of the vast majority of the questionnaires that jurors completed at the start of *voir dire*, including those filled out by the seven black and Hispanic jurors against whom the prosecution exercised its peremptory strikes. The prosecution cited these questionnaires in support of its alleged race-neutral reasons at the *ex parte Batson* hearings. See *e. g.*, App. 283, 298, 312, 314, 316. Without the underlying documents, however, it is impossible to assess whether the prosecution's characterizations of those prospective jurors' responses were fair and accurate. The loss of the questionnaires has also precluded every court that has reviewed this case from performing a comprehensive comparative juror analysis. The Court today analyzes

---

[1] Indeed, in a future case arising in a direct review posture, the Court may have occasion to consider whether the error that the Court assumes here gives rise to "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States* v. *Cronic*, 466 U. S. 648, 658 (1984). See also *Mickens* v. *Taylor*, 535 U. S. 162, 166 (2002) (noting that we have "presumed [prejudicial] effec[t] where assistance of counsel has been denied entirely or during a critical stage of the proceeding").

how the prosecution's statements at the *ex parte Batson* hearings regarding the black and Hispanic jurors' questionnaires stack up against the actual questionnaires completed by the white seated jurors and alternates. But there is no way to discern how these representations compare with the answers that were given by white jurors whom the prosecution would have permitted to serve but whom the defense ultimately struck. See *Miller-El* v. *Dretke*, 545 U. S., at 244–245 (comparing a juror struck by the prosecution with a juror challenged only by the defense).

C

The above-described consequences of the trial court's procedural error and the fact that the prosecution struck every potential black or Hispanic juror go a long way toward establishing the degree of uncertainty that *Brecht* requires. Keeping these considerations in mind, the next step is to assess the arguments that Ayala's attorneys may have raised had they been allowed to participate at his *Batson* hearings. As explained above, Ayala is entitled to habeas relief if a reviewing judge is in "equipoise" as to whether his lawyers' exclusion from the *Batson* hearings had an "injurious effect" on the trial court's failure to find by a preponderance of the evidence that any of the prosecution's peremptory strikes was racially motivated. With the inquiry so framed, it is easy to see that the Ninth Circuit correctly found that Ayala was actually prejudiced by the trial court's constitutional error. In particular, there is a substantial likelihood that if defense counsel had been present, Ayala could at least have convinced the trial court that the race-neutral reasons the prosecution put forward for dismissing a black juror, Olanders D., were pretextual.[2]

---

[2] Because Ayala was actually prejudiced by his counsel's exclusion from the *Batson* hearing on Olanders D., there is no need to address his claims concerning the other black and Hispanic jurors. That said, Ayala's attor-

The prosecution offered three justifications for striking Olanders D.: (1) He might be unable to vote for the death penalty because he had written in his questionnaire that "he does not believe [in] it" and had failed to fully explain a subsequent change in position; (2) his questionnaire answers were poor; and, (3) he might lack the "ability to fit in with a cohesive group of 12 people." App. 283. The trial court rejected the third of these reasons outright, noting that "it may well . . . be that he would get along very well with 12 people." *Id.*, at 283–284. I have grave misgivings as to whether the trial judge would have found it more likely than not that the first two purported bases were legitimate had defense counsel been given an opportunity to respond to them.

Ayala's attorneys could have challenged the prosecution's claim that Olanders D. would hesitate to impose the death penalty by pointing to a seated juror—Ana L.—who made remarkably similar statements concerning capital punishment. Based on his remarks during *voir dire*, it appears that Olanders D. suggested on his questionnaire that he was or had been opposed to the death penalty.[3] *Id.*, at 176, 179. Ana L.'s questionnaire contained numerous comparable statements. When asked to express her "feelings about the death penalty," she wrote: "I don't believe in taking a life." *Id.*, at 108. And, in response to a question regarding

---

neys may have had strong arguments with respect to those jurors too. Moreover, Ayala's *Batson* challenge to Olanders D. would have been even stronger had counsel been given the opportunity to demonstrate that some of the reasons given for striking the other black and Hispanic jurors were pretextual. See *Snyder* v. *Louisiana*, 552 U. S. 472, 478 (2008) (observing that courts should "consider the strike of [one juror] for the bearing it might have upon the strike of [a second juror]").

[3] It is, of course, impossible to verify what Olanders D. said in his questionnaire because that document is not in the record. If Ayala's lawyers had been present at Olanders D.'s *Batson* hearing, they may have argued that his questionnaire showed that his position on capital punishment had changed over time. See Part III, *infra*.

whether she "would like to serve as a juror and why?," Ana L. said: "no—If I am selected as a Juror and all Jurors voted for the death penalty I probably would not be able to vote for the death penalty." *Id.*, at 109. Finally, on her questionnaire, Ana L. indicated that she believes the death penalty is imposed "[t]oo often" and that she strongly disagrees with the "adage, 'An eye for any eye,' " which she understood to mean,"[a] criminal took a life[,] now [it] is our turn to take his." *Id.*, at 108–109.

A direct comparison of Olanders D.'s and Ana L.'s *voir dire* answers is equally telling. During *voir dire*, Olanders D. clarified that he had not intended his questionnaire to reflect that he was categorically opposed to the death penalty, but only that his views on the topic had evolved over the prior decade and that he had come to believe that the death penalty "would be an appropriate sentence under certain circumstances." *Id.*, at 176. To account for this change in his position, Olanders D. cited a number of considerations, including a new understanding of what his religion required, *ibid.*, "more familiar[ity] with the laws," *id.*, at 178, increased violence in our society, *ibid.*, and conversations with his immediate family, *id.*, at 180. Ana L., by contrast, stated at *voir dire* that she "strongly . . . did not believe in the death penalty" up until she "[f]illed out the questionnaire." *Id.*, at 193. And, only after repeated attempts by both the defense and the prosecution to get her to pinpoint what caused this sudden about-face, Ana L. said that she had "listen[ed] to the Bundy evidence that was said and his being put to death, and I started to think; and I said if they were guilty maybe there is a death sentence for these people." *Id.*, at 202.[4]

---

[4] The Court claims that Olanders D. was less than eloquent in describing his thought process. *Ante*, at 272–273. But it is not difficult to understand what he meant. In any event, as the Court later concedes, prospective jurors are likely to struggle when asked to express their views on the death penalty. *Ante*, at 273. Ana L. was no exception. For instance, when defense counsel first asked her to describe her thought process, she

Based on this record, it requires little speculation to see that defense counsel could have made a powerful argument that Ana L. was equally or even less likely to impose the death penalty than Olanders D. While both jurors had opposed the death penalty at some point in the past, Olanders D. stated that he had come to believe in capital punishment after a period of sustained deliberation. Ana L., however, purported to change her view due only to one recent execution and the fact that she had been called to serve as a juror on a capital case. Moreover, there is no basis to think that the trial court accounted for the similarities between Ana L. and Olanders D. Approximately two months passed between Olanders D.'s and Ana L.'s *voir dire* hearings and the date on which the prosecution exercised its peremptory strike against Olanders D. Without the benefit of defense counsel to help jog his recollection, it is absurd to proceed as if the trial judge actually considered one of more than 200 prospective jurors' statements concerning the death penalty when ruling on Ayala's *Batson* motion. Taken together, it seems highly likely that these arguments—had they been raised—would have convinced the trial judge that the prosecution's first alleged reason for striking Olanders D. was pretextual.

As for the prosecution's second purported justification—that his questionnaire responses "were poor," App. 283—it is impossible to know what winning arguments the defense could have raised because the questionnaire itself is missing from the record.[5] Indeed, for all that is known, counsel may

responded, "Up to [when I filled out my questionnaire], I did not believe in putting someone to death." App. 194. She continued: "But being that you've given me the—the opportunity to come over here, seeing something that is not correct in the system, it wouldn't be no problem . . . for me to give to come to a decision on the death penalty anymore." *Ibid.*

[5] The Court states that the prosecution's second purported race-neutral reason for striking Olanders D. was that his "responses" were poor, but it conveniently neglects to mention that the responses to which the prosecution referred were clearly those Olanders D. gave on his question-

have had a compelling argument that Olanders D.'s answers were cogent and complete. Even if some of them were lacking, however, counsel could still have drawn the trial judge's attention to weak questionnaires completed by several of the seated jurors. For instance, if the prosecution's claim was that Olanders D.'s questionnaire answers were conclusory, Ayala's counsel could have referred the court to seated juror Charles G.'s questionnaire. In response to a prompt asking prospective jurors to explain why they would or would not like to be empaneled in Ayala's case, Charles G. wrote only "No." *Id.*, at 71. Alternatively, if the prosecution's concern was that Olanders D.'s answer to a particular question demonstrated an inability to clearly express himself, the defense could have directed the court's attention to the questionnaire completed by seated juror Thomas B. When asked to share his "impressions or feelings . . . about gangs based on what [he had] read or s[een]," Thomas B. stated: "I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage." *Id.*, at 30. Finally, it bears noting that if Ayala's lawyers had been able to respond at the *Batson* hearing, they would have had the questionnaires of many more comparable jurors at their disposal. It is entirely possible that some of the questionnaires completed by prospective jurors who were accepted by the prosecution but dismissed by the defense were weaker than those completed by Charles G. and Thomas B.

In short, it is probable that had Ayala's lawyers been present at the *Batson* hearing on Olanders D., his strong *Batson* claim would have turned out to be a winning one. The trial judge rejected one of the reasons advanced by the prosecution on its own and the defense had numerous persuasive

---

naire. *Ante*, at 271; see App. 283 ("My observations in reading his questionnaire and before even making note of his racial orientation was that his responses were poor").

arguments that it could have leveled against the remaining two justifications had it been given the opportunity to do so.

III

The Court concludes that Ayala is not entitled to habeas relief because it finds that there is little or no reason to doubt that the trial judge would have accepted both of the above-discussed reasons for striking Olanders D. even if counsel participated at Ayala's *Batson* hearings. The Court's analysis, however, misunderstands the record and mistakes Ayala's procedural *Batson* claim for a direct challenge to a trial court's denial of a *Batson* motion.

In defense of the prosecution's first basis for striking Olanders D.—that he was uncomfortable with the death penalty—the Court begins by asserting that Ana L. was insufficiently similar to Olanders D. to have cast any doubt on the prosecution's position. Olanders D., the Court maintains, "initially voiced unequivocal opposition to the death penalty," whereas Ana L. "wrote on [her] questionnaire that she '*probably* would not be able to vote for the death penalty.'" *Ante*, at 273 (emphasis in original). But the Court has plucked one arguably ambiguous statement from Ana L.'s questionnaire while ignoring others (described above) suggesting that she fundamentally opposed capital punishment. More importantly, the Court is not comparing apples with apples. Because Olanders D.'s questionnaire has been lost, there is no way to know the extent to which the views he expressed there were "unequivocal." Consequently, in support of its contention that Olanders D. originally wrote that he was categorically opposed to the death penalty, the Court relies on his response to a question posed by the prosecution during *voir dire*. To be sure, when asked whether he had stated that he did not "believe in the death penalty" on his questionnaire, Olanders D. responded: "That's correct." App. 179. During *voir dire*, however, Ana L. described the position she had taken in her questionnaire in identical

terms, stating: "I remember saying [on my questionnaire] that I didn't believe in the death penalty." *Id.*, at 201.

Given the difficulty of differentiating between Ana L.'s and Olanders D.'s views toward the death penalty based on the record before us, the Court understandably does not press this factual point further. Instead, it commits a legal error by contending that the trial court's determination is entitled to deference because the judge—unlike this Court—had the benefit of observing both Olanders D.'s and the prosecution's demeanor. *Ante*, at 273–274. Deference may be warranted when reviewing a substantive *Batson* claim. By suggesting that a trial judge can make a sound credibility determination without the benefit of an adversarial proceeding, however, the Court ignores the procedural nature of the constitutional error whose existence it purports to assume. Courts defer to credibility findings not only because of trial judges' proximity to courtroom events, but also because of the expectations regarding the procedures used in the proceedings that they oversee. A decision to credit a prosecution's race-neutral basis for striking a juror is entitled to great weight if that reason has "survive[d] the crucible of meaningful adversarial testing." *Cronic*, 466 U. S., at 656. It warrants substantially less—if any—deference where, as here, it is made in the absence of the "fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175, 183 (1968); see also *Kaley*, 571 U. S., at 355 (ROBERTS, C. J., dissenting) ("It takes little imagination to see that . . . *ex parte* proceedings create a heightened risk of error").[6]

---

[6] None of the cases the Court cites are inconsistent with this logic. *Miller-El* v. *Dretke*, 545 U. S. 231, 236–237 (2005), *Snyder*, 552 U. S., at 474, and *Rice* v. *Collins*, 546 U. S. 333, 336 (2006), all concerned direct challenges to a trial court's denial of a *Batson* motion as opposed to procedural *Batson* claims.

The Court's analysis of the second reason put forward for striking Olanders D.—that his questionnaire was faulty—fares no better. As a preliminary matter, perhaps because Olanders D.'s questionnaire has been lost, the Court characterizes the prosecution's second proffered reason for dismissing Olanders D. as an objection to *all* of his "responses" as opposed to simply the responses on his *questionnaire*. *Ante*, at 271. But even if the prosecution had relied on the rationale that the Court now substitutes, there is a real likelihood that the defense would still have been able to undermine its credibility.

The Court asserts that Olanders D.'s "responses" were misleading because he had "unequivocally" stated that he did not believe in the death penalty on his questionnaire, but at *voir dire* he said that his views on capital punishment had changed over the previous 10 years. *Ante*, at 275. The Court's argument thus hinges on the premise that Olanders D.'s questionnaire clearly stated that he was opposed to the death penalty. At least one person, however, did not construe Olander D.'s questionnaire to express such a categorical view: defense counsel. During *voir dire*, one of Ayala's lawyers remarked that she thought Olanders D.'s questionnaire "indicated that [he] had had some change in [his] feelings about the death penalty." App. 176. "[M]y understanding," she said, "is that at one time [he] felt one way, and—and then at some point [he] felt differently." *Ibid.* Thus, if (as the Court now hypothesizes) the trial court was inclined to accept the prosecution's second reason for striking Olanders D. based on apparent tension between his questionnaire and his statements during *voir dire* (a proposition that is itself uncertain), the defense may have been able to argue persuasively that any claimed inconsistency was illusory.

* * *

Batson recognized that it is fundamentally unfair to permit racial considerations to drive the use of peremptory chal-

lenges against jurors. When the prosecution strikes every potential black and Hispanic juror, a reviewing court has a responsibility to ensure that the trial court's denial of the defendant's *Batson* motion was not influenced by constitutional error. But there is neither a factual nor a legal basis for the Court's confidence that the prosecution's race-neutral reasons for striking Olanders D. were unassailable. Because the Court overlooks that Ayala raised a procedural *Batson* claim, it scours the record for possible support for the trial court's credibility determination without accounting for the flaws in the process that led to it. The proper inquiry is not whether the trial court's determination can be sustained, but whether it may have been different had counsel been present. Given the strength of Ayala's prima facie case and the arguments his counsel would have been able to make based even on the limited existing record, grave doubts exist as to whether counsel's exclusion from Ayala's *Batson* hearings was harmless. Accordingly, I respectfully dissent.

Syllabus

BRUMFIELD *v.* CAIN, WARDEN

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

No. 13–1433. Argued March 30, 2015—Decided June 18, 2015

Petitioner Kevan Brumfield was convicted of murder in a Louisiana court and sentenced to death before this Court held that the Eighth Amendment prohibits execution of the intellectually disabled, *Atkins* v. *Virginia*, 536 U. S. 304. Implementing *Atkins*' mandate, see *id.*, at 317, the Louisiana Supreme Court determined that an evidentiary hearing is required when a defendant "provide[s] objective factors" sufficient to raise a " 'reasonable ground' " to believe that he has an intellectual disability, which the court defined as "(1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage." *State* v. *Williams*, 2001–1650 (La. 11/1/02), 831 So. 2d 835, 857, 861, 854.

Soon after the *Williams* decision, Brumfield amended his pending state postconviction petition to raise an *Atkins* claim. Seeking an evidentiary hearing, he pointed to evidence introduced at sentencing that he had an IQ of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having a learning disability, and had been placed in special education classes. The trial court dismissed Brumfield's petition without holding a hearing or granting funds to conduct additional investigation. Brumfield subsequently sought federal habeas relief. The District Court found that the state court's rejection of Brumfield's claim was both "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court and "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§ 2254(d)(1), (2). The court went on to determine that Brumfield was intellectually disabled. The Fifth Circuit found that Brumfield's petition failed to satisfy either of § 2254(d)'s requirements and reversed.

Held: Because Brumfield satisfied § 2254(d)(2)'s requirements, he was entitled to have his *Atkins* claim considered on the merits in federal court. Pp. 312–324.

(a) The two underlying factual determinations on which the state trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he pre-

sented no evidence of adaptive impairment—were unreasonable under § 2254(d)(2). Because that standard is satisfied, the Court need not address § 2254(d)(1). Pp. 312–322.

(1) Expert trial testimony that Brumfield scored a 75 on an IQ test is entirely consistent with intellectual disability. Every IQ score has a margin of error. Accounting for that margin of error, the sources on which the *Williams* court relied in defining subaverage intelligence describe a score of 75 as consistent with an intellectual disability diagnosis. There was no evidence presented to the trial court of any other IQ test that was sufficiently rigorous to preclude the possibility that Brumfield possessed subaverage intelligence. Pp. 314–316.

(2) The state-court record contains sufficient evidence to suggest that Brumfield would meet the criteria for adaptive impairment. Under the test most favorable to the State, an individual like Brumfield must show a "substantial functional limitation" in three of six "areas of major life activity." *Williams*, 831 So. 2d, at 854. Brumfield—who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level—would seem to be deficient in two of those areas: "[u]nderstanding and use of language" and "[l]earning." *Ibid.* His low birth weight, his commitment to mental health facilities at a young age, and officials' administration of antipsychotic and sedative drugs to him at that time all indicate that he may well have had significant deficits in at least one of the remaining four areas. In light of that evidence, the fact that the record contains some contrary evidence cannot be said to foreclose all reasonable doubt as to his intellectual disability. And given that Brumfield's trial occurred before *Atkins*, the trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. Pp. 317–322.

(b) The State's two additional arguments are rejected. Because the State did not press below the theory that § 2254(e)(1) supplies the governing standard when evaluating whether a habeas petitioner has satisfied § 2254(d)(2)'s requirements, that issue is not addressed here. And because the state trial court made no finding that Brumfield had failed to produce evidence suggesting he could meet the "manifestations . . . in the developmental stage" requirement for intellectual disability, there is no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d). In any event, the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood. Pp. 322–323.

744 F. 3d 918, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in all but Part I–C of which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, *post*, p. 324. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 350.

Michael B. DeSanctis argued the cause for petitioner. With him on the briefs were *Adam G. Unikowsky*, *R. Trent McCotter*, *Nicholas J. Trenticosta*, and *Susan Herrero*.

Premila Burns argued the cause for respondent. With her on the brief were *Monisa L. Thompson*, *Thomas R. McCarthy*, *William S. Consovoy*, and *J. Michael Connolly*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Atkins* v. *Virginia*, 536 U. S. 304 (2002), this Court recognized that the execution of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment. After *Atkins* was decided, petitioner, a Louisiana death-row inmate, requested an opportunity to prove he was intellectually disabled in state court. Without affording him an evidentiary hearing or granting him time or funding to secure expert evidence, the state court rejected petitioner's claim. That decision, we hold, was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). Petitioner was therefore entitled to have his *Atkins* claim considered on the merits in federal court.

I

Petitioner Kevan Brumfield was sentenced to death for the 1993 murder of off-duty Baton Rouge police officer Betty Smothers. Brumfield, accompanied by another individual, shot and killed Officer Smothers while she was escorting the manager of a grocery store to the bank.

**Ted Brett Brunson* and *Sarah Ottinger* filed a brief for Pascal F. Calogero, Jr., et al. as *amici curiae* urging reversal.

At the time of Brumfield's trial, this Court's precedent permitted the imposition of the death penalty on intellectually disabled persons. See *Penry* v. *Lynaugh*, 492 U. S. 302, 340 (1989) (opinion of O'Connor, J.). But in *Atkins*, this Court subsequently held that "in the light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U. S., at 321 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 405 (1986)).[1] Acknowledging the "disagreement" regarding how to "determin[e] which offenders are in fact" intellectually disabled, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U. S., at 317 (internal quotation marks omitted; some alterations in original).

The Louisiana Supreme Court took up the charge of implementing *Atkins*' mandate in *State* v. *Williams*, 2001–1650 (La. 11/1/02), 831 So. 2d 835. The court held that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage." *Id.*, at 854 (relying on, *inter alia*, American Association of Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) (AAMR), and American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (rev. 4th ed. 2000) (DSM–IV)); see also La. Code Crim. Proc. Ann., Art. 905.5.1(H)(1) (West Cum. Supp. 2015) (subsequently enacted statute governing *Atkins* claims adopting the three *Williams* criteria). The *Williams* court also clarified that "not everyone faced with a death penalty sentence" would "automatically be entitled

[1] While this Court formerly employed the phrase "mentally retarded," we now "us[e] the term 'intellectual disability' to describe the identical phenomenon." *Hall* v. *Florida*, 572 U. S. 701, 704 (2014).

to a post-*Atkins* hearing"; rather, it would "be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation." 831 So. 2d, at 857. Borrowing from the state statutory standard for determining when a pretrial competency inquiry is necessary, the court held that an *Atkins* evidentiary hearing is required when an inmate has put forward sufficient evidence to raise a "'reasonable ground'" to believe him to be intellectually disabled. See 831 So. 2d, at 861; see also *id.*, at 858, n. 33 (characterizing the requisite showing as one raising a "'reasonable doubt'").[2]

Shortly after the *Williams* decision, Brumfield amended his pending state postconviction petition to raise an *Atkins* claim. He sought an evidentiary hearing on the issue, asserting that his case was "accompanied by a host of objective facts which raise the issue of mental retardation." App. 203a.

In support, Brumfield pointed to mitigation evidence introduced at the sentencing phase of his trial. He focused on the testimony of three witnesses in particular: his mother; Dr. Cecile Guin, a social worker who had compiled a history of Brumfield by consulting available records and conducting interviews with family members and teachers; and Dr. John Bolter, a clinical neuropsychologist who had performed a number of cognitive tests on Brumfield. A psychologist, Dr. Brian Jordan, had also examined Brumfield and prepared a report, but did not testify at trial. Brumfield contended that this evidence showed, among other things, that he had

---

[2] Although Louisiana subsequently adopted a statute governing the adjudication of *Atkins* claims, see La. Code Crim. Proc. Ann., Art. 905.5.1 (West Cum. Supp. 2015), the parties agree that the procedures set forth in *Williams* governed this case. See Brief for Petitioner 26, n. 7; Brief for Respondent 13, n. 6; see also *State* v. *Dunn*, 2007–0878 (La. 1/25/08), 974 So. 2d 658, 662 (holding that this statute does not "establis[h] a procedure to be used for *Atkins* hearings conducted post-trial and/or post-sentencing").

registered an IQ score of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having some form of learning disability, and had been placed in special education classes. See *id.*, at 203a–204a. Brumfield further requested "all the resources necessary to the proper presentation of his case," asserting that until he was able to "retain the services of various experts," it would be "premature for [the court] to address [his] claims." *Id.*, at 207a.

Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed Brumfield's petition. With respect to the request for an *Atkins* hearing, the court stated:

> "I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [*sic*] testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report.
>
> "Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an antisocial personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out." App. to Pet. for Cert. 171a–172a.

After the Louisiana Supreme Court summarily denied his application for a supervisory writ to review the trial court's ruling, *Brumfield* v. *State*, 2004–0081 (La. 10/29/04), 885 So.

2d 580, Brumfield filed a petition for habeas corpus in federal court, again pressing his *Atkins* claim. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brumfield could secure relief only if the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§ 2254(d)(1), (2).

The District Court found that both of these requirements had been met. 854 F. Supp. 2d 366, 383–384 (MD La. 2012). First, the District Court held that denying Brumfield an evidentiary hearing without first granting him funding to develop his *Atkins* claim "represented an unreasonable application of then-existing due process law," thus satisfying § 2254(d)(1). 854 F. Supp. 2d, at 379. Second, and in the alternative, the District Court found that the state court's decision denying Brumfield a hearing "suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceeding in violation of § 2254(d)(2)." *Ibid.*

The District Court further determined Brumfield to be intellectually disabled based on the extensive evidence it received during an evidentiary hearing. *Id.*, at 406; see *Cullen* v. *Pinholster*, 563 U. S. 170, 185 (2011) (recognizing that federal habeas courts may "take new evidence in an evidentiary hearing" when § 2254(d) does not bar relief). This evidence included the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70, 854 F. Supp. 2d, at 392—testimony and expert reports regarding Brumfield's adaptive behavior and "significantly limited conceptual skills," *id.*, at 401, and proof that these deficits in intellectual functioning had exhibited themselves before Brumfield reached adulthood, *id.*, at 405. Thus, the District Court

held, Brumfield had "demonstrated he is mentally retarded as defined by Louisiana law" and was "ineligible for execution." *Id.*, at 406.

The United States Court of Appeals for the Fifth Circuit reversed. 744 F. 3d 918, 927 (2014). It held that Brumfield's federal habeas petition failed to satisfy either of § 2254(d)'s requirements. With respect to the District Court's conclusion that the state court had unreasonably applied clearly established federal law, the Fifth Circuit rejected the notion that any of this Court's precedents required a state court to grant an *Atkins* claimant the funds necessary to make a threshold showing of intellectual disability. See 744 F. 3d, at 925–926. As for the District Court's holding that the state court's decision rested on an unreasonable determination of the facts, the Fifth Circuit declared that its "review of the record persuad[ed it] that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing." *Id.*, at 926. Having found that Brumfield's petition failed to clear § 2254(d)'s hurdle, the Fifth Circuit did not review the District Court's conclusion that Brumfield is, in fact, intellectually disabled. See *id.*, at 927, and n. 8.

We granted certiorari on both aspects of the Fifth Circuit's § 2254(d) analysis, 574 U. S. 1045 (2014), and now vacate its decision and remand for further proceedings.

II

Before this Court, Brumfield advances both of the rationales on which the District Court relied in holding § 2254(d) to be satisfied. Because we agree that the state court's rejection of Brumfield's request for an *Atkins* hearing was premised on an "unreasonable determination of the facts" within the meaning of § 2254(d)(2), we need not address whether its refusal to grant him expert funding, or at least the opportunity to seek *pro bono* expert assistance to further his threshold showing, reflected an "unreasonable application of . . . clearly established Federal law," § 2254(d)(1).

In conducting the § 2254(d)(2) inquiry, we, like the courts below, "look through" the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing. See *Johnson* v. *Williams*, 568 U. S. 289, 297, n. 1 (2013); *Ylst* v. *Nunnemaker*, 501 U. S. 797, 806 (1991). Like Brumfield, we do not question the propriety of the legal standard the trial court applied, and presume that a rule according an evidentiary hearing only to those capital defendants who raise a "reasonable doubt" as to their intellectual disability is consistent with our decision in *Atkins*. Instead, we train our attention on the two underlying factual determinations on which the trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. App. to Pet. for Cert. 171a–172a.[3]

We may not characterize these state-court factual determinations as unreasonable "merely because [we] would have

---

[3] The dissent accuses us of "recasting legal determinations as factual ones." *Post*, at 337 (opinion of THOMAS, J.) (emphasis deleted) (hereinafter the dissent). But we subject these determinations to review under § 2254(d)(2) instead of § 2254(d)(1) because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting Brumfield's *Atkins* claim, but with the underlying factual conclusions the court reached when it determined that the record evidence was inconsistent with intellectual disability. See *Maggio* v. *Fulford*, 462 U. S. 111, 117 (1983) (*per curiam*) (reviewing under the predecessor to § 2254(d)(2) the "factual conclusions" underlying a state court's conclusion that a criminal defendant had raised no doubt as to his competency to stand trial). We look to Louisiana case law only because it provides the framework in which these factual determinations were made, and makes clear that the state court's decision rejecting Brumfield's *Atkins* claim was premised on those determinations. And we apply § 2254(d)(2) at the behest of the State itself, which invokes that provision (and § 2254(e)(1)'s similarly fact-focused standard) in contending that AEDPA bars Brumfield's *Atkins* claim, and characterizes the determinations we review here as "highly factual." Brief for Respondent 25.

reached a different conclusion in the first instance." *Wood* v. *Allen*, 558 U. S. 290, 301 (2010). Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Ibid.* (quoting *Rice* v. *Collins*, 546 U. S. 333, 341–342 (2006)). As we have also observed, however, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003). Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

A

The state trial court's rejection of Brumfield's request for an *Atkins* hearing rested, first, on Dr. Bolter's testimony that Brumfield scored 75 on an IQ test and may have scored higher on another test. See App. to Pet. for Cert. 171a. These scores, the state court apparently believed, belied the claim that Brumfield was intellectually disabled because they necessarily precluded any possibility that he possessed subaverage intelligence—the first of the three criteria necessary for a finding of intellectual disability. But in fact, this evidence was entirely consistent with intellectual disability.

To qualify as "significantly subaverage in general intellectual functioning" in Louisiana, "one must be more than two standard deviations below the mean for the test of intellectual functioning." *Williams*, 831 So. 2d, at 853 (internal quotation marks omitted). On the Wechsler scale for IQ—the scale employed by Dr. Bolter—that would equate to a score of 70 or less. See *id.*, at 853–854, n. 26.

As the Louisiana Supreme Court cautioned in *Williams*, however, an IQ test result cannot be assessed in a vacuum. In accord with sound statistical methods, the court ex-

plained: "[T]he assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement." *Ibid.* Thus, *Williams* held, "[a]lthough Louisiana's definition of significantly subaverage intellectual functioning does not specifically use the word 'approximately,' because of the SEM [(standard error of measurement)], any IQ test score has a margin of error and is only a factor in assessing mental retardation." *Id.*, at 855, n. 29.

Accounting for this margin of error, Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability. The sources on which *Williams* relied in defining subaverage intelligence both describe a score of 75 as being consistent with such a diagnosis. See AAMR, at 59; DSM–IV, at 41–42; see also *State* v. *Dunn*, 2001–1635 (La. 5/11/10), 41 So. 3d 454, 470 ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis").[4] Relying on similar authorities, this Court observed in *Atkins* that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U. S., at 309, n. 5. Indeed, in adopting these definitions, the Louisiana Supreme Court anticipated our holding in *Hall* v. *Florida*, 572 U. S. 701 (2014), that it is unconstitutional to foreclose "all further exploration of intellectual disability" simply because a capital defendant is deemed to have an IQ above 70. *Id.*, at 704; see also *id.*, at 714 ("For professionals to diagnose—and for the law then

[4] The dissent insists that we have ignored language in *Williams* establishing that "the requisite IQ could range 'from 66 to 74.'" *Post*, at 340 (quoting *Williams*, 831 So. 2d, at 854, n. 26). But the dissent wrenches the quoted language out of context. The *Williams* Court actually said: "One SEM is plus or minus a specified number of IQ points. Thus, an IQ of 70 could range from 66 to 74 assuming an SEM of 4." *Id.*, at 854, n. 26. *Williams* did not thereby hold that an SEM of 4, and a resultant range of 66 to 74, must be used; it was simply using this example to illustrate the concept of SEM.

to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning"). To conclude, as the state trial court did, that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.

Nor was there evidence of any higher IQ test score that could render the state court's determination reasonable. The state court claimed that Dr. Jordan, who examined Brumfield but never testified at trial, "came up with a little bit higher IQ." App. to Pet. for Cert. 171a. At trial, the existence of such a test score was mentioned only during the cross-examination of Dr. Bolter, who had simply acknowledged the following: "Dr. Jordan rated his intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning." App. 133a. And in fact, Dr. Jordan's written report provides no IQ score. See *id.*, at 429a.[5] The state court therefore could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence. See *State* v. *Dunn*, 2001–1635 (La. 11/1/02), 831 So. 2d 862, 886, n. 9 (ordering *Atkins* evidentiary hearing even though "prison records indicate[d]" the defendant had an "'estimated IQ of 76,'" emphasizing testimony that prison officials "did not do the formal IQ testing").

---

[5] There is some question whether Dr. Jordan's report, which was introduced in federal habeas proceedings, was ever entered into the state-court record. See 854 F. Supp. 2d 366, 380, n. 13 (MD La. 2012) (accepting counsel's representation that the report was not in the state-court record); but see Tr. of Oral Arg. 50 (State's counsel asserting that it was). We see no need to resolve this dispute, though we note that the report is not currently contained in the state-court record lodged with the District Court.

B

The state court's refusal to grant Brumfield's request for an *Atkins* evidentiary hearing rested, next, on its conclusion that the record failed to raise any question as to Brumfield's "impairment . . . in adaptive skills." App. to Pet. for Cert. 171a. That determination was also unreasonable.

The adaptive impairment prong of an intellectual disability diagnosis requires an evaluation of the individual's ability to function across a variety of dimensions. The Louisiana Supreme Court in *Williams* described three separate sets of criteria that may be utilized in making this assessment. See 831 So. 2d, at 852–854. Although Louisiana courts appear to utilize all three of these tests in evaluating adaptive impairment, see *Dunn*, 41 So. 3d, at 458–459, 463, for the sake of simplicity we will assume that the third of these tests, derived from Louisiana statutory law, governed here, as it appears to be the most favorable to the State.[6] Under that standard, an individual may be intellectually disabled if he has "substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care. (ii) Understanding and use of language. (iii) Learning. (iv) Mobility. (v) Self-direction. (vi) Capacity for independent living." *Williams*, 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. § 28:381(12) (repealed 2005)).

The record before the state court contained sufficient evidence to raise a question as to whether Brumfield met these criteria. During the sentencing hearing, Brumfield's

---

[6] The other two standards set forth in *Williams* were: the AAMR criteria, which require "'limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work,'" 831 So. 2d, at 852, n. 22; and the DSM–IV criteria, which similarly require "'significant limitations'" in "'at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety,'" *id.*, at 853, n. 25.

mother testified that Brumfield had been born prematurely at a very low birth weight. App. 28a. She also recounted that he had been taken out of school in the fifth grade and hospitalized due to his behavior, and recalled an incident in which he suffered a seizure. *Id.*, at 34a–38a, 41a, 47a.

Social worker Dr. Guin elaborated on this testimony, explaining that Brumfield's low birth weight indicated "that something ha[d] gone wrong during the pregnancy," that medical records suggested Brumfield had "slower responses than normal babies," and that "they knew that something was wrong at that point." *Id.*, at 75a–76a. Dr. Guin also confirmed that, beginning in fifth grade, Brumfield had been placed in special classes in school and in multiple mental health facilities, and had been prescribed antipsychotics and sedatives. *Id.*, at 89a, 93a–94a.[7] Moreover, one report Dr. Guin reviewed from a facility that treated Brumfield as a child "questioned his intellectual functions," and opined that "he probably had a learning disability related to some type of slowness in motor development, some type of physiological [problem]." *Id.*, at 89a. Dr. Guin herself reached a similar conclusion, stating that Brumfield "obviously did have a physiologically linked learning disability that he was born with," and that his "basic problem was that he . . . could not process information." *Id.*, at 90a, 98a.

Finally, Dr. Bolter, who had performed "a comprehensive battery of tests," confirmed that Brumfield had a "borderline general level of intelligence." *Id.*, at 127a–128a. His low intellect manifested itself in a fourth-grade reading level—and he reached that level, Dr. Bolter elaborated, only with respect to "simple word recognition," and "not even comprehension." *Id.*, at 128a; see also *id.*, at 134a. In a written report submitted to the state court, Dr. Bolter further noted

[7] While the dissent contends that the record shows Brumfield's placement in special education classes was simply due to his misbehavior, *post*, at 341, Dr. Guin testified that Brumfield's behavioral problems were in part a function of a learning disability, see App. 86a.

that Brumfield had deficiencies "frequently seen in individuals with a history of learning disabilities," and "clearly" had "learning characteristics that make it more difficult for him to acquire new information." *Id.*, at 418a, 420a. Dr. Bolter also testified that Brumfield's low birth weight had "place[d] him [at] a risk of some form of potential neurological trauma," and affirmed that the medications administered to Brumfield as a child were generally reserved for "severe cases." *Id.*, at 130a, 132a.

All told, then, the evidence in the state-court record provided substantial grounds to question Brumfield's adaptive functioning. An individual, like Brumfield, who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level, certainly would seem to be deficient in both "[u]nderstanding and use of language" and "[l]earning"—two of the six "areas of major life activity" identified in *Williams*. 831 So. 2d, at 854. And the evidence of his low birth weight, of his commitment to mental health facilities at a young age, and of officials' administration of antipsychotic and sedative drugs to him at that time, all indicate that Brumfield may well have had significant deficits in at least one of the remaining four areas. See *ibid.*

In advancing its contrary view of the record, the state court noted that Dr. Bolter had described Brumfield as someone with "an antisocial personality." App. 127a; see App. to Pet. for Cert. 171a. The relevance of this diagnosis is, however, unclear, as an antisocial personality is not inconsistent with any of the above-mentioned areas of adaptive impairment, or with intellectual disability more generally. The DSM–IV—one of the sources on which the *Williams* court relied in defining intellectual disability—provides: "The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder." DSM–IV, at 47; see also AAMR, at 172 (noting that

individuals with intellectual disability also tend to have a number of other mental health disorders, including personality disorders).

To be sure, as the dissent emphasizes, *post*, at 336–337, 341, other evidence in the record before the state court may have cut against Brumfield's claim of intellectual disability. Perhaps most significant, in his written report Dr. Bolter stated that Brumfield "appears to be normal from a neurocognitive perspective," with a "normal capacity to learn and acquire information when given the opportunity for repetition," and "problem solving and reasoning skills" that were "adequate." App. 421a. Likewise, the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns. But cf. AAMR, at 8 (intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation").

It is critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a "reasonable doubt" as to his intellectual disability to be entitled to an evidentiary hearing. See *Williams*, 831 So. 2d, at 858, n. 33. The Louisiana Supreme Court's decision in *Williams* illustrated how low the threshold for an evidentiary hearing was intended to be: There, the court held that the defendant was entitled to a hearing on his *Atkins* claim notwithstanding the fact that "the defense's own expert testified unequivocally, at both the guilt and penalty phases of trial, that [the] defendant is not mentally retarded," an assessment "based on the fact that [the] defendant [was] not deficient in adaptive functioning." 831 So. 2d, at 855; see also *Dunn*, 831 So. 2d, at 885, 887 (ordering hear-

ing despite expert testimony that the defendant "had never been identified as a child who was a slow learner," and had "received college credit for courses completed during his incarceration"). Similarly, in light of the evidence of Brumfield's deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt. An individual who points to evidence that he was at risk of "neurological trauma" at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot "process information" has raised substantial reason to believe that he suffers from adaptive impairments.

That these facts were alone sufficient to raise a doubt as to Brumfield's adaptive impairments is all the more apparent given that Brumfield had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim. At his pre-*Atkins* trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability. In fact, had he done so at the penalty phase, he ran the risk that it would "enhance the likelihood . . . future dangerousness [would] be found by the jury." *Atkins*, 536 U. S., at 321. Thus, given that the evidence from trial provided good reason to think Brumfield suffered from an intellectual disability, there was even greater cause to believe he might prove such a claim in a full evidentiary hearing. Indeed, the Louisiana Supreme Court had made clear that a capital defendant in Brumfield's position should be accorded this additional benefit of the doubt when it defined the standard for assessing whether a hearing is required. Echoing *Atkins*' observation that penalty-phase evidence of intellectual disability can be a "two-edged sword," *ibid.*, *Williams* noted that where a trial "was conducted prior to *Atkins*," the defense's "trial strategy may have been to shift the focus away from any diagnosis of mental retardation." 831 So. 2d, at 856, n. 31. For that reason, the *Williams*

court considered the fact that the defendant "ha[d] not had the issue of mental retardation put before the fact finder in light of the *Atkins* restriction on the death penalty" as a factor supporting the requisite threshold showing that "entitled [him] to an evidentiary hearing." *Id.*, at 857; accord, *Dunn*, 831 So. 2d, at 886. Here, the state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. The court's failure to do so resulted in an unreasonable determination of the facts.

III

A

Urging affirmance of the decision below, the State advances two additional arguments that we need discuss only briefly.

First, the State suggests that rather than being evaluated pursuant to § 2254(d)(2)'s "unreasonable determination of the facts" standard, Brumfield's attack on the state trial court's decision should instead be "'reviewed under the arguably more deferential standard set out in § 2254(e)(1).'" Brief for Respondent 30 (quoting *Wood*, 558 U. S., at 301).[8] We have not yet "defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," *Burt* v. *Titlow*, 571 U. S. 12, 18 (2013), and we need not do so here. The State did not press below the theory that § 2254(e)(1) supplies the governing standard when a court evaluates whether a habeas petitioner has satisfied § 2254(d)(2)'s requirements, the Fifth Circuit did not address that possibility, and the State in its brief in opposition to certiorari failed to advance any specific argument that

[8] Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

the decision below could be supported by invocation of that statutory provision. See Brief in Opposition 60–64. The argument is therefore "properly 'deemed waived.'" *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 306 (2010) (quoting this Court's Rule 15.2).

Second, the State contends that Brumfield's request for an *Atkins* hearing was properly rejected because the record evidence failed to show that Brumfield's intellectual deficiencies manifested while he was in the "developmental stage"—that is, before he reached adulthood. *Williams*, 831 So. 2d, at 854. But the state trial court never made any finding that Brumfield had failed to produce evidence suggesting he could meet this age-of-onset requirement. There is thus no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d). See *Panetti* v. *Quarterman*, 551 U. S. 930, 953–954 (2007); compare, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003) (reviewing *de novo* the question whether petitioner had suffered prejudice where state court's reasoned decision rejecting claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984), was premised solely on conclusion that attorney's performance had not been constitutionally deficient), with *Harrington* v. *Richter*, 562 U. S. 86, 98 (2011) (requiring federal habeas court to defer to hypothetical reasons state court might have given for rejecting federal claim where there is no "opinion explaining the reasons relief has been denied"). In any event, the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood: Both Dr. Guin and Dr. Bolter testified at length about Brumfield's intellectual shortcomings as a child and their possible connection to his low birth weight. If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child.

B

Finally, we offer a few additional words in response to JUSTICE THOMAS' dissent. We do not deny that Brumfield's crimes were terrible, causing untold pain for the victims and their families. But we are called upon today to resolve a different issue. There has already been one death that society rightly condemns. The question here is whether Brumfield cleared AEDPA's procedural hurdles, and was thus entitled to a hearing to show that he so lacked the capacity for self-determination that it would violate the Eighth Amendment to permit the State to impose the "law's most severe sentence," *Hall*, 572 U. S., at 709, and take his life as well. That question, and that question alone, we answer in the affirmative.

* * *

We hold that Brumfield has satisfied the requirements of § 2254(d). The judgment of the United States Court of Appeals for the Fifth Circuit is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join as to all but Part I–C, dissenting.

Federal collateral review of state convictions interrupts the enforcement of state criminal laws and undermines the finality of state-court judgments. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) addresses that interference by constraining the ability of federal courts to grant relief to state prisoners. Today, the Court oversteps those limits in a decision that fails to respect the Louisiana state courts and our precedents. I respectfully dissent.

I

This case is a study in contrasts. On the one hand, we have Kevan Brumfield, a man who murdered Louisiana police officer Betty Smothers and who has spent the last 20 years claiming that his actions were the product of circumstances beyond his control. On the other hand, we have Warrick Dunn, the eldest son of Corporal Smothers, who responded to circumstances beyond his control by caring for his family, building a professional football career, and turning his success on the field into charitable work off the field.

A

Given that the majority devotes a single sentence to a description of the crime for which a Louisiana jury sentenced Brumfield to death, I begin there.

Corporal Smothers, a 14-year veteran of the Baton Rouge Police Department, was working a second job to support her family when she was murdered just after midnight on January 7, 1993. Following a 10-hour shift at the department on January 6, Corporal Smothers reported to a local grocery store, where she served as a uniformed security officer with the official authorization of the department. She monitored the security of the grocery store and waited to escort the assistant manager, Kimen Lee, to a local bank to make the store's nightly deposit.

Corporal Smothers followed her usual practice of driving Lee to the bank in her police cruiser. Shortly after midnight, they arrived at the bank's night depository. As Lee leaned out of the passenger side door to make the deposit, she heard the racking of the slide on a handgun. Brumfield and his accomplice, Henri Broadway, then opened fire on the two women.

Brumfield fired seven rounds from a .380-caliber handgun at close range from the left side of the cruiser, while Broadway fired five rounds from a .25-caliber handgun from the

right rear of the cruiser. Brumfield hit Corporal Smothers five times in the forearm, chest, and head. Lee was hit multiple times as well, causing 11 entrance and exit wounds, but she somehow managed to slide over on the bench seat and take control of the police car. She drove to a nearby convenience store, where she was able to call for help and to describe Broadway to police. Emergency responders transported both women to the hospital. Corporal Smothers was pronounced dead on arrival. Lee survived.

On January 11, 1993, Baton Rouge police arrested Brumfield for Corporal Smothers' murder. After several hours of police interrogation, during which he denied involvement in the murder, Brumfield eventually gave a videotaped confession.[1] He admitted that, after riding around at night looking for a "hustle," he had come up with the idea to steal the grocery store's deposit. He described how he and Broadway hid in the bushes waiting for the car to arrive, and how, when Lee looked back while trying to make the deposit, he started shooting. He admitted that he had fired seven rounds from his .380-caliber handgun, that Broadway had fired five shots with the .25-caliber handgun, and that a third man had served as the getaway driver.

A Louisiana jury convicted Brumfield of first-degree murder. In addition to his videotaped confession, the State introduced evidence that Brumfield had spoken about committing a robbery to several people in the weeks leading up to the murder. He was facing sentencing on unrelated charges and had promised his pregnant girlfriend that he would obtain money to support her, their baby, and her child from a previous relationship while he was in jail. The State also introduced evidence that Brumfield had told an acquaintance right after the murder that he had just killed "a son of a bitch." Record 3566.

---

[1] The videotaped confession can be found at http://www.supremecourt.gov/media/media.aspx.

B

At the penalty phase, the State sought a death sentence. It reintroduced the evidence from the guilt phase, along with evidence of Brumfield's other criminal acts.[2] The felony convictions for which Brumfield was awaiting sentencing when he murdered Corporal Smothers were for attempted possession of cocaine and felony theft of a gun. Brumfield had worked only three months in his adult life because, as he had admitted to his psychologist, he found drug dealing a far more effective way to make money. In fact, he had been involved a few years earlier in the fatal shooting of a fellow drug dealer in a deal gone bad. And 10 months after he murdered Corporal Smothers, Brumfield battered another police officer while in prison.

The State also explained that Brumfield's murder of Corporal Smothers was the culmination of a 2-week crime spree. On Christmas Day 1992, Brumfield robbed Anthony Miller at gunpoint after giving him a ride. He forced Miller out of the car, put a gun to Miller's head, and pulled the trigger. Fortunately for Miller, the gun misfired, and he survived. One week later, Brumfield robbed Edna Marie Perry and her daughter Trina Perkins at gunpoint as they were walking along the side of the road. Brumfield pulled alongside them, pointed a sawed-off shotgun at Perry, and said, "Hand it over, bitch." *Id.*, at 3790. Perry turned over her purse, but pleaded with Brumfield to give back the pictures from her

[2] Although not introduced at trial, it is worth noting that the night of Corporal Smothers' murder was apparently not her first interaction with Brumfield. Six years earlier, she had caught him stealing and had given him a chance to turn his life around, a chance he unfortunately did not take. See W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond 12 (2008). As Corporal Smothers' eldest son recounted, "[Brumfield] told me a story that in 1987, my mother, working security at a store, caught him stealing and made him put back whatever he took. . . . Brumfield said my mom could have made an example of him that day, but she elected not to. I thought to myself, that was Mom—always giving people second chances to do right." *Ibid.*

deceased son's funeral that she carried in the purse. He responded none too courteously, "Bitch, you dead," and drove away. *Ibid.*

The State also introduced evidence about the murder's broader impact. In addition to serving as a police officer, Corporal Smothers was a single mother to six children and a volunteer coach at a local track club. Her children, who ranged from 10 to 18 years old, went to live with their grandmother after the murder. The loss of their mother weighed heavily on all of them. It was particularly hard on Corporal Smothers' eldest son, Warrick, who had been especially close to his mother, and on her second eldest son, Derrick Green, who had been hoping to spend more time with her after Warrick went off to college. Derrick was deprived of that chance, and he and Warrick had to take on extra responsibilities to care for their younger siblings.

For his part, Brumfield introduced evidence that his crimes were "beyond his control," a product of his disadvantaged background. *Id.*, at 3927. He was born at a low birth weight, and his mother testified that he spent several months in the hospital shortly after his birth. His father left the family, and his stepfather would make him sit in the corner on hot rice, whip him, and hit him over the head with a telephone book. His brother eventually decided to go live with their biological father. Brumfield opted to stay with his mother and stepfather.

When he was around seven or eight years old, Brumfield began to have behavioral problems. He had trouble staying in his seat at school, was disruptive, easily distracted, and prone to fighting. He was eventually taken to a psychiatric hospital to address his hyperactivity. Although he was a straight-A student until the third grade, his time in four or five group homes educated him in the criminal lifestyle, and his grades began to suffer.

Dr. Cecile Guin, a social worker, testified that Brumfield's hyperactivity and acting out could be traced largely to his

low birth weight, lack of a supportive home environment, and abusive stepfather. Although she was not a medical doctor, she concluded that Brumfield had a "neurologically based hyperactive or learning disability problem." *Id.*, at 3886. She acknowledged, however, that his school records described him as having a behavior disorder—"a pattern situation or inappropriate behavior extended over a long period of time which cannot be explained by intellectual, sensory, neurological or other general factors." *Id.*, at 3882. She also admitted on cross-examination that a psychologist, Brian T. Jordan, had not diagnosed Brumfield as suffering from any neurological disorder, but instead from "a sociopathic personality disorder, antisocial type, poor impulse control, especially in the area of aggression." *Id.*, at 3897–3898.

Dr. John Bolter, a clinical neuropsychologist, testified on behalf of the defense that Brumfield suffered from an antisocial personality disorder. Based on a battery of tests employed to determine whether Brumfield suffered from "any kind of neurological deficits in cognitive functions," Dr. Bolter concluded that Brumfield early on in life "manifest[ed] . . . a conduct disorder with extreme levels of aggressivity and a disregard for the basic rights of others," along with "an attention deficit disorder of some type." *Id.*, at 3904. Over time, he "emerged into what looks more like an antisocial personality," and he continued to have "attention difficulty" and "borderline general level of intelligence." *Ibid.* Brumfield's IQ score was a 75, placing him at about the seventh percentile of the general population or "on the low end of intelligence." *Ibid.* His reading skills were at about a fourth-grade level, while his math and spelling skills were at about a sixth-grade level. On the other hand, Dr. Bolter concluded that Brumfield's "problem solving, judgment and reasoning skills [we]re sufficient to meet the demands of everyday adulthood and he [wa]s not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or

mental illness." *Id.*, at 275. Dr. Bolter had also reviewed Dr. Jordan's report, and he testified that the only inconsistency in their conclusions was that Dr. Jordan rated Brumfield's intelligence "just a little higher than" he did. *Id.*, at 3907.

The jury unanimously recommended that Brumfield be sentenced to death. It found three statutory aggravators that made him eligible for that penalty: He was engaged in the attempted perpetration of an armed robbery; he knowingly created a risk of death or great bodily harm to more than one person; and the victim was a peace officer engaged in her lawful duties. The jury found no statutory mitigators.

C

Brumfield's argument that his actions were the product of his disadvantaged background is striking in light of the conduct of Corporal Smothers' children following her murder. Most widely known is that of Warrick. Though he had turned 18 just two days before Brumfield murdered his mother, he quickly stepped into the role of father figure to his younger siblings.[3] In his view, it "was up to [him] to make sure that everybody grew up to be somebody." W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond 37 (2008).

To that end, Warrick led by example, becoming a star running back at Florida State University and then in the National Football League (NFL). During his time at Florida State, he set records on the field while coping with the loss of his mother. *Id.*, at 71, 111, 117. Though separated from his family in Louisiana, he called his brothers and sisters

[3] Like Brumfield, Warrick's father was not a part of his life. *Id.*, at 51. But, unlike Brumfield, Warrick did not use the absence of a father figure as a justification for murder. *Ibid.* Instead, he recognized that his mother had been "the family patriarch" when she was alive, *ibid.*, and that he had a responsibility to take on that role after her death, *id.*, at 37.

regularly,[4] sought parenting advice from his coach, and returned home when he could. *Id.*, at 111–113. He kept his mother's pearl earrings, stained with her blood from the night she was murdered, in a box on his dresser. *Id.*, at 71. After four years at Florida State, Dunn was drafted by the Tampa Bay Buccaneers. Concerned that some of his siblings were struggling in Baton Rouge, he moved the three youngest into his home in Tampa Bay. *Id.*, at 139. Although the strain of playing for the Buccaneers and raising his family weighed on him, he "accepted it as [his] responsibility . . . to make sure they stayed on the right path." *Ibid.*

While balancing football and family, Dunn still found time for others. He started Homes for the Holidays, a charitable organization that decorates and fully furnishes—down to the toothbrush—homes obtained by single mothers through first-time homeowner assistance programs. Dunn was inspired by his own mother, who spent years working toward the purchase of a home for her family, but, thanks to Brumfield, did not live to reach her goal. *Id.*, at 152.

Dunn's contributions did not end there. After joining the Atlanta Falcons in 2002, he expanded the reach of Homes for the Holidays, *id.*, at 157; traveled overseas to visit our Armed Forces, *id.*, at 200–201; led an effort to raise money from the NFL to help respond to the tragic effects of Hurricane Katrina, *id.*, at 202–205; and became a founding member of Athletes for Hope, an organization dedicated to helping athletes find and pursue charitable opportunities, *id.*, at 207–208. Following his retirement from professional football in

---

[4] In a letter to Brumfield, one of Corporal Smothers' daughters, Summer, later wrote: "Can you imagine life at 14 without your mother, no father to step up and take responsibility for his seed? Not knowing where your next meal will come from, or where you are going to lay your head at night, or even who's going to sacrifice their life to raise six children because of someone's selfish acts? Do you know what this can [do to] a 14-year-old's physical, emotional, and mental state of mind?" *Id.*, at 13 (italics deleted).

2008, Dunn launched two more charitable organizations in honor of his mother: Betty's Hope, a mobile bereavement program that offers no-cost grief counseling services to children in the Baton Rouge area, and Homes for Service, a program dedicated to helping servicemembers, police officers, and firefighters achieve home ownership. As Dunn once remarked, "I knew that was what my mother would have been most proud of: not my records, not my awards, but the way I used my worldly success to give something back." *Id.*, at 157.

D

Brumfield, meanwhile, has spent the last 20 years engaged in a ceaseless campaign of review proceedings. He raised numerous challenges on direct appeal to the trial court's discovery orders, admission of evidence, jury instructions, and preservation of the record; the prosecutor's references during the penalty phase; and the alleged deficiencies of his trial counsel. The Louisiana Supreme Court rejected each of these claims, *State* v. *Brumfield*, 96–2667 (La. 10/20/98), 737 So. 2d 660, and this Court denied his petition for a writ of certiorari, *Brumfield* v. *Louisiana*, 526 U. S. 1025 (1999).

In 2000, Brumfield filed his first petition for state postconviction relief. In that petition, among other things, he alleged 9 instances of prosecutorial misconduct, over 18 instances of ineffective assistance of counsel, and at least 17 constitutional errors in the jury instructions at the guilt phase of his trial.

Brumfield sought and received multiple extensions of time before finally filing his amended petition for state postconviction relief in 2003. He raised many of the same claims as he had in his initial petition, but also asserted for the first time that he was mentally retarded and therefore ineligible for the death penalty under *Atkins* v. *Virginia*, 536 U. S. 304 (2002). In support of that claim, he alleged that his IQ score was 75, that his reading level was that of a fourth grader,

that he was born prematurely with a low birth weight and indications of slower responses than normal babies, that he had suffered seizures and been prescribed a variety of medications since childhood, that he was twice treated in psychiatric hospitals during childhood and adolescence, and that he had been diagnosed with a learning disability.

The state court denied Brumfield's petition. In a ruling from the bench, the court explained that not every defendant who requests an evidentiary hearing on an *Atkins* claim is entitled to one. Based on its review of "the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [*sic*] testimony, which refers to and discusses Dr. Jordan's report," App. to Pet. for Cert. 171a, it concluded that Brumfield had not met his burden to make a threshold showing of mental retardation. In particular, the court noted that Brumfield had an IQ score of 75 or higher and had demonstrated no impairment in adaptive skills. Although Brumfield had requested fees to develop his *Atkins* claim, the trial court did not explicitly rule on the motion, and Brumfield's counsel did not prompt him to do so.

Brumfield then sought federal collateral review. In his first habeas application, he repeated many of his claims, including the claim that he is ineligible to be executed under *Atkins*. He requested funds to develop that claim in an evidentiary hearing. The District Court dismissed all of his claims except for the *Atkins* one and ordered an evidentiary hearing. As the majority describes, the District Court eventually granted a writ of habeas corpus. It concluded that the state court had based its denial of Brumfield's *Atkins* claim on an unreasonable determination of the facts and had unreasonably applied clearly established Supreme Court precedent in denying him funds to develop the claim. The U. S. Court of Appeals for the Fifth Circuit reversed, concluding that the District Court should not have conducted an evidentiary hearing and that AEDPA did not afford relief on

either of the grounds identified by the District Court. 744 F. 3d 918, 926–927 (2014).

II

AEDPA limits "the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen* v. *Pinholster*, 563 U. S. 170, 181 (2011). As relevant here, 28 U. S. C. § 2254(d) provides that a federal court may not grant an application

> "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In applying this "highly deferential standard for evaluating state-court rulings, . . . state-court decisions [must] be given the benefit of the doubt." *Pinholster*, 563 U. S., at 181 (internal quotation marks omitted). They must be reviewed solely on "the record that was before the state court that adjudicated the claim on the merits." *Id.*, at 181, 185, and n. 7. And the prisoner must rebut any state-court factual findings he seeks to challenge by clear and convincing evidence under § 2254(e)(1). *Burt* v. *Titlow*, 571 U. S. 12, 18 (2013).

Brumfield presents two grounds for relief under this framework. First, he argues that the Louisiana state court denied his *Atkins* claim based on an unreasonable determination of the facts, § 2254(d)(2).[5] Second, he argues that the

[5] Although this question presented in his petition is framed as one of law—"[w]hether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's

Louisiana state court violated clearly established federal law as determined by this Court when it denied him funding to develop evidence for that claim, § 2254(d)(1).

III

The majority resolves the case solely on Brumfield's first ground, so I begin there.

A

The Louisiana state court's decision to deny Brumfield's *Atkins* claim was not based on an unreasonable determination of the facts. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood* v. *Allen*, 558 U. S. 290, 301 (2010). Where the record supports a state court's factual determinations, the prisoner cannot make that showing. See, *e. g.*, *Titlow*, *supra*, at 19–20. Here, the state court rejected Brumfield's *Atkins* claim in an oral ruling as follows:

> "Dr. Bolter in particular found [Brumfield] had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden [of] placing the claim of mental retardation at issue." App. to Pet. for Cert. 171a–172a.

---

claim of mental retardation under *Atkins v. Virginia*, 536 U. S. 304 (2002), has based its decision on an unreasonable determination of the facts under 28 U. S. C. § 2254(d)(2)," Pet. for Cert. i—Brumfield reframed his question at oral argument as purely one based on the factual determinations made in his case, Tr. of Oral Arg. 27–28. He properly conceded that a court does not necessarily make its decision based on an unreasonable determination of the facts when it rejects an *Atkins* claim based on a record developed before *Atkins*. Tr. of Oral Arg. 7–8.

That statement contains three factual determinations: (1) Brumfield's IQ was at least 75; (2) Brumfield had not demonstrated impairment in adaptive skills; and (3) Brumfield has an antisocial personality disorder. Each of these facts is amply supported by the state-court record.

To begin, the record justifies a finding that Brumfield's IQ is 75, if not a bit higher. Dr. Bolter testified, without contradiction, that Brumfield scored a 75 on the IQ test he administered and that "Dr. Jordan rated [Brumfield's] intelligence just a little higher than I did." Record 3907. Dr. Bolter's report similarly shows that Brumfield's test results were "lower than estimated by Dr. Jordan in January of this year," but it notes that "Dr. Jordan was using a screening measure which proves to be less reliable." *Id.*, at 272. The parties dispute whether Dr. Jordan's report was made part of the record, but to the extent it was, it confirms Dr. Bolter's testimony. Although it does not specify an IQ score, Dr. Jordan's report states that Brumfield's "intellectual function is slightly limited but generally close to the Average Range" and that a psychological test showed him "to be intellectually functioning generally in the low Average Range." App. 428a–429a. Because two thirds of all IQs are expected to lie between 85 and 115, a fair reading of Dr. Jordan's statements would suggest an IQ score closer to 85. See American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 37 (9th ed. 1992).

The record likewise supports the state court's finding that Brumfield is not impaired in adaptive skills. Under *Atkins*, the relevant adaptive skill areas are "'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.'" 536 U. S., at 308, n. 3. Dr. Bolter reported that Brumfield's speech was "intelligible and prosodic" without "evidence of thought derailment," Record 271, and that his writing appeared "normal," *id.*, at 273. Brumfield lived independently

before his arrest, often staying with his pregnant girlfriend and had been able to maintain a job for approximately three months before quitting "because his earnings were better through distributing drugs and selling firearms." *Id.*, at 271. Although Brumfield reads at a fourth-grade level and spells and performs arithmetic at a sixth-grade level, Dr. Bolter concluded that he "has a normal capacity to learn and acquire information when given the opportunity for repetition." *Id.*, at 276.

Finally, the record supports a finding that Brumfield has an antisocial personality disorder. Dr. Bolter testified, without contradiction, that what manifested in childhood as a conduct disorder had developed in adulthood into an antisocial personality disorder. He described that disorder as "an absence of a conscience" and "the ability to disregard the rights and feelings of others in favor of what you want" without any "sense of compunction or remorse." *Id.*, at 3909. Dr. Guin acknowledged that Dr. Jordan had reached a similar diagnosis. Brumfield presented no medical evidence disputing it. That the majority disputes "[t]he relevance of this diagnosis," *ante*, at 319, does not make it any less supported by the record.

Brumfield thus not only has failed to rebut the state court's factual findings by clear and convincing evidence, § 2254(e)(1), he has failed to show that they were anything other than eminently reasonable. Under any fairminded application of § 2254(d)(2), he would not be entitled to relief.

B

1

The majority reaches the opposite result with a bit of legerdemain, recasting *legal* determinations as *factual* ones. It contends that the state court erred in denying Brumfield's claim because the evidence Brumfield presented "was entirely consistent with intellectual disability" as defined in Louisiana and thus sufficient to entitle him to an evidentiary

hearing. *Ante*, at 314. That argument betrays the legal nature of the majority's dispute with the state court's decision: The majority does not—because it cannot—disagree that each of the state court's factual findings was supported by the record. See *ante*, at 315–316 (not disputing Brumfield's IQ score); *ante*, at 320 (not disputing Brumfield's diagnosed antisocial personality disorder); *ibid.* (acknowledging that "evidence in the record before the state court may have cut against Brumfield's claim of intellectual disability"); *ibid.* (acknowledging that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills"). Instead, the majority disagrees with the state court's *conclusion* that Brumfield had not made a sufficient threshold showing of mental retardation to be entitled to an evidentiary hearing on his claim. *Ante*, at 320–321.

That conclusion, however, is properly characterized as one based on the application of law to fact, not on the determination of the facts themselves.[6] As we have explained, "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice* v. *Collins*, 546 U. S. 333, 342 (2006). No one can dispute that Brumfield's IQ score, adaptive skills, and antisocial personality disorder are facts. By contrast, the question whether Brumfield has met the legal standard for relief on, or at least an evidentiary hearing with regard to, his *Atkins* claim requires the application of law to those facts. See *Panetti* v. *Quarterman*, 551 U. S. 930, 948–952 (2007) (applying § 2254(d)(1) to conclude that a state court unreason-

[6] The majority attempts to defend its recharacterization of the inquiry on the ground that the State invoked § 2254(d)(2). The State invoked that provision because that is the basis upon which Brumfield sought federal collateral relief. But, Brumfield is not entitled to that relief unless he can show that the state court based its decision to deny his *Atkins* claim on unreasonable factual determinations. Rather than address those determinations, the majority addresses something else entirely.

ably applied clearly established federal law when it failed to provide a prisoner with a competency hearing after he made " 'a substantial threshold showing of insanity' ").[7] Indeed, in discussing each of these "factual determinations," the majority turns first to state law to determine what showing a prisoner must make to qualify as mentally retarded. *Ante*, at 314, 317 (citing *State* v. *Williams*, 2001–165 (La. 11/1/02), 831 So. 2d 835). If the majority's disagreement with the state court's decision were truly based on "factual determinations," it is hard to understand what relevance state law would have.

2

Even on its own terms, the majority's so-called "factual" analysis fails. The majority holds that the record supported a finding that Brumfield qualified for a hearing on mental retardation under *state* law. To reiterate, even if true, this state-law-based *legal* analysis cannot overcome AEDPA's bar to relief under § 2254(d)(2). To make matters worse, the majority gets the state law wrong.

The Louisiana Supreme Court's decision in *Williams* instructed state courts to use the statutory standard for determining when a pretrial competency hearing is necessary—when there is " 'reasonable ground to doubt the defendant's mental capacity to proceed.' " 831 So. 2d, at 858, n. 33 (quot-

[7] To be sure, the question whether someone is mentally retarded is one of fact. But that is not the question at issue in an *Atkins* claim. *Atkins* held that a category of mentally retarded offenders could not be executed consistent with the Eighth Amendment because a national consensus had developed against such executions. It acknowledged that there was disagreement about how to define mentally retarded offenders and clarified that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U. S., at 317. Thus, when a prisoner brings an *Atkins* claim, he bears the burden to establish not just the "fact" of his mental retardation, but also that he is sufficiently impaired to fall within the category of persons identified in *Atkins* as legally beyond a State's power to execute.

ing La. Code Crim. Proc. Ann., Art. 643 (West 2003)).[8] It made clear that "reasonable ground to doubt" is "*not* a reference to proof beyond a reasonable doubt in the guilt phase of the trial," 831 So. 2d, at 858, n. 33 (emphasis added),[9] and that the burden was on the prisoner to bring forward objective evidence to put his mental retardation at issue.

Brumfield's IQ test score failed to meet the standard for significantly subaverage intellectual functioning under Louisiana law. As *Williams* explained, Louisiana statutes defined " 'significantly subaverage general intellectual functioning' " as " 'more than two standard deviations below the mean for the test of intellectual functioning,' " and a person with intellectual functioning two standard deviations below the mean "would have an IQ of 70 using the Wechsler scale." *Id.*, at 853, and n. 26. Accounting for the standard error of measurement, *Williams* explained that the requisite IQ could range "from 66 to 74." *Id.*, at 854, n. 26.[10] The majority prefers to avoid this language, focusing instead on "[t]he sources on which *Williams* relied in defining subaverage intelligence." *Ante*, at 315. But the way to apply a state

---

[8] It is unclear whether *Williams* even continued to supply the governing state law at the time the state court acted, for the Louisiana Legislature had established a procedure for adjudicating claims of mental retardation in capital cases three months before Brumfield's hearing. See 2003 La. Acts p. 698 (enacting La. Code Crim. Proc. Ann., Art. 905.5.1 (West Supp. 2015)). Because that law did not specifically address the circumstances under which capital defendants would be entitled to a hearing on such claims, however, I assume for the sake of argument that *Williams* supplies the applicable state law.

[9] The majority's persistent characterization of this standard as a "reasonable doubt" standard is quite misleading. *Ante*, at 313, 321, 323.

[10] As the majority points out, the Court in *Williams* was "using this example to illustrate the concept of [the standard error of measurement]," *ante*, at 315, n. 4, but it was illustrating the standard error of measurement *as it related* to the Louisiana law defining significantly subaverage general intellectual functioning as " 'more than two standard deviations below the mean for the test of intellectual functioning,' " *Williams*, 831 So. 2d, at 853, and n. 26 (quoting then La. Rev. Stat. Ann. §28:381(42) (repealed 2005)).

court's decision is to apply what the state court said, and, at 75 and higher, Brumfield's IQ scores exceeded the cutoff for significantly subaverage general intellectual functioning under that decision.

Brumfield's evidence of alleged deficits in adaptive skills similarly failed to meet the requisite standards under Louisiana law. *Williams* defined deficits in adaptive skills as "'substantial functional limitations in three or more of the following areas of major life activity:'" (1) self-care, (2) understanding and use of language, (3) learning, (4) mobility, (5) self-direction, and (6) capacity for independent living. 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. 28:381(12) (repealed 2005)). The only evidence Brumfield presented that is even potentially relevant to these factors was evidence of his poor reading skills and behavioral problems in school. But, once again, Dr. Bolter's report confirmed that he had "a normal capacity to learn and acquire information when given the opportunity for repetition" and that Brumfield's behavioral problems were attributable to "a conduct disorder that . . . progressed into an antisocial personality disorder." Record 276. The majority places special weight on Brumfield's placement in "special education" classes, *ante*, at 310, 318, n. 7, 319, 321, but the record explains that he was placed in *behavioral disorder* classes not because he had a low capacity to learn, but because he had a high capacity to make trouble, Record 3846–3847.[11] The state court could reasonably have found that Brumfield had not provided evidence of "substantial functional limitations" in any of these categories, let alone the *three* required by state law.

---

[11] The majority places great reliance on the testimony of Dr. Guin, who was *not* a medical doctor, that Brumfield's "out of control behavior" in the classroom, Record 3879, was a function in part of a learning disability, *ante*, at 318. But, Dr. Guin was not qualified to make that diagnosis, and she acknowledged that the school had diagnosed him only with a behavioral disorder. Record 3882.

Absent objective evidence of either significantly subaverage intellectual functioning or deficits in adaptive behavior, Brumfield was not entitled to an evidentiary hearing under *Williams*. The majority's analysis is erroneous: It takes a meritless state-law claim, recasts it as two factual determinations, and then awards relief, despite ample evidence in the record to support each of the state court's *actual* factual determinations.

C

The majority engages in such maneuvering because Brumfield argued *only* that the state court based its decision to deny his *Atkins* claim on an unreasonable determination of the facts, § 2254(d)(2), not an unreasonable application of clearly established federal law as determined by this Court, § 2254(d)(1). Brumfield, for his part, presented his claim in this way to avoid AEDPA's additional restrictions on relief for alleged legal errors. As explained below, overcoming § 2254(d)(1)'s bar based on an alleged legal error is particularly demanding. Brumfield's arguments, even if presented properly as legal ones, would not meet the bar.

Under § 2254(d)(1), a federal court may not award relief for a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "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* v. *Woodall*, 572 U. S. 415, 419 (2014) (internal quotation marks and alteration omitted). A state court's decision is therefore not "contrary to" our decisions unless its holding contradicts our holdings, or it "'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Mitchell* v. *Esparza*, 540 U. S. 12, 15–16 (2003) (*per curiam*). A state

court's decision is not " 'an unreasonable application' " of our decisions if it merely " 'decline[s] to apply a specific legal rule that has not been squarely established by this Court.' " *Harrington* v. *Richter*, 562 U. S. 86, 101 (2011). Instead, the Court must evaluate the application of our holdings in the context of the rule's specificity: "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.* (internal quotation marks omitted). "[W]here the precise contours of [a] right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *Woodall*, *supra*, at 424 (internal quotation marks omitted).

"If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U. S., at 102. " 'Federal habeas review of state convictions . . . disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' " *Id.*, at 103. Although AEDPA "stops short of imposing a complete bar" on this type of review, it does require "a state prisoner [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 fairminded disagreement." *Id.*, at 102–103. Brumfield cannot meet this standard.

1

The state court's decision to deny Brumfield's *Atkins* claim was not contrary to any holding of this Court. The state court recognized that *Atkins* precludes the execution of mentally retarded offenders and then concluded that Brumfield did not qualify as a mentally retarded offender. Because this Court has never confronted a set of facts that are materially indistinguishable from the facts in this case and arrived at a different result, the state court's decision was not

"contrary to" clearly established federal law as determined by this Court.

Nor is the decision of the state court to deny a *hearing* on the claim contrary to such clearly established law. In *Atkins*, this Court held that the Eighth Amendment precludes the execution of mentally retarded offenders, but "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restrictions upon their execution of sentences." 536 U. S., at 317 (internal quotation mark and brackets omitted). This Court did not so much as mention an evidentiary hearing, let alone hold that prisoners raising *Atkins* claims are entitled to one. To be sure, *Atkins* cited this Court's decision in *Ford* v. *Wainwright*, 477 U. S. 399 (1986), when it explained that it was leaving the enforcement of the right to the States. See 536 U. S., at 316–317. Justice Powell's controlling concurrence in *Ford* required a court to afford a prisoner a hearing on the claim that he is insane and therefore ineligible to be executed after a prisoner made a "substantial threshold showing of insanity." 477 U. S., at 426 (opinion concurring in part and concurring in judgment). The citation in *Atkins*, however, not only was not to that portion of *Ford*, it was not even to Justice Powell's *opinion* in *Ford*. Compare *Atkins*, *supra*, at 317 (citing *Ford*, *supra*, at 405 (majority opinion), 416–417 (opinion of Marshall, J.)), with *Ford*, *supra*, at 426 (opinion of Powell, J.). *Atkins* thus did not imply—let alone hold—that a prisoner is entitled to a hearing on an *Atkins* claim. There being no mention of a hearing, the state court's decision to deny Brumfield such a hearing could not be "contrary to . . . clearly established Federal law." § 2254(d)(1).

Even if *Atkins did* establish a right to an evidentiary hearing upon a threshold showing of mental retardation, the state court's decision to deny Brumfield a hearing would not be contrary to that rule. After all, the state court took the position that Brumfield would have been entitled to an evidentiary hearing if he had made a threshold showing of men-

tal retardation; it simply concluded that he had not made that showing. This Court has never confronted a set of materially indistinguishable facts and found the threshold showing satisfied. Thus, as with its rejection of the *Atkins* claim itself, the state court's decision to deny Brumfield an *Atkins* hearing was not contrary to clearly established federal law as determined by this Court.

2

The state court's decision here likewise was not an unreasonable application of *Atkins*. The *Atkins* Court did not clearly define the category "of mentally retarded offenders about whom there is a national consensus." 536 U. S., at 317. It offered guidance in the form of several clinical definitions of mental retardation as "'subaverage intellectual functioning'" accompanied by "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*, at 318. It gave conflicting indications of the IQ score necessary for "subaverage intellectual functioning," defining mild mental retardation as the term used to describe "people with an IQ level of 50–55 to approximately 70," *id.*, at 308, n. 3; and citing one source that reports 70 or less as the statistical criterion for mental retardation, *id.*, at 309, n. 5; see 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2589 (B. Sadock & V. Sadock eds., 7th ed. 2000); but commenting that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," 536 U. S., at 309, n. 5. It offered no greater specificity with respect to "significant limitations in adaptive skills," though it remarked that, "by definition," mentally retarded offenders "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control

impulses, and to understand the reactions of others." *Id.*, at 318.

The state court here reasonably applied the general rule announced in *Atkins* when it rejected Brumfield's claim. Brumfield achieved a 75 on the IQ test administered to him by Dr. Bolter, 5 points above the score identified by *Atkins* as the upper end of " '[m]ild' " mental retardation, *id.*, at 308, n. 3, and by clinical definitions as the criterion for mental retardation. He also scored somewhat higher on the IQ tests administered to him by Dr. Jordan. In addition, he demonstrated no impairment in adaptive skills. To the contrary, his test results "indicate[d] that his problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." Record 275. Based on this record, the state court reasonably concluded that Brumfield had not come forward with evidence that he fell within the category of mentally retarded offenders about whom a national consensus against execution had developed.

For the same reasons, even if one were to mischaracterize *Atkins* as clearly establishing a right to an evidentiary hearing upon a substantial threshold showing of mental retardation, the state court did not unreasonably apply that rule. *Atkins* did not define the showing necessary, and the state court reasonably concluded that, on this record, Brumfield had not met it.[12]

---

[12] It is worth reiterating that the majority's analysis of state law would afford no basis for relief under § 2254(d)(1), even if Brumfield had requested relief under that provision. Section 2254(d)(1) serves as a basis for relief only when a state court reached a decision that involved an "unreasonable application of . . . clearly established *Federal* law, as determined by [*this*] Court." (Emphasis added.) And even if Brumfield could show a violation of state law, which he cannot for the reasons I discussed

D

In sum, § 2254(d) bars Brumfield's *Atkins* claim. The facts upon which the state court rejected his claim are amply supported by the record and thus not unreasonable. In concluding otherwise, the majority conflates questions of fact with questions about the application of law to fact. That conflation may help it get around the inconveniences of "clearly established Federal law as determined by th[is Court]," § 2254(d)(1), but it does violence to the statute and to our ordinary understanding of "facts." Indeed, we have summarily reversed lower courts for making that same error. See, *e. g.*, *Lopez* v. *Smith*, 574 U. S. 1, 8 (2014) (*per curiam*) ("Although the Ninth Circuit claimed its disagreement with the state court was factual in nature, in reality its grant of relief was based on a legal conclusion about the adequacy of the notice provided"). We should hold ourselves to the same standard.

IV

The majority's willingness to afford relief on Brumfield's first ground of alleged error in the state court's dismissal of his *Atkins* claim obviates its need to resolve his second, which focuses on the state court's denial of funding to develop that claim. Because I would conclude that AEDPA bars relief on the first ground, I must also address the second. AEDPA's standards make short work of that ground as well.

The state court's denial of funding to Brumfield was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by this Court. *No* precedent of this Court addresses whether and under what circumstances a state prisoner must be afforded funds to develop an *Atkins* claim. *Atkins* left "to the States the task

---

above, such a violation would "provide no basis for federal habeas relief." *Estelle* v. *McGuire*, 502 U. S. 62, 68, n. 2 (1991).

of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U. S., at 317 (internal quotation marks and brackets omitted). None of our decisions since *Atkins* have even purported to address constitutional requirements for funding of these claims.

Brumfield believes that the decision was contrary to, and involved an unreasonable application of, *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), and *Ford* v. *Wainwright*, 477 U. S. 399, but neither of those decisions even involved protections for mentally retarded offenders. Instead, both decisions addressed protections for prisoners asserting *insanity*—*Ake* in the context of insanity as a defense to a crime, 470 U. S., at 70, 77, and *Ford* in the context of insanity as a limitation on the State's power to execute a prisoner, 477 U. S., at 418 (Powell, J., concurring in part and concurring in judgment). Neither involved the question whether a prisoner is entitled to funds to develop an insanity claim before he has made a substantial threshold showing of that claim. Only *Ake* addressed the question of funds at all, and it held that an indigent defendant has a right of "access" to a competent psychiatrist to assist in the preparation of his insanity defense, *not* that an "indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U. S., at 83.

The state court fully complied with this Court's decisions when it declined to award Brumfield funds. Brumfield did not meet his burden to make a substantial threshold showing of mental retardation. No decision of this Court requires a State to afford a defendant funds to do so.

* * *

Over 20 years ago, Brumfield deprived the people of Baton Rouge of one of their police officers and six children of their mother. A jury of his peers found Brumfield guilty of the crime and sentenced him to death. The Louisiana

courts afforded him full appellate and collateral-review proceedings.

Today, the majority tosses those proceedings aside, concluding that the state court based its decision to deny Brumfield's *Atkins* claim on an "unreasonable determination of the facts," even as it concedes that the record includes evidence supporting that court's factual findings. Under AEDPA, that concession should bar relief for Brumfield. In concluding otherwise, the majority distorts federal law and intrudes upon Louisiana's sovereign right to enforce its criminal laws and its courts' judgments. Such willfulness is disheartening.

What is perhaps more disheartening than the majority's disregard for both AEDPA and our precedents is its disregard for the human cost of its decision. It spares not a thought for the 20 years of judicial proceedings that its decision so casually extends. It spares no more than a sentence to describe the crime for which a Louisiana jury sentenced Brumfield to death. It barely spares the two words necessary to identify Brumfield's victim, Betty Smothers, by name. She and her family—not to mention our legal system—deserve better.

I respectfully dissent.

[Appendix to opinion of THOMAS, J., follows this page.]

APPENDIX

W. Dunn & D. Yaeger, Running for My Life: My Journey in the Game of Football and Beyond (2008).

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

I join all but Part I–C of JUSTICE THOMAS' dissent. The story recounted in that Part is inspiring and will serve a very beneficial purpose if widely read, but I do not want to suggest that it is essential to the legal analysis in this case.

Syllabus

HORNE ET AL. *v.* DEPARTMENT OF AGRICULTURE

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

No. 14–275. Argued April 22, 2015—Decided June 22, 2015

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins established a Raisin Administrative Committee that imposes a reserve requirement—a requirement that growers set aside a certain percentage of their crop for the account of the Government, free of charge. The Government makes use of those raisins by selling them in noncompetitive markets, donating them, or disposing of them by any means consistent with the purposes of the program. If any profits are left over after subtracting the Government's expenses from administering the program, the net proceeds are distributed back to the raisin growers. In 2002–2003, raisin growers were required to set aside 47 percent of their raisin crop under the reserve requirement. In 2003–2004, 30 percent. Marvin Horne, Laura Horne, and their family are raisin growers who refused to set aside any raisins for the Government on the ground that the reserve requirement was an unconstitutional taking of their property for public use without just compensation. The Government fined the Hornes the fair market value of the raisins as well as additional civil penalties for their failure to obey the raisin marketing order.

The Hornes sought relief in federal court, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. On remand from this Court over the issue of jurisdiction, *Horne* v. *Department of Agriculture*, 569 U. S. 513, the Ninth Circuit held that the reserve requirement was not a Fifth Amendment taking. The court determined that the requirement was not a *per se* taking because personal property is afforded less protection under the Takings Clause than real property and because the Hornes, who retained an interest in any net proceeds, were not completely divested of their property. The Ninth Circuit held that, as in cases allowing the government to set conditions on land use and development, the Government imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). It held that the Hornes could avoid relinquishing large percentages of their crop by "planting different crops." 730 F. 3d 1128, 1143.

Syllabus

Held: The Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property. Any net proceeds the raisin growers receive from the sale of the reserve raisins goes to the amount of compensation they have received for that taking—it does not mean the raisins have not been appropriated for Government use. Nor can the Government make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce. Pp. 356–369.

(a) The Fifth Amendment applies to personal property as well as real property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. Pp. 356–361.

(1) This principle, dating back as far as Magna Carta, was codified in the Takings Clause in part because of property appropriations by both sides during the Revolutionary War. This Court has noted that an owner of personal property may expect that new regulation of the use of property could "render his property economically worthless." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1027–1028. But there is still a "longstanding distinction" between regulations concerning the use of property and government acquisition of property. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 323. When it comes to physical appropriations, people do not expect their property, real or personal, to be actually occupied or taken away. Pp. 356–360.

(2) The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee disposes of those raisins as it wishes, to promote the purposes of the raisin marketing order. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 432. Pp. 360–361.

(b) The fact that the growers are entitled to the net proceeds of the raisin sales does not mean that there has been no taking at all. When there has been a physical appropriation, "we do not ask . . . whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no taking, particularly when that interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here. *Andrus* v. *Allard*, 444 U. S. 51,

distinguished. Once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation. Pp. 361–364.

(c) The taking in this case also cannot be characterized as part of a voluntary exchange for a valuable government benefit. In one of the years at issue, the Government insisted that the Hornes part with 47 percent of their crop for the privilege of selling the rest. But the ability to sell produce in interstate commerce, although certainly subject to reasonable government regulation, is not a "benefit" that the Government may withhold unless growers waive constitutional protections. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, and *Leonard & Leonard* v. *Earle*, 279 U. S. 392, distinguished. Pp. 364–366.

(d) The Hornes are not required to first pay the fine and then seek compensation under the Tucker Act. See *Horne*, 569 U. S., at 527–528. Because they have the full economic interest in the raisins the Government alleges should have been set aside for its account—*i. e.*, they own the raisins they grew as well as the raisins they handled, having paid the growers for all of their raisins, not just their free-tonnage raisins—they may raise a takings-based defense to the fine levied against them. There is no need for the Ninth Circuit to calculate the just compensation due on remand. The clear and administrable rule is that "just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *United States* v. *50 Acres of Land*, 469 U. S. 24, 29. Here, the Government already calculated that amount when it fined the Hornes the fair market value of the raisins. Pp. 366–369.

750 F. 3d 1128, reversed.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined, and in which Ginsburg, Breyer, and Kagan, JJ., joined as to Parts I and II. Thomas, J., filed a concurring opinion, *post*, p. 370. Breyer, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg and Kagan, JJ., joined, *post*, p. 371. Sotomayor, J., filed a dissenting opinion, *post*, p. 377.

Michael W. McConnell argued the cause for petitioners. With him on the briefs were *John C. O'Quinn*, *Stephen S. Schwartz*, and *Brian C. Leighton*.

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were *Solicitor General*

Verrilli, *Acting Assistant Attorney General Mizer*, *Elizabeth B. Preglogar*, *Michael S. Raab*, and *Carrie F. Ricci*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from im-

---

*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Charles E. Roy*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Dustin M. Howell*, Assistant Solicitor General, and by the Attorneys General of their respective States as follows: *Mark Brnovich* of Arizona and *Wayne Stenehjem* of North Dakota; for the Cato Institute et al. by *Steffen N. Johnson*, *William P. Ferranti*, *Ilya Shapiro*, *Karen R. Harned*, *Elizabeth Milito*, *Luke A. Wake*, *Manuel S. Klausner*, *Thomas J. Ward*, *Devala A. Janardan*, and *Shannon L. Goessling*; for the Center for Constitutional Jurisprudence by *Timothy S. Bishop*, *Kevin Ranlett*, *John C. Eastman*, and *Anthony T. Caso*; for the Chamber of Commerce of the United States of America by *John P. Elwood*, *Jeremy C. Marwell*, *Kate Comerford Todd*, and *Sheldon Gilbert*; for Constitutional and Property Law Scholars by *James C. Ho* and *Prerak Shah*; for the DKT Liberty Project et al. by *Jessica Ring Amunson*; for the Federal Circuit Bar Association by *Jerry Stouck* and *Edgar H. Haug*; for the Institute for Justice by *Michael M. Berger*, *Scott G. Bullock*, *Dana Berliner*, *Jeffrey T. Rowes*, *Robert J. McNamara*, and *Mahesha P. Subbaraman*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Foundation by *J. David Breemer* and *James S. Burling*; for The Rutherford Institute by *John W. Whitehead*; for the Washington Legal Foundation by *Richard A. Samp*; and for Baylen J. Linnekin et al. by *Mr. Linnekin*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the International Municipal Lawyers Association by *John D. Echeverria*; and for Sun-Maid Growers of California et al. by *Edward M. Ruckert* and *M. Miller Baker*.

posing such a demand on the growers without just compensation.

I

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge. The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. In 2002–2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003–2004, 30 percent.

Growers generally ship their raisins to a raisin "handler," who physically separates the raisins due the Government (called "reserve raisins"), pays the growers only for the remainder ("free-tonnage raisins"), and packs and sells the free-tonnage raisins. The Raisin Committee acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion. It sells them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by "any other means" consistent with the purposes of the raisin program. 7 CFR § 989.67(b)(5) (2015). Proceeds from Committee sales are principally used to subsidize handlers who sell raisins for export (not including the Hornes, who are not raisin exporters). Raisin growers retain an interest in any net proceeds from sales the Raisin Committee makes, after deductions for the export subsidies and the Committee's administrative expenses. In the years at issue in this case, those proceeds were less than the cost of producing the crop one year, and nothing at all the next.

The Hornes—Marvin Horne, Laura Horne, and their family—are both raisin growers and handlers. They "handled" not only their own raisins but also those produced by other growers, paying those growers in full for all of their raisins, not just the free-tonnage portion. In 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so. The Government sent trucks to the Hornes' facility at eight o'clock one morning to pick up the raisins, but the Hornes refused entry. App. 31; cf. *post*, at 386–387 (SOTOMAYOR, J., dissenting). The Government then assessed against the Hornes a fine equal to the market value of the missing raisins—some $480,000—as well as an additional civil penalty of just over $200,000 for disobeying the order to turn them over.

When the Government sought to collect the fine, the Hornes turned to the courts, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. Their case eventually made it to this Court when the Government argued that the lower courts had no jurisdiction to consider the Hornes' constitutional defense to the fine. *Horne* v. *Department of Agriculture*, 569 U. S. 513 (2013) (*Horne I*). We rejected the Government's argument and sent the case back to the Court of Appeals so it could address the Hornes' contention on the merits. *Id.*, at 529.

On remand, the Ninth Circuit agreed with the Hornes that the validity of the fine rose or fell with the constitutionality of the reserve requirement. 750 F. 3d 1128, 1137 (2014). The court then considered whether that requirement was a physical appropriation of property, giving rise to a *per se* taking, or a restriction on a raisin grower's use of his property, properly analyzed under the more flexible and forgiving standard for a regulatory taking. The court rejected the Hornes' argument that the reserve requirement was a *per se* taking, reasoning that "the Takings Clause affords less protection to personal than to real property," and concluding

that the Hornes "are not completely divested of their property rights," because growers retain an interest in the proceeds from any sale of reserve raisins by the Raisin Committee. *Id.*, at 1139.

The court instead viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit. See *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987). As in such permit cases, the Court of Appeals explained, the Government here imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). And just as a landowner was free to avoid the government condition by forgoing a permit, so too the Hornes could avoid the reserve requirement by "planting different crops." 750 F. 3d, at 1143. Under that analysis, the court found that the reserve requirement was a proportional response to the Government's interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment.

We granted certiorari. 574 U. S. 1118 (2015).

II

The petition for certiorari poses three questions, which we answer in turn.

A

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' *Arkansas Game & Fish Comm'n v. United States*, [568 U. S. 23, 31] (2012), applies only to real property and not to personal property." The answer is no.

1

There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council*,

Inc. v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (brackets and internal quotation marks omitted). Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 426–435 (1982).

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5. It protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings. Clause 28 of that charter forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Cl. 28 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 329 (2d ed. 1914).

The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property. In 1641, for example, Massachusetts adopted its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Massachusetts Body of Liberties ¶8, in R. Perry, Sources of Our Liberties 149 (1978). Virginia allowed the seizure of surplus "live stock, or beef, pork, or bacon" for the military, but only upon

"paying or tendering to the owner the price so estimated by the appraisers." 1777 Va. Acts ch. XII. And South Carolina authorized the seizure of "necessaries" for public use, but provided that "said articles so seized shall be paid for agreeable to the prices such and the like articles sold for on the ninth day of October last." 1779 S. C. Acts § 4.

Given that background, it is not surprising that early Americans bridled at appropriations of their personal property during the Revolutionary War, at the hands of both sides. John Jay, for example, complained to the New York Legislature about military impressment by the Continental Army of "Horses, Teems, and Carriages," and voiced his fear that such action by the "little Officers" of the Quartermasters Department might extend to "Blankets, Shoes, and many other articles." A Hint to the Legislature of the State of New York (1778), in John Jay, The Making of a Revolutionary 461–463 (R. Morris ed. 1975) (emphasis deleted). The legislature took the "hint," passing a law that, among other things, provided for compensation for the impressment of horses and carriages. 1778 N. Y. Laws ch. 29. According to the author of the first treatise on the Constitution, St. George Tucker, the Takings Clause was "probably" adopted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Blackstone's Commentaries, Editor's App. 305–306 (1803).

Nothing in this history suggests that personal property was any less protected against physical appropriation than real property. As this Court summed up in *James* v. *Campbell*, 104 U. S. 356, 358 (1882), a case concerning the alleged appropriation of a patent by the Government:

> "[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use

> without compensation land which has been patented to a private purchaser."

Prior to this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real. *Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a "regulatory taking"—a restriction on the use of property that went "too far." *Id.*, at 415. And in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978), the Court clarified that the test for how far was "too far" required an "ad hoc" factual inquiry. That inquiry required considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Four years after *Penn Central*, however, the Court reaffirmed the rule that a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors. In *Loretto*, the Court held that requiring an owner of an apartment building to allow installation of a cable box on her rooftop was a physical taking of real property, for which compensation was required. That was true without regard to the claimed public benefit or the economic impact on the owner. The Court explained that such protection was justified not only by history, but also because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of "the rights to possess, use and dispose of" the property. 458 U. S., at 435 (internal quotation marks omitted). That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property.

The Ninth Circuit based its distinction between real and personal property on this Court's discussion in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), a case involving extensive limitations on the use of shorefront prop-

erty. 750 F. 3d, at 1139–1141. *Lucas* recognized that while an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless," such an "implied limitation" was not reasonable in the case of land. 505 U. S., at 1027–1028.

Lucas, however, was about regulatory takings, not direct appropriations. Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away. Our cases have stressed the "longstanding distinction" between government acquisitions of property and regulations. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323. The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike. See 535 U. S., at 323 (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa" (footnote omitted)).

2

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. App. to Pet. for Cert. 179a; Tr. of Oral Arg. 31. The Committee's raisins must be physically segregated from free-tonnage raisins. 7 CFR § 989.66(b)(2). Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. § 989.66(a). The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of"

them, *Loretto*, 458 U. S., at 435 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," *id.*, at 431 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.*, at 432.

The Government thinks it "strange" and the dissent "baffling" that the Hornes object to the reserve requirement, when they nonetheless concede that "the government may prohibit the sale of raisins without effecting a per se taking." Brief for Respondent 35; *post*, at 388 (SOTOMAYOR, J., dissenting). But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal*, 260 U. S., at 416.

B

The second question presented asks "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the

property owner a contingent interest in a portion of the value of the property, set at the government's discretion." The answer is no.

The Government and dissent argue that raisins are fungible goods whose only value is in the revenue from their sale. According to the Government, the raisin marketing order leaves that interest with the raisin growers: After selling reserve raisins and deducting expenses and subsidies for exporters, the Raisin Committee returns any net proceeds to the growers. 7 CFR §§ 989.67(d), 989.82, 989.53(a), 989.66(h). The Government contends that because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place. The dissent agrees, arguing that this possible future revenue means there has been no taking under *Loretto*. See *post*, at 378–382.

But when there has been a physical appropriation, "we do not ask . . . whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe-Sierra Preservation Council*, 535 U. S., at 323; see *id.*, at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (citation omitted)). For example, in *Loretto*, we held that the installation of a cable box on a small corner of Loretto's rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property. 458 U. S., at 430, 436. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.

The dissent points to *Andrus* v. *Allard*, 444 U. S. 51 (1979), noting that the Court found no taking in that case, even though the owners' artifacts could not be sold at all. *Post*,

at 381–382. The dissent suggests that the Hornes should be happy, because they might at least get *something* from what had been their raisins. But *Allard* is a very different case. As the dissent recognizes, the owners in that case retained the rights to possess, donate, and devise their property. In finding no taking, the Court emphasized that the Government did not "compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them." 444 U. S., at 65–66. Here of course the raisin program requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition.

The Government and dissent again confuse our inquiry concerning *per se* takings with our analysis for regulatory takings. A regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*. That is why, in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we held that a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property. The owner retained the value of the use of the property as a shopping center largely unimpaired, so the regulation did not go "too far." *Id.*, at 83 (quoting *Pennsylvania Coal Co.*, 260 U. S., at 415). But once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation. See *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 747–748 (1997) (SCALIA, J., concurring in part and concurring in judgment). That is not an issue here: The Hornes did not receive any net proceeds from Raisin Committee sales for the years at issue, because they had not set aside any reserve raisins in those years (and, in any event, there were no net proceeds in one of them).

C

The third question presented asks "Whether a governmental mandate to relinquish specific, identifiable property as a

'condition' on permission to engage in commerce effects a per se taking." The answer, at least in this case, is yes.

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." Brief for Respondent 32 (brackets and internal quotation marks omitted).

"Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law. In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U. S., at 439, n. 17. As the Court explained, the contrary argument "proves too much":

> "For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices." *Ibid.*

As the Court concluded, property rights "cannot be so easily manipulated." *Ibid.*

The Government and dissent rely heavily on *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984). There we held that the Environmental Protection Agency could require companies manufacturing pesticides, fungicides, and rodenticides to disclose health, safety, and environmental information about their products as a condition to receiving a permit to sell

those products. While such information included trade secrets in which pesticide manufacturers had a property interest, those manufacturers were not subjected to a taking because they received a "valuable Government benefit" in exchange—a license to sell dangerous chemicals. *Id.*, at 1007; see *Nollan*, 483 U. S., at 834, n. 2 (discussing *Monsanto*).

The taking here cannot reasonably be characterized as part of a similar voluntary exchange. In one of the years at issue here, the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the "benefit" of being allowed to sell the remaining 53 percent. The next year, the toll was 30 percent. We have already rejected the idea that *Monsanto* may be extended by regarding basic and familiar uses of property as a "Government benefit" on the same order as a permit to sell hazardous chemicals. See *Nollan*, 483 U. S., at 834, n. 2 (distinguishing *Monsanto* on the ground that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit' "). Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.

Leonard & Leonard v. *Earle*, 279 U. S. 392 (1929), is also readily distinguishable. In that case, the Court upheld a Maryland requirement that oyster packers remit ten percent of the marketable detached oyster shells or their monetary equivalent to the State for the privilege of harvesting the oysters. But the packers did "not deny the power of the

State to declare their business a privilege," and the power of the State to impose a "privilege tax" was "not questioned by counsel." *Id.*, at 396. The oysters, unlike raisins, were "feræ naturæ" that belonged to the State under state law, and "[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire." *Leonard* v. *Earle*, 155 Md. 252, 258, 141 A. 714, 716 (1928). The oyster packers did not simply seek to sell their property; they sought to appropriate the State's. Indeed, the Maryland Court of Appeals saw the issue as a question of "a reasonable and fair compensation" *from* the packers *to* "the state, as owner of the oysters." *Id.*, at 259, 141 A., at 717 (internal quotation marks omitted).

Raisins are not like oysters: they are private property—the fruit of the growers' labor—not "public things subject to the absolute control of the state," *id.*, at 258, 141 A., at 716. Any physical taking of them for public use must be accompanied by just compensation.

III

The Government correctly points out that a taking does not violate the Fifth Amendment unless there is no just compensation, and argues that the Hornes are free to seek compensation for any taking by bringing a damages action under the Tucker Act in the Court of Federal Claims. See 28 U. S. C. § 1491(a)(1); *Monsanto*, 467 U. S., at 1020. But we held in *Horne I* that the Hornes may, in their capacity as handlers, raise a takings-based defense to the fine levied against them. We specifically rejected the contention that the Hornes were required to pay the fine and then seek compensation under the Tucker Act. See 569 U. S., at 527–528 ("We . . . conclude that the [Agricultural Marketing Agreement Act] withdraws Tucker Act jurisdiction over [the Hornes'] takings claim. [The Hornes] (as handlers) have no alternative remedy, and their takings claim was not 'premature' when presented to the Ninth Circuit.").

As noted, the Hornes are both growers and handlers. Their situation is unusual in that, as handlers, they have the full economic interest in the raisins the Government alleges should have been set aside for its account. They own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers, having paid those growers for all their raisins (not just the free-tonnage amount, as is true with respect to most handlers). See *supra*, at 356; Tr. of Oral Arg. 3–4. The penalty assessed against them as handlers included the dollar equivalent of the raisins they refused to set aside—their raisins. 750 F. 3d, at 1135, n. 6; Brief for Petitioners 15. They may challenge the imposition of that fine, and do not have to pay it first and then resort to the Court of Federal Claims.

Finally, the Government briefly argues that if we conclude that the reserve requirement effects a taking, we should remand for the Court of Appeals to calculate "what compensation would have been due if petitioners had complied with the reserve requirement." Brief for Respondent 55. The Government contends that the calculation must consider what the value of the reserve raisins would have been without the price support program, as well as "other benefits . . . from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and promotional activities." *Id.*, at 55–56. Indeed, according to the Government, the Hornes would "likely" have a net gain under this theory. *Id.*, at 56.

The best defense may be a good offense, but the Government cites no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking. Instead, our cases have set forth a clear and administrable rule for just compensation: "The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property

at the time of the taking.' " *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934)).

JUSTICE BREYER is concerned that applying this rule in this case will affect provisions concerning whether a condemning authority may deduct special benefits—such as new access to a waterway or highway, or filling in of swampland—from the amount of compensation it seeks to pay a landowner suffering a partial taking. *Post*, at 375 (opinion concurring in part and dissenting in part); see *Bauman* v. *Ross*, 167 U. S. 548 (1897) (laying out of streets and subdivisions in the District of Columbia). He need not be. Cases of that sort can raise complicated questions involving the exercise of the eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here. Nothing in the cases JUSTICE BREYER labels "*Bauman* and its progeny," *post*, at 374, suggests otherwise, which may be why the Solicitor General does not cite them.*

---

*For example, in *United States* v. *Miller*, 317 U. S. 369, 377 (1943), the Court—in calculating the fair market value of land—discounted an increase in value resulting from speculation "as to what the Government would be compelled to pay as compensation" after the land was earmarked for acquisition. In *United States* v. *Sponenbarger*, 308 U. S. 256, 265 (1939), the Court determined there was no taking in the first place, when the complaint was merely that a Government flood control plan provided insufficient protection for the claimant's land. *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 363 (1918), similarly involved a claim "for damages to property not actually taken." So too *Reichelderfer* v. *Quinn*, 287 U. S. 315 (1932). There the Court held that claimants who had paid a special assessment when Rock Creek Park in Washington, D. C., was created—because the Park increased the value of their property—did not thereby have the right to prevent Congress from altering use of part of the Park for a fire station 38 years later. In *Dohany* v. *Rogers*, 281 U. S. 362 (1930), the law authorizing the taking did "not permit the offset of benefits for a railroad," and therefore was "not subject to the objection that it fails to provide adequate compensation . . . and is therefore unconstitutional." *Id.*, at

In any event, this litigation presents no occasion to consider the broader issues discussed by JUSTICE BREYER. The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: $483,843.53. 750 F. 3d, at 1135, n. 6. The Government cannot now disavow that valuation, see Reply Brief 21–23, and does not suggest that the marketing order affords the Hornes compensation in that amount. There is accordingly no need for a remand; the Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins. This case, in litigation for more than a decade, has gone on long enough.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to offer an additional observation concerning JUSTICE BREYER's argument that we should remand the case. The Takings Clause prohibits the government from taking private property except "for public use," even when it offers "just compensation." U. S. Const., Amdt. 5. That requirement, as originally understood, imposes a meaningful constraint on the power of the state—"the government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo* v. *New London*, 545

367, and n. 1 (quoting *Fitzsimons & Galvin, Inc.* v. *Rogers*, 243 Mich. 649, 665, 220 N. W. 881, 886 (1928)). And in *Norwood* v. *Baker*, 172 U. S. 269 (1898), the issue was whether an assessment to pay for improvements exceeded a village's taxing power. Perhaps farthest afield are the *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 153 (1974), which involved valuation questions arising from the Government reorganization of northeast and midwest railroads. The Court in that case held that the legislation at issue was not "merely an eminent domain statute" but instead was enacted "pursuant to the bankruptcy power." *Id.*, at 151, 153.

U. S. 469, 521 (2005) (Thomas, J., dissenting). It is far from clear that the Raisin Administrative Committee's conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments. 7 CFR § 989.67(b) (2015). To the extent that the Committee is not taking the raisins "for public use," having the Court of Appeals calculate "just compensation" in this case would be a fruitless exercise.

Justice Breyer, with whom Justice Ginsburg and Justice Kagan join, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion. However, I cannot agree with the Court's rejection, in Part III, of the Government's final argument. The Government contends that we should remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order's reserve requirement. In my view, a remand for such a determination is necessary.

The question of just compensation was not presented in the Hornes' petition for certiorari. It was barely touched on in the briefs. And the courts below did not decide it. At the same time, the case law that I have found indicates that the Government may well be right: The marketing order may afford just compensation for the takings of raisins that it imposes. If that is correct, then the reserve requirement does not violate the Takings Clause.

I

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Clause means what it says: It "does not proscribe the taking of property; it proscribes taking *without just compensation*." *Williamson County Re-*

gional Planning Comm'n v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985) (emphasis added). Under the Clause, a property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken," which is to say that "[h]e must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).

On the record before us, the Hornes have not established that the Government, through the raisin reserve program, takes raisins *without just compensation*. When the Government takes as reserve raisins a percentage of the annual crop, the raisin owners retain the remaining, free-tonnage, raisins. The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market. See 7 CFR § 989.55 (2015); 7 U. S. C. § 602(1). And any such enhancement matters. This Court's precedents indicate that, when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the taking to the value of the remaining (free-tonnage) raisins.

More than a century ago, in *Bauman* v. *Ross*, 167 U. S. 548 (1897), this Court established an exception to the rule that "just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (quoting *Olson*, *supra*, at 255). We considered in *Bauman* how to calculate just compensation when the Government takes only a portion of a parcel of property:

> "[W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages

> on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." 167 U. S., at 574.

"The Constitution of the United States," the Court stated, "contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use." *Id.*, at 584.

The Court has consistently applied this method for calculating just compensation: It sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of the property. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 151 (1974) ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation" (footnote omitted)); *United States* v. *Miller*, 317 U. S. 369, 376 (1943) ("[I]f the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken"); *United States* v. *Sponenbarger*, 308 U. S. 256, 266–267 (1939) ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner"); *Reichelderfer* v. *Quinn*, 287 U. S. 315, 323 (1932) ("Just compensation . . . was awarded if the benefits resulting from the proximity of the improvement [were] set off against the value of the property taken from the same owners"); *Dohany* v. *Rogers*, 281 U. S. 362, 367–368 (1930) (a statute that "permits deduction of benefits derived from the construction of a highway" from the compensation paid to landowners "afford[s] no basis for anticipating that . . . just compensation will be denied"); *Norwood* v. *Baker*, 172 U. S. 269, 277 (1898) ("Except for [state law], the State could have authorized benefits to be deducted

from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use").

The rule applies regardless of whether a taking enhances the value of one property or the value of many properties. That is to say, the Government may "permi[t] consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages." *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, 366 (1918). The Federal Constitution does not distinguish between "special" benefits, which specifically affect the property taken, and "general" benefits, which have a broader impact.

Of course, a State may prefer to guarantee a greater payment to property owners, for instance by establishing a standard for compensation that does not account for general benefits (or for any benefits) afforded to a property owner by a taking. See *id.*, at 365 (describing categories of rules applied in different jurisdictions); Schopflocher, Deduction of Benefits in Determining Compensation or Damages in Eminent Domain, 145 A. L. R. 7, 158–294 (1943) (describing particular rules applied in different jurisdictions). Similarly, "Congress . . . has the power to authorize compensation greater than the constitutional minimum." *50 Acres of Land*, *supra*, at 30, n. 14. Thus, Congress, too, may limit the types of benefits to be considered. See, *e. g.*, 33 U. S. C. § 595. But I am unaware of any congressional authorization that would increase beyond the constitutional floor the compensation owed for a taking of the Hornes' raisins.

If we apply *Bauman* and its progeny to the marketing order's reserve requirement, "the benefit [to the free-tonnage raisins] may be set off against the value of the [reserve raisins] taken." *Miller*, *supra*, at 376. The value

of the raisins taken might exceed the value of the benefit conferred. In that case, the reserve requirement effects a taking without just compensation, and the Hornes' decision not to comply with the requirement was justified. On the other hand, the benefit might equal or exceed the value of the raisins taken. In that case, the California Raisin Marketing Order does not effect a taking without just compensation. See *McCoy*, *supra*, at 366 ("In such [a] case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury"); *Brown* v. *Legal Foundation of Wash.*, 538 U. S. 216, 237 (2003) ("[I]f petitioners' net loss was zero, the compensation that is due is also zero"). And even the Hornes agree that if the reserve requirement does not effect a taking without just compensation, then they cannot use the Takings Clause to excuse their failure to comply with the marketing order—or to justify their refusal to pay the fine and penalty imposed based on that failure. See Brief for Petitioners 31 ("The constitutionality of the fine rises or falls on the constitutionality of the Marketing Order's reserve requirement and attendant transfer of reserve raisins" (internal quotation marks omitted)).

II

The majority believes the *Bauman* line of cases most likely does not apply here. It says that those cases do "not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here." *Ante*, at 369. But it is unclear to me what distinguishes this case from those.

It seems unlikely that the majority finds a distinction in the fact that this taking is based on regulatory authority. Cf. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law" (internal quotation marks omitted)). It similarly seems unlikely that the majority intends to distin-

guish between takings of real property and takings of personal property, given its recognition that the Takings Clause "protects 'private property' without any distinction between different types." *Ante*, at 358. It is possible that the majority questions the Government's argument because of its breadth—the Government argues that "it would be appropriate to consider what value all of the raisins would have had *in the absence of the marketing order*," Brief for Respondent 55, and I am unaware of any precedent that allows a court to account for portions of the marketing order that are entirely separate from the reserve requirement. But neither am I aware of any precedent that would distinguish between how the *Bauman* doctrine applies to the reserve requirement itself and how it applies to other types of partial takings.

Ultimately, the majority rejects the Government's request for a remand because it believes that the Government "does not suggest that the marketing order affords the Hornes compensation" in the amount of the fine that the Government assessed. *Ante*, at 370. In my view, however, the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received. And the Government does, indeed, suggest that the marketing order affords just compensation. See Brief for Respondent 56 ("It is likely that when all benefits and alleged losses from the marketing order are calculated, [the Hornes] would have a net *gain* rather than a net loss, given that a central point of the order is to benefit producers"). Further, the Hornes have not demonstrated the contrary. Before granting judgment in favor of the Hornes, a court should address the issue in light of all of the relevant facts and law.

* * *

Given the precedents, the parties should provide full briefing on this question. I would remand the case, permit-

ting the lower courts to consider argument on the question of just compensation.

For these reasons, while joining Parts I and II of the Court's opinion, I respectfully dissent from Part III.

JUSTICE SOTOMAYOR, dissenting.

The Hornes claim, and the Court agrees, that the Raisin Marketing Order, 7 CFR pt. 989 (2015) (hereinafter Order), effects a *per se* taking under our decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982). But *Loretto* sets a high bar for such claims: It requires that each and every property right be destroyed by governmental action before that action can be said to have effected a *per se* taking. Because the Order does not deprive the Hornes of all of their property rights, it does not effect a *per se* taking. I respectfully dissent from the Court's contrary holding.

I

Our Takings Clause jurisprudence has generally eschewed "magic formula[s]" and has "recognized few invariable rules." *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012). Most takings cases therefore proceed under the fact-specific balancing test set out in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). See *Arkansas Game and Fish Comm'n*, 568 U. S., at 31; *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538–539 (2005). The Hornes have not made any argument under *Penn Central*. In order to prevail, they therefore must fit their claim into one of the three narrow categories in which we have assessed takings claims more categorically.

In the "special context of land-use exactions," we have held that "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit" constitute takings unless the government demonstrates a nexus and rough proportionality between its demand and the impact of the pro-

posed development. *Lingle*, 544 U. S., at 538, 546; see *Dolan* v. *City of Tigard*, 512 U. S. 374, 386, 391 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 837 (1987). We have also held that a regulation that deprives a property owner of "*all* economically beneficial us[e]" of his or her land is a *per se* taking. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1019 (1992) (emphasis in original). The Hornes have not relied on either of these rules in this Court. See Brief for Petitioners 42, 55.

Finally—and this is the argument the Hornes do rely on—we have held that the government effects a *per se* taking when it requires a property owner to suffer a "permanent physical occupation" of his or her property. *Loretto*, 458 U. S., at 426. In my view, however, *Loretto*—when properly understood—does not encompass the circumstances of this case because it only applies where all property rights have been destroyed by governmental action. Where some property right is retained by the owner, no *per se* taking under *Loretto* has occurred.

This strict rule is apparent from the reasoning in *Loretto* itself. We explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Id.*, at 435 (quoting *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945)). A "permanent physical occupation" of property occurs, we said, when governmental action "destroys *each* of these rights." 458 U. S., at 435 (emphasis in original); see *ibid.*, n. 12 (requiring that an owner be "absolutely dispossess[ed]" of rights). When, as we held in *Loretto*, *each* of these rights is destroyed, the government has not simply "take[n] a single 'strand' from the 'bundle' of property rights"; it has "chop[ped] through the bundle" entirely. *Id.*, at 435. In the narrow circumstance in which a property owner has suffered this "most serious form of invasion of [his or her] property interests," a taking can be said to have occurred without any further showing on the property owner's part. *Ibid.*

By contrast, in the mine run of cases where governmental action impacts property rights in ways that do not chop through the bundle entirely, we have declined to apply *per se* rules and have instead opted for the more nuanced *Penn Central* test. See, *e. g.*, *Hodel* v. *Irving*, 481 U. S. 704 (1987) (applying *Penn Central* to assess a requirement that title to land within Indian reservations escheat to the tribe upon the landowner's death); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83 (1980) (engaging in similar analysis where there was "literally . . . a 'taking' of th[e] right" to exclude); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–180 (1979) (applying *Penn Central* to find that the Government's imposition of a servitude requiring public access to a pond was a taking); see also *Loretto*, 458 U. S., at 433–434 (distinguishing *PruneYard* and *Kaiser Aetna*). Even governmental action that reduces the value of property or that imposes "a significant restriction . . . on one means of disposing" of property is not a *per se* taking; in fact, it may not even be a taking at all. *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979).

What our jurisprudence thus makes plain is that a claim of a *Loretto* taking is a bold accusation that carries with it a heavy burden. To qualify as a *per se* taking under *Loretto*, the governmental action must be so completely destructive to the property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task. Simply put, the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking under *Loretto*.

II

A

When evaluating the Order under this rubric, it is important to bear two things in mind. The first is that *Loretto* is not concerned with whether the Order is a good idea now,

whether it was ever a good idea, or whether it intrudes upon some property rights. The Order may well be an outdated, and by some lights downright silly, regulation. It is also no doubt intrusive. But whatever else one can say about the Order, it is not a *per se* taking if it does not result in the destruction of every property right. The second thing to keep in mind is the need for precision about whose property rights are at issue and about what property is at issue. Here, what is at issue are the Hornes' property rights in the raisins they own and that are subject to the reserve requirement. The Order therefore effects a *per se* taking under *Loretto* if and only if each of the Hornes' property rights in the portion of raisins that the Order designated as reserve has been destroyed. If not, then whatever fate the Order may reach under some other takings test, it is not a *per se* taking.

The Hornes, however, retain at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition. The Order explicitly provides that raisin producers retain the right to "[t]he net proceeds from the disposition of reserve tonnage raisins," 7 CFR § 989.66(h), and ensures that reserve raisins will be sold "at prices and in a manner intended to maxim[ize] producer returns," § 989.67(d)(1). According to the Government, of the 49 crop years for which a reserve pool was operative, producers received equitable distributions of net proceeds from the disposition of reserve raisins in 42. See Letter from Donald B. Verrilli, Jr., Solicitor General, to Scott S. Harris, Clerk of Court (Apr. 29, 2015).

Granted, this equitable distribution may represent less income than what some or all of the reserve raisins could fetch if sold in an unregulated market. In some years, it may even turn out (and has turned out) to represent no net income. But whether and when that occurs turns on market forces for which the Government cannot be blamed and to which all commodities—indeed, all property—are subject. In any event, we have emphasized that "a reduction in the

value of property is not necessarily equated with a taking," *Andrus*, 444 U. S., at 66, that even "a significant restriction . . . imposed on one means of disposing" of property is not necessarily a taking, *id.*, at 65, and that not every " 'injury to property by governmental action' " amounts to a taking, *PruneYard*, 447 U. S., at 82. Indeed, we would not have used the word "destroy" in *Loretto* if we meant "damaged" or even "substantially damaged." I take us at our word: *Loretto*'s strict requirement that all property interests be "destroy[ed]" by governmental action before that action can be called a *per se* taking cannot be satisfied if there remains a property interest that is at most merely damaged. That is the case here; accordingly, no *per se* taking has occurred.

Moreover, when, as here, the property at issue is a fungible commodity for sale, the income that the property may yield is the property owner's most central interest. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1002 (1984) (noting that the "nature" of particular property defines "the extent of the property right therein"). "[A]rticles of commerce," in other words, are "desirable because [they are] convertible into money." *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 396 (1929). The Hornes do not use the raisins that are subject to the reserve requirement—which are, again, the only raisins that have allegedly been unlawfully taken—by eating them, feeding them to farm animals, or the like. They wish to use those reserve raisins by selling them, and they value those raisins only because they are a means of acquiring money. While the Order infringes upon the amount of that potential income, it does not inexorably eliminate it. Unlike the law in *Loretto*, see 458 U. S., at 436, the Order therefore cannot be said to have prevented the Hornes from making *any* use of the relevant property.

The conclusion that the Order does not effect a *per se* taking fits comfortably within our precedents. After all, we have observed that even "[r]egulations that bar trade in certain goods" altogether—for example, a ban on the sale of eagle feathers—may survive takings challenges. *Andrus*,

444 U. S., at 67. To be sure, it was important to our decision in *Andrus* that the regulation at issue did not prohibit the possession, donation, or devise of the property. See *id.*, at 66. But as to those feathers the plaintiffs would have liked to sell, the law said they could not be sold at any price—and therefore categorically could not be converted into money. Here, too, the Hornes may do as they wish with the raisins they are not selling. But as to those raisins that they would like to sell, the Order subjects a subset of them to the reserve requirement, which allows for the conversion of reserve raisins into at least *some* money and which is thus *more* generous than the law in *Andrus*. We held that no taking occurred in *Andrus*, so rejecting the Hornes' claim follows *a fortiori*.

We made this principle even clearer in *Lucas*, when we relied on *Andrus* and said that where, as here, "property's only economically productive use is sale or manufacture for sale," a regulation could even "render [that] property economically *worthless*" without effecting a *per se* taking. *Lucas*, 505 U. S., at 1027–1028 (citing *Andrus*, 444 U. S., at 66–67; emphasis added). The Order does not go nearly that far. It should easily escape our opprobrium, at least where a *per se* takings claim is concerned.

B

The fact that at least one property right is not destroyed by the Order is alone sufficient to hold that this case does not fall within the narrow confines of *Loretto*. But such a holding is also consistent with another line of cases that, when viewed together, teach that the government may require certain property rights to be given up as a condition of entry into a regulated market without effecting a *per se* taking.

First, in *Leonard & Leonard* v. *Earle*, 279 U. S. 392, we considered a state law that required those who wished to engage in the business of oyster packing to deliver to the State 10 percent of the empty oyster shells. We rejected

the argument that this law effected a taking and held that it was "not materially different" from a tax upon the privilege of doing business in the State. *Id.*, at 396. "[A]s the packer lawfully could be required to pay that sum in money," we said, "nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent. of such shells." *Ibid.*[1]

Next, in *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, we held that no taking occurred when a provision of the Federal Insecticide, Fungicide, and Rodenticide Act required companies that wished to sell certain pesticides to first submit sensitive data and trade secrets to the Environmental Protection Agency as part of a registration process. Even though the EPA was permitted to publicly disclose some of that submitted data—which would have had the effect of revealing trade secrets, thus substantially diminishing or perhaps even eliminating their value—we reasoned that, like the privilege tax in *Leonard & Leonard*, the disclosure requirement was the price Monsanto had to pay for " 'the advantage of living and doing business in a civilized community.' " 467 U. S., at 1007 (quoting *Andrus*, 444 U. S., at 67; some internal quotation marks omitted). We offered nary a suggestion that the law at issue could be considered a *per se* taking, and instead recognized that "a voluntary submission of data by an applicant" in exchange for the ability to participate in a regulated market "can hardly be called a taking." 467 U. S., at 1007.[2]

---

[1] The Court attempts to distinguish *Leonard & Leonard* because it involved wild oysters, not raisins. *Ante*, at 366–367. That is not an inaccurate factual statement, but I do not find in *Leonard & Leonard* any suggestion that its holding turned on this or any other of the facts to which the Court now points. Indeed, the only citation the Court offers for these allegedly crucial facts is the Maryland Court of Appeals' opinion, not ours. See *ante*, at 366–367.

[2] The Court claims that *Monsanto* is distinguishable for three reasons, none of which hold up. First, it seems, the Court believes the degree of the intrusion on property rights is greater here than in *Monsanto*. See *ante*, at 365–366. Maybe, maybe not. But nothing in *Monsanto* sug-

Finally, in *Yee* v. *Escondido*, 503 U. S. 519 (1992), we addressed a mobile-home park rent-control ordinance that set rents at below-market rates. We held the ordinance did not effect a taking under *Loretto*, even when it was considered in conjunction with other state laws regarding eviction that effectively permitted tenants to remain at will, because it only regulated the terms of market participation. See 503 U. S., at 527–529.

Understood together, these cases demonstrate that the Government may condition the ability to offer goods in the market on the giving up of certain property interests without effecting a *per se* taking.[3] The Order is a similar regulation. It has no effect whatsoever on raisins that the Hornes grow for their own use. But insofar as the Hornes wish to sell some raisins in a market regulated by the Government

---

gests this is a relevant question, and the Court points to nothing saying that it is. Second, the Court believes that "[s]elling produce in interstate commerce" is not a government benefit. *Ante*, at 366. Again, that may be true, but the Hornes are not simply selling raisins in interstate commerce. They are selling raisins in a regulated market at a price artificially inflated by Government action in that market. That is the benefit the Hornes receive, and it does not matter that they "would rather not have" received it. *United States* v. *Sperry Corp.*, 493 U. S. 52, 62–63 (1989). Third, the Court points out that raisins "are not dangerous pesticides; they are a healthy snack." *Ante*, at 366. I could not agree more, but nothing in *Monsanto*, or in *Andrus* for that matter, turned on the dangerousness of the commodity at issue.

[3] The Court points out that, in a footnote in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982), we suggested that it did not matter for takings purposes whether a property owner could avoid an intrusion on her property rights by using her property differently. See *ante*, at 365 (quoting 458 U. S., at 439, n. 17). But in *Yee* v. *Escondido*, 503 U. S. 519 (1992), we clarified that, where a law does not on its face effect a *per se* taking, the voluntariness of a particular use of property or of entry into a particular market is quite relevant. See *id.*, at 531–532. In other words, only when a law requires the forfeiture of *all* rights in property does it effect a *per se* taking regardless of whether the law could be avoided by a different use of the property. As discussed above, the Order is not such a law.

and at a price supported by governmental intervention, the Order requires that they give up the right to sell a portion of those raisins at that price and instead accept disposal of them at a lower price. Given that we have held that the Government may impose a price on the privilege of engaging in a particular business without effecting a taking—which is all that the Order does—it follows that the Order at the very least does not run afoul of our *per se* takings jurisprudence. Under a different takings test, one might reach a different conclusion. But the Hornes have advanced only this narrow *per se* takings claim, and that claim fails.

III

The Court's contrary conclusion rests upon two fundamental errors. The first is the Court's breezy assertion that a *per se* taking has occurred because the Hornes "lose the entire 'bundle' of property rights in the appropriated raisins . . . with the exception of" the retained interest in the equitable distribution of the proceeds from the disposition of the reserve raisins. *Ante*, at 361–362. But if there is a property right that has not been lost, as the Court concedes there is, then the Order has *not* destroyed each of the Hornes' rights in the reserve raisins and does *not* effect a *per se* taking. The Court protests that the retained interest is not substantial or certain enough. But while I see more value in that interest than the Court does, the bottom line is that *Loretto* does not distinguish among retained property interests that are substantial or certain enough to count and others that are not.[4] Nor is it at all clear how the Court's approach will

[4] The Court relies on *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322 (2002), for the proposition that "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.'" *Ante*, at 363. But all that means is that a *per se* taking may be said to have occurred with respect to the portion of property that has been taken even if other por-

be administrable. How, after all, are courts, governments, or individuals supposed to know how much a property owner must be left with before this Court will bless the retained interest as sufficiently meaningful and certain?

One virtue of the *Loretto* test was, at least until today, its clarity. Under *Loretto*, a total destruction of all property rights constitutes a *per se* taking; anything less does not. See 458 U. S., at 441 (noting the "very narrow" nature of the *Loretto* framework). Among the most significant doctrinal damage that the Court causes is the blurring of this otherwise bright line and the expansion of this otherwise narrow category. By the Court's lights, perhaps a 95 percent destruction of property rights can be a *per se* taking. Perhaps 90? Perhaps 60, so long as the remaining 40 is viewed by a reviewing court as less than meaningful? And what makes a retained right meaningful enough? One wonders. Indeed, it is not at all clear what test the Court has actually applied. Such confusion would be bad enough in any context, but it is especially pernicious in the area of property rights. Property owners should be assured of where they stand, and the government needs to know how far it can permissibly go without tripping over a categorical rule.

The second overarching error in the Court's opinion arises from its reliance on what it views as the uniquely physical nature of the taking effected by the Order. This, it says, is why many of the cases having to do with so-called regulatory takings are inapposite. See *ante*, at 362–364. It is not the case, however, that Government agents acting pursuant to the Order are storming raisin farms in the dark of night to load raisins onto trucks. But see Tr. of Oral Arg. 30 (re-

---

tions of the property have not been taken. This is of no help to the Hornes, or to the Court, because it in no way diminishes a plaintiff's burden to demonstrate a *per se* taking as to the portion of his or her property that he or she claims has been taken—here, the reserve raisins. As to that specific property, a *per se* taking occurs if and only if the *Loretto* conditions are satisfied.

marks of ROBERTS, C. J.). The Order simply requires the Hornes to set aside a portion of their raisins—a requirement with which the Hornes refused to comply. See 7 CFR § 989.66(b)(2); Tr. of Oral Arg. 31. And it does so to facilitate two classic regulatory goals. One is the regulatory purpose of limiting the quantity of raisins that can be sold on the market. The other is the regulatory purpose of arranging the orderly disposition of those raisins whose sale would otherwise exceed the cap.

The Hornes and the Court both concede that a cap on the quantity of raisins that the Hornes can sell would not be a *per se* taking. See *ante*, at 362; Brief for Petitioners 23, 52. The Court's focus on the physical nature of the intrusion also suggests that merely arranging for the sale of the reserve raisins would not be a *per se* taking. The rub for the Court must therefore be not that the Government is doing these things, but that it is accomplishing them by the altogether understandable requirement that the reserve raisins be physically set aside. I know of no principle, however, providing that if the Government achieves a permissible regulatory end by asking regulated individuals or entities to physically move the property subject to the regulation, it has committed a *per se* taking rather than a potential regulatory taking. After all, in *Monsanto*, the data that the pesticide companies had to turn over to the Government was presumably turned over in some physical form, yet even the Court does not call *Monsanto* a physical takings case. It therefore cannot be that any regulation that involves the slightest physical movement of property is necessarily evaluated as a *per se* taking rather than as a regulatory taking.

The combined effect of these errors is to unsettle an important area of our jurisprudence. Unable to justify its holding under our precedents, the Court resorts to superimposing new limitations on those precedents, stretching the otherwise strict *Loretto* test into an unadministrable one, and deeming regulatory takings jurisprudence irrelevant in some

undefined set of cases involving government regulation of property rights. And it does all of this in service of eliminating a type of reserve requirement that is applicable to just a few commodities in the entire country—and that, in any event, commodity producers could vote to terminate if they wished. See Letter from Solicitor General to Clerk of Court (Apr. 29, 2015); 7 U. S. C. § 608c(16)(B); 7 CFR § 989.91(c). This intervention hardly strikes me as worth the cost, but what makes the Court's twisting of the doctrine even more baffling is that it ultimately instructs the Government that it can permissibly achieve its market control goals by imposing a quota without offering raisin producers a way of reaping any return whatsoever on the raisins they cannot sell. I have trouble understanding why anyone would prefer that.

* * *

Because a straightforward application of our precedents reveals that the Hornes have not suffered a *per se* taking, I would affirm the judgment of the Ninth Circuit. The Court reaches a contrary conclusion only by expanding our *per se* takings doctrine in a manner that is as unwarranted as it is vague. I respectfully dissent.

Syllabus

KINGSLEY *v.* HENDRICKSON ET AL.

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

No. 14–6368. Argued April 27, 2015—Decided June 22, 2015

While petitioner Kingsley was awaiting trial in county jail, officers forcibly removed him from his cell when he refused to comply with their instructions. Kingsley filed a complaint in Federal District Court claiming, as relevant here, that two of the officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause. At the trial's conclusion, the District Court instructed the jury that Kingsley was required to prove, *inter alia*, that the officers "recklessly disregarded [Kingsley's] safety" and "acted with reckless disregard of [his] rights." The jury found in the officers' favor. On appeal, Kingsley argued that the jury instruction did not adhere to the proper standard for judging a pretrial detainee's excessive force claim, namely, objective unreasonableness. The Seventh Circuit disagreed, holding that the law required a subjective inquiry into the officers' state of mind, *i. e.*, whether the officers actually intended to violate, or recklessly disregarded, Kingsley's rights.

Held:

1. Under 42 U. S. C. § 1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. Pp. 395–402.

(a) This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time, see *Graham* v. *Connor*, 490 U. S. 386, 396, and must account for the "legitimate interests [stemming from the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security," *Bell* v. *Wolfish*, 441 U. S. 520, 540, 547. Pp. 395–397.

(b) Several considerations lead to this conclusion. An objective standard is consistent with precedent. In *Bell*, for instance, this Court held that a pretrial detainee could prevail on a claim that his due process rights were violated by providing only objective evidence that the challenged governmental action was not rationally related to a legitimate governmental objective or that it was excessive in relation to that purpose. 441 U. S., at 541–543. Cf. *Block* v. *Rutherford*, 468 U. S. 576, 585–586. Experience also suggests that an objective standard is work-

able. It is consistent with the pattern jury instructions used in several Circuits, and many facilities train officers to interact with detainees as if the officers' conduct is subject to objective reasonableness. Finally, the use of an objective standard adequately protects an officer who acts in good faith, *e. g.*, by acknowledging that judging the reasonableness of the force used from the perspective and with the knowledge of the defendant officer is an appropriate part of the analysis. Pp. 397–400.

(c) None of the cases respondents point to provides significant support for a subjective standard. *Whitley* v. *Albers*, 475 U. S. 312, and *Hudson* v. *McMillian*, 503 U. S. 1, lack relevance in this context because they involved claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause. And in *County of Sacramento* v. *Lewis*, 523 U. S. 833, a statement indicating the need to show "purpose to cause harm," *id.*, at 854, for due process liability refers not to whether the force intentionally used was excessive, but whether the defendant intended to commit the acts in question, *ibid.*, and n. 13. Finally, in *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2), a malicious-and-sadistic-purpose-to-cause-harm factor was not suggested as a *necessary* condition for liability, but as a factor, among others, that might help show that the use of force was excessive. Pp. 400–402.

2. Applying the proper standard, the jury instruction was erroneous. Taken together, the features of that instruction suggested that the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of that force. Respondents' claim that, irrespective of this Court's holding, any error in the instruction was harmless is left to the Seventh Circuit to resolve on remand. Pp. 402–404.

744 F. 3d 443, 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, J., joined, *post*, p. 404. ALITO, J., filed a dissenting opinion, *post*, p. 408.

Wendy M. Ward argued the cause for petitioner. With her on the briefs were *Jeffrey T. Green*, *Jeffrey S. Ward*, and *Sarah O'Rourke Schrup*.

John F. Bash argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorneys*

General Mizer and *Gupta*, *Deputy Solicitor General Gershengorn*, *Barbara L. Herwig*, *Mark L. Gross*, and *Erin Aslan*.

Paul D. Clement argued the cause for respondents. With him on the brief were *Charles H. Bohl*, *Andrew A. Jones*, *Timothy H. Posnanski*, *Mpoli N. Simwanza-Johnson*, *D. Zachary Hudson*, and *William R. Levi*.*

JUSTICE BREYER delivered the opinion of the Court.

In this case, an individual detained in a jail prior to trial brought a claim under Rev. Stat. § 1979, 42 U. S. C. § 1983, against several jail officers, alleging that they used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause. The officers concede that they intended to use the force that they used. But the parties disagree about whether the force used was excessive.

The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers

---

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Catherine M. A. Carroll*, *Steven R. Shapiro*, *David C. Fathi*, and *Laurence J. Dupuis*; for Former Corrections Administrators and Experts by *Jon Loevy*; for the National Association of Criminal Defense Lawyers by *Mitchell F. Dolin* and *Barbara E. Bergman*; and for The Rutherford Institute by *John W. Whitehead* and *Stephen J. Neuberger*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Heather Hagan McVeigh* and *Lara Langeneckert*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Matthew P. Denn* of Delaware, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Bill Schuette* of Michigan, *Joseph A. Foster* of New Hampshire, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, and *Brad D. Schimel* of Wisconsin; and for the National Association of Counties by *Aaron M. Streett*, *Shane Pennington*, and *Lisa Soronen*.

Gregory C. Champagne, *Maurice E. Bostick*, *Robert P. Faigin*, *Richard M. Weintraub*, *Carrie L. Hill*, and *Robert Spence* filed a brief for the National Sheriffs' Association et al. as *amici curiae*.

were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable. We conclude that the latter standard is the correct one.

I

A

Some but not all of the facts are undisputed: Michael Kingsley, the petitioner, was arrested on a drug charge and detained in a Wisconsin county jail prior to trial. On the evening of May 20, 2010, an officer performing a cell check noticed a piece of paper covering the light fixture above Kingsley's bed. The officer told Kingsley to remove it; Kingsley refused; subsequently other officers told Kingsley to remove the paper; and each time Kingsley refused. The next morning, the jail administrator, Lieutenant Robert Conroy, ordered Kingsley to remove the paper. Kingsley once again refused. Conroy then told Kingsley that officers would remove the paper and that he would be moved to a receiving cell in the interim.

Shortly thereafter, four officers, including respondents Sergeant Stan Hendrickson and Deputy Sheriff Fritz Degner, approached the cell and ordered Kingsley to stand, back up to the door, and keep his hands behind him. When Kingsley refused to comply, the officers handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands handcuffed behind his back.

The parties' views about what happened next differ. The officers testified that Kingsley resisted their efforts to remove his handcuffs. Kingsley testified that he did not resist. All agree that Sergeant Hendrickson placed his knee in Kingsley's back and Kingsley told him in impolite language to get off. Kingsley testified that Hendrickson and Degner then slammed his head into the concrete bunk—an allegation the officers deny.

The parties agree, however, about what happened next: Hendrickson directed Degner to stun Kingsley with a Taser; Degner applied a Taser to Kingsley's back for approximately five seconds; the officers then left the handcuffed Kingsley alone in the receiving cell; and officers returned to the cell 15 minutes later and removed Kingsley's handcuffs.

B

Based on these and related events, Kingsley filed a § 1983 complaint in Federal District Court claiming (among other things) that Hendrickson and Degner used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause. The officers moved for summary judgment, which the District Court denied, stating that "a reasonable jury could conclude that [the officers] acted with malice and intended to harm [Kingsley] when they used force against him." *Kingsley* v. *Josvai*, No. 10–cv–832–bbc (WD Wis., Nov. 16, 2011), App. to Pet. for Cert. 66a. 67a. Kingsley's excessive force claim accordingly proceeded to trial. At the conclusion of the trial, the District Court instructed the jury as follows:

> "Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> "(1) Defendants used force on plaintiff;
>
> "(2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;
>
> "(3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and
>
> "(4) Defendants' conduct caused some harm to plaintiff.

> "In deciding whether one or more defendants used 'unreasonable' force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> "Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:
>
> "• The need to use force;
>
> "• The relationship between the need to use force and the amount of force used;
>
> "• The extent of plaintiff's injury;
>
> "• Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
>
> "• Any efforts made by defendants to limit the amount of force used." App. 277–278 (emphasis added).

The jury found in the officers' favor.

On appeal, Kingsley argued that the correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness. And, the jury instruction, he said, did not hew to that standard. A panel of the Court of Appeals disagreed, with one judge dissenting. The majority held that the law required a "subjective inquiry" into the officer's state of mind. There must be "'an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'" 744 F. 3d 443, 451 (CA7 2014) (quoting *Wilson* v. *Williams*, 83 F. 3d 870, 875 (CA7 1996)). The dissent would have used instructions promulgated by the Committee on Pattern Civil Jury Instructions of the Seventh Circuit, which require a pretrial detainee claiming excessive force to show only that the use of force was objectively unreasonable. 744 F. 3d, at 455 (opinion of Hamilton, J.); see Pattern Civ. Jury

Instr. 7.08 (2009). The dissent further stated that the District Court's use of the word "reckless" in the jury instruction added "an unnecessary and confusing element." 744 F. 3d, at 455.

Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard. In light of disagreement among the Circuits, we agreed to do so. Compare, *e. g.*, *Murray* v. *Johnson No. 260*, 367 Fed. Appx. 196, 198 (CA2 2010); *Bozeman* v. *Orum*, 422 F. 3d 1265, 1271 (CA11 2005) (*per curiam*), with *Aldini* v. *Johnson*, 609 F. 3d 858, 865–866 (CA6 2010); *Young* v. *Wolfe*, 478 Fed. Appx. 354, 356 (CA9 2012).

II

A

We consider a legally requisite state of mind. In a case like this one, there are, in a sense, two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—*i. e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was "excessive." Here, as to the first question, there is no dispute. As to the second, whether to interpret the defendant's physical acts in the world as involving force that was "excessive," there is a dispute. We conclude with respect to that question that the relevant standard is objective not subjective. Thus, the defendant's state of mind is not a matter that a plaintiff is required to prove.

Consider the series of physical events that take place in the world—a series of events that might consist, for example, of the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient. No one here denies, and we must assume, that,

as to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. That is because, as we have stated, "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 849 (1998) (emphasis added). See also *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property"). Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—*i. e.*, purposeful or knowing—the pretrial detainee's claim may proceed. In the context of a police pursuit of a suspect the Court noted, though without so holding, that recklessness in some cases might suffice as a standard for imposing liability. See *Lewis*, *supra*, at 849. Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.

We now consider the question before us here—the defendant's state of mind with respect to the proper *interpretation* of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used. In deciding whether the force deliberately used is, constitutionally speaking, "excessive," should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard. In short, we agree with the dissenting appeals court judge, the Seventh Circuit's jury instruction committee, and Kingsley, that a pretrial detainee must show only

that the force purposely or knowingly used against him was objectively unreasonable.

A court (judge or jury) cannot apply this standard mechanically. See *Lewis*, *supra*, at 850. Rather, objective reasonableness turns on the "facts and circumstances of each particular case." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989). A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. See *ibid.* A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S. 520, 540, 547 (1979).

Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. See, *e. g.*, *Graham*, *supra*, at 396. We do not consider this list to be exclusive. We mention these factors only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force.

B

Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one. For one thing, it is consistent with our precedent. We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, *supra*, at

395, n. 10. And in *Bell*, we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." 441 U. S., at 538. But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." *Id.*, at 561. The *Bell* Court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. *Id.*, at 541–543. Rather, the Court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose. *Ibid.*

Bell's focus on "punishment" does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated. Rather, as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose. Cf. *Block* v. *Rutherford*, 468 U. S. 576, 585–586 (1984) (where there was no suggestion that the purpose of jail policy of denying contact visitation was to punish inmates, the Court need only evaluate whether the policy was "reasonably related to legitimate governmental objectives" and whether it appears excessive in relation to that objective); *Schall* v. *Martin*, 467 U. S. 253, 269–271 (1984) (similar); see also *United States* v. *Salerno*, 481 U. S. 739, 747 (1987) ("[T]he punitive/regulatory distinction *turns on* 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive

in relation to the alternative purpose assigned [to it]' " (quoting *Schall*, *supra*, at 269; emphasis added and some internal quotation marks omitted)). The Court did not suggest in any of these cases, either by its words or its analysis, that its application of *Bell*'s objective standard should involve subjective considerations. Our standard is also consistent with our use of an objective "excessive force" standard where officers apply force to a person who, like Kingsley, has been accused but not convicted of a crime, but who, unlike Kingsley, is free on bail. See *Graham*, *supra*.

For another thing, experience suggests that an objective standard is workable. It is consistent with the pattern jury instructions used in several Circuits. We are also told that many facilities, including the facility at issue here, train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard. See Brief for Petitioner 26; App. 247–248; Brief for Former Corrections Administrators and Experts as *Amici Curiae* 8–18.

Finally, the use of an objective standard adequately protects an officer who acts in good faith. We recognize that "[r]unning a prison is an inordinately difficult undertaking," *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987), and that "safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face," *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 326 (2012). Officers facing disturbances "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U. S., at 397. For these reasons, we have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to

maintain order and institutional security is appropriate. See Part II–A, *supra.* And we have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a "reckless" act as well). *Ibid.* Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001); see also Brief for United States as *Amicus Curiae* 27–28. It is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith.

C

Respondents believe that the relevant legal standard should be subjective, *i. e.*, that the plaintiff must prove that the use of force was not "applied in a good-faith effort to maintain or restore discipline" but, rather, was applied "maliciously and sadistically to cause harm." Brief for Respondents 27. And they refer to several cases that they believe support their position. See *id.*, at 26–31 (citing *Whitley* v. *Albers*, 475 U. S. 312 (1986); *Hudson* v. *McMillian*, 503 U. S. 1 (1992); *Lewis*, 523 U. S. 833; *Johnson* v. *Glick*, 481 F. 2d 1028 (CA2 1973)).

The first two of these cases, however, concern excessive force claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause. *Whitley*, *supra*, at 320; *Hudson*, *supra*, at 6–7. The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less "maliciously and sadistically." *Ingraham* v. *Wright*, 430 U. S. 651, 671–

672, n. 40 (1977); *Graham*, *supra*, at 395, n. 10; see also 4 W. Blackstone, Commentaries *300 ("[I]f the offence be not bailable, or the party cannot find bail, he is to be committed to the county [jail] . . . [b]ut . . . only for safe custody, and not for punishment"). Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional. *Whitley* and *Hudson* are relevant here only insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails. And, as explained above, we believe we have done so.

Lewis does not prove respondents' point, either. There, the Court considered a claim that a police officer had violated due process by causing a death during a high-speed automobile chase aimed at apprehending a suspect. We wrote that "[j]ust as a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case, so it ought to be needed for due process liability in a pursuit case." 523 U. S., at 854. Respondents contend that this statement shows that the Court embraced a standard for due process claims that requires a showing of subjective intent. Brief for Respondents 30–31. Other portions of the *Lewis* opinion make clear, however, that this statement referred to the defendant's intent to commit the *acts* in question, not to whether the force intentionally used was "excessive." 523 U. S., at 854, and n. 13. As explained above, the parties here do not dispute that respondents' use of force was intentional. See Part II–A, *supra*.

Nor does *Glick* provide respondents with significant support. In that case Judge Friendly, writing for the Second Circuit, considered an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment's Due Process Clause. Judge Friendly pointed out that the "management by a few guards of large numbers of prisoners" in an institution "may require and justify the occasional use of a degree of intentional force." 481 F. 2d, at 1033. He added

that, in determining whether that intentional use of force "crosse[s]" the "constitutional line," a court should look

> "to such factors as [(1)] the need for the application of force, [(2)] the relationship between the need and the amount of force that was used, [(3)] the extent of injury inflicted, and [(4)] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Ibid.*

This statement does not suggest that the fourth factor (malicious and sadistic purpose to cause harm) is a *necessary* condition for liability. To the contrary, the words "such . . . as" make clear that the four factors provide examples of some considerations, among others, that might help show that the use of force was excessive.

Respondents believe these cases nonetheless help them make a broader point—namely, that a subjective standard "protects against a relative flood of claims," many of them perhaps unfounded, brought by pretrial detainees. Brief for Respondents 38. But we note that the Prison Litigation Reform Act of 1995, 42 U. S. C. § 1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners. Nor is there evidence of a rash of unfounded filings in Circuits that use an objective standard.

We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.

III

We now consider the lawfulness of the jury instruction given in this case in light of our adoption of an objective

standard for pretrial detainees' excessive force claims. See Part II–A, *supra*. That jury instruction defined "excessive force" as "force applied recklessly that is unreasonable in light of the facts and circumstances of the time." App. 277. It required Kingsley to show that the officers "recklessly disregarded [Kingsley's] safety." *Id.*, at 278. And it suggested that Kingsley must show the defendants "acted with reckless disregard of [Kingsley's] rights," while telling the jury that it could consider several objective factors in making this determination. *Ibid.*

Kingsley argues that the jury instruction is faulty because the word "reckless" suggests a need to prove that respondents acted with a certain subjective state of mind with respect to the excessive or nonexcessive nature of the force used, contrary to what we have just held. Reply Brief 20–22. Respondents argue that irrespective of our holding, any error in the instruction was harmless. Brief for Respondents 57–58. And the Solicitor General suggests that, because the instructions defined "recklessness" with reference to objective factors, those instructions effectively embody our objective standard and did not confuse the jury. Brief for United States as *Amicus Curiae* 28–32.

We agree with Kingsley that the instructions were erroneous. "[R]eckles[s] disregar[d] [of Kingsley's] safety" was listed as an additional requirement, beyond the need to find that "[respondents'] use of force was unreasonable in light of the facts and circumstances at the time." App. 278. See also *ibid.* (Kingsley had to show respondents "used unreasonable force *and* acted with reckless disregard of [Kingsley's] rights" (emphasis added)). And in determining whether respondents "acted with reckless disregard of [Kingsley's] rights," the jury was instructed to "consider . . . [w]hether [respondents] reasonably *believed* there was a threat to the safety of staff or prisoners." *Ibid.* (emphasis added). Together, these features suggested the jury should weigh respondents' subjective reasons for using force and subjective

views about the excessiveness of the force. As we have just held, that was error. But because the question whether that error was harmless may depend in part on the detailed specifics of this case, we leave that question for the Court of Appeals to resolve in the first instance.

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

It is so ordered.

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

The Constitution contains no freestanding prohibition of excessive force. There are, however, four constitutional provisions that we have said forbid the use of excessive force in certain circumstances. The Fourth Amendment prohibits it when it makes a search or seizure "unreasonable." The Eighth Amendment prohibits it when it constitutes "cruel and unusual" punishment. The Fifth and Fourteenth Amendments prohibit it (or, for that matter, any use of force) when it is used to "deprive" someone of "life, liberty, or property, without due process of law."

This is a Fourteenth Amendment case. The Fifth Amendment applies only to federal actors; Kingsley forfeited any argument under the Fourth Amendment by failing to raise it below; and he acknowledges that the Eighth Amendment standard is inapplicable, Brief for Petitioner 27, n. 8. The only question before us is whether a pretrial detainee's due-process rights are violated when "the force purposely or knowingly used against him [is] objectively unreasonable." *Ante*, at 397. In my view, the answer is no. Our cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of "objectively unreasonable" force, without more, is not the intentional infliction of punishment.

In *Bell* v. *Wolfish*, 441 U. S. 520 (1979), we held that the Due Process Clause forbids holding pretrial detainees in conditions that "amount to punishment." *Id.*, at 535. Conditions amount to punishment, we explained, when they are "imposed for the purpose of punishment." *Id.*, at 538. Acting with the intent to punish means taking a " 'deliberate act intended to chastise or deter.' " *Wilson* v. *Seiter*, 501 U. S. 294, 300 (1991) (quoting *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985)); see also *Bell*, *supra*, at 537–538. The Court in *Bell* recognized that intent to punish need not be "expressed," 441 U. S., at 538, but may be established with circumstantial evidence. More specifically, if the condition of confinement being challenged "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*, at 539. We endorsed the same inference when we applied *Bell*'s intent-to-punish test in challenges brought by pretrial detainees against jailhouse security policies, *id.*, at 560–562; *Block* v. *Rutherford*, 468 U. S. 576, 583–584 (1984), and statutes permitting pretrial detention, *Schall* v. *Martin*, 467 U. S. 253, 255, 269 (1984); *United States* v. *Salerno*, 481 U. S. 739, 741, 746–747 (1987).

In light of these cases, I agree with the Court that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989) (citing *Bell*, *supra*, at 535–539). I disagree, however, that any intentional application of force that is objectively unreasonable in degree is a use of excessive force that "amount[s] to punishment." *Bell*, 441 U. S., at 535. The Court reaches that conclusion by misreading *Bell* as forbidding States to take *any* harmful action against pretrial detainees that is not "reasonably related to a legitimate goal." *Id.*, at 539.

Bell endorsed this "reasonable relation" inference in the context of a challenge *to conditions of a confinement*—spe-

cifically, challenges to the State's policy of housing two people in each cell, *id.*, at 528, and various security policies, *id.*, at 548–549, 553, 555, 558, 560–562. The conditions in which pretrial detainees are held, and the security policies to which they are subject, are the result of considered deliberation by the authority imposing the detention. If those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent. And the same logic supports finding a punitive intent in statutes authorizing detention that lacks any reasonable relationship to a valid government interest. *Schall*, *supra*, at 269; *Salerno*, *supra*, at 746–747.

It is *illogical*, however, automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary. That could easily have been the result of a misjudgment about the degree of force required to maintain order or protect other inmates, rather than the product of an intent to punish the detainee for his charged crime (or for any other behavior). An officer's decision regarding how much force to use is made "in haste, under pressure, and frequently without the luxury of a second chance," *Hudson* v. *McMillian*, 503 U. S. 1, 6 (1992) (internal quotation marks omitted), not after the considered thought that precedes detention-policy determinations like those at issue in *Bell*, *Block*, *Schall*, and *Salerno*. That an officer used more force than necessary might be *evidence* that he acted with intent to punish, but it is no more than that.

In sum: *Bell* makes intent to punish the focus of its due-process analysis. Objective reasonableness of the force used is nothing more than a heuristic for identifying this intent. That heuristic makes good sense for considered decisions by the detaining authority, but is much weaker in the context of excessive-force claims. Kingsley does not argue that respondents actually intended to punish him, and his reliance on *Bell* to infer such an intent is misplaced.

Kingsley claims that "the protections of due process . . . extend beyond the narrow context of 'punishment.' " Brief for Petitioner 15. Unquestionably. A State would plainly violate the Due Process Clause if it extended a detainee's confinement because it believed him mentally ill (not as "punishment"), without giving him the constitutionally guaranteed processes that must precede the deprivation of liberty. But Kingsley does not claim deprivation of liberty in that normal sense of that word—the right to walk about free. He claims that the Due Process Clause confers, on pretrial detainees, a substantive "liberty" interest that consists of freedom from objectively unreasonable force. Kingsley seeks relief, in other words, under the doctrine of "substantive due process," through which we have occasionally recognized "liberty" interests other than freedom from incarceration or detention, that "cannot be limited at all, except by provisions that are 'narrowly tailored to serve a compelling state interest.' " *Kerry* v. *Din*, *ante*, at 92 (plurality opinion) (quoting *Reno* v. *Flores*, 507 U. S. 292, 301–302 (1993)).

Even if one believed that the right to process can confer the right to substance in particular cases, Kingsley's interest is not one of the "fundamental liberty interests" that substantive due process protects. We have said that that doctrine protects only those liberty interests that, carefully described, are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997) (citations and internal quotation marks omitted). Carefully described, the liberty interest Kingsley asserts is the right of pretrial detainees to be free from the application of force that is more than is objectively required to further some legitimate, nonpunitive, governmental interest. He does not argue (nor could he) that this asserted interest could pass the test announced in *Glucksberg*.

I conclude by emphasizing that our Constitution is not the only source of American law. There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief. Kingsley himself, in addition to suing respondents for excessive force under 42 U. S. C. § 1983, brought a state-law claim for assault and battery. 744 F. 3d 443, 446, n. 6 (CA7 2014). The Due Process Clause is not "a font of tort law to be superimposed upon" that state system. *Daniels* v. *Williams*, 474 U. S. 327, 332 (1986) (quoting *Paul* v. *Davis*, 424 U. S. 693, 701 (1976)). Today's majority overlooks this in its tender-hearted desire to tortify the Fourteenth Amendment.

JUSTICE ALITO, dissenting.

I would dismiss this case as improvidently granted. Before deciding what a pretrial detainee must show in order to prevail on a due process excessive force claim, we should decide whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee. We have not yet decided that question. See *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989). If a pretrial detainee can bring such a claim, we need not and should not rely on substantive due process. See *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (plurality opinion); *Graham*, 490 U. S., at 395. It is settled that the test for an unreasonable seizure under the Fourth Amendment is objective, see *id.*, at 397, so if a pretrial detainee can bring such a claim, it apparently would be indistinguishable from the substantive due process claim that the Court discusses.

I would not decide the due process issue presented in this case until the availability of a Fourth Amendment claim is settled, and I would therefore dismiss this case as improvidently granted.

CITY OF LOS ANGELES, CALIFORNIA *v.* PATEL ET AL.

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

No. 13–1175. Argued March 3, 2015—Decided June 22, 2015

Petitioner, the city of Los Angeles (City), requires hotel operators to record and keep specific information about their guests on the premises for a 90-day period. Los Angeles Municipal Code § 41.49. These records "shall be made available to any officer of the Los Angeles Police Department for inspection . . . at a time and in a manner that minimizes any interference with the operation of the business," § 41.49(3)(a), and a hotel operator's failure to make the records available is a criminal misdemeanor, § 11.00(m). Respondents, a group of motel operators and a lodging association, brought a facial challenge to § 41.49(3)(a) on Fourth Amendment grounds. The District Court entered judgment for the City, finding that respondents lacked a reasonable expectation of privacy in their records. The Ninth Circuit subsequently reversed, determining that inspections under § 41.49(3)(a) are Fourth Amendment searches and that such searches are unreasonable under the Fourth Amendment because hotel owners are subjected to punishment for failure to turn over their records without first being afforded the opportunity for pre-compliance review.

Held:

1. Facial challenges under the Fourth Amendment are not categorically barred or especially disfavored. Pp. 415–419.

(a) Facial challenges to statutes—as opposed to challenges to particular applications of statutes—have been permitted to proceed under a diverse array of constitutional provisions. See, *e. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (First Amendment); *District of Columbia* v. *Heller*, 554 U. S. 570 (Second Amendment). The Fourth Amendment is no exception. *Sibron* v. *New York*, 392 U. S. 40, distinguished. This Court has entertained facial challenges to statutes authorizing warrantless searches, declaring them, on several occasions, facially invalid, see, *e. g.*, *Chandler* v. *Miller*, 520 U. S. 305, 308–309. Pp. 415–417.

(b) Petitioner contends that facial challenges to statutes authorizing warrantless searches must fail because they will never be unconstitutional in all applications, but this Court's precedents demonstrate that such challenges can be brought, and can succeed. Under the proper facial-challenge analysis, only applications of a statute in which the statute actually authorizes or prohibits conduct are considered. See, *e. g.*,

Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U. S. 833. When addressing a facial challenge to a statute authorizing warrantless searches, the proper focus is on searches that the law actually authorizes and not those that could proceed irrespective of whether they are authorized by the statute, *e. g.*, where exigent circumstances, a warrant, or consent to search exists. Pp. 417–419.

2. Section 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. Pp. 419–428.

(a) "'[S]earches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few . . . exceptions.'" *Arizona* v. *Gant*, 556 U. S. 332, 338. One exception is for administrative searches. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534. To be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See *See* v. *Seattle*, 387 U. S. 541, 545. Assuming the administrative search exception otherwise applies here, § 41.49 is facially invalid because it fails to afford hotel operators any opportunity for precompliance review. To be clear, a hotel owner must only be afforded an opportunity for precompliance review; actual review need occur only when a hotel operator objects to turning over the records. This opportunity can be provided without imposing onerous burdens on law enforcement. For instance, officers in the field can issue administrative subpoenas without probable cause that a regulation is being infringed. This narrow holding does not call into question those parts of § 41.49 requiring hotel operators to keep records nor does it prevent police from obtaining access to those records where a hotel operator consents to the search, where the officer has a proper administrative warrant, or where some other exception to the warrant requirement applies. Pp. 419–423.

(b) Petitioner's argument that the ordinance is facially valid under the more relaxed standard for closely regulated industries is rejected. See *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313. This Court has only recognized four such industries, and nothing inherent in the operation of hotels poses a comparable clear and significant risk to the public welfare. Additionally, because the majority of regulations applicable to hotels apply to many businesses, to classify hotels as closely regulated would permit what has always been a narrow exception to swallow the rule. But even if hotels were closely regulated, § 41.49 would still contravene the Fourth Amendment as it fails to satisfy the additional criteria that must be met for searches of closely regulated industries to be reasonable. See *New York* v. *Burger*, 482 U. S. 691, 702–703. Pp. 424–428.

738 F. 3d 1058, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 428. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 441.

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *Robert M. Loeb*, *Gregory P. Orland*, *Rachel Wainer Apter*, *Orin S. Kerr*, *Michael N. Feuer*, and *James P. Clark*.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Leslie R. Caldwell*, *Zachary D. Tripp*, and *John M. Peilletieri*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Kevin K. Russell*, *Tejinder Singh*, and *Frank A. Weiser*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Gerald A. Engler*, Chief Assistant Attorney General, *Julie L. Garland*, Senior Assistant Attorney General, *Janill L. Richards*, Principal Deputy Solicitor General, *A. Natasha Cortina*, Supervising Deputy Attorney General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Tom Horne* of Arizona, *Russell A. Suzuki* of Hawaii, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Kathleen G. Kane* of Pennsylvania, and *Alan Wilson* of South Carolina; for the California State Sheriffs' Association et al. by *Martin J. Mayer*, *James R. Touchstone*, and *Krista MacNevin Jee*; for the County of Los Angeles et al. by *Timothy T. Coates*; for Drug Free America Foundation, Inc., et al. by *Orly Degani*; for the Manhattan Institute for Policy Research by *Nicholas Quinn Rosenkranz*; and for the National League of Cities et al. by *Thomas R. McCarthy*, *William S. Consovoy*, *J. Michael Connolly*, and *Lisa Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the Asian American Hotel Owners Association by *Onkar N. Sharma* and *William H. Owens*; for the Chamber of Commerce of the United States of America by *Jessica Ring Amunson*, *Jessie K. Liu*, *Lindsay C. Harrison*, *Kate Comerford Todd*, and *Warren Postman*; for the Cato Institute by *Jim Harper* and

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels "[e]very operator of a hotel to keep a record" containing specified information concerning guests and to make this record "available to any officer of the Los Angeles Police Department for inspection" on demand. Los Angeles Municipal Code §§ 41.49(2), (3)(a), (4) (2015). The questions presented are whether facial challenges to statutes can be brought under the Fourth Amendment and, if so, whether this provision of the Los Angeles Municipal Code is facially invalid. We hold facial challenges can be brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for precompliance review.

I

A

Los Angeles Municipal Code (LAMC) § 41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the

---

Ilya Shapiro; for the Electronic Frontier Foundation by *Lee Tien*, *Hanni Fakhoury*, and *Jennifer Lynch*; for Google Inc. by *Eric D. Miller* and *Albert Gidari, Jr.*; for Gun Owners of America, Inc., et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, and *Jeremiah L. Morgan*; and for The Rutherford Institute by *John W. Whitehead* and *Amand Agneshwar*.

Briefs of *amici curiae* were filed for the Institute for Justice by *Anthony B. Sanders*, *William H. Mellor*, *Dana Berliner*, and *Mahesha P. Subbaraman*; for Love146 by *Amanda R. Parker* and *Louis K. Fisher*; and for Adam Lamparello et al. by *James J. Berles* and *Mr. Lamparello*, *pro se*.

guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. § 41.49(2). Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. § 41.49(4). For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. § 41.49(2)(b). This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. § 41.49(3)(a).

Section 41.49(3)(a)—the only provision at issue here—states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. § 11.00(m) (general provision applicable to entire LAMC).

B

In 2003, respondents, a group of motel operators along with a lodging association, sued the city of Los Angeles (City or petitioner) in three consolidated cases challenging the constitutionality of § 41.49(3)(a). They sought declaratory and injunctive relief. The parties "agree[d] that the sole issue in the . . . action [would be] a facial constitutional challenge" to § 41.49(3)(a) under the Fourth Amendment. App. 195. They further stipulated that respondents have been sub-

jected to mandatory record inspections under the ordinance without consent or a warrant. *Id.*, at 194–195.

Following a bench trial, the District Court entered judgment in favor of the City, holding that respondents' facial challenge failed because they lacked a reasonable expectation of privacy in the records subject to inspection. A divided panel of the Ninth Circuit affirmed on the same grounds. 686 F. 3d 1085 (2012). On rehearing en banc, however, the Court of Appeals reversed. 738 F. 3d 1058, 1065 (2013).

The en banc court first determined that a police officer's nonconsensual inspection of hotel records under § 41.49 is a Fourth Amendment "search" because "[t]he business records covered by § 41.49 are the hotel's private property" and the hotel therefore "has the right to exclude others from prying into the[ir] contents." *Id.*, at 1061. Next, the court assessed "whether the searches authorized by § 41.49 are reasonable." *Id.*, at 1063. Relying on *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408 (1984), and *See* v. *Seattle*, 387 U. S. 541 (1967), the court held that § 41.49 is facially unconstitutional "as it authorizes inspections" of hotel records "without affording an opportunity to 'obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.'" 738 F. 3d, at 1065 (quoting *See*, 387 U. S., at 545).

Two dissenting opinions were filed. The first dissent argued that facial relief should rarely be available for Fourth Amendment challenges, and was inappropriate here because the ordinance would be constitutional in those circumstances where police officers demand access to hotel records with a warrant in hand or exigent circumstances justify the search. 738 F. 3d, at 1065–1070 (opinion of Tallman, J.). The second dissent conceded that inspections under § 41.49 constitute Fourth Amendment searches, but faulted the majority for assessing the reasonableness of these searches without accounting for the weakness of the hotel operators' privacy in-

terest in the content of their guest registries. *Id.*, at 1070–1074 (opinion of Clifton, J.).

We granted certiorari, 574 U. S. 958 (2014), and now affirm.

II

We first clarify that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored.

A

A facial challenge is an attack on a statute itself as opposed to a particular application. While such challenges are "the most difficult . . . to mount successfully," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), the Court has never held that these claims cannot be brought under any otherwise enforceable provision of the Constitution. Cf. Fallon, Fact and Fiction About Facial Challenges, 99 Cal. L. Rev. 915, 918 (2011) (pointing to several Terms in which "the Court adjudicated more facial challenges on the merits than it did as-applied challenges"). Instead, the Court has allowed such challenges to proceed under a diverse array of constitutional provisions. See, *e. g.*, *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (First Amendment); *District of Columbia* v. *Heller*, 554 U. S. 570 (2008) (Second Amendment); *Chicago* v. *Morales*, 527 U. S. 41 (1999) (Due Process Clause of the Fourteenth Amendment); *Kraft Gen. Foods, Inc.* v. *Iowa Dept. of Revenue and Finance*, 505 U. S. 71 (1992) (Foreign Commerce Clause).

Fourth Amendment challenges to statutes authorizing warrantless searches are no exception. Any claim to the contrary reflects a misunderstanding of our decision in *Sibron* v. *New York*, 392 U. S. 40 (1968). In *Sibron*, two criminal defendants challenged the constitutionality of a statute authorizing police to, among other things, " 'stop any person abroad in a public place whom [they] reasonably suspec[t] is committing, has committed or is about to commit a felony." *Id.*, at 43 (quoting then N. Y. Code Crim. Proc. § 180–a). The

Court held that the search of one of the defendants under the statute violated the Fourth Amendment, 392 U. S., at 59, 62, but refused to opine more broadly on the statute's validity, stating that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *id.*, at 59.

This statement from *Sibron*—which on its face might suggest an intent to foreclose all facial challenges to statutes authorizing warrantless searches—must be understood in the broader context of that case. In the same section of the opinion, the Court emphasized that the "operative categories" of the New York law at issue were "susceptible of a wide variety of interpretations," *id.*, at 60, and that "[the law] was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees," *id.*, at 60, n. 20. *Sibron* thus stands for the simple proposition that claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes: Where a statute consists of "extraordinarily elastic categories," it may be "impossible to tell" whether and to what extent it deviates from the requirements of the Fourth Amendment. *Id.*, at 59, 61, n. 20.

This reading of *Sibron* is confirmed by subsequent precedents. Since *Sibron*, the Court has entertained facial challenges under the Fourth Amendment to statutes authorizing warrantless searches. See, *e. g.*, *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 648 (1995) ("We granted certiorari to decide whether" petitioner's student athlete drug testing policy "violates the Fourth and Fourteenth Amendments to the United States Constitution"); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 633, n. 10 (1989) ("[R]espondents have challenged the administrative scheme on its face. We deal therefore with whether the [drug] tests contemplated by the regulation can *ever* be conducted"); cf. *Illi-*

nois v. *Krull*, 480 U. S. 340, 354 (1987) ("[A] person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation"). Perhaps more importantly, the Court has on numerous occasions declared statutes facially invalid under the Fourth Amendment. For instance, in *Chandler* v. *Miller*, 520 U. S. 305, 308–309 (1997), the Court struck down a Georgia statute requiring candidates for certain state offices to take and pass a drug test, concluding that this "requirement . . . [did] not fit within the closely guarded category of constitutionally permissible suspicionless searches." Similar examples abound. See, *e. g.*, *Ferguson* v. *Charleston*, 532 U. S. 67, 86 (2001) (holding that a hospital policy authorizing "nonconsensual, warrantless, and suspicionless searches" contravened the Fourth Amendment); *Payton* v. *New York*, 445 U. S. 573, 574, 576 (1980) (holding that a New York statute "authoriz[ing] police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest" was "not consistent with the Fourth Amendment"); *Torres* v. *Puerto Rico*, 442 U. S. 465, 466, 471 (1979) (holding that a Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was unconstitutional because it failed to require either probable cause or a warrant).

B

Petitioner principally contends that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications. Cf. *Salerno*, 481 U. S., at 745 (to obtain facial relief the party seeking it "must establish that no set of circumstances exists under which the [statute] would be valid"). In particular, the City points to situations where police are responding to an emergency, where the subject of the search consents to the intrusion, and where police are acting under

a court-ordered warrant. See Brief for Petitioner 19–20. While petitioner frames this argument as an objection to respondents' challenge in this case, its logic would preclude facial relief in every Fourth Amendment challenge to a statute authorizing warrantless searches. For this reason alone, the City's argument must fail: The Court's precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed. See Part II–A, *supra*.

Moreover, the City's argument misunderstands how courts analyze facial challenges. Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a "law is unconstitutional in all of its applications." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449 (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. For instance, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.*, at 894.

Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the

search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.[1]

III

Turning to the merits of the particular claim before us, we hold that § 41.49(3)(a) is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review.

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that "no Warrants shall issue, but upon probable cause." Based on this constitutional text, the Court has repeatedly held that "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Arizona* v. *Gant*, 556 U. S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967)). This rule "applies

---

[1] Relatedly, the United States claims that a statute authorizing warrantless searches may still have independent force if it imposes a penalty for failing to cooperate in a search conducted under a warrant or in an exigency. See Brief for United States as *Amicus Curiae* 19. This argument gets things backwards. An otherwise facially unconstitutional statute cannot be saved from invalidation based solely on the existence of a penalty provision that applies when searches are not actually authorized by the statute. This argument is especially unconvincing where, as here, an independent obstruction of justice statute imposes a penalty for "willfully, resist[ing], delay[ing], or obstruct[ing] any public officer . . . in the discharge or attempt to discharge any duty of his or her office of employment." Cal. Penal Code Ann. § 148(a)(1) (West 2014).

to commercial premises as well as to homes." *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312 (1978).

Search regimes where no warrant is ever required may be reasonable where "'special needs . . . make the warrant and probable-cause requirement impracticable,'" *Skinner*, 489 U. S., at 619 (quoting *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987); some internal quotation marks omitted), and where the "primary purpose" of the searches is "[d]istinguishable from the general interest in crime control," *Indianapolis* v. *Edmond*, 531 U. S. 32, 44 (2000). Here, we assume that the searches authorized by § 41.49 serve a "special need" other than conducting criminal investigations: They ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels' premises.[2] The Court has referred to this kind of search as an "administrative searc[h]." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 534 (1967). Thus, we consider whether § 41.49 falls within the administrative search exception to the warrant requirement.

The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See *See*, 387 U. S., at 545; *Lone Steer*, 464 U. S., at 415 (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court"). And, we see no reason why this minimal requirement is inapplicable here. While the

---

[2] Respondents contend that § 41.49's principal purpose instead is to facilitate criminal investigation. Brief for Respondents 44–47. Because we find that the searches authorized by § 41.49 are unconstitutional even if they serve the City's asserted purpose, we decline to address this argument.

Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that § 41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid.

A hotel owner who refuses to give an officer access to his or her registry can be arrested on the spot. The Court has held that business owners cannot reasonably be put to this kind of choice. *Camara*, 387 U. S., at 533 (holding that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty"). Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests. Even if a hotel has been searched 10 times a day, every day, for three months, without any violation being found, the operator can only refuse to comply with an officer's demand to turn over the registry at his or her own peril.

To be clear, we hold only that a hotel owner must be afforded an *opportunity* to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply. Actual review need only occur in those rare instances where a hotel operator objects to turning over the registry. Moreover, this opportunity can be provided without imposing onerous burdens on those charged with an administrative scheme's enforcement. For instance, respondents accept that the searches authorized by § 41.49(3)(a) would be constitutional if they were performed pursuant to an administrative subpoena. Tr. of Oral Arg. 36–37. These subpoenas, which are typically a simple form, can be issued by the individual seeking the record—here, officers in the field—without probable cause that a regulation is being infringed. See *See*, 387 U. S., at 544 ("[T]he demand to inspect may be issued by the agency"). Issuing a

subpoena will usually be the full extent of an officer's burden because "the great majority of businessmen can be expected in normal course to consent to inspection without warrant." *Barlow's, Inc.*, 436 U. S., at 316. Indeed, the City has cited no evidence suggesting that without an ordinance authorizing on-demand searches, hotel operators would regularly refuse to cooperate with the police.

In those instances, however, where a subpoenaed hotel operator believes that an attempted search is motivated by illicit purposes, respondents suggest it would be sufficient if he or she could move to quash the subpoena before any search takes place. Tr. of Oral Arg. 38–39. A neutral decisionmaker, including an administrative law judge, would then review the subpoenaed party's objections before deciding whether the subpoena is enforceable. Given the limited grounds on which a motion to quash can be granted, such challenges will likely be rare. And, in the even rarer event that an officer reasonably suspects that a hotel operator may tamper with the registry while the motion to quash is pending, he or she can guard the registry until the required hearing can occur, which ought not take long. *Riley* v. *California*, 573 U. S. 373, 388 (2014) (police may seize and hold a cell phone "to prevent destruction of evidence while seeking a warrant"); *Illinois* v. *McArthur*, 531 U. S. 326, 334 (2001) (citing cases upholding the constitutionality of "temporary restraints where [they are] needed to preserve evidence until police could obtain a warrant"). Cf. *Missouri* v. *McNeely*, 569 U. S. 141, 154, and n. 4 (2013) (noting that many States have procedures in place for considering warrant applications telephonically).[3]

Procedures along these lines are ubiquitous. A 2002 report by the Department of Justice "identified approximately

---

[3] JUSTICE SCALIA professes to be baffled at the idea that we could suggest that in certain circumstances, police officers may seize something that they cannot immediately search. *Post*, at 437 (dissenting opinion). But that is what this Court's cases have explicitly endorsed, including *Riley* just last Term.

335 existing administrative subpoena authorities held by various [federal] executive branch entities." Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 3, online at http://www.justice.gov/archive/olp/rpt_to_congress.htm (all Internet materials as visited June 19, 2015, and available in Clerk of Court's case file). Their prevalence confirms what common sense alone would otherwise lead us to conclude: In most contexts, business owners can be afforded at least an opportunity to contest an administrative search's propriety without unduly compromising the government's ability to achieve its regulatory aims.

Of course administrative subpoenas are only one way in which an opportunity for precompliance review can be made available. But whatever the precise form, the availability of precompliance review alters the dynamic between the officer and the hotel to be searched, and reduces the risk that officers will use these administrative searches as a pretext to harass business owners.

Finally, we underscore the narrow nature of our holding. Respondents have not challenged and nothing in our opinion calls into question those parts of § 41.49 that require hotel operators to maintain guest registries containing certain information. And, even absent legislative action to create a procedure along the lines discussed above, see *supra*, at 422, police will not be prevented from obtaining access to these documents. As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued *ex parte*—or if some other exception to the warrant requirement applies, including exigent circumstances.[4]

---

[4] In suggesting that our holding today will somehow impede law enforcement from achieving its important aims, JUSTICE SCALIA relies on instances where hotels were used as "prisons for migrants smuggled across the border and held for ransom" or as "rendezvous sites where child sex workers meet their clients on threat of violence from their pro-

B

Rather than arguing that § 41.49(3)(a) is constitutional under the general administrative search doctrine, the City and JUSTICE SCALIA contend that hotels are "closely regulated," and that the ordinance is facially valid under the more relaxed standard that applies to searches of this category of businesses. Brief for Petitioner 28–47; *post*, at 432. They are wrong on both counts.

Over the past 45 years, the Court has identified only four industries that "have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise," *Barlow's, Inc.*, 436 U. S., at 313. Simply listing these industries refutes petitioner's argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), firearms dealing, *United States* v. *Biswell*, 406 U. S. 311, 311–312 (1972), mining, *Donovan* v. *Dewey*, 452 U. S. 594 (1981), or running an automobile junkyard, *New York* v. *Burger*, 482 U. S. 691 (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. See, *e. g.*, *id.*, at 709 ("Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts"); *Dewey*, 452 U. S., at 602 (describing the mining industry as "among the most hazardous in the country").[5]

Moreover, "[t]he clear import of our cases is that the closely regulated industry . . . is the exception." *Barlow's, Inc.*, 436 U. S., at 313. To classify hotels as pervasively regulated would permit what has always been a narrow excep-

---

curers." See *post*, at 429. It is hard to imagine circumstances more exigent than these.

[5] JUSTICE SCALIA's effort to depict hotels as raising a comparable degree of risk rings hollow. See *post*, at 428–429, 441. Hotels—like practically all commercial premises or services—can be put to use for nefarious ends. But unlike the industries that the Court has found to be closely regulated, hotels are not intrinsically dangerous.

tion to swallow the rule. The City wisely refrains from arguing that § 41.49 itself renders hotels closely regulated. Nor do any of the other regulations on which petitioner and JUSTICE SCALIA rely—regulations requiring hotels to, *inter alia*, maintain a license, collect taxes, conspicuously post their rates, and meet certain sanitary standards—establish a comprehensive scheme of regulation that distinguishes hotels from numerous other businesses. See Brief for Petitioner 33–34 (citing regulations); *post*, at 433–434 (same). All businesses in Los Angeles need a license to operate. LAMC §§ 21.03(a), 21.09(a). While some regulations apply to a smaller set of businesses, see, *e. g.*, Cal. Code Regs., tit. 25, § 40 (2015) (requiring linens to be changed between rental guests), online at http://www.oal.ca.gov/ccr.htm, these can hardly be said to have created a "'comprehensive'" scheme that puts hotel owners on notice that their "'property will be subject to periodic inspections undertaken for specific purposes,'" *Burger*, 482 U. S., at 705, n. 16 (quoting *Dewey*, 452 U. S., at 600). Instead, they are more akin to the widely applicable minimum wage and maximum hour rules that the Court rejected as a basis for deeming "the entirety of American interstate commerce" to be closely regulated in *Barlow's, Inc.* 436 U. S., at 314. If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify. See Brief for Google Inc. as *Amicus Curiae* 16–17; Brief for the Chamber of Commerce of United States of America as *Amicus Curiae* 12–13.

Petitioner attempts to recast this hodgepodge of regulations as a comprehensive scheme by referring to a "centuries-old tradition" of warrantless searches of hotels. Brief for Petitioner 34–36. History is relevant when determining whether an industry is closely regulated. See, *e. g.*, *Burger*, 482 U. S., at 707. The historical record here, however, is not as clear as petitioner suggests. The City and JUSTICE SCALIA principally point to evidence that hotels were treated

as public accommodations. Brief for Petitioner 34–36; *post*, at 432–433, and n. 1. For instance, the Commonwealth of Massachusetts required innkeepers to "'furnish[] . . . suitable provisions and lodging, for the refreshment and entertainment of strangers and travellers, pasturing and stable room, hay and provender . . . for their horses and cattle.'" Brief for Petitioner 35 (quoting An Act For The Due Regulation Of Licensed Houses (1786), reprinted in Acts and Laws of the Commonwealth of Massachusetts 209 (1893)). But laws obligating inns to provide suitable lodging to all paying guests are not the same as laws subjecting inns to warrantless searches. Petitioner also asserts that "[f]or a long time, [hotel] owners left their registers open to widespread inspection." Brief for Petitioner 51. Setting aside that modern hotel registries contain sensitive information, such as driver's licenses and credit card numbers for which there is no historic analog, the fact that some hotels chose to make registries accessible to the public has little bearing on whether government authorities could have viewed these documents on demand without a hotel's consent.

Even if we were to find that hotels are pervasively regulated, § 41.49 would need to satisfy three additional criteria to be reasonable under the Fourth Amendment: (1) "[T]here must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary' to further [the] regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Burger*, 482 U. S., at 702–703 (internal quotation marks omitted). We assume petitioner's interest in ensuring that hotels maintain accurate and complete registries might fulfill the first of these requirements, but conclude that § 41.49 fails the second and third prongs of this test.

The City claims that affording hotel operators any opportunity for precompliance review would fatally undermine the scheme's efficacy by giving operators a chance to falsify their records. Brief for Petitioner 41–42. The Court has previously rejected this exact argument, which could be made regarding any recordkeeping requirement. See *Barlow's, Inc.*, 436 U. S., at 320 ("[It is not] apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the [Labor] Secretary to seek an *ex parte* warrant to reappear at the premises without further notice to the establishment being inspected"); cf. *Lone Steer*, 464 U. S., at 411, 415 (affirming use of administrative subpoena which provided an opportunity for precompliance review as a means for obtaining "payroll and sales records"). We see no reason to accept it here.

As explained above, nothing in our decision today precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant or, where an officer reasonably suspects the registry would be altered, from guarding the registry pending a hearing on a motion to quash. See *Barlow's, Inc.*, 436 U. S., at 319–321; *Riley*, 573 U. S., at 388. JUSTICE SCALIA's claim that these procedures will prove unworkable given the large number of hotels in Los Angeles is a red herring. See *post*, at 438. While there are approximately 2,000 hotels in Los Angeles, *ibid.*, there is no basis to believe that resort to such measures will be needed to conduct spot checks in the vast majority of them. See *supra*, at 421–422.

Section 41.49 is also constitutionally deficient under the "certainty and regularity" prong of the closely regulated industries test because it fails sufficiently to constrain police officers' discretion as to which hotels to search and under what circumstances. While the Court has upheld inspection schemes of closely regulated industries that called for searches at least four times a year, *Dewey*, 452 U. S., at 604,

or on a "regular basis," *Burger*, 482 U. S., at 711, § 41.49 imposes no comparable standard.

* * *

For the foregoing reasons, we agree with the Ninth Circuit that § 41.49(3)(a) is facially invalid insofar as it fails to provide any opportunity for precompliance review before a hotel must give its guest registry to the police for inspection. Accordingly, the judgment of the Ninth Circuit is affirmed.

It is so ordered.

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

The city of Los Angeles, like many jurisdictions across the country, has a law that requires motels, hotels, and other places of overnight accommodation (hereinafter motels) to keep a register containing specified information about their guests. Los Angeles Municipal Code (LAMC) § 41.49(2) (2015). The purpose of this recordkeeping requirement is to deter criminal conduct, on the theory that criminals will be unwilling to carry on illicit activities in motel rooms if they must provide identifying information at check-in. Because this deterrent effect will only be accomplished if motels actually do require guests to provide the required information, the ordinance also authorizes police to conduct random spot checks of motels' guest registers to ensure that they are properly maintained. § 41.49(3). The ordinance limits these spot checks to the four corners of the register, and does not authorize police to enter any nonpublic area of the motel. To the extent possible, police must conduct these spot checks at times that will minimize any disruption to a motel's business.

The parties do not dispute the governmental interests at stake. Motels not only provide housing to vulnerable transient populations, they are also a particularly attractive site

for criminal activity ranging from drug dealing and prostitution to human trafficking. Offering privacy and anonymity on the cheap, they have been employed as prisons for migrants smuggled across the border and held for ransom, see Sanchez, Immigrant Smugglers Become More Ruthless, Washington Post, June 28, 2004, p. A3; Wagner, Human Smuggling, Arizona Republic, July 23, 2006, p. A1, and rendezvous sites where child sex workers meet their clients on threat of violence from their procurers.

Nevertheless, the Court today concludes that Los Angeles's ordinance is "unreasonable" inasmuch as it permits police to flip through a guest register to ensure it is being filled out without first providing an opportunity for the motel operator to seek judicial review. Because I believe that such a limited inspection of a guest register is eminently reasonable under the circumstances presented, I dissent.

I

I assume that respondents may bring a facial challenge to the City's ordinance under the Fourth Amendment. Even so, their claim must fail because, as discussed *infra*, the law is constitutional in most, if not all, of its applications. See *United States* v. *Salerno*, 481 U. S. 739, 751 (1987). But because the Court discusses the propriety of a facial challenge at some length, I offer a few thoughts.

Article III limits our jurisdiction to "Cases" and "Controversies." Accordingly, "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin* v. *Chafin*, 568 U. S. 165, 172 (2013). To be sure, the *reasoning* of a decision may suggest that there is no permissible application of a particular statute, *Chicago* v. *Morales*, 527 U. S. 41, 77 (1999) (SCALIA, J., dissenting), and under the doctrine of *stare decisis*, this reasoning—to the extent that it is necessary to the holding—will be binding in all future cases. But

in this sense, the facial invalidation of a statute is a logical consequence of the Court's opinion, not the immediate effect of its judgment. Although we have at times described our holdings as invalidating a law, it is always the application of a law, rather than the law itself, that is before us.

The upshot is that the effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it. If a plaintiff elects not to present any case-specific facts in support of a claim that a law is unconstitutional—as is the case here—he will limit the grounds on which a Court may find for him to highly abstract rules that would have broad application in future cases. The decision to do this might be a poor strategic move, especially in a Fourth Amendment case, where the reasonableness of a search is a highly factbound question and general, abstract rules are hard to come by. Cf. *Sibron* v. *New York*, 392 U. S. 40, 59 (1968). But even had the plaintiffs in this case presented voluminous facts in a self-styled as-applied challenge, nothing would force this Court to rely upon those facts rather than the broader principle that the Court has chosen to rely upon. I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.

II

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Grammatically, the two clauses of the Amendment seem to be independent—and directed at entirely different actors. The former tells the executive what it must do when it conducts a search, and the latter tells the judiciary what it must do when it issues a

search warrant. But in an effort to guide courts in applying the Search-and-Seizure Clause's indeterminate reasonableness standard, and to maintain coherence in our case law, we have used the Warrant Clause as a guidepost for assessing the reasonableness of a search, and have erected a framework of presumptions applicable to broad categories of searches conducted by executive officials. Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional *requirement* is that a search be reasonable.

When, for example, a search is conducted to enforce an administrative regime rather than to investigate criminal wrongdoing, we have been willing to modify the probable-cause standard so that a warrant may issue absent individualized suspicion of wrongdoing. Thus, our cases say a warrant may issue to inspect a structure for fire-code violations on the basis of such factors as the passage of time, the nature of the building, and the condition of the neighborhood. *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 538–539 (1967). As we recognized in that case, "reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.*, at 539. And precisely "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" even the presumption that the search of a home without a warrant is unreasonable "is subject to certain exceptions." *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006).

One exception to normal warrant requirements applies to searches of closely regulated businesses. "[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation," and so a warrantless search to enforce those regulations is not unreasonable. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313 (1978). Recognizing that warrantless searches of closely regulated businesses may nevertheless

become unreasonable if arbitrarily conducted, we have required laws authorizing such searches to satisfy three criteria: (1) There must be a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *New York* v. *Burger*, 482 U. S. 691, 702–703 (1987).

Los Angeles's ordinance easily meets these standards.

A

In determining whether a business is closely regulated, this Court has looked to factors including the duration of the regulatory tradition, *id.*, at 705–707, *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72, 75–77 (1970), *Donovan* v. *Dewey*, 452 U. S. 594, 606 (1981); the comprehensiveness of the regulatory regime, *Burger*, *supra*, at 704–705, *Dewey*, *supra*, at 606; and the imposition of similar regulations by other jurisdictions, *Burger*, *supra*, at 705. These factors are not talismans, but shed light on the expectation of privacy the owner of a business may reasonably have, which in turn affects the reasonableness of a warrantless search. See *Barlow's*, *supra*, at 313.

Reflecting the unique public role of motels and their commercial forebears, governments have long subjected these businesses to unique public duties, and have established inspection regimes to ensure compliance. As Blackstone observed, "Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behavior." 4 W. Blackstone, Commentaries on the Laws of England 168 (1765). Justice Story similarly recognized "[t]he soundness

of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder." J. Story, Commentaries on the Law of Bailments § 464, pp. 487–488 (5th ed. 1851). Accordingly, in addition to the obligation to receive any paying guest, "innkeepers are bound to take, not merely ordinary care, but uncommon care, of the goods, money, and baggage of their guests," *id.*, § 470, at 495, as travellers "are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers," *id.*, § 471, at 498.

These obligations were not merely aspirational. At the time of the founding, searches—indeed, warrantless searches—of inns and similar places of public accommodation were commonplace. For example, although Massachusetts was perhaps the State most protective against government searches, "the state code of 1788 still allowed tithingmen to search public houses of entertainment on every Sabbath without any sort of warrant." W. Cuddihy, Fourth Amendment: Origins and Original Meaning 602–1791, p. 743 (2009).[1]

As this evidence demonstrates, the regulatory tradition governing motels is not only longstanding, but comprehensive. And the tradition continues in Los Angeles. The City imposes an occupancy tax upon transients who stay in motels, LAMC § 21.7.3, and makes the motel owner responsible for collecting it, § 21.7.5. It authorizes city officials "to enter [a motel], free of charge, during business hours" in order to "inspect and examine" them to determine whether these tax provisions have been complied with. §§ 21.7.9, 21.15. It requires all motels to obtain a "Transient Occu-

[1] As Beale helpfully confirms, "[f]rom the earliest times the fundamental characteristic of an inn has been its public nature. It is a public house, a house of public entertainment, or, as it is legally phrased, a common inn." J. Beale, The Law of Innkeepers and Hotels § 11, p. 10 (1906).

pancy Registration Certificate," which must be displayed on the premises. § 21.7.6. State law requires motels to "post in a conspicuous place . . . a statement of rate or range of rates by the day for lodging," and forbids any charges in excess of those posted rates. Cal. Civ. Code Ann. § 1863 (West 2010). Hotels must change bed linens between guests, Cal. Code Regs., tit. 25, § 40 (2015), and they must offer guests the option not to have towels and linens laundered daily, LAMC § 121.08. "Multiuse drinking utensils" may be placed in guest rooms only if they are "thoroughly washed and sanitized after each use" and "placed in protective bags." Cal. Code Regs., tit. 17, § 30852. And state authorities, like their municipal counterparts, "may at reasonable times enter and inspect any hotels, motels, or other public places" to ensure compliance. § 30858.

The regulatory regime at issue here is thus substantially *more* comprehensive than the regulations governing junkyards in *Burger*, where licensing, inventory-recording, and permit-posting requirements were found sufficient to qualify the industry as closely regulated. 482 U. S., at 704–705. The Court's suggestion that these regulations are not sufficiently targeted to motels, and are "akin to . . . minimum wage and maximum hour rules," *ante*, at 425, is simply false. The regulations we have described above reach into the "minutest detail[s]" of motel operations, *Barlow's*, *supra*, at 314, and those who enter that business today (like those who have entered it over the centuries) do so with an expectation that they will be subjected to especially vigilant governmental oversight.

Finally, this ordinance is not an outlier. The City has pointed us to more than 100 similar register-inspection laws in cities and counties across the country, Brief for Petitioner 36, and n. 3, and that is far from exhaustive. In all, municipalities in at least 41 States have laws similar to Los Angeles's, Brief for National League of Cities et al. as *Amici Curiae* 16–17, and at least 8 States have their own laws au-

thorizing register inspections, Brief for California et al. as *Amici Curiae* 12–13.

This copious evidence is surely enough to establish that "[w]hen a [motel operator] chooses to engage in this pervasively regulated business . . . he does so with the knowledge that his business records . . . will be subject to effective inspection." *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). And *that* is the relevant constitutional test—not whether this regulatory superstructure is "the same as laws subjecting inns to warrantless searches," or whether, as an historical matter, government authorities not only required these documents to be kept but permitted them to be viewed on demand without a motel's consent. *Ante*, at 426.

The Court's observation that "[o]ver the past 45 years, the Court has identified only four industries" as closely regulated, *ante*, at 424, is neither here nor there. Since we first concluded in *Colonnade Catering* that warrantless searches of closely regulated businesses are reasonable, we have only identified *one* industry as *not* closely regulated, see *Barlow's*, 436 U. S., at 313–314. The Court's statistic thus tells us more about how this Court exercises its discretionary review than it does about the number of industries that qualify as closely regulated. At the same time, lower courts, which do not have the luxury of picking the cases they hear, have identified many more businesses as closely regulated under the test we have announced: pharmacies, *United States* v. *Gonsalves*, 435 F. 3d 64, 67 (CA1 2006); massage parlors, *Pollard* v. *Cockrell*, 578 F. 2d 1002, 1014 (CA5 1978); commercial-fishing operations, *United States* v. *Raub*, 637 F. 2d 1205, 1208–1209 (CA9 1980); day-care facilities, *Rush* v. *Obledo*, 756 F. 2d 713, 720–721 (CA9 1985); nursing homes, *People* v. *Firstenberg*, 92 Cal. App. 3d 570, 578–580, 155 Cal. Rptr. 80, 84–86 (1979); jewelers, *People* v. *Pashigian*, 150 Mich. App. 97, 100–101, 388 N. W. 2d 259, 261–262 (1986) (*per curiam*); barbershops, *Stogner* v. *Kentucky*, 638 F. Supp. 1, 3 (WD Ky. 1985); and yes, even rabbit dealers, *Lesser* v. *Espy*, 34 F. 3d

1301, 1306–1307 (CA7 1994). Like automobile junkyards and catering companies that serve alcohol, many of these businesses are far from "intrinsically dangerous," cf. *ante*, at 424, n. 5. This should come as no surprise. The reason closely regulated industries may be searched without a warrant has nothing to do with the risk of harm they pose; rather, it has to do with the expectations of those who enter such a line of work. See *Barlow's*, *supra*, at 313.

B

The City's ordinance easily satisfies the remaining *Burger* requirements: It furthers a substantial governmental interest, it is necessary to achieving that interest, and it provides an adequate substitute for a search warrant.

Neither respondents nor the Court question the substantial interest of the City in deterring criminal activity. See Brief for Respondents 34–41; *ante*, at 420. The private pain and public costs imposed by drug dealing, prostitution, and human trafficking are beyond contention, and motels provide an obvious haven for those who trade in human misery.

Warrantless inspections are also necessary to advance this interest. Although the Court acknowledges that law enforcement can enter a motel room without a warrant when exigent circumstances exist, see *ante*, at 423, n. 4, the whole reason criminals use motel rooms in the first place is that they offer privacy and secrecy, so that police will never come to discover these exigencies. The recordkeeping requirement, which all parties admit is permissible, therefore operates by *deterring* crime. Criminals, who depend on the anonymity that motels offer, will balk when confronted with a motel's demand that they produce identification. And a motel's evasion of the recordkeeping requirement fosters crime. In San Diego, for example, motel owners were indicted for collaborating with members of the Crips street gang in the prostitution of underage girls; the motel owners "set aside rooms apart from the rest of their legitimate customers

where girls and women were housed, charged the gang members/pimps a higher rate for the rooms where 'dates' or 'tricks' took place, and warned the gang members of inquiries by law enforcement." Office of the Attorney General, Cal. Dept. of Justice, The State of Human Trafficking in California 25 (2012). The warrantless inspection requirement provides a necessary incentive for motels to maintain their registers thoroughly and accurately: They never know when law enforcement might drop by to inspect.

Respondents and the Court acknowledge that *inspections* are necessary to achieve the purposes of the recordkeeping regime, but insist that *warrantless* inspections are not. They have to acknowledge, however, that the motel operators who conspire with drug dealers and procurers may demand precompliance judicial review simply as a pretext to buy time for making fraudulent entries in their guest registers. The Court therefore must resort to arguing that warrantless inspections are not "necessary" because other alternatives exist.

The Court suggests that police could obtain an administrative subpoena to search a guest register and, if a motel moves to quash, the police could "guar[d] the registry pending a hearing" on the motion. *Ante*, at 427. This proposal is equal parts 1984 and Alice in Wonderland. It protects motels from government inspection of their registers by authorizing government agents to seize the registers[2] (if "guarding" entails forbidding the register to be moved) or to upset guests by a prolonged police presence at the motel. The Court also notes that police can obtain an *ex parte* warrant before conducting a register inspection. *Ibid.* Presumably such warrants could issue without probable cause of wrongdoing by a particular motel, see *Camara*, 387 U. S., at

[2] We are not at all "baffled at the idea that . . . police officers may seize something that they cannot immediately search." *Ante*, at 422, n. 3. We are baffled at the idea that anyone would think a seizure of required records less intrusive than a visual inspection.

535–536; otherwise, this would be no alternative at all. Even so, under this regime police would have to obtain an *ex parte* warrant before *every* inspection. That is because law enforcement would have no way of knowing ahead of time which motels would refuse consent to a search upon request; and if they wait to obtain a warrant until consent is refused, motels will have the opportunity to falsify their guest registers while the police jump through the procedural hoops required to obtain a warrant. It is quite plausible that the costs of this always-get-a-warrant "alternative" would be prohibitive for a police force in one of America's largest cities, juggling numerous law-enforcement priorities, and confronting more than 2,000 motels within its jurisdiction. E. Wallace, K. Pollock, B. Horth, S. Carty, & N. Elyas, Los Angeles Tourism: A Domestic and International Analysis 7 (May 2014), online at http://www.lachamber.com/client uploads/Global_Programs/WTW/2014/LATourism_LMU_May2014.pdf (as visited June 19, 2015, and available in Clerk of Court's case file). To be sure, the fact that obtaining a warrant might be costly will not by itself render a warrantless search reasonable under the Fourth Amendment; but it can render a warrantless search *necessary* in the context of an administrative-search regime governing closely regulated businesses.

But all that discussion is in any case irrelevant. The administrative search need only be reasonable. It is not the burden of Los Angeles to show that there are no less restrictive means of achieving the City's purposes. Sequestration or *ex parte* warrants were *possible* alternatives to the warrantless-search regimes approved by this Court in *Colonnade Catering*, *Biswell*, *Dewey*, and *Burger*. By importing a least-restrictive-means test into *Burger*'s Fourth Amendment framework, today's opinion implicitly overrules that entire line of cases.

Finally, the City's ordinance provides an adequate substitute for a warrant. Warrants "advise the owner of the scope

and objects of the search, beyond which limits the inspector is not expected to proceed." *Barlow's*, 436 U. S., at 323. Ultimately, they aim to protect against "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Ibid.*

Los Angeles's ordinance provides that the guest register must be kept in the guest reception or guest check-in area, or in an adjacent office, and that it "be made available to any officer of the Los Angeles Police Department for inspection. Whenever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." LAMC § 41.49(3). Nothing in the ordinance authorizes law enforcement to enter a nonpublic part of the motel. Compare this to the statute upheld in *Colonnade Catering*, which provided that "'[t]he Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects,'" 397 U. S., at 73, n. 2 (quoting 26 U. S. C. § 7606(a) (1964 ed.)); or the one in *Biswell*, which stated that "'[t]he Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . , and (2) any firearms or ammunition kept or stored,'" 406 U. S., at 312, n. 1 (quoting 18 U. S. C. § 923(g) (1970 ed.)); or the one in *Dewey*, which granted federal mine inspectors "'a right of entry to, upon, or through any coal or other mine,'" 452 U. S., at 596 (quoting 30 U. S. C. § 813(a) (1976 ed., Supp. III)); or the one in *Burger*, which compelled junkyard operators to "'produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises,'" 482 U. S., at 694, n. 1 (quoting N. Y. Veh. &

Traf. Law § 415–a5 (McKinney 1986)). The Los Angeles ordinance—which limits warrantless police searches to the pages of a guest register in a public part of a motel—circumscribes police discretion in much more exacting terms than the laws we have approved in our earlier cases.

The Court claims that Los Angeles's ordinance confers too much discretion because it does not adequately limit the *frequency* of searches. Without a trace of irony, the Court tries to distinguish Los Angeles's law from the laws upheld in *Dewey* and *Burger* by pointing out that the latter regimes required inspections at least four times a year and on a "'regular basis,'" respectively. *Ante*, at 427–428. But the warrantless police searches of a business "10 times a day, every day, for three months" that the Court envisions under Los Angeles's regime, *ante*, at 421, are entirely consistent with the regimes in *Dewey* and *Burger*; 10 times a day, every day, is "at least four times a year," and on a (much too) "'regular basis.'" *Ante*, at 427–428.

That is not to say that the Court's hypothetical searches are necessarily constitutional. It is only to say that Los Angeles's ordinance presents no greater risk that such a hypothetical will materialize than the laws we have already upheld. As in our earlier cases, we should leave it to lower courts to consider on a case-by-case basis whether warrantless searches have been conducted in an unreasonably intrusive or harassing manner.

III

The Court reaches its wrongheaded conclusion not simply by misapplying our precedent, but by mistaking our precedent for the Fourth Amendment itself. Rather than bother with the text of that Amendment, the Court relies exclusively on our administrative-search cases, *Camara*, *See* v. *Seattle*, 387 U. S. 541 (1967), and *Barlow's*. But the Constitution predates 1967, and it remains the supreme law of the land today. Although the categorical framework our jurisprudence has erected in this area may provide us guidance,

it is guidance to answer the constitutional question at issue: whether the challenged search is *reasonable*.

An administrative, warrantless-search ordinance that narrowly limits the scope of searches to a single business record, that does not authorize entry upon premises not open to the public, and that is supported by the need to prevent fabrication of guest registers, is, to say the least, far afield from the laws at issue in the cases the Court relies upon. The Court concludes that such minor intrusions, permissible when the police are trying to tamp down the market in stolen auto parts, are "unreasonable" when police are instead attempting to stamp out the market in child sex slaves.

Because I believe that the limited warrantless searches authorized by Los Angeles's ordinance are reasonable under the circumstances, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

After today, the city of Los Angeles can never, under any circumstances, enforce its 116-year-old requirement that hotels make their registers available to police officers. That is because the Court holds that § 41.49(3)(a) of the Los Angeles Municipal Code (2015) is *facially* unconstitutional. Before entering a judgment with such serious safety and federalism implications, the Court must conclude that every application of this law is unconstitutional—*i. e.*, that " 'no set of circumstances exists under which the [law] would be valid.' " *Ante*, at 417 (quoting *United States* v. *Salerno*, 481 U. S. 739, 745 (1987)). I have doubts about the Court's approach to administrative searches and closely regulated industries. *Ante*, at 419–428. But even if the Court were 100% correct, it still should uphold § 41.49(3)(a) because many other applications of this law are constitutional. Here are five examples.

Example One. The police have probable cause to believe that a register contains evidence of a crime. They go to a judge and get a search warrant. The hotel operator, how-

ever, refuses to surrender the register, but instead stashes it away. Officers could tear the hotel apart looking for it. Or they could simply order the operator to produce it. The Fourth Amendment does not create a right to defy a warrant. Hence § 41.49(3)(a) could be constitutionally applied in this scenario. Indeed, the Court concedes that it is proper to apply a California obstruction of justice law in such a case. See *ante*, at 419, n. 1; Brief for Respondents 49. How could applying a city law with a similar effect be different? No one thinks that overlapping laws are unconstitutional. See, *e. g.*, *Yates* v. *United States*, 574 U. S. 528, 562 (2015) (KAGAN, J. dissenting) ("Overlap—even significant overlap—abounds in criminal law") (collecting citations). And a specific law gives more notice than a general law.

In any event, the Los Angeles ordinance is arguably broader in at least one important respect than the California obstruction of justice statute on which the Court relies. *Ante*, at 419, n. 1. The state law applies when a person "willfully resists, delays, or obstructs any public officer . . . in the discharge or attempt to discharge any duty of his or her office." Cal. Penal Code Ann. § 148(a)(1) (West 2014). In the example set out above, suppose that the hotel operator, instead of hiding the register, simply refused to tell the police where it is located. The Court cites no California case holding that such a refusal would be unlawful, and the city of Los Angeles submits that under California law, "[o]bstruction statutes prohibit a hotel owner from *obstructing* a search, but they do not require affirmative assistance." Reply Brief 5. The Los Angeles ordinance, by contrast, unequivocally requires a hotel operator to make the register available on request.

Example Two. A murderer has kidnapped a woman with the intent to rape and kill her and there is reason to believe he is holed up in a certain motel. The Fourth Amendment's reasonableness standard accounts for exigent circumstances. See, *e. g.*, *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006).

When the police arrive, the motel operator folds her arms and says the register is locked in a safe. Invoking § 41.49(3)(a), the police order the operator to turn over the register. She refuses. The Fourth Amendment does not protect her from arrest.

Example Three. A neighborhood of "pay by the hour" motels is a notorious gathering spot for child-sex traffickers. Police officers drive through the neighborhood late one night and see unusual amounts of activity at a particular motel. The officers stop and ask the motel operator for the names of those who paid with cash to rent rooms for less than three hours. The operator refuses to provide the information. Requesting to see the register—and arresting the operator for failing to provide it—would be reasonable under the "totality of the circumstances." *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996). In fact, the Court has upheld a similar reporting duty against a Fourth Amendment challenge where the scope of information required was also targeted and the public's interest in crime prevention was no less serious. See *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 39, n. 15, 66–67 (1974) (having "no difficulty" upholding a requirement that banks must provide reports about transactions involving more than $10,000, including the name, address, occupation, and social security number of the customer involved, along with a summary of the transaction, the amount of money at issue, and the type of identification presented).

Example Four. A motel is operated by a dishonest employee. He has been charging more for rooms than he records, all the while pocketing the difference. The owner finds out and eagerly consents to a police inspection of the register. But when officers arrive and ask to see the register, the operator hides it. The Fourth Amendment does not allow the operator's refusal to defeat the owner's consent. See, *e. g.*, *Mancusi* v. *DeForte*, 392 U. S. 364, 369–370 (1968). Accordingly, it would not violate the Fourth Amendment to arrest the operator for failing to make the register "available

to any officer of the Los Angeles Police Department for inspection." § 41.49(3)(a).

Example Five. A "mom and pop" motel always keeps its old-fashioned guest register open on the front desk. Anyone who wants to can walk up and leaf through it. (Such motels are not as common as they used to be, but Los Angeles is a big place.) The motel has no reasonable expectation of privacy in the register, and no one doubts that police officers—like anyone else—can enter into the lobby. See, *e. g.*, *Florida* v. *Jardines*, 569 U. S. 1, 8 (2013); *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 413 (1984). But when an officer starts looking at the register, as others do, the motel operator at the desk snatches it away and will not give it back. Arresting that person would not violate the Fourth Amendment.

These are just five examples. There are many more. The Court rushes past examples like these by suggesting that § 41.49(3)(a) does no "work" in such scenarios. *Ante*, at 419. That is not true. Under threat of legal sanction, this law orders hotel operators to do things they do not want to do. To be sure, there may be circumstances in which § 41.49(3)(a)'s command conflicts with the Fourth Amendment, and in those circumstances the Fourth Amendment is supreme. See U. S. Const., Art. VI, cl. 2. But no different from any other local law, the remedy for such circumstances should be an as-applied injunction *limited to the conflict with the Fourth Amendment*. Such an injunction would protect a hotel from being "searched 10 times a day, every day, for three months, without any violation being found." *Ante*, at 421. But unlike facial invalidation, an as-applied injunction does not produce collateral damage. Section 41.49(3)(a) should be enforceable in those many cases in which the Fourth Amendment is not violated.

There are serious arguments that the Fourth Amendment's application to warrantless searches and seizures is inherently inconsistent with facial challenges. See *Sibron* v.

New York, 392 U. S. 40, 59, 62 (1968) (explaining that because of the Fourth Amendment's reasonableness requirement, "[t]he constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case"); Brief for Manhattan Institute for Policy Research as *Amicus Curiae* 33 ("A constitutional claim under the first clause of the Fourth Amendment is never a 'facial' challenge, because it is always and inherently a challenge to executive action"). But assuming such facial challenges ever make sense conceptually, this particular one fails under basic principles of facial invalidation. The Court's contrary holding is befuddling. I respectfully dissent.

Syllabus

KIMBLE ET AL. *v.* MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC.

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

No. 13–720. Argued March 31, 2015—Decided June 22, 2015

Respondent Marvel Entertainment's corporate predecessor agreed to purchase petitioner Stephen Kimble's patent for a Spider-Man toy in exchange for a lump sum plus a 3% royalty on future sales. The agreement set no end date for royalties. As the patent neared the end of its statutory 20-year term, Marvel discovered *Brulotte* v. *Thys Co.*, 379 U. S. 29, in which this Court held that a patentee cannot continue to receive royalties for sales made after his patent expires. Marvel then sought a declaratory judgment in federal district court confirming that it could stop paying Kimble royalties. The district court granted relief, and the Ninth Circuit affirmed. Kimble now asks this Court to overrule *Brulotte*.

Held: *Stare decisis* requires this Court to adhere to *Brulotte*. Pp. 451–465.

(a) A patent typically expires 20 years from its application date. 35 U. S. C. § 154(a)(2). At that point, the unrestricted right to make or use the article passes to the public. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230. This Court has carefully guarded the significance of that expiration date, declining to enforce laws and contracts that restrict free public access to formerly patented, as well as unpatentable, inventions. See, *e. g.*, *id.*, at 230–233; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 255–256.

Brulotte applied that principle to a patent licensing agreement that provided for the payment of royalties accruing after the patent's expiration. 379 U. S., at 30. The Court held that the post-patent royalty provision was "unlawful *per se*," *id.*, at 30, 32, because it continued "the patent monopoly beyond the [patent] period," *id.*, at 33, and, in so doing, conflicted with patent law's policy of establishing a "post-expiration . . . public domain," *ibid.*

The *Brulotte* rule may prevent some parties from entering into deals they desire, but parties can often find ways to achieve similar outcomes. For example, *Brulotte* leaves parties free to defer payments for pre-expiration use of a patent, tie royalties to non-patent rights, or make non-royalty-based business arrangements. Contending that such alternatives are not enough, Kimble asks this Court to abandon *Brulotte*'s

bright-line rule in favor of a case-by-case approach based on antitrust law's "rule of reason." Pp. 451–455.

(b) The doctrine of *stare decisis* provides that today's Court should stand by yesterday's decisions. Application of that doctrine, though "not an inexorable command," is the "preferred course." *Payne* v. *Tennessee*, 501 U. S. 808, 828, 827. Overruling a case always requires "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266. Where, as here, the precedent interprets a statute, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress. See, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173. Congress, moreover, has spurned multiple opportunities to reverse *Brulotte*, see *Watson* v. *United States*, 552 U. S. 74, 82–83, and has even rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the standard Kimble urges. In addition, *Brulotte* implicates property and contract law, two contexts in which considerations favoring *stare decisis* are "at their acme," *Payne*, 501 U. S., at 828, because parties are especially likely to rely on such precedents when ordering their affairs.

Given those good reasons for adhering to *stare decisis* in this case, this Court would need a very strong justification for overruling *Brulotte*. But traditional justifications for abandoning *stare decisis* do not help Kimble here. First, *Brulotte*'s doctrinal underpinnings have not eroded over time. The patent statute at issue in *Brulotte* is essentially unchanged. And the precedent on which the *Brulotte* Court primarily relied, like other decisions enforcing a patent's cut-off date, remains good law. Indeed, *Brulotte*'s close relation to a whole web of precedents means that overruling it could threaten others. Second, nothing about *Brulotte* has proved unworkable. See *Patterson*, 491 U. S., at 173. To the contrary, the decision itself is simple to apply—particularly as compared to Kimble's proposed alternative, which can produce high litigation costs and unpredictable results. Pp. 455–460.

(c) Neither of the justifications Kimble offers gives cause to overrule *Brulotte*. Pp. 460–465.

(1) Kimble first argues that *Brulotte* hinged on an economic error—*i. e.*, an assumption that post-expiration royalties are always anticompetitive. This Court sees no error in Kimble's economic analysis. But even assuming Kimble is right that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. The patent laws are not like the Sherman Act, which gives courts exceptional authority to shape the law and reconsider precedent based on better economic analysis. Moreover, Kimble's argument is based not on evolving economic

theory but rather on a claim that the *Brulotte* Court simply made the wrong call. That claim fails to clear *stare decisis*'s high bar. In any event, *Brulotte* did not even turn on the notion that post-patent royalties harm competition. Instead, the *Brulotte* Court simply applied the categorical principle that all patent-related benefits must end when the patent term expires. Kimble's real complaint may go to the merits of that principle as a policy matter. But Congress, not this Court, gets to make patent policy. Pp. 460–463.

(2) Kimble also argues that *Brulotte* suppresses technological innovation and harms the national economy by preventing parties from reaching agreements to commercialize patents. This Court cannot tell whether that is true. *Brulotte* leaves parties free to enter alternative arrangements that may suffice to accomplish parties' payment deferral and risk-spreading goals. And neither Kimble nor his *amici* offer any empirical evidence connecting *Brulotte* to decreased innovation. In any event, claims about a statutory precedent's consequences for innovation are "more appropriately addressed to Congress." *Halliburton*, 573 U. S., at 277. Pp. 463–465.

727 F. 3d 856, affirmed.

KAGAN, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 465.

Roman Melnik argued the cause for petitioners. With him on the briefs were *Kenneth Weatherwax*, *Flavio M. Rose*, and *Antonio R. Durando*.

Thomas G. Saunders argued the cause for respondent. With him on the brief were *Seth P. Waxman*, *Matthew Guanieri*, and *Paul R. Q. Wolfson*.

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Mizer*, *Curtis E. Gannon*, *Mark R. Freeman*, and *Katherine Twomey Allen*.*

---

*Briefs of *amici curiae* urging reversal were filed for Biotime, Inc., by *Robert H. Stier, Jr.*; for the Center for Intellectual Property Research of the Indiana University Maurer School of Law et al. by *Mark D. Janis*; for the Intellectual Property Owners Association by *Robert P. Taylor*, *Philip*

JUSTICE KAGAN delivered the opinion of the Court.

In *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), this Court held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis*, we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as "a spider person" by shooting webs—really, pressurized foam string—"from the palm of [the] hand." U. S. Patent No. 5,072,856, Abstract (filed May 25, 1990).[1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider-Man, among other comic-book characters. Seeking to sell or license his patent, Kim-

---

S. Johnson, and *Kevin H. Rhoads*; for the Memorial Sloan Kettering Cancer Center et al. by *Harvey M. Stone* and *Richard H. Dolan*; for the New York Intellectual Property Law Association by *Jeffrey I. D. Lewis*, *Scott B. Howard*, *Anthony Lo Cicero*, *Charles R. Macedo*, and *David F. Ryan*; and for the University of Massachusetts Biologic Laboratories by *Donald R. Ware*.

Briefs of *amici curiae* urging affirmance were filed for Nautilus, Inc., by *David Lieberworth*; for Public Knowledge by *Charles Duan*; for the Washington Legal Foundation by *Richard A. Samp*; and for the William Mitchell College of Law Intellectual Property Institute by *R. Carl Moy*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Paul M. Smith*, *Joshua M. Segal*, and *Sharon A. Israel*; for the Association of the Bar of the City of New York by *Fiona Schaeffer* and *Aaron L. Pereira*; for the Intellectual Property Law Association of Chicago by *David L. Applegate*, *Charles W. Shifley*, and *Donald W. Rupert*; for the Licensing Executives Society (U. S. A. and Canada), Inc., by *Brian P. O'Shaughnessy* and *Brian S. Seal*; and for Robin Feldman et al. by *Ms. Feldman*, *pro se*.

[1] Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we refer only to Kimble.

ble met with the president of Marvel's corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the "Web Blaster"—a toy that, like Kimble's patented invention, enables would-be action heroes to mimic Spider-Man through the use of a polyester glove and a canister of foam.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble's patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel's future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte*, the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent's expiration. See 379 U. S., at 32. So the decision's effect was to sunset the settlement's royalty clause.[2] On making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision . . . unenforceable after the expiration of the Kimble patent." 692 F. Supp. 2d 1156, 1161 (Ariz. 2010). The Court of Appeals for the Ninth Circuit affirmed, though making clear that it

[2] In *Brulotte*, the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See 379 U. S., at 29–30. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, "is counterintuitive and its rationale is arguably unconvincing." 727 F. 3d 856, 857 (2013).

We granted certiorari, 574 U. S. 1058 (2014), to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.[3] For reasons of *stare decisis*, we demur.

II

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See 35 U. S. C. § 154(a)(1). But a patent typically expires 20 years from the day the application for it was filed. See § 154(a)(2). And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230 (1964).

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have

---

[3] See, *e. g.*, *Scheiber* v. *Dolby Labs., Inc.*, 293 F. 3d 1014, 1017–1018 (CA7 2002) (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized . . . . However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies, 97 Mich. L. Rev. 985, 1027 (1999) ("Our analysis . . . suggests that *Brulotte* should be overruled").

struck down state statutes with that consequence. See, *e. g.*, *id.*, at 230–233; *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 152, 167–168 (1989); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234, 237–238 (1964). By virtue of federal law, we reasoned, "an article on which the patent has expired," like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears*, 376 U. S., at 231. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249 (1945), for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive . . . the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id.*, at 256. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id.*, at 255–256; see also, *e. g.*, *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394, 400–401 (1947) (ruling that *Scott Paper* applies to licensees); *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 668–675 (1969) (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8-1 vote) held the agreement unenforceable—"unlawful *per se*"—to the extent it provided for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." 379 U. S., at 30, 32. To arrive at that conclusion, the Court began with the statutory provision setting the length of a patent term. See *id.*, at 30 (quoting the then-current version of § 154). Emphasizing that a

patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper*: Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." 379 U. S., at 31 (quoting 326 U. S., at 256). In the *Brulotte* Court's view, contracts to pay royalties for such use continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. 379 U. S., at 33. And in so doing, those agreements conflict with patent law's policy of establishing a "post-expiration . . . public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e. g.*, 3 R. Milgrim & E. Bensen, Milgrim on Licensing § 18.05, p. 18–9 (2013). As to either goal, *Brulotte* may pose an obstacle.

Yet parties can often find ways around *Brulotte*, enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are

royalties for using an invention after it has moved into the public domain. See 379 U. S., at 31; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 136 (1969). A licensee could agree, for example, to pay the licensor a sum equal to 10% of sales during the 20-year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte*, royalties may run until the latest-running patent covered in the parties' agreement expires. See 379 U. S., at 30. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e. g.*, 3 Milgrim on Licensing § 18.07, at 18–16 to 18–17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997). Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be

able to curtail competition. See Brief for Petitioners 47–48; *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 44 (2006) ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 3.2e, p. 3–12.1 (2d ed., Supp. 2014) (Hovenkamp)).

III

Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991). It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well

what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014).

What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). That is true, contrary to the dissent's view, see *post*, at 471 (opinion of ALITO, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e. g.*, *Bilski* v. *Kappos*, 561 U. S. 593, 601–602 (2010). Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton*, 573 U. S., at 274. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees. *Brulotte* has governed licensing agreements for more than half a century. See *Watson* v. *United States*, 552 U. S. 74, 82–83 (2007) (stating that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (35 U. S. C. § 154) on which *Brulotte* rested. See, *e. g.*, Uruguay Round Agreements Act, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, § 201, 102 Stat. 4676

(limiting patent-misuse claims). *Brulotte s*urvived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e. g.*, S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices . . . unless such practices . . . violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., § 201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements). And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E. g.*, *Payne*, 501 U. S., at 828; *Khan*, 522 U. S., at 20. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32–33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations § 3.13, p. 3–13, and n. 2 (2014) (noting that it is not "necessary to specify the term . . . of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements . . . actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reason-

able possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.

As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte*'s statutory and doctrinal underpinnings have not eroded over time. When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson*, 491 U. S., at 173 (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: Section 154 now, as then, draws a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention after its patent's expiration. See *supra*, at 451–452. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra*, at 451–452. *Brulotte*, then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Cf., *e. g.*, *Alleyne* v. *United States*, 570 U. S. 99, 119–121 (2013) (SOTOMAYOR, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law.[4]

[4] The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i. e.*, contracts conditioning a licensee's right to use a patent on the purchase of an unpatented prod-

And second, nothing about *Brulotte* has proved unworkable. See, *e. g.*, *Patterson*, 491 U. S., at 173 (identifying unworkability as another "traditional justification" for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte*'s ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ antitrust law's rule of reason to identify and invalidate those post-expiration royalty clauses with anticompetitive consequences. See *supra*, at 454–455. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces notoriously high litigation costs and unpredictable results. *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 343 (1982). For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most

---

uct. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (adding the market power requirement in the patent-misuse context); *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U. S. 28, 41–43 (2006) (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte*'s legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." 379 U. S., at 32. And even if that analogy played some real role in *Brulotte*, the development of tying law would not undercut the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra*, at 457 (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte*, and so further supports adhering to *stare decisis*.

usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post*, at 465–468.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte*, but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id.*, at 36–40. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra*, at 453. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12–13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38–39. In light of those realities, Kimble

concludes, "the *Brulotte per se* rule makes little sense." *Id.*, at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.*, at 13–18 (citing numerous treatises and articles critiquing *Brulotte*). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55–56 (citing, *e. g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007); *Illinois Tool Works*, 547 U. S. 28). But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming Kimble accurately characterizes *Brulotte*'s basis, does the decision's economic mistake suffice to overcome *stare decisis*? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e. g.*, *Khan*, 522 U. S., at 20–21. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 731–732 (1988). We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See *Leegin*, 551 U. S., at 899–900. Moreover, because the question in those cases was

whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See *Business Electronics Corp.*, 485 U. S., at 731. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." *Halliburton*, 573 U. S., at 271.

But *Brulotte* is a patent rather than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See *supra*, at 456. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See *supra*, at 455–456. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Cf., *e. g.*, *Halliburton*, 573 U. S., at 270–274 (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36–40. That claim, even if itself dead-right, fails to clear *stare decisis*'s high bar.

And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra*, the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint

of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See *Brulotte*, 379 U. S., at 30–32; *supra*, at 452–453. Or more specifically put, the Court held, as it had in *Scott Paper*, that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See *Brulotte*, 379 U. S., at 31–32 (a licensee's obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so "runs counter to the policy and purpose of the patent laws" (quoting *Scott Paper*, 326 U. S., at 256)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp § 3.2d, at 3–10.

Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]," and its detachment from "economic reality." Brief for Petitioners 27–28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte*, he

contends, "discourages technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra*, at 453. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." *Id.*, at 33.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral and risk-spreading alike. See *supra*, at 453–454. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." *Halliburton*,

573 U. S., at 277. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, considering concerns of just the kind Kimble raises. See *supra*, at 456–457. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

V

What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee & S. Ditko, Amazing Fantasy No. 15: Spider-Man! p. 11 (1962) ("[I]n this world, with great power there must also come—great responsibility"). Finding many reasons for staying the *stare decisis* course and no "special justification" for departing from it, we decline Kimble's invitation to overrule *Brulotte*.

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

It is so ordered.

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

The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964), held that parties cannot enter into a patent licensing agreement that provides for royalty payments to continue after the term of the patent expires. That decision was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an

economic theory—and one that has been debunked. The decision interferes with the ability of parties to negotiate licensing agreements that reflect the true value of a patent, and it disrupts contractual expectations. *Stare decisis* does not require us to retain this baseless and damaging precedent.

I

A

The Patent Act provides that a patent grants certain exclusive rights to the patentee and "his heirs or assigns" for a term of 20 years. 35 U. S. C. §§ 154(a)(1) and (2). The Act says nothing whatsoever about post-expiration royalties. In *Brulotte*, however, the Court held that such royalties are *per se* unlawful. The Court made little pretense of finding support for this holding in the language of the Act. Instead, the Court reasoned that allowing post-expiration royalties would subject "the free market visualized for the post-expiration period . . . to monopoly influences that have no proper place there." 379 U. S., at 32–33. Invoking antitrust concepts, the decision suggested that such arrangements are "an effort to enlarge the monopoly of the patent by t[y]ing the sale or use of the patented article to the purchase or use of unpatented ones." *Id.*, at 33.

Whatever the merits of this economic argument, it does not represent a serious attempt to interpret the Patent Act. A licensing agreement that provides for the payment of royalties after a patent's term expires does not enlarge the patentee's monopoly or extend the term of the patent. It simply gives the licensor a contractual right. Thus, nothing in the text of the Act even arguably forbids licensing agreements that provide for post-expiration royalties.

Brulotte was thus a bald act of policymaking. It was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.

B

Not only was *Brulotte* based on policymaking, it was based on a policy that is difficult to defend. Indeed, in the intervening 50 years, its reasoning has been soundly refuted. See, *e. g.*, 10 P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶1782c.3, pp. 554–556 (3d ed. 2011); See & Caprio, The Trouble with *Brulotte*: The Patent Royalty Term and Patent Monopoly Extension, 1990 Utah L. Rev. 813, 846–851; *Scheiber* v. *Dolby Labs., Inc.*, 293 F. 3d 1014, 1017 (CA7 2002); Brief for Petitioners 23–25, and n. 11 (collecting sources); *ante*, at 451, n. 3.

Brulotte misperceived the purpose and effect of post-expiration royalties. The decision rested on the view that post-expiration royalties extend the patent term by means of an anticompetitive tying arrangement. As the Court understood such an arrangement, the patent holder leverages its monopoly power during the patent term to require payments after the term ends, when the invention would otherwise be available for free public use. But agreements to pay licensing fees after a patent expires do not "enlarge the monopoly of the patent." 379 U. S., at 33. Instead, "[o]nce the patent term expires, the power to exclude is gone," and all that is left "is a problem about optimal contract design." Easterbrook, Contract and Copyright, 42 Hous. L. Rev. 953, 955 (2005).

The economics are simple: Extending a royalty term allows the parties to spread the licensing fees over a longer period of time, which naturally has the effect of reducing the fees during the patent term. See *ante*, at 453. Restricting royalty payments to the patent term, as *Brulotte* requires, compresses payment into a shorter period of higher fees. The Patent Act does not prefer one approach over the other.

There are, however, good reasons why parties sometimes prefer post-expiration royalties over upfront fees, and why

such arrangements have procompetitive effects. Patent holders and licensees are often unsure whether a patented idea will yield significant economic value, and it often takes years to monetize an innovation. In those circumstances, deferred royalty agreements are economically efficient. They encourage innovators, like universities, hospitals, and other institutions, to invest in research that might not yield marketable products until decades down the line. See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 8–12. And they allow producers to hedge their bets and develop more products by spreading licensing fees over longer periods. See *ibid.* By prohibiting these arrangements, *Brulotte* erects an obstacle to efficient patent use. In patent law and other areas, we have abandoned *per se* rules with similarly disruptive effects. See, *e. g.*, *Illinois Tool Works Inc.* v. *Independent Ink*, *Inc.*, 547 U. S. 28 (2006); *Leegin Creative Leather Products*, *Inc.* v. *PSKS*, *Inc.*, 551 U. S. 877 (2007).

The majority downplays this harm by insisting that "parties can often find ways around *Brulotte*." *Ante*, at 453. But the need to avoid *Brulotte* is an economic inefficiency in itself. Parties are not always aware of the prohibition—as this case amply demonstrates. And the suggested alternatives do not provide the same benefits as post-expiration royalty agreements. For instance, although an agreement to amortize payments for sales during the patent term would "bring down early outlays," the Court admits that such an agreement might not reflect the parties' risk preferences. *Ante*, at 454. Moreover, such an arrangement would not necessarily yield the same amount of total royalties, particularly for an invention or a medical breakthrough that takes decades to develop into a marketable product. The sort of agreements that *Brulotte* prohibits would allow licensees to spread their costs, while *also* allowing patent holders to capitalize on slow-developing inventions.

C

On top of that, *Brulotte* most often functions to upset the parties' expectations.

This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." *Ante*, at 450. Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term. Instead, both sides expected the royalty payments to continue until Marvel stopped selling toys that fit the terms of the agreement. But that is not what happened. When Marvel discovered *Brulotte*, it used that decision to nullify a key part of the agreement. The parties' contractual expectations were shattered, and petitioners' rights were extinguished.

The Court's suggestion that some parties have come to rely on *Brulotte* is fanciful. The Court believes that there is a "reasonable possibility that parties have structured their business transactions in light of *Brulotte*." *Ante*, at 457–458. Its only support for this conclusion is Marvel's self-serving and unsupported assertion that some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule. To its credit, the Court stops short of endorsing this unlikely prediction, saying only that "uncertainty on this score cuts in Marvel's direction." *Ante*, at 457.

But there is no real uncertainty. "[W]e do not know" if Marvel's assertion is correct because Marvel has provided no evidence to support it. *Ibid.* And there are reasons to believe that, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties expected. See, *e. g.*, 27 R. Lord, Williston on Contracts § 70:124 (4th ed. 2003). What we know for sure, however, is

that *Brulotte* has upended the parties' expectations here and in many other cases. See, *e. g.*, *Scheiber*, 293 F. 3d, at 1016; *Boggild* v. *Kenner Products*, 853 F. 2d 465, 466–467 (CA6 1988); *Pitney Bowes, Inc.* v. *Mestre*, 701 F. 2d 1365, 1367, 1373 (CA11 1983). These confirmed problems with retaining *Brulotte* clearly outweigh Marvel's hypothetical fears.

II

In the end, *Brulotte*'s only virtue is that we decided it. But that does not render it invincible. *Stare decisis* is important to the rule of law, but so are correct judicial decisions. Adherence to prior decisions "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991)). But *stare decisis* is not an "inexorable command." *Id.*, at 828; *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 238 (1924) (Brandeis, J., dissenting). "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . , and experience has pointed up the precedent's shortcomings." *Pearson*, *supra*, at 233.

Our traditional approach to *stare decisis* does not require us to retain *Brulotte*'s *per se* rule. *Brulotte*'s holding had no basis in the law. Its reasoning has been thoroughly disproved. It poses economic barriers that stifle innovation. And it unsettles contractual expectations.

It is not decisive that Congress could have altered *Brulotte*'s rule. In general, we are especially reluctant to overturn decisions interpreting statutes because those decisions can be undone by Congress. See, *e. g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). The Court calls this a "superpowered form of *stare decisis*"

that renders statutory interpretation decisions nearly impervious to challenge. *Ante*, at 458. I think this goes a bit too far.

As an initial matter, we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 69–70 (1946). On the contrary, we have recognized that it is appropriate for us to correct rules of this sort. See, *e. g.*, *Leegin*, *supra*, at 899–900; *State Oil Co.* v. *Khan*, 522 U. S. 3, 20–21 (1997).

The Court says that it might agree if *Brulotte* were an antitrust precedent because *stare decisis* has "less-than-usual force in cases involving the Sherman Act." *Ante*, at 461. But this distinction is unwarranted. We have been more willing to reexamine antitrust precedents because they have attributes of common-law decisions. I see no reason why the same approach should not apply where the precedent at issue, while purporting to apply a statute, is actually based on policy concerns. Indeed, we should be even more willing to reconsider such a precedent because the role implicitly assigned to the federal courts under the Sherman Act has no parallel in Patent Act cases.

Even taking the Court on its own terms, *Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power. See 379 U. S., at 32–33. And it expressly characterized post-expiration royalties as anticompetitive tying arrangements. See *id.*, at 33. It makes no sense to afford greater *stare decisis* protection to *Brulotte*'s thinly veiled antitrust reasoning than to our Sherman Act decisions.

The Court also places too much weight on Congress' failure to overturn *Brulotte*. We have long cautioned that "[i]t

is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard*, *supra*, at 69. Even where Congress has considered, but not adopted, legislation that would abrogate a judicial ruling, it cannot be inferred that Congress' failure to act shows that it approves the ruling. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994). " '[S]everal equally tenable inferences may be drawn from such inaction.' " *Ibid.* (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990)).

Passing legislation is no easy task. A federal statute must withstand the "finely wrought" procedure of bicameralism and presentment. *INS* v. *Chadha*, 462 U. S. 919, 951 (1983); *Clinton* v. *City of New York*, 524 U. S. 417, 440 (1998); see U. S. Const., Art. I, § 7. Within that onerous process, there are additional practical hurdles. A law must be taken up for discussion and not passed over in favor of more pressing matters, and Senate rules require 60 votes to end debate on most legislation. And even if the House and Senate agree on a general policy, the details of the measure usually must be hammered out in a conference committee and repassed by both Houses.

* * *

A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte*. Even the Court does not defend the decision on the merits. I would reconsider and overrule our obvious mistake. For these reasons, I respectfully dissent.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 472 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 8 THROUGH
JUNE 22, 2015

JUNE 8, 2015

Certiorari Granted—Vacated and Remanded

No. 13–697. MADRIGAL-BARCENAS *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mellouli* v. *Lynch*, 575 U. S. 798 (2015). Reported below: 507 Fed. Appx. 715.

No. 13–8837. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Elonis* v. *United States*, 575 U. S. 723 (2015). Reported below: 736 F. 3d 981.

No. 14–235. BANK OF AMERICA, N. A. *v.* BELLO. C. A. 11th Cir. Reported below: 563 Fed. Appx. 691;

No. 14–580. BANK OF AMERICA, N. A. *v.* WAITS. C. A. 11th Cir. Reported below: 578 Fed. Appx. 827;

No. 14–581. BANK OF AMERICA, N. A. *v.* LEE ET AL. C. A. 11th Cir. Reported below: 578 Fed. Appx. 835;

No. 14–600. BANK OF AMERICA, N. A. *v.* VANDER IEST. C. A. 11th Cir. Reported below: 578 Fed. Appx. 906;

No. 14–652. BANK OF AMERICA, N. A. *v.* NEMCIK. C. A. 11th Cir. Reported below: 573 Fed. Appx. 917;

No. 14–749. BANK OF AMERICA, N. A. *v.* HALL ET AL. C. A. 11th Cir.;

No. 14–750. BANK OF AMERICA, N. A. *v.* PHILLIPS ET AL. C. A. 11th Cir. Reported below: 575 Fed. Appx. 876;

No. 14–787. BANK OF AMERICA, N. A. *v.* VANDER IEST. C. A. 11th Cir. Reported below: 580 Fed. Appx. 865;

No. 14–828. BANK OF NEW YORK MELLON, FKA BANK OF NEW YORK *v.* LANG. C. A. 11th Cir. Reported below: 580 Fed. Appx. 890; and

No. 14–829. Bank of America, N. A. *v.* Farmer. C. A. 11th Cir. Reported below: 580 Fed. Appx. 893. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

No. 14–808. Nobach *v.* Woodland Village Nursing Center, Inc. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768 (2015). Reported below: 762 F. 3d 442.

No. 14–1052. Belmont Holdings Corp. et al. *v.* Deutsche Bank AG 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*, 575 U. S. 175 (2015). Reported below: 572 Fed. Appx. 58.

No. 14–7915. Abdul-Aziz *v.* Ricci et al. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Holt* v. *Hobbs*, 574 U. S. 352 (2015). Reported below: 569 Fed. Appx. 62.

Certiorari Dismissed

No. 14–9200. Lavergne *v.* Bajat 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: 591 Fed. Appx. 270.

No. 14–9323. Ware *v.* Securities and Exchange Commission. 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.

No. 14–9530. Snipes *v.* Illinois. App. Ct. Ill., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 14M122. Wilkins *v.* Johnson, Secretary of Homeland Security, et al.; and

No. 14M123. SHELTON *v.* BITER, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 14M124. JOLLEY *v.* DEPARTMENT OF JUSTICE. Motion for leave to proceed as a veteran granted.

No. 14M125. GARCIA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 14–8806. TEICHMANN *v.* NEW YORK. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 982] denied.

No. 14–9160. SCOTT *v.* LACKEY ET AL. C. A. 3d Cir.;

No. 14–9373. CRUZ MEZA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist.; and

No. 14–9495. TADLOCK *v.* FOXX, SECRETARY OF TRANSPORTATION. C. A. 10th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 29, 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. 14–9865. IN RE BUSH. Petition for writ of habeas corpus denied.

No. 14–9760. IN RE MILL. Petition for writ of mandamus denied.

No. 14–9151. IN RE LAMB. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed.

Certiorari Granted

No. 14–419. LUIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 564 Fed. Appx. 493.

No. 14–990. SHAPIRO ET AL. *v.* MACK, CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 584 Fed. Appx. 140.

No. 14–1146. TYSON FOODS, INC. *v.* BOUAPHAKEO ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.

C. A. 8th Cir. Certiorari granted. Reported below: 765 F. 3d 791.

Certiorari Denied

No. 14–772. Fields *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 761 F. 3d 443.

No. 14–847. Fort Bend County, Texas *v.* Davis. C. A. 5th Cir. Certiorari denied. Reported below: 765 F. 3d 480.

No. 14–882. U. S. Legal Services Group, L. P. *v.* Atalese. Sup. Ct. N. J. Certiorari denied. Reported below: 219 N. J. 430, 99 A. 3d 306.

No. 14–883. State of Michigan Workers' Compensation Insurance Agency et al. *v.* Ace American Insurance Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 10.

No. 14–891. SuperValu, Inc., et al. *v.* D&G, Inc., dba Gary's Foods. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 3d 728.

No. 14–992. Mayhew, Commissioner, Maine Department of Health and Human Services *v.* Burwell, Secretary of Health and Human Services, et al. C. A. 1st Cir. Certiorari denied. Reported below: 772 F. 3d 80.

No. 14–1060. Aurora Energy Services, LLC, et al. *v.* Alaska Community Action on Toxics et al. C. A. 9th Cir. Certiorari denied. Reported below: 765 F. 3d 1169.

No. 14–1062. Garcia-Padilla, Governor of Puerto Rico *v.* Diaz-Carrasquillo. Sup. Ct. P. R. Certiorari denied. Reported below: 191 D. P. R. 97.

No. 14–1070. G. M., By and Through His Next Friend, Lopez *v.* Aledo Independent School District et al. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 262.

No. 14–1193. Diamond *v.* Local 807 Labor-Management Pension Fund et al. C. A. 2d Cir. Certiorari denied. Reported below: 595 Fed. Appx. 22.

No. 14–1197. Williams *v.* Nassau County, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 581 Fed. Appx. 56.

No. 14–1211. Accord et al. *v.* Philip Morris USA Inc. et al. Sup. Ct. App. W. Va. Certiorari denied.

No. 14–1221. Stiegel *v.* Peters Township, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 600 Fed. Appx. 60.

No. 14–1226. Sweports, Ltd. *v.* Much Shelist, P. C., et al. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 364.

No. 14–1239. Budik *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 14–1244. Chiquillo *v.* California. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 14–1259. Caleb et al. *v.* Grier et al. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 227.

No. 14–1261. Stone *v.* Louisiana Department of Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 332.

No. 14–1271. Moody *v.* Vozel, Deputy Director and Chief Engineer, Arkansas Highway and Transportation Department, in His Official and Individual Capacity, et al. C. A. 8th Cir. Certiorari denied. Reported below: 771 F. 3d 1093.

No. 14–1292. Holz *v.* Foster, Warden. C. A. 7th Cir. Certiorari denied.

No. 14–1297. Mohamed *v.* Lynch, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 804.

No. 14–1298. Carlson *v.* Marin General Services Authority et al. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 14–1300. Sea Shepherd Conservation Society *v.* Institute of Cetacean Research et al. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 3d 935 and 588 Fed. Appx. 701.

No. 14–1305. Trowbridge *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 298.

No. 14–1307. Al-Dabagh *v.* Case Western Reserve University. C. A. 6th Cir. Certiorari denied. Reported below: 777 F. 3d 355.

No. 14–1311. Fischer et al. *v.* Allamvasutak Zrt. et al. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 847.

No. 14–1325. Troyer *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 897.

No. 14–1333. Mills *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 563.

No. 14–1339. Kivisto *v.* Soifer. C. A. 11th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 522.

No. 14–8355. Clewis *v.* Medco Health Solutions, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 469.

No. 14–8665. Esparza *v.* Jenkins, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 765 F. 3d 615.

No. 14–8976. Gilmore *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 390.

No. 14–9156. Nixon *v.* Abbott, Governor of Texas. C. A. 5th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 279.

No. 14–9159. Norman *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–9163. Strahorn *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 152 So. 3d 594.

No. 14–9164. Ellison *v.* Evans et al. C. A. 2d Cir. Certiorari denied. Reported below: 586 Fed. Appx. 825.

No. 14–9166. Castillo *v.* Johnson et al. C. A. 7th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 499.

No. 14–9169. Wilson *v.* Joyner, Correctional Administrator, Harnett Correctional Institution. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 216.

No. 14–9170. M. K. *v.* N. B. Ct. App. Ind. Certiorari denied.

No. 14–9172. Delk *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9173. Moline *v.* CBS News Inc. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 14–9174. Reiser *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied.

No. 14–9176. Kha Thao Pham *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 14–9178. Richardson *v.* Knight, Warden. Sup. Ct. Ind. Certiorari denied. Reported below: 22 N. E. 3d 580.

No. 14–9180. King *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 14–9187. YHWHnewBN *v.* United States et al. C. A. 7th Cir. Certiorari denied.

No. 14–9191. Roach *v.* Bottom, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–9195. Sands-Wedeward *v.* Local 306, National Postal Mail Handlers Union. C. A. 7th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 333.

No. 14–9196. Ramsey *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 14–9197. Moats *v.* West Virginia Department of Transportation, Division of Highways, et al. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 208.

No. 14–9205. Warner *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2013–0168 (La. App. 4 Cir. 3/12/14), 137 So. 3d 715.

No. 14–9207. Bob *v.* Alan M. Cass and Associates et al. C. A. 2d Cir. Certiorari denied.

No. 14–9211. Adkins *v.* United States District Court for the District of Kansas. C. A. 10th Cir. Certiorari denied.

No. 14–9218. Bradford *v.* Gordy, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 14–9219. Stewart *v.* Lee, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 14–9225. Duc Van Nguyen *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 14–9232. Cruse *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–9260. Marceaux *v.* United States Marine Corps. C. A. 6th Cir. Certiorari denied.

No. 14–9302. Broz *v.* Deutsche Bank National Trust Co. Sup. Ct. Fla. Certiorari denied. Reported below: 160 So. 3d 893.

No. 14–9306. Palafox *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 231 Cal. App. 4th 68, 179 Cal. Rptr. 3d 789.

No. 14–9312. Teague *v.* California. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 14–9315. Scott *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2013–2061 (La. App. 1 Cir. 5/2/14).

No. 14–9330. Furs-Julius *v.* Social Security Administration. C. A. 11th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 510.

No. 14–9339. Edgard *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 14–9347. Leong *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 14–9370. Holmes *v.* Washington (two judgments). Ct. App. Wash. Certiorari denied.

No. 14–9392. Diamantopoulos *v.* Ricketts, Governor of Nebraska, et al. C. A. 8th Cir. Certiorari denied.

No. 14–9410. Brooks *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 435.

No. 14–9441. Minto *v.* Mafnas, Commissioner, Commonwealth of the Northern Mariana Islands Department of Corrections. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 712.

No. 14–9446. Trujillo *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 14–9460. Kendrick *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 14–9462. Small *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 155 So. 3d 354.

No. 14–9471. Karsten *v.* Camacho et al. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 835.

No. 14–9472. Kwong *v.* Connecticut. App. Ct. Conn. Certiorari denied. Reported below: 153 Conn. App. 911, 101 A. 3d 404.

No. 14–9477. James *v.* Cartledge, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 72.

No. 14–9527. Fairchild-Littlefield *v.* Cavazos, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–9541. Dahlk *v.* Woomer et al. C. A. 7th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 523.

No. 14–9542. Elam *v.* Norman, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–9555. Blakeney *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 631 Pa. 1, 108 A. 3d 739.

No. 14–9562. King *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 14–9563. Henry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 201.

No. 14–9564. Solis-Jaramillo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 720.

No. 14–9567. Moreno-Azua *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 150.

No. 14–9570. Jones *v.* Pierce, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 433.

No. 14–9571. March *v.* McAllister, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 573 Fed. Appx. 450.

No. 14–9573. Gathings *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 14–9577. Rivers *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 14–9578. Grado-Meza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 717.

No. 14–9579. Hawthorne *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 676.

No. 14–9586. Futch *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9587. Green *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 764 F. 3d 1352.

No. 14–9588. Ferranti *v.* Atkinson, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 129.

No. 14–9591. Simons *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 717.

No. 14–9592. Marshall *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9595. Delval-Estrada, aka Ochoa Olguin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 777.

No. 14–9596. Devos *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 590 Fed. Appx. 649.

No. 14–9597. Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 317.

No. 14–9599. Bell, aka El-Bey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 72.

No. 14–9600. MILLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 615.

No. 14–9602. SARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 176.

No. 14–9606. KABIR *v.* BRENNAN, POSTMASTER GENERAL (two judgments). C. A. 6th Cir. Certiorari denied.

No. 14–9610. MCCRACKEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 530.

No. 14–9612. SCRIPPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 Fed. Appx. 443.

No. 14–9621. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 570.

No. 14–9622. TRALA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 211.

No. 14–9624. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 777 F. 3d 769.

No. 14–9626. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 14–9631. FULLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 346.

No. 14–9633. YOUNG *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 14–9637. BEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9638. ARBODELA, AKA ORTIZ, AKA RIVERA GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9639. BARTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 14–9640. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 311.

No. 14–9641. LIMON-JUVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 601.

No. 14–9651. VIOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9652. DOHOU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9653. INGRAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 151.

No. 14–9654. MUHAMMAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9658. BARRETO ABILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 387.

No. 14–9663. CHAPMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 623.

No. 14–9666. WILKERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 587 Fed. Appx. 703.

No. 14–9668. VASQUEZ-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 280.

No. 14–9670. KIEFFER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 653.

No. 14–9675. REID *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 769 F. 3d 990.

No. 14–9679. MCCAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 220.

No. 14–9681. MICKENS, AKA DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 746.

No. 14–9688. MOSES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9689. MELENDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 775 F. 3d 50.

No. 14–9696. ESPINOZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 3d 689.

No. 14–9697. LYNCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 191.

No. 14–9698. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 890.

No. 14–9699. ROBBINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 14–9700. NDIAGU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 632.

No. 14–9702. CARDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 577 Fed. Appx. 546.

No. 14–9704. WATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 84.

No. 14–9710. SEVERINO-BATISTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 352.

No. 14–9713. SMITH ET AL. *v.* UNITED STATES (Reported below: 775 F. 3d 1262); MOSS *v.* UNITED STATES (592 Fed. Appx. 914); PEREZ-PRADO *v.* UNITED STATES (598 Fed. Appx. 739); PHILLIPS *v.* UNITED STATES (598 Fed. Appx. 742); LOWRY *v.* UNITED STATES (599 Fed. Appx. 358); WILLIAMS *v.* UNITED STATES (605 Fed. Appx. 833); and HEPBURN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9721. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 777 F. 3d 984.

No. 14–9730. MAXWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 778 F. 3d 719.

No. 14–9748. LAGONA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 592 Fed. Appx. 4.

No. 14–704. JACKSON ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 3d 953.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

"Self-defense is a basic right" and "the central component" of the Second Amendment's guarantee of an individual's right to keep and bear arms. *McDonald* v. *Chicago*, 561 U. S. 742, 767 (2010) (emphasis deleted). Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the

Second Amendment because it "ma[de] it impossible for citizens to use [their firearms] for the core lawful purpose of self-defense." *District of Columbia* v. *Heller*, 554 U. S. 570, 630 (2008). Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.

I

Section 4512 of the San Francisco Police Code provides that "[n]o person shall keep a handgun within a residence owned or controlled by that person unless" (1) "the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice" or (2) "[t]he handgun is carried on the person of an individual over the age of 18" or "under the control of a person who is a peace officer under [California law]." San Francisco Police Code, Art. 45, §§ 4512(a), (c) (2015). The law applies across the board, regardless of whether children are present in the home. A violation of the law is punishable by up to six months of imprisonment and/or a fine of up to $1,000. § 4512(e).

Petitioners—six San Francisco residents who keep handguns in their homes, as well as two organizations—filed suit to challenge this law under the Second Amendment. According to petitioners, the law impermissibly rendered their handguns "[in]operable for the purpose of immediate self-defense" in the home. *Heller*, *supra*, at 635. Because it is impossible to "carry" a firearm on one's person while sleeping, for example, petitioners contended that the law effectively denies them their right to self-defense at times when their potential need for that defense is most acute. In support of that point, they cited a Department of Justice, Bureau of Justice Statistics, survey estimating that over 60 percent of all robberies of occupied dwellings between 2003 and 2007 occurred between 6 p.m. and 6 a.m.

The District Court for the Northern District of California denied them a preliminary injunction, and the U. S. Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals readily acknowledged that the law "burdens the core of the Second Amendment right" because "[h]aving to retrieve handguns from locked containers or removing trigger locks makes it more

difficult 'for citizens to use them for the core lawful purpose of self-defense' in the home." 746 F. 3d 953, 964 (2014) (quoting *Heller*, *supra*, at 630). But it reasoned that this was not a "severe burden" justifying the application of strict scrutiny because "a modern gun safe may be opened quickly." 746 F. 3d, at 964. Applying intermediate scrutiny, the court evaluated San Francisco's proffered "evidence that 'guns kept in the home are most often used in suicides and against family and friends rather than in self-defense' and that children are particularly at risk of injury and death." *Id.*, at 965. The court concluded that the law served "a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home" and was "substantially related" to that interest. *Id.*, at 966.

II

The decision of the Court of Appeals is in serious tension with *Heller*. We explained in *Heller* that the Second Amendment codified a right "'inherited from our English ancestors,'" a key component of which is the right to keep and bear arms for the lawful purpose of self-defense. 554 U. S., at 599. We therefore rejected as inconsistent with the Second Amendment a ban on possession of handguns in the home because "handguns are the most popular weapon chosen by Americans for self-defense in the home" and because a trigger-lock requirement prevented residents from rendering their firearms "operable for the purpose of immediate self-defense." *Id.*, at 629, 635. San Francisco's law allows residents to *use* their handguns for the purpose of self-defense, but it prohibits them from *keeping* those handguns "operable for the purpose of *immediate* self-defense" when not carried on their person. The law thus burdens their right to self-defense at the times they are most vulnerable—when they are sleeping, bathing, changing clothes, or otherwise indisposed. There is consequently no question that San Francisco's law burdens the core of the Second Amendment right.

That burden is significant. One petitioner, an elderly woman who lives alone, explained that she is currently forced to store her handgun in a lockbox and that if an intruder broke into her home at night, she would need to "turn on the light, find [her] glasses, find the key to the lockbox, insert the key in the lock and unlock the box (under the stress of the emergency), and then get [her] gun before being in position to defend [herself]." Decla-

ration of Espanola Jackson in Support of Motion for Preliminary Injunction, Record in Case 3:09–cv–02143 (ND Cal.), Doc. 136–3, p. 2. As she is over 79 years old, that would "not [be] an easy task." *Ibid.* Another petitioner stated that she is forced to store her gun in a code-operated safe and, in the event of an emergency, would need to get to that safe, remember her code under stress, and correctly enter it before she could retrieve her gun and be in a position to defend herself. If she erroneously entered the number due to stress, the safe would impose a delay before she could try again. A third petitioner explained that he would face the same challenge and, in the event the battery drains on his battery-operated safe, would need to locate a backup key to access his handgun. In an emergency situation, the delay imposed by this law could prevent San Francisco residents from using their handguns for the lawful purpose of self-defense. And that delay could easily be the difference between life and death.

Since our decision in *Heller*, members of the Courts of Appeals have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights. Compare *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1252 (CADC 2011) ("We ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny"), with *id.*, at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny"). One need not resolve that dispute to know that something was seriously amiss in the decision below. In that decision, the Court of Appeals recognized that the law "burdens the core of the Second Amendment right," yet concluded that, because the law's burden was not as "severe" as the one at issue in *Heller*, it was "not a substantial burden on the Second Amendment right itself." 746 F. 3d, at 963–965. But nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a "substantial burden" on the core of the Second Amendment right. And when a law burdens a constitutionally protected right, we have generally required a higher showing than the Court of Appeals demanded here. See generally *Heller*, 554 U. S., at 628–635; *Turner Broadcasting Sys-*

tem, Inc. v. *FCC*, 512 U. S. 622, 662 (1994) (explaining that even intermediate scrutiny requires that a regulation not "burden substantially more speech than is necessary to further the government's legitimate interests" (internal quotation marks omitted)).

The Court should have granted a writ of certiorari to review this questionable decision and to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights. See *Heller*, 554 U. S., at 634 ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis what is *really worth* insisting upon"); *id.*, at 635 (explaining that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

The Court's refusal to review this decision is difficult to account for in light of its repeated willingness to review splitless decisions involving alleged violations of other constitutional rights. See, *e. g.*, *Glossip* v. *Gross*, 574 U. S. 1133 (2015) (cert. granted) (Eighth Amendment); *Ontario* v. *Quon*, 560 U. S. 746 (2010) (Fourth Amendment); *Hill* v. *Colorado*, 530 U. S. 703 (2000) (First Amendment). Indeed, the Court has been willing to review splitless decisions involving alleged violations of rights it has never previously enforced. See, *e. g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996) (right to limit on punitive damages awards). And it has even gone so far as to review splitless decisions involving alleged violations of rights expressly foreclosed by precedent. See, *e. g.*, *Boumediene* v. *Bush*, 553 U. S. 723 (2008) (right of aliens held outside U. S. territory to the privilege of habeas corpus); *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in adult, consensual same-sex intimate behavior). I see no reason that challenges based on Second Amendment rights should be treated differently.

* * *

We warned in *Heller* that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." 554 U. S., at 634. The Court of Appeals in this case recognized that San Francisco's law burdened the core component of the Second Amendment guarantee, yet upheld the law. Because of the importance of the constitutional right at

stake and the questionable nature of the Court of Appeals' judgment, I would have granted a writ of certiorari.

No. 14–9417. EL-HAGE, AKA SABBUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 589 Fed. Appx. 29.

Rehearing Denied

No. 14–806. TRIPLETT-FAZZONE *v.* CITY OF COLUMBUS DIVISION OF POLICE ET AL., 575 U. S. 913;

No. 14–1034. SCHMUDE *v.* TEXAS, 575 U. S. 963;

No. 14–5180. BAJO-GONZALEZ *v.* UNITED STATES, 574 U. S. 886;

No. 14–7845. SORO *v.* SORO, 575 U. S. 905;

No. 14–7934. AUGUST *v.* WARREN, WARDEN, 575 U. S. 917;

No. 14–7962. HAMMERSLEY *v.* COUNTY OF OCONTO, WISCONSIN, 575 U. S. 918;

No. 14–8242. PRINCE *v.* LOMA LINDA UNIVERSITY MEDICAL CENTER, 575 U. S. 953;

No. 14–8259. LUCIEN *v.* HOLDER, ATTORNEY GENERAL, 575 U. S. 941;

No. 14–8342. YEGOROV *v.* MELNICHUK, 575 U. S. 955;

No. 14–8354. CURRIE *v.* MISSOURI, 575 U. S. 965;

No. 14–8406. WILLIAMS *v.* RUSSELL, WARDEN, 575 U. S. 966;

No. 14–8411. JAIME REYNA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 575 U. S. 966;

No. 14–8431. RICHARDSON *v.* TEXAS WORKFORCE COMMISSION ET AL., 575 U. S. 967;

No. 14–8607. CASTEEL *v.* UNITED STATES, 575 U. S. 944; and

No. 14–8703. GRIFFITH *v.* NEW YORK, 575 U. S. 971. Petitions for rehearing denied.

JUNE 9, 2015

Miscellaneous Order

No. 14A1202 (14–9223). STRONG *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.

Certiorari Denied

No. 14–10020 (14A1221). STRONG *v.* GRIFFITH, WARDEN. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

No. 14–10137 (14A1239). STRONG *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: 462 S. W. 3d 732.

JUNE 15, 2015

Certiorari Granted—Vacated and Remanded

No. 14–851. BANK OF AMERICA, N. A. *v.* PEELE. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–852. BANK OF AMERICA, N. A. *v.* JOHNSON. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–853. BANK OF AMERICA, N. A. *v.* BOYKINS. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–854. BANK OF AMERICA, N. A. *v.* HAMILTON-PRESHA. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–855. BANK OF AMERICA, N. A. *v.* GARRO. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–856. BANK OF AMERICA, N. A. *v.* BELOTSERKOVSKY. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824;

No. 14–979. BANK OF AMERICA, N. A. *v.* LAKHANI. C. A. 11th Cir. Reported below: 583 Fed. Appx. 896; and

No. 14–980. BANK OF AMERICA, N. A. *v.* CORRAD. C. A. 11th Cir. Reported below: 583 Fed. Appx. 904. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

Certiorari Dismissed

No. 14–9253. ARIEGWE *v.* KIRKEGARD, WARDEN, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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. 14–9267. EVANS *v.* OHIO. Ct. App. Ohio, 4th App. Dist., Scioto County. 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. 14–9284. SOLOMON *v.* KESS-LEWIS ET AL. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 107 A. 3d 1118.

No. 14–9291. MANLEY *v.* MONROE COUNTY PROSECUTOR. Ct. App. Ind. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 16 N. E. 3d 488.

No. 14–9443. KOON *v.* CARTLEDGE, WARDEN, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 585 Fed. Appx. 32.

No. 14–9801. GARCON *v.* CRUZ, WARDEN. 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: 581 Fed. Appx. 193.

Miscellaneous Orders

No. 14M126. RUCKER *v.* MOORE, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 14M127. WHITEHEAD *v.* WHITE & CASE LLP ET AL. Motion for leave to proceed as a veteran denied.

No. 14M128. HOPKINS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 14–8499. MANKO *v.* LENOX HILL HOSPITAL. Ct. App. N. Y. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 959] denied.

No. 14–8617. HORSLEY *v.* UNIVERSITY OF ALABAMA ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 961] denied.

No. 14–8931. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 960] denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 14–9320. MISSUD *v.* CALIFORNIA ET AL. C. A. 9th Cir.; and

No. 14–9799. HARDRICK *v.* UNITED STATES. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 6, 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. 14–9891. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 14–1238. IN RE JOLING ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 13–1496. DOLLAR GENERAL CORP. ET AL. *v.* MISSISSIPPI BAND OF CHOCTAW INDIANS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 746 F. 3d 167.

No. 14–844. BRUCE *v.* SAMUELS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 761 F. 3d 1.

Certiorari Denied

No. 14–748. VOLVO POWERTRAIN CORP. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 758 F. 3d 330.

No. 14–807. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS *v.* DEBRUCE. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 3d 1263.

No. 14–1077. LEAKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 96 A. 3d 1.

No. 14–1111. ASSOCIATED BUILDERS & CONTRACTORS INC. *v.* SHIU ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 773 F. 3d 257.

No. 14–1121. HUI HSIUNG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 778 F. 3d 738.

No. 14–1122. MOTOROLA MOBILITY LLC *v.* AU OPTRONICS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 775 F. 3d 816.

No. 14–1212. RAMSAY *v.* TAPPER. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 204.

No. 14–1218. JOHNSON *v.* CHICAGO TRIBUNE CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 133087–U.

No. 14–1220. SAFARI ET AL. *v.* KAISER FOUNDATION HEALTH PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 849.

No. 14–1227. KUGLER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 110, 357 Wis. 2d 722, 855 N. W. 2d 904.

No. 14–1229. MOTOYAMA *v.* HAWAII DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 399.

No. 14–1250. WIEDER *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 569 Fed. Appx. 28.

No. 14–1264. RICKARD *v.* SWEDISH MATCH NORTH AMERICA, INC. C. A. 8th Cir. Certiorari denied. Reported below: 773 F. 3d 181.

No. 14–1279. WASHINGTON *v.* WALKER. Sup. Ct. Wash. Certiorari denied. Reported below: 182 Wash. 2d 463, 341 P. 3d 976.

No. 14–1296. OHNEMUS *v.* THOMPSON. C. A. 6th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 864.

No. 14–1330. Dorn *v.* Annucci, Acting Commissioner, New York Department of Corrections and Community Supervision. C. A. 2d Cir. Certiorari denied.

No. 14–1338. Kung Da Chang *v.* Shanghai Commercial Bank Ltd. Ct. App. Wash. Certiorari denied. Reported below: 183 Wash. App. 1007.

No. 14–1357. Tirado Tamez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 773 F. 3d 654.

No. 14–8115. Corrothers, aka Carrothers, aka Carother, aka Corothers, aka Carothers *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 148 So. 3d 278.

No. 14–8449. Spencer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 773 F. 3d 1132.

No. 14–8491. White *v.* Southeast Michigan Surgical Hospital et al. Ct. App. Mich. Certiorari denied.

No. 14–8780. Cohen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 196.

No. 14–8793. Allebban *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 578 Fed. Appx. 492.

No. 14–8943. Haugabook *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9220. Robinson *v.* Texas. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 14–9240. Hackney *v.* Woods, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–9247. Solorio *v.* Montgomery, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–9254. Sanchez *v.* Lizarraga, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–9264. Chance *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 14–9269. Saenz *v.* Stephens, Director Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–9270. CHANCE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 150 So. 3d 1136.

No. 14–9283. BURDA *v.* KORENMAN, FKA BURDA. Super. Ct. Pa. Certiorari denied. Reported below: 96 A. 3d 1084.

No. 14–9286. ROBITSCHEK *v.* ESCOVEDO. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 14–9298. MASTERSON *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 282.

No. 14–9300. AGUIRRE *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 586.

No. 14–9304. ANGEL MENDEZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 14–9309. YATES *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 859 N. W. 2d 672.

No. 14–9311. TURNER *v.* COLEMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 14–9313. THOMAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 14–9325. WATSON *v.* MCCLAIN ET AL. C. A. 6th Cir. Certiorari denied.

No. 14–9327. WEBB *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 216 Md. App. 759.

No. 14–9328. MARION *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9342. PETERKA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 160 So. 3d 897.

No. 14–9343. CRUZ *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 89.

No. 14–9344. FORT *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2014-Ohio-3412, 17 N. E. 3d 1172.

No. 14–9397. HUTCHINSON *v.* RAZDAN. C. A. 11th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 795.

No. 14–9433. BLACKSHEAR *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 158 So. 3d 564.

No. 14–9501. YOUNG *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 14–9513. BLAINE *v.* NORMAN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 14–9516. PEEPLES *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9517. PHILLIPS *v.* BARNES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 14–9518. FONG SOTO *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 760 F. 3d 947 and 583 Fed. Appx. 782.

No. 14–9519. HENDERSON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 289 Neb. 271, 854 N. W. 2d 616.

No. 14–9545. POWELL *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 392.

No. 14–9556. BRIDGES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 14–9576. GRICE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 753, 767 S. E. 2d 312.

No. 14–9580. HAWES *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 2014 WY 127, 335 P. 3d 1073.

No. 14–9616. M. G. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied. Reported below: 228 Cal. App. 4th 1268, 176 Cal. Rptr. 3d 459.

No. 14–9619. Clark *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 452 S. W. 3d 268.

No. 14–9630. Flowers *v.* McEwen, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 867.

No. 14–9678. Jefferson *v.* Burger King Corp. et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 160 So. 3d 448.

No. 14–9694. Demouchette *v.* United States District Court for the Middle District of Louisiana. C. A. 5th Cir. Certiorari denied.

No. 14–9711. Tucker *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 596 Fed. Appx. 616.

No. 14–9725. Rene Diaz *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9728. Giddens *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 598 Fed. Appx. 889.

No. 14–9729. Harris *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 985.

No. 14–9734. Hodge *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9737. Burgos-Ortega *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 777 F. 3d 1047.

No. 14–9738. Beall *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9739. Gatson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 3d 405.

No. 14–9745. Diehl *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 568.

No. 14–9761. Washington *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 775 F. 3d 405.

No. 14–9763. Gibson *v.* Wilson, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 285.

No. 14–9769. Henry *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9771. Ernesto Israel *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9772. Goins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 581 Fed. Appx. 284.

No. 14–9774. Britton *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 608 Fed. Appx. 111.

No. 14–9777. Gabe *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9785. Crenshaw *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 14–9792. Foote *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 784 F. 3d 931.

No. 14–9795. Hernandez-Munoz *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 14–9796. Harris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 241.

No. 14–9803. Rivera *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 14–9805. Dunn *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 101.

No. 14–9809. Garcia-Morales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 262.

No. 14–9812. Elizalde-Ortiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 715.

No. 14–9813. Diaz-Bermudez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 309.

No. 14–9815. Caraballo *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 14–9846. Rodriguez Gil *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 607 Fed. Appx. 956.

No. 14–9849. Torres-Diaz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 398.

No. 14–9851. Ayala-Medina *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 866.

No. 14–9852. McDaniels *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 763.

No. 14–910. Allstate Insurance Co. *v.* Jimenez, Individually and on Behalf of All Others Similarly Situated. C. A. 9th Cir. Motions of Retail Litigation Center, Inc.; Chamber of Commerce of the United States of America et al.; Equal Employment Advisory Council; Product Liability Advisory Council, Inc.; and DRI–The Voice of the Defense Bar for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 765 F. 3d 1161.

No. 14–1074. Republic of Iraq *v.* ABB AG et al. C. A. 2d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 768 F. 3d 145.

No. 14–1172. Walker-McGill, President of the North Carolina Medical Board, et al. *v.* Stuart et al. C. A. 4th Cir. Certiorari denied. Justice Scalia dissents. Reported below: 774 F. 3d 238.

No. 14–8589. Hittson *v.* Chatman, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 759 F. 3d 1210.

Justice Ginsburg, with whom Justice Kagan joins, concurring.

The Antiterrorism and Effective Death Penalty Act of 1996 directs a federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims. Only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented" may a federal court grant habeas relief premised on a federal claim previously adjudicated on the merits in state court. 28 U. S. C. § 2254(d).

This task is straightforward when the last state court to decide a claim has issued an opinion explaining its decision. In that

situation, a federal habeas court simply evaluates deferentially the specific reasons set out by the state court. *E. g.*, *Porter* v. *McCollum*, 558 U. S. 30, 39–44 (2009) (*per curiam*); *Rompilla* v. *Beard*, 545 U. S. 374, 388–392 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 523–538 (2003).

In *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991), this Court stated how federal courts should handle a more challenging circumstance: when the last state court to reject a prisoner's claim issues only an unexplained order. "Where there has been one reasoned state judgment rejecting a federal claim," the Court held, federal habeas courts should presume that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.*, at 803. "[U]nexplained orders," the Court recognized, typically reflect "agree[ment] . . . with the reasons given below." *Id.*, at 804. Accordingly, "a presumption . . . which simply 'looks through' [unexplained orders] to the last reasoned decision . . . most nearly reflects the role [such orders] are ordinarily intended to play." *Ibid.*

In this case, the Eleventh Circuit decided that it would no longer apply the *Ylst* "look through" presumption—at least when assessing the Georgia Supreme Court's unexplained denial of a certificate of probable cause to appeal. Although it had long "'look[ed] through' summary decisions by state appellate courts," the Eleventh Circuit believed that a recent decision of this Court—*Harrington* v. *Richter*, 562 U. S. 86 (2011)—had superseded *Ylst*. *Hittson* v. *GDCP Warden*, 759 F. 3d 1210, 1232, n. 25 (2014). Accordingly, instead of "review[ing] the reasoning given in the [last reasoned state court] decision," the Eleventh Circuit held it would consider hypothetical theories that could have supported the Georgia Supreme Court's unexplained order. *Id.*, at 1233, n. 25.

The Eleventh Circuit plainly erred in discarding *Ylst*. In *Richter*, the only state court to reject the prisoner's federal claim had done so in an unexplained order. See 562 U. S., at 96–97. With no reasoned opinion to look through to, the Court had no occasion to cast doubt on *Ylst*. To the contrary, the Court cited *Ylst* approvingly in *Richter*, 562 U. S., at 99–100, and did so again two years later in *Johnson* v. *Williams*, 568 U. S. 287, 297, n. 1 (2013).

The Eleventh Circuit believed that the following language from *Richter* superseded *Ylst* and required the appeals court to hypothesize reasons that might have supported the state court's

unexplained order: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, *could* have supported, the state court's decision." 562 U. S., at 102 (emphasis added). See 759 F. 3d, at 1232. *Richter*'s hypothetical inquiry was necessary, however, because *no* state court "opinion explain[ed] the reasons relief ha[d] been denied." 562 U. S., at 98. In that circumstance, a federal habeas court can assess whether the state court's decision "*involved* an unreasonable application of . . . clearly established Federal law," § 2254(d)(1) (emphasis added), only by hypothesizing reasons that might have supported it. But *Richter* makes clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual "arguments or theories [that] supported . . . the state court's decision." *Id.*, at 102.

The Eleventh Circuit also appears to have thought it relevant that the Georgia Supreme Court exercises mandatory, not discretionary, review when deciding whether to grant or deny a certificate of probable cause to appeal. See 759 F. 3d, at 1231–1232. *Ylst* itself, however, looked through a nondiscretionary adjudication. See 501 U. S., at 800–801. And *Richter* confirms that it matters not whether the state court exercised mandatory or discretionary review. Although *Richter* required a federal habeas court to presume that an unexplained summary affirmance adjudicated the merits of any federal claim presented to the state court, *Richter* cited *Ylst* as an example of how this "presumption may be overcome." 562 U. S., at 99. If looking through the summary affirmance reveals that the last reasoned state-court decision found a claim procedurally defaulted, then it is "more likely," *id.*, at 100, that the summary affirmance of that claim "rest[ed] upon the same ground," *Ylst*, 501 U. S., at 803. In short, *Richter* instructs that federal habeas courts should continue to "look through" even nondiscretionary adjudications to determine whether a claim was procedurally defaulted. There is no reason not to "look through" such adjudications, as well, to determine the particular reasons why the state court rejected the claim on the merits.

Although the Eleventh Circuit clearly erred in declining to apply *Ylst*, I concur in the denial of certiorari. The District Court did "look through" to the last reasoned state-court opinion, and for the reasons given by that court, I am convinced that the Eleventh Circuit would have reached the same conclusion had it

properly applied *Ylst*. See *Hittson* v. *Humphrey*, 2012 WL 5497808, *17–*25 (MD Ga., Nov. 13, 2012). Moreover, an en banc rehearing petition raising the *Ylst* issue is currently pending before the Eleventh Circuit. See *Wilson* v. *Warden*, No. 14–10681. That petition affords the Eleventh Circuit an opportunity to correct its error without the need for this Court to intervene.

No. 14–9539. VIEIRA *v.* CALIFORNIA. C. A. D. C. Cir. Certiorari before judgment denied.

No. 14–9755. WILKERSON *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. 14–326. YACUBIAN *v.* UNITED STATES, 575 U. S. 983;

No. 14–922. GOMEZ *v.* CHASE HOME FINANCE, LLC, 575 U. S. 936;

No. 14–1012. ESCAMILLA ET AL. *v.* M2 TECHNOLOGY, INC.; and ESCAMILLA *v.* M2 TECHNOLOGY, INC., ET AL., 575 U. S. 984;

No. 14–7553. COOPER *v.* COOPER, 575 U. S. 965;

No. 14–7641. GARZA *v.* UNITED STATES, 574 U. S. 1171;

No. 14–7795. FREY *v.* FOSTER ET AL., 574 U. S. 1196;

No. 14–8189. SCOTT *v.* ALABAMA, 575 U. S. 979;

No. 14–8194. LOCKHART *v.* ALABAMA, 575 U. S. 979;

No. 14–8382. MOSES *v.* TEXAS WORKFORCE COMMISSION ET AL., 575 U. S. 966;

No. 14–8448. WALTERS *v.* CALIFORNIA, 575 U. S. 968;

No. 14–8543. DONGSHENG HUANG *v.* ULTIMO SOFTWARE SOLUTIONS, INC., 575 U. S. 969;

No. 14–8553. WALTON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 969; and

No. 14–8598. DAVIS *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 575 U. S. 988. Petitions for rehearing denied.

No. 14–7861. TWEED *v.* COBURN ET AL., 575 U. S. 905. Motion for leave to file petition for rehearing denied.

JUNE 22, 2015

Certiorari Granted—Vacated and Remanded

No. 14–902. BANK OF AMERICA, N. A. *v.* GLASPIE. C. A. 11th Cir. Reported below: 581 Fed. Appx. 830;

No. 14–903. Bank of America, N. A. *v.* Madden et al. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824; and

No. 14–904. Bank of America, N. A. *v.* Brown. C. A. 11th Cir. Reported below: 581 Fed. Appx. 824. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Bank of America, N. A.* v. *Caulkett*, 575 U. S. 790 (2015).

Certiorari Dismissed

No. 14–9385. Israel *v.* Brown, Superintendent, Wabash Valley Correctional Facility, 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. 14–9821. Williams *v.* United States et al. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari before judgment dismissed. See this Court's Rule 39.8.

No. 14–9835. Cox *v.* O'Brien, Warden. 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: 597 Fed. Appx. 189.

No. 14–9838. Crosby *v.* Ives, Warden. 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*).

Miscellaneous Orders

No. D–2813. In re Disbarment of Mongelli. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2814. In re Disbarment of Tarshis. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2815. In re Disbarment of Spector. Disbarment entered. [For earlier order herein, see 574 U. S. 806.]

No. D–2816. In re Disbarment of Council. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2817. In re Disbarment of Daugerdas. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2818. In re Disbarment of Lewis. Disbarment entered. [For earlier order herein, see 574 U. S. 971.]

No. D–2819. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 574 U. S. 1022.]

No. D–2820. In re Disbarment of Berger. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2821. In re Disbarment of Scher. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2822. In re Disbarment of Jackson. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2823. In re Disbarment of Hill. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2824. In re Disbarment of Purcell. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. D–2826. In re Disbarment of Worsham. Disbarment entered. [For earlier order herein, see 574 U. S. 1023.]

No. 14M129. McDowell *v.* Commissioner of Internal Revenue. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 14–990. Shapiro et al. *v.* Mack, Chairman, Maryland State Board of Elections, et al. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1003.] Motion of petitioners to dispense with printing joint appendix granted.

No. 14–7802. In re Holloway. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [574 U. S. 1190] denied.

No. 14–7899. PERRY *v.* EDD ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 909] denied.

No. 14–8081. DAKER *v.* ROBINSON ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 932] denied.

No. 14–8082. DAKER *v.* DAWES ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [575 U. S. 932] denied.

No. 14–9396. JUDY *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir.; and

No. 14–9747. MACAK *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 13, 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. 14–9972. IN RE JAVIER BARAJAS; and

No. 14–9974. IN RE AYERS. Petitions for writs of habeas corpus denied.

No. 14–1254. IN RE POTTS. Petition for writ of mandamus denied.

No. 14–9840. IN RE MATTHEWS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Certiorari Granted

No. 14–916. KINGDOMWARE TECHNOLOGIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted. Reported below: 754 F. 3d 923.

Certiorari Denied

No. 14–448. GOOGLE, INC. *v.* VEDERI, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 744 F. 3d 1376.

No. 14–602. Ramirez Umana *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 750 F. 3d 320.

No. 14–1006. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 503.

No. 14–1037. Nyambal *v.* International Monetary Fund. C. A. D. C. Cir. Certiorari denied. Reported below: 772 F. 3d 277.

No. 14–1069. Zayac *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 3d 112.

No. 14–1085. Ford Motor Co. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 768 F. 3d 580.

No. 14–1103. Bolden et al. *v.* City of Euclid, Ohio, et al. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 464.

No. 14–1118. Rugiero *v.* Nationstar Mortgage, LLC, et al. C. A. 6th Cir. Certiorari denied. Reported below: 580 Fed. Appx. 376.

No. 14–1131. Zhenli Ye Gon *v.* Aylor, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 3d 207.

No. 14–1138. Aransas Project *v.* Shaw, Chairman of the Texas Commission on Environmental Quality, et al. C. A. 5th Cir. Certiorari denied. Reported below: 775 F. 3d 641.

No. 14–1189. Schwalier *v.* Carter, Secretary of Defense, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 3d 832.

No. 14–1190. FCA US LLC, fka Chrysler Group LLC *v.* Fox Hills Motor Sales, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 776 F. 3d 411.

No. 14–1204. Simpson *v.* Feuerstein. C. A. 3d Cir. Certiorari denied. Reported below: 582 Fed. Appx. 93.

No. 14–1205. Koro AR, S. A. *v.* Universal Leather, LLC. C. A. 4th Cir. Certiorari denied. Reported below: 773 F. 3d 553.

No. 14–1231. Lam et al. *v.* City and County of San Francisco, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 565 Fed. Appx. 641.

No. 14–1240. Zurich American Insurance Co. et al. *v.* Tennessee; Northern Insurance Company of New York et al. *v.* Tennessee; American Home Assurance Co. et al. *v.* Tennessee; and Great American Insurance Company of New York *v.* Tennessee. Ct. App. Tenn. Certiorari denied.

No. 14–1241. Lawrence *v.* Gwinnett County, Georgia, et al. C. A. 11th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 864.

No. 14–1246. Gorski *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 929.

No. 14–1247. Hartigan *v.* Utah Transit Authority. C. A. 10th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 779.

No. 14–1253. Cladakis *v.* Miller. Ct. App. Miss. Certiorari denied. Reported below: 155 So. 3d 181.

No. 14–1257. Moorhead et al. *v.* First Tennessee Bank N. A. Ct. App. Tenn. Certiorari denied.

No. 14–1258. Leyva *v.* Wells Fargo Bank, N. A. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 155 So. 3d 359.

No. 14–1263. Corbett *v.* Transportation Security Administration. C. A. 11th Cir. Certiorari denied. Reported below: 767 F. 3d 1171.

No. 14–1267. Potts *v.* American Bottling Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 540.

No. 14–1274. Tze Wung Consultants, Ltd. *v.* Bank of Baroda. C. A. 2d Cir. Certiorari denied. Reported below: 580 Fed. Appx. 33.

No. 14–1289. Weidman *v.* Exxon Mobil Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 776 F. 3d 214.

No. 14–1293. Hayashi *v.* Illinois Department of Financial and Professional Regulation. Sup. Ct. Ill. Certiorari denied. Reported below: 2014 IL 116023, 25 N. E. 3d 570.

No. 14–1304. Apotex Inc. et al. *v.* UCB, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 763 F. 3d 1354.

No. 14–1329. Wilson *v.* Cleveland Clinic Foundation. C. A. 6th Cir. Certiorari denied. Reported below: 579 Fed. Appx. 392.

No. 14–1340. Lucree *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 596 Fed. Appx. 922.

No. 14–1345. Acevedo-Perez et al. *v.* United States et al. C. A. 1st Cir. Certiorari denied. Reported below: 768 F. 3d 51.

No. 14–1347. Gaon *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1250.

No. 14–1349. Esparza de Rubio *v.* Lynch, Attorney General. C. A. 9th Cir. Certiorari denied.

No. 14–1355. Salado-Alva *v.* Lynch, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 700.

No. 14–1369. Ramon Tarango, aka Tarango *v.* Lynch, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 592 Fed. Appx. 293.

No. 14–1390. Allegheny Ford Truck Sales, Inc., et al. *v.* Ford Motor Co. C. A. 3d Cir. Certiorari denied. Reported below: 607 Fed. Appx. 203.

No. 14–8305. Cathey *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 451 S. W. 3d 1.

No. 14–8964. Selvan-Cupil *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 603 Fed. Appx. 242.

No. 14–8969. Frazier *v.* Jenkins, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 770 F. 3d 485.

No. 14–9349. Serrano *v.* Oregon. Sup. Ct. Ore. Certiorari denied. Reported below: 355 Ore. 172, 324 P. 3d 1274.

No. 14–9355. Sklyarsky *v.* Means-Knaus Partners, L. P., et al. C. A. 7th Cir. Certiorari denied. Reported below: 777 F. 3d 892.

No. 14–9357. Heffernan *v.* Arlington County Department of Human Services. Sup. Ct. Va. Certiorari denied.

No. 14–9358. Speller *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 14–9362. Pearson *v.* Haas, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–9367. Duncan *v.* Sheldon, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–9369. Garcia *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9374. Steedley *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 103.

No. 14–9375. Yuan *v.* Green Century Development, LLC, et al. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 14–9376. Tomaselli et al. *v.* Beaulieu et al. C. A. 1st Cir. Certiorari denied.

No. 14–9381. Hampton *v.* Tribley, Warden. C. A. 6th Cir. Certiorari denied.

No. 14–9382. Greene *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 583 Fed. Appx. 171.

No. 14–9383. Freeman *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 14–9388. Sims *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 130840–U.

No. 14–9389. Chanh Minh Dang *v.* Giurbino, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 385.

No. 14–9391. Lima Castro *v.* Tanner, Warden. C. A. 5th Cir. Certiorari denied.

No. 14–9393. Smith *v.* Murray et al. C. A. 5th Cir. Certiorari denied. Reported below: 597 Fed. Appx. 807.

No. 14–9394. Canada *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 8.

No. 14–9395. Crisbasan *v.* Collins, Judge, Circuit Court of Illinois, 17th Judicial Circuit; Crisbasan *v.* O'Neal; Crisbasan *v.* Payne; and Crisbasan *v.* Sweeney et al. Sup. Ct. Ill. Certiorari denied.

No. 14–9401. Hodge *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 147 So. 3d 1029.

No. 14–9402. Cabrera-Flores *v.* Oates. C. A. 4th Cir. Certiorari denied. Reported below: 566 Fed. Appx. 279.

No. 14–9411. Fennell *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 582 Fed. Appx. 828.

No. 14–9412. Hessmer *v.* Wilson County, Tennessee, et al. C. A. 6th Cir. Certiorari denied.

No. 14–9413. Fayson *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 568 Fed. Appx. 771.

No. 14–9414. Gatewood *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 14–9415. Patton *v.* Bryant et al. C. A. 5th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 242.

No. 14–9420. Ross *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2011–1668 (La. App. 4 Cir. 6/4/14), 144 So. 3d 1118.

No. 14–9421. Mazin *v.* Town of Norwood, Massachusetts, et al. App. Ct. Mass. Certiorari denied. Reported below: 85 Mass. App. 1128, 10 N. E. 3d 672.

No. 14–9422. Kargbo *v.* New Hampshire. Sup. Ct. N. H. Certiorari denied.

No. 14–9427. Tkachyshyn *v.* New York Commissioner of Labor. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 109 App. Div. 3d 1071, 972 N. Y. S. 2d 350.

No. 14–9430. Babb *v.* Maine. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2014 ME 129, 104 A. 3d 878.

No. 14–9435. SIMMONS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 14–9439. PATTERSON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2014 WI App 90, 356 Wis. 2d 326, 855 N. W. 2d 491.

No. 14–9447. THOMAS *v.* MCCULLOCH, DIRECTOR, SAND RIDGE SECURE TREATMENT FACILITY. C. A. 7th Cir. Certiorari denied.

No. 14–9531. SUTTON *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 14–9549. SANTIAGO *v.* COLLINS ET AL. C. A. 3d Cir. Certiorari denied.

No. 14–9572. DOWLING *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 105 A. 3d 787.

No. 14–9581. HENSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 42.

No. 14–9585. GAMBLE *v.* BULLARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 563 Fed. Appx. 259.

No. 14–9604. RICHARDSON *v.* HUNTER, SUPERINTENDENT, PIEDMONT REGIONAL JAIL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 Fed. Appx. 57.

No. 14–9613. RANGREJ *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 717.

No. 14–9614. LAVENDER *v.* CARROLL, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL. C. A. 11th Cir. Certiorari denied.

No. 14–9615. MABLE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9623. YUSOV *v.* LYNCH, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied.

No. 14–9644. Machen *v.* Rackley, Warden. C. A. 9th Cir. Certiorari denied.

No. 14–9657. Patterson *v.* Broderick et al. C. A. 9th Cir. Certiorari denied. Reported below: 591 Fed. Appx. 622.

No. 14–9664. Collins *v.* Steele, Warden. C. A. 8th Cir. Certiorari denied.

No. 14–9677. Johnson *v.* Colvin, Acting Commissioner of Social Security. C. A. 5th Cir. Certiorari denied. Reported below: 595 Fed. Appx. 443.

No. 14–9705. White *v.* Obama, President of the United States, et al. C. A. D. C. Cir. Certiorari denied.

No. 14–9709. Simpson *v.* Kelley, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 14–9714. Shoemaker *v.* Freeman, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 979.

No. 14–9715. Perez *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 402.

No. 14–9716. Bellon *v.* Neven, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 14–9722. Messere et al. *v.* White et al. C. A. 1st Cir. Certiorari denied.

No. 14–9735. Thomas *v.* United States Postal Service. C. A. Fed. Cir. Certiorari denied. Reported below: 593 Fed. Appx. 988.

No. 14–9775. Donelson *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 14–9788. Mattox *v.* Pryor, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 833.

No. 14–9800. Floyd *v.* Department of Homeland Security et al. C. A. 4th Cir. Certiorari denied. Reported below: 585 Fed. Appx. 63.

No. 14–9808. BURNS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 3d 688.

No. 14–9818. RAMIREZ-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 Fed. Appx. 368.

No. 14–9830. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 575 Fed. Appx. 117.

No. 14–9832. ELLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 266.

No. 14–9839. JOHNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 163.

No. 14–9842. JOUBERT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 247.

No. 14–9857. MERCER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 111 A. 3d 647.

No. 14–9859. LANDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 Fed. Appx. 255.

No. 14–9868. SUSINKA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 14–9871. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9874. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 Fed. Appx. 251.

No. 14–9890. KOCH *v.* THOMAS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 14–9892. LARACUENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 3d 347.

No. 14–9896. VARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9898. BAILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 14–9900. WATFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 14–9901. LUMPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 14–9912. KOPP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 3d 986.

No. 14–9913. MCGEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 602 Fed. Appx. 90.

No. 14–9915. DOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 247.

No. 14–9917. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 396.

No. 14–9918. BURNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 3d 536.

No. 14–9935. ESPINDOLA-PINEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 Fed. Appx. 161.

No. 14–9940. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 Fed. Appx. 770.

No. 14–9942. SANCHEZ-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 14–9944. RABANALES-CASIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 Fed. Appx. 690.

No. 14–9950. NOLASCO-PERAZA ET AL. *v.* UNITED STATES (Reported below: 606 Fed. Appx. 175); GONZALEZ CAAL, AKA MANUEL GONZALEZ *v.* UNITED STATES (605 Fed. Appx. 403); and QUINTERO-FLORES *v.* UNITED STATES (605 Fed. Appx. 389). C. A. 5th Cir. Certiorari denied.

No. 14–9951. LEDEZMA-RODRIGUEZ ET AL. *v.* UNITED STATES (Reported below: 595 Fed. Appx. 435); GARCIA-ZELAYA, AKA GARCIA, AKA GARCIA ZELAYA *v.* UNITED STATES (600 Fed. Appx. 268); CHICOJ-MEJIA *v.* UNITED STATES (605 Fed. Appx. 391); and FRANCO-ALARCON, AKA ADAN FRANCO, AKA FRANCO ALARCON, AKA FRANCO *v.* UNITED STATES (600 Fed. Appx. 266). C. A. 5th Cir. Certiorari denied.

No. 14–9952. LUNA-SOTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 Fed. Appx. 323.

No. 14–1128. Securities Investor Protection Corp. *v.* Ida Fishman Revocable Trust et al. C. A. 2d Cir. Motions of Academics; Certain "Net Loser" Customers; and National Association of Bankruptcy Trustees for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 773 F. 3d 411.

No. 14–1129. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC *v.* Ida Fishman Revocable Trust et al. C. A. 2d Cir. Motions of National Association of Bankruptcy Trustees; Kenneth Krys, as Liquidator and Foreign Representative of Fairfield Sentry Limited; Academics; and Certain "Net Loser" Customers for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 773 F. 3d 411.

No. 14–1371. Penney, aka Penny *v.* United States. C. A. 6th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 14–8740. Carlton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 346.

Statement of Justice Sotomayor, with whom Justice Breyer joins, respecting the denial of certiorari.

The District Court enhanced petitioner Roy Carlton's sentence based on a factual inaccuracy introduced into the sentencing record by the Government. The United States Court of Appeals for the Fifth Circuit refused to review Carlton's appellate challenge to the enhancement, relying on Circuit precedent holding that factual errors are never cognizable on plain-error review. For the reasons that follow, I believe the Fifth Circuit's precedent is misguided.

Carlton was convicted by a jury of possessing marijuana while incarcerated. The Probation Office prepared a presentence report recommending a two-level enhancement of Carlton's base offense level because the ultimate aim of his crime was the distribution of a controlled substance in a prison. See United States Sentencing Commission, Guidelines Manual § 2D1.1(b)(4) (Nov. 2014). The foundation for this enhancement was the Government's representation that Carlton's girlfriend, Whitney Anderson, had testified at trial that Carlton intended to use the marijuana to pay off a debt owed to another inmate. In fact,

Anderson said no such thing. The Government nevertheless repeated its faulty assertion at sentencing, and the District Court, which shared a similar misimpression of Anderson's testimony, imposed the enhancement and sentenced Carlton to 27 months' imprisonment.

Carlton challenged the sentencing enhancement before the Fifth Circuit, citing the inaccuracy regarding Anderson's testimony. The Government conceded its error, but the Fifth Circuit rejected Carlton's claim anyway. 593 Fed. Appx. 346 (2014) (*per curiam*). In light of defense counsel's failure to object at sentencing to the Government's characterization of the record, the court reviewed Carlton's argument under the plain-error standard. *Id.*, at 348. The Fifth Circuit acknowledged that the record "unambiguously" showed "Anderson never testified that Carlton needed the marijuana to repay a prison debt," and that the District Court had therefore erred in supporting the enhancement with her imagined statement. *Ibid.* The court explained, however, that the District Court's mistake was a mistake of fact. And under the Fifth Circuit's decision in *United States* v. *Lopez*, 923 F. 2d 47 (1991) (*per curiam*), such a factual error "'can never constitute plain error'" because it "could have been cured by bringing it to the district court's attention at sentencing." 593 Fed. Appx., at 349 (quoting *Lopez*, 923 F. 2d, at 50).

Judge Prado issued a concurring opinion. Although he agreed that *Lopez* controlled Carlton's case, Judge Prado wrote separately to reiterate his view that *Lopez* was wrongly decided. 593 Fed. Appx., at 349–352 (specially concurring opinion).

I agree with Judge Prado. This Court has long held that "[i]n exceptional circumstances, especially in criminal cases, appellate courts . . . may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). The doctrine of plain error follows from the recognition that a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice." *United States* v. *Olano*, 507 U. S. 725, 732 (1993) (internal quotation marks omitted). And in all the years since the doctrine arose, we have

never suggested that plain-error review should apply differently depending on whether a mistake is characterized as one of fact or one of law. To the contrary, "[w]e have emphasized that a *per se* approach to plain-error review is flawed." *Puckett* v. *United States*, 556 U. S. 129, 142 (2009) (internal quotation marks omitted). The Fifth Circuit's wooden rule that factual mistakes cannot constitute plain error runs counter to these teachings.

Federal Rule of Criminal Procedure 52(b), which codifies the common-law plain-error rule, similarly draws no distinction between factual errors and legal errors. It states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Not "a plain *legal* error," or "a plain error *other than a factual error*"; all plain errors fall within the Rule's ambit. Courts must apply the Federal Rules as they are written, see *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993), and no basis is apparent for reading into Rule 52(b) an exception for factual errors.

Given its inconsistency with the governing text and longstanding precedent, it is little wonder that no other court of appeals has adopted the *per se* rule outlined by the Fifth Circuit in Lopez.* This lack of uniformity can have important consequences for criminal defendants. Indeed, Carlton's case illustrates the potential inequity caused by the Fifth Circuit's outlier

---

*See, *e. g.*, *United States* v. *Thomas*, 518 Fed. Appx. 610, 612–613 (CA11 2013) (*per curiam*) (applying plain-error review to asserted factual error); *United States* v. *Griffiths*, 504 Fed. Appx. 122, 126–127 (CA3 2012) (same); *United States* v. *Durham*, 645 F. 3d 883, 899–900 (CA7 2011) (same); *United States* v. *Sahakian*, 446 Fed. Appx. 861, 863 (CA9 2011) (same); *United States* v. *Romeo*, 385 Fed. Appx. 45, 50 (CA2 2010) (same); *United States* v. *Gonzalez-Castillo*, 562 F. 3d 80, 83–84 (CA1 2009) (same); *United States* v. *Sargent*, 19 Fed. Appx. 268 (CA6 2001) (*per curiam*) (same); *United States* v. *Wells*, 163 F. 3d 889, 900 (CA4 1998) (same); *United States* v. *Saro*, 24 F. 3d 283, 291 (CADC 1994) (same). Of the remaining Courts of Appeals, it appears that only the Tenth Circuit has articulated a rule for unraised factual errors anything like the Fifth Circuit's. See *United States* v. *Overholt*, 307 F. 3d 1231, 1253 (2002) (where defendant "fail[s] to raise his factual challenge at sentencing," court will "consider the issue waived and will not find plain error"). But even the Tenth Circuit's rule is subject to an exception in cases, like this one, where "the appellant can establish the certainty of a favorable finding on remand." *United States* v. *Dunbar*, 718 F. 3d 1268, 1280 (2013) (internal quotation marks omitted).

position on plain error: All agree the District Court improperly relied on testimony Anderson never gave. But in the Fifth Circuit—and only the Fifth Circuit—that mistake cannot be reviewed and possibly corrected. As a result, Carlton may spend several additional months in jail simply because he was sentenced in Alexandria, Louisiana, instead of Alexandria, Virginia.

For all these reasons, I conclude that *Lopez*'s categorical rule is unjustified. Nevertheless, I reluctantly agree with the Court's decision to deny certiorari in this case. The Solicitor General informs us that the Fifth Circuit is at times inconsistent in its adherence to *Lopez*. Compare *United States* v. *Akinosho*, 285 Fed. Appx. 128, 130 (2008) (*per curiam*) (applying *Lopez*), with *United States* v. *Stevenson*, 97 Fed. Appx. 468, 470 (2004) (*per curiam*) (ignoring *Lopez*); see also *United States* v. *Rodriguez*, 15 F. 3d 408, 416, n. 10 (1994) (questioning whether *Lopez* survived this Court's decision in *Olano*). When that sort of internal division exists, the ordinary course of action is to allow the court of appeals the first opportunity to resolve the disagreement. I hope the Fifth Circuit will use that opportunity to rethink its approach to plain-error review.

Rehearing Denied

No. 14–950. Schafler *v.* HSBC Bank USA et al., 575 U. S. 951;

No. 14–1046. Flander *v.* Texas Department of Public Safety et al., 575 U. S. 985;

No. 14–1105. Dean *v.* Slade et al., 575 U. S. 985;

No. 14–8338. Williams *v.* Circuit Court of Wisconsin, Racine County, et al., 575 U. S. 965;

No. 14–8367. Perry *v.* Entertainment One et al., 575 U. S. 965;

No. 14–8429. Toney *v.* Hakala et al., 575 U. S. 967;

No. 14–8513. Ragin *v.* Circuit Court of Virginia, City of Newport News, 575 U. S. 986;

No. 14–8722. Boykin *v.* United States, 575 U. S. 971;

No. 14–8727. L. B. *v.* San Diego County Health and Human Services Agency, 575 U. S. 1001;

No. 14–8735. Cunningham *v.* Department of Justice, 575 U. S. 1001;

No. 14–8786. OKEAYAINNEH *v.* UNITED STATES, 575 U. S. 972;

No. 14–8834. SAYERS *v.* VIRGINIA, 575 U. S. 1014;

No. 14–8927. CASCIOLA *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 575 U. S. 1001; and

No. 14–9027. WRIGHT *v.* WILLIAMSBURG AREA MEDICAL ASSISTANCE CORP., AKA OLDE TOWNE MEDICAL CENTER, 575 U. S. 1002. Petitions for rehearing denied.

No. 14–7102. KEARNEY *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, 574 U. S. 1132. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.