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OF

THE SUPREME COURT

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CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective June 27, 2017, viz.:

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

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

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

June 27, 2017.

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CNH INDUSTRIAL N. V. ET AL. *v.* REESE ET AL.

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

No. 17–515. Decided February 20, 2018

In *M&G Polymers USA, LLC* v. *Tackett*, 574 U. S. 427, the Court directed the Sixth Circuit to interpret collective-bargaining agreements according to "ordinary principles of contract law" and rejected as inconsistent with those principles the Sixth Circuit's application of "*Yard-Man* inferences"—derived from the Sixth Circuit's decision in *International Union, United Auto, Aerospace, & Agricultural Implement Workers of America* v. *Yard-Man, Inc.*, 716 F. 2d 1476. *Tackett* held that *Yard-Man* incorrectly inferred lifetime vesting of retiree benefits whenever "a contract is silent as to the[ir] duration," instead of following the "traditional principle" that "'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" 574 U. S., at 441–442.

Here, CNH Industrial N. V. and CNH Industrial America LLC (collectively, CNH) agreed to a collective-bargaining agreement in 1998 that provided healthcare benefits to certain retiring employees. When the agreement expired in 2004, a class of CNH retirees and surviving spouses (collectively, retirees) sued, seeking a declaration that their healthcare benefits vested for life. The Sixth Circuit agreed with the retirees. The court described the 1988 agreement as "silent" on whether healthcare benefits vested for life notwithstanding the agreement's general durational clause, which the court deemed inconclusive on the question in light of *Yard-Man* inferences. Finding the 1998 agreement ambiguous allowed the Sixth Circuit to consult extrinsic evidence, which it said supported lifetime vesting.

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Held: The Sixth Circuit's decision does not comply with *Tackett*'s direction to apply ordinary contract principles. A contract is not ambiguous unless, "after applying established rules of interpretation, [it] remains reasonably susceptible to at least two reasonable but conflicting meanings." 11 R. Lord, Williston on Contracts § 30:4, pp. 53–54. Only by employing the inferences rejected in *Tackett* did the Sixth Circuit find ambiguity in the contract's terms. Because the *Yard-Man* inferences are not a valid way to read a contract, those inferences cannot supply a conflicting reasonable contract interpretation. The 1998 agreement contained a general durational clause applicable to all benefits unless specified otherwise, and no provision specified that the healthcare benefits were subject to a different durational clause. The agreement

> also stated that the health benefit plan ran concurrently with the collective-bargaining agreement. Had the parties intended to vest health benefits for life, they could have said so in the agreement. They did not do so, and the only reasonable interpretation of the agreement is that the healthcare benefits expired when the agreement expired in 2004.

Certiorari granted; 854 F. 3d 877, reversed and remanded.

PER CURIAM.

Three Terms ago, this Court's decision in *M&G Polymers USA, LLC* v. *Tackett*, 574 U. S. 427 (2015), held that the Court of Appeals for the Sixth Circuit was required to interpret collective-bargaining agreements according to "ordinary principles of contract law." *Id.*, at 430. Before *Tackett*, the Sixth Circuit applied a series of "*Yard-Man* inferences," stemming from its decision in *International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am.* v. *Yard-Man, Inc.*, 716 F. 2d 1476 (1983). In accord with the *Yard-Man* inferences, courts presumed, in a variety of circumstances, that collective-bargaining agreements vested retiree benefits for life. See *Tackett*, 574 U. S., at 436–438. But *Tackett* "reject[ed]" these inferences "as inconsistent with ordinary principles of contract law." *Id.*, at 442.

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In this case, the Sixth Circuit held that the same *Yard-Man* inferences it once used to presume lifetime vesting can now be used to render a collective-bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting. 854 F. 3d 877, 882–883 (2017). This analysis cannot be squared with *Tackett*. A contract is not ambiguous unless it is subject to more than one reasonable interpretation, and the *Yard-Man* inferences cannot generate a reasonable interpretation because they are not "ordinary principles of contract law," *Tackett*, *supra*, at 442. Because the Sixth Circuit's analysis is "*Yard-Man* re-born, re-built, and re-purposed for new adventures," 854 F. 3d, at 891 (Sutton, J., dissenting), we reverse.

I

A

This Court has long held that collective-bargaining agreements must be interpreted "according to ordinary principles of contract law." *Tackett*, *supra*, at 435 (citing *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 456–457 (1957)). Prior to *Tackett*, the Sixth Circuit purported to follow this rule, but it used a unique series of "*Yard-Man* inferences" that no other circuit applied. 574 U. S., at 435. For example, the Sixth Circuit presumed that "'a general durational clause'" in a collective-bargaining agreement "'*says nothing* about the vesting of retiree benefits'" in that agreement. *Id.*, at 438 (quoting *Noe* v. *PolyOne Corp.*, 520 F. 3d 548, 555 (CA6 2008)). If the collective-bargaining agreement lacked "a termination provision specifically addressing retiree benefits" but contained specific termination provisions for other benefits, the Sixth Circuit presumed that the retiree benefits vested for life. *Tackett*, *supra*, at 436 (citing *Yard-Man*, *supra*, at 1480). The Sixth Circuit also presumed vesting if "a provision . . . 'tie[d] eligibility for retirement-health benefits to eligibility for a pension.'" 574 U. S., at 438 (quoting *Noe*, *supra*, at 558).

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This Court's decision in *Tackett* "reject[ed] the *Yard-Man* inferences as inconsistent with ordinary principles of contract law." 574 U. S., at 442. Most obviously, the *Yard-Man* inferences erroneously "refused to apply general durational clauses to provisions governing retiree benefits." 574 U. S., at 440. This refusal "distort[ed] the text of the agreement and conflict[ed] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Ibid.*

The *Yard-Man* inferences also incorrectly inferred lifetime vesting whenever "a contract is silent as to the duration of retiree benefits." 574 U. S., at 442. The "traditional principle," *Tackett* explained, is that "'contractual obligations will

cease, in the ordinary course, upon termination of the bargaining agreement.' " *Id.*, at 441–442 (quoting *Litton Financial Printing Div., Litton Business Systems, Inc.* v. *NLRB*, 501 U. S. 190, 207 (1991)). "[C]ontracts that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time.' " 574 U. S., at 441 (quoting 3 A. Corbin, Corbin on Contracts § 553, p. 216 (1960)). In fact, the Sixth Circuit had followed this principle in cases involving noncollectively bargained agreements, see *Sprague* v. *General Motors Corp.*, 133 F. 3d 388, 400 (1998) (en banc), which "only underscore[d] *Yard-Man*'s deviation from ordinary principles of contract law." *Tackett*, *supra*, at 441.

As for the tying of retiree benefits to pensioner status, *Tackett* rejected this *Yard-Man* inference as "contrary to Congress' determination" in the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891. 574 U. S., at 440. The Sixth Circuit adopted this inference on the assumption that retiree health benefits are " 'a form of delayed compensation or reward for past services,' " like a pension. *Id.*, at 433 (quoting *Yard-Man*, *supra*, at 1482). But ERISA distinguishes between plans that "resul[t] in a deferral of income," 29 U. S. C. § 1002(2)(A)(ii), and plans that offer medical benefits, § 1002(1)(A). See *Tackett*, 574 U. S., at 440. *Tackett* thus concluded that this and the other "inferences applied in *Yard-Man* and its progeny" do not "represent ordinary principles of contract law." *Id.*, at 438.

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B

Like *Tackett*, this case involves a dispute between retirees and their former employer about whether an expired collective-bargaining agreement created a vested right to lifetime healthcare benefits. In 1998, CNH Industrial N. V. and CNH Industrial America LLC (collectively, CNH) agreed to a collective-bargaining agreement. The 1998

agreement provided healthcare benefits under a group benefit plan to certain "[e]mployees who retire under the . . . Pension Plan." App. to Pet. for Cert. A–116. "All other coverages," such as life insurance, ceased upon retirement. *Ibid.* The group benefit plan was "made part of" the collective-bargaining agreement and "r[an] concurrently" with it. *Id.*, at A–114. The 1998 agreement contained a general durational clause stating that it would terminate in May 2004. *Id.*, at A–115. The agreement also stated that it "dispose[d] of any and all bargaining issues, whether or not presented during negotiations." *Ibid.*

When the 1998 agreement expired in 2004, a class of CNH retirees and surviving spouses (collectively, the retirees) filed this lawsuit, seeking a declaration that their healthcare benefits vested for life and an injunction preventing CNH from changing them. While their lawsuit was pending, this Court decided *Tackett*. Based on *Tackett*, the District Court initially awarded summary judgment to CNH. But after reconsideration, it awarded summary judgment to the retirees. 143 F. Supp. 3d 609 (ED Mich. 2015).

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The Sixth Circuit affirmed in relevant part. 854 F. 3d, at 879. The court began by noting that the 1998 agreement was "silent" on whether healthcare benefits vested for life. *Id.*, at 882. Although the agreement contained a general durational clause, the Sixth Circuit found that clause inconclusive for two reasons. First, the 1998 agreement "carved out certain benefits" like life insurance "and stated that those coverages ceased at a time different than other provisions." *Ibid.*; see App. to Pet. for Cert. A–116. Second, the 1998 agreement "tied" healthcare benefits to pension eligibility. 854 F. 3d, at 882; see App. to Pet. for Cert. A–116. These conditions rendered the 1998 agreement ambiguous, according to the Sixth Circuit, which allowed it to consult extrinsic evidence. 854 F. 3d, at 883. And that evidence supported lifetime vesting. *Ibid.* The Sixth Circuit acknowledged

that these features of the agreement are the same ones it used to "infer vesting" under *Yard-Man*, but it concluded that nothing in *Tackett* precludes this kind of analysis: "There is surely a difference between finding ambiguity from silence and finding vesting from silence." 854 F. 3d, at 882.[1]

Judge Sutton dissented. See *id.*, at 887–893. He concluded that the 1998 agreement was unambiguous because "the company never promised to provide healthcare benefits for life, and the agreement contained a durational clause that limited *all* of the benefits." *Id.*, at 888. Judge Sutton noted that, in finding ambiguity, the panel majority relied on the same inferences that this Court proscribed in *Tackett*. See 854 F. 3d, at 890–891. But ambiguity, he explained, requires "two competing interpretations, both of which are fairly plausible," *id.*, at 890, and "[a] forbidden inference cannot generate a plausible reading," *id.*, at 891. The panel majority's contrary decision, Judge Sutton concluded, "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." *Id.*, at 890.[2]

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[1] After accepting the retirees' reading of the 1998 agreement, the Sixth Circuit remanded for the District Court to reconsider the reasonableness of CNH's proposed modifications to the healthcare benefits. See 854 F. 3d 877, 884–887 (2017). CNH does not challenge that determination, and we express no view on it.

[2] By "intra-circuit split," Judge Sutton was referring to the Sixth Circuit's earlier decision in *Gallo* v. *Moen Inc.*, 813 F. 3d 265 (2016). That decision concluded that a collective-bargaining agreement did not vest healthcare benefits for life, relying on the general durational clause and rejecting the same inferences that the Sixth Circuit invoked here. See *id.*, at 269–272. The conflict between these decisions, and others like them, has led one judge in the Sixth Circuit to declare that "[o]ur post-*Tackett* case law is a mess." *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am.* v. *Kelsey-Hayes Co.*, 872 F. 3d 388, 390 (2017) (Griffin, J., dissenting from denial of rehearing en banc). To date, the en banc Sixth Circuit has been unwilling (or unable) to reconcile its precedents. See *ibid.* (Sutton, J., concurring in denial of rehearing en banc) (agreeing that this conflict "warrants en banc review" but voting against it because "there is a real possibility that we would not have nine votes for any one [approach]").

II

The decision below does not comply with *Tackett*'s direction to apply ordinary contract principles. True, one such principle is that, when a contract is ambiguous, courts can consult extrinsic evidence to determine the parties' intentions. See 574 U. S., at 443 (GINSBURG, J., concurring) (citing 11 R. Lord, Williston on Contracts § 30:7, pp. 116–124 (4th ed. 2012) (Williston)). But a contract is not ambiguous unless, "after applying established rules of interpretation, [it] remains reasonably susceptible to at least two reasonable but conflicting meanings." *Id.*, § 30:4, at 53–54 (footnote omitted). Here, that means the 1998 agreement was not ambiguous unless it could reasonably be read as vesting healthcare benefits for life.

The Sixth Circuit read it that way only by employing the inferences that this Court rejected in *Tackett*. The Sixth Circuit did not point to any explicit terms, implied terms, or industry practice suggesting that the 1998 agreement vested healthcare benefits for life. Cf. 574 U. S., at 443–444 (GINSBURG, J., concurring). Instead, it found ambiguity in the 1998 agreement by applying several of the *Yard-Man* inferences: It declined to apply the general durational clause to the healthcare benefits, and then it inferred vesting from the presence of specific termination provisions for other benefits and the tying of healthcare benefits to pensioner status.

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Tackett rejected those inferences precisely because they are not "established rules of interpretation," 11 Williston § 30:4, at 53–54. The *Yard-Man* inferences "distort the text of the agreement," fail "to apply general durational clauses," erroneously presume lifetime vesting from silence, and contradict how "Congress specifically defined" key terms in ERISA. *Tackett*, 574 U. S., at 439–442. *Tackett* thus rejected these inferences not because of the *consequences* that the Sixth Circuit attached to them—presuming vesting versus finding ambiguity—but because they are not a valid way to read a contract. They cannot be used to create a reason-

able interpretation any more than they can be used to create a presumptive one.

Tellingly, no other Court of Appeals would find ambiguity in these circumstances. When a collective-bargaining agreement is merely silent on the question of vesting, other courts would conclude that it does *not* vest benefits for life.[3] Similarly, when an agreement does not specify a duration for healthcare benefits in particular, other courts would simply apply the general durational clause.[4] And other courts would not find ambiguity from the tying of retiree benefits to pensioner status.[5] The approach taken in these other decisions "only underscores" how the decision below "deviat[ed] from ordinary principles of contract law." *Tackett*, *supra*, at 441.

Shorn of *Yard-Man* inferences, this case is straightforward. The 1998 agreement contained a general durational clause that applied to all benefits, unless the agreement specified otherwise. No provision specified that the healthcare benefits were subject to a different durational clause. The agreement stated that the health benefits plan "r[an] concurrently" with the collective-bargaining agreement, tying the healthcare benefits to the duration of the rest of the agreement. App. to Pet. for Cert. A–114. If the parties meant to vest healthcare benefits for life, they easily could have said so in the text. But they did not. And they specified that their agreement "dispose[d] of any and all bargaining issues" between them. *Id.*, at A–115. Thus, the only

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[3] See, *e. g.*, *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am.* v. *Skinner Engine Co.*, 188 F. 3d 130, 147 (CA3 1999); *Joyce* v. *Curtiss-Wright Corp.*, 171 F. 3d 130, 135 (CA2 1999); *Wise* v. *El Paso Natural Gas Co.*, 986 F. 2d 929, 938 (CA5 1993); *Senn* v. *United Dominion Industries, Inc.*, 951 F. 2d 806, 816 (CA7 1992).

[4] See, *e. g.*, *Des Moines Mailers Union, Teamsters Local No. 358* v. *NLRB*, 381 F. 3d 767, 770 (CA8 2004); *Skinner Engine Co.*, 188 F. 3d, at 140–141.

[5] See, *e. g.*, *id.*, at 141; *Joyce*, *supra*, at 134; *Anderson* v. *Alpha Portland Industries, Inc.*, 836 F. 2d 1512, 1517 (CA8 1988).

reasonable interpretation of the 1998 agreement is that the healthcare benefits expired when the collective-bargaining agreement expired in May 2004. "When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further." *Tackett*, *supra*, at 443 (GINSBURG, J., concurring) (citing 11 Williston § 30:6, at 98–104).

* * *

Because the decision below is not consistent with *Tackett*, the petition for a writ of certiorari and the motions for leave to file briefs *amici curiae* are granted. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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MONTANA *v.* WYOMING ET AL.

ON BILL OF COMPLAINT

No. 137, Orig. Decided May 2, 2011—Order and judgment entered March 21, 2016—Judgment and decree entered February 20, 2018

Judgment and decree entered.

Opinion reported: 563 U. S. 368; order and judgment reported: 577 U. S. 423.

The Report of the Special Master is received and ordered filed. The proposed judgment and decree are entered. JUSTICE KAGAN took no part in the consideration or decision of this case.

JUDGMENT

Judgment is awarded against the State of Wyoming and in favor of the State of Montana for violations of the Yellowstone River Compact resulting from Wyoming's reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1300 acre feet in 2004 and 56 acre feet in 2006. Judgment is awarded in the amount of $20,340, together with pre-judgment and post-judgment interest of seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of $67,270.87.

Wyoming shall pay these damages, interest, and costs in full not later than 90 days from the date of entry of this Judgment. Wyoming shall make its payment into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in Montana. Montana may distribute these funds to a state agency or program, a political subdivision of the State, a nonprofit corporation, association, and/or a charitable organization at the sole discretion of the Montana Attorney General in accordance with the laws of the State of Montana, with the express condition that the funds be used for improvements to the Tongue River Reservoir or related facilities in Montana.

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Except as herein provided, all claims in Montana's Bill of Complaint are denied and dismissed with prejudice.

DECREE

A. General Provisions

1. Article V(A) of the Yellowstone River Compact (Compact) protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River System in Montana from diversions and withdrawals of surface water and groundwater in Wyoming, whether for direct use or storage, that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950.

2. Article V of the Compact, including the protections of Article V(A), applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact).

3. Article V(A) of the Compact does not guarantee Montana a fixed quantity or flow of water, nor does it limit Wyoming to the net volume of water actually consumed in Wyoming prior to January 1, 1950.

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4. Article V(A) of the Compact protects pre-1950 appropriative rights only to the extent they are for "beneficial uses," as defined in Article II(H) of the Compact, and are otherwise consistent with the doctrine of appropriation. In particular, pre-1950 rights are not protected to the extent they are wasteful under the doctrine of appropriation.

5. Except as otherwise expressly provided in this Decree or the Compact, the laws of Montana and Wyoming (including rules for reservoir accounting) govern the administration and management of each State's respective water rights in the implementation of Article V(A) of the Compact.

B. Calls

1. To protect pre-1950 appropriative rights under Article V(A) of the Compact, Montana must place a call. Wyoming is not liable for flow or storage impacts that take place when a call is not in effect.

2. Subject to paragraph B(3), Montana may place a call on the Tongue River whenever (a) a pre-1950 direct flow right in Montana is not receiving the water to which it is entitled, or (b) Montana reasonably believes, based on substantial evidence, that the Tongue River Reservoir might not fill before the end of the water year.

3. Montana cannot place a call under Article V(A) when it can remedy shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact.

4. A call need not take any particular form, use any specific language, or be delivered by or to any particular official, but should be sufficient to place Wyoming on clear notice that Montana needs additional water to satisfy its pre-1950 appropriative rights.

5. A call is effective upon receipt by Wyoming and continues in effect until Montana notifies Wyoming that Montana is lifting the call.

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6. Montana shall promptly notify Wyoming that it is lifting a call when (a) pre-1950 direct flow rights in Montana are receiving the water to which they are entitled, and (b) Montana reasonably believes, based on substantial evidence, that the Tongue River Reservoir will fill before the end of the water year. Montana may place a new call at a later date if the conditions of paragraph B(2) are again met.

7. Upon receiving a call, Wyoming shall promptly initiate action to ensure, to the degree physically possible, that only pre-1950 appropriators in Wyoming are diverting or storing surface water and only to the degree permitted by their appropriative rights and this Decree. Wyoming also shall promptly initiate any action needed to ensure, to the degree physically possible, that any groundwater withdrawals under post-January 1, 1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana. Wyoming shall be liable for diversions, storage, or withdrawals in violation of Article V(A) of the Compact even if it was not physically possible for Wyoming to prevent

the diversions, storage, or withdrawals during a call (including depletions caused by groundwater withdrawals occurring before the call). Where it is initially not physically possible to prevent the storage of water in violation of Article V(A), Wyoming shall deliver such water to Montana as soon as it is physically possible to do so after a request from Montana.

C. Pre-1950 Appropriative Rights

1. The Compact assigns the same seniority level to all pre-1950 water users in Montana and Wyoming. Except as otherwise provided in this Decree, the exercise of pre-1950 appropriative rights in Wyoming does not violate the Compact rights of pre-1950 appropriative rights in Montana.

2. Article V(A) does not prohibit Montana or Wyoming from allowing a pre-1950 appropriator to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands to which the specific pre-1950 appropriative right attaches, even when the increased consumption interferes with pre-1950 uses in Montana. Article V(A) protects pre-1950 appropriators in Montana from the use of such conserved water in Wyoming on new lands or for new purposes. Such uses fall within Article V(B) of the Compact and cannot interfere with pre-1950 appropriative rights in Montana.

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3. Pre-1950 appropriators in Montana and Wyoming may change their place of use, type of use, and point of diversion pursuant to applicable state law, so long as any such changes do not injure appropriators in the other States as evaluated at the time of the change.

D. Wyoming Storage Reservoirs

1. Post-January 1, 1950 appropriators in Wyoming may not store water when Montana has issued a call, except as provided in paragraph B(7) of this Decree. Post-January 1, 1950 appropriators in Wyoming may store water during periods when a call is not in effect.

2. Water stored under post-January 1, 1950 appropriative rights in Wyoming when a call is not in effect has been legally stored under the Compact and can be subsequently used at any time, including when pre-1950 appropriative rights in Montana are unsatisfied. The Compact does not require Wyoming to release such water to Montana in response to a call.

E. Tongue River Reservoir

1. Article V(A) protects Montana's right to store each water year (October 1 to September 30) up to, but not more than, 72,500 acre feet of water in the Tongue River Reservoir, less carryover storage in excess of 6,571 acre feet. If the Tongue River Reservoir begins the water year on October 1 with over 6,571 acre feet of carryover water, Article V(A) protects Montana's right to fill the Tongue River Reservoir to its current capacity of 79,071 acre feet.

2. Montana must avoid wasting water in its operation of the Tongue River Reservoir by not permitting outflows during winter months that are not dictated by good engineering practices. Any wasteful outflows reduce the amount of water storage protected under Article V(A) for that water year by an equal volume.

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3. The reasonable range for winter outflows from the Tongue River Reservoir is 75 to 175 cubic feet per second. The appropriate outflow at any particular point of time varies within this range and depends on the specific conditions, including, but not limited to, the needs of downstream appropriative water rights and risks such as ice jams and flooding. Montana enjoys significant discretion in setting the appropriate outflow within this range and in other reservoir operations.

F. General Reservoir Rules

1. Article V(A) of the Compact does not protect water stored exclusively for non-depletive purposes, such as hydroelectric generation and fish protection.

2. Montana and Wyoming must operate and regulate reservoirs on the Tongue River and its tributaries in a fashion that is generally consistent with the appropriation laws and rules that govern similar reservoirs elsewhere in each respective State.

G. Exchange of Information

1. Within 30 days of the entry of this Decree, Montana and Wyoming each shall provide the other State with a list of its current surface water rights in the Tongue River basin, including information on which rights are pre-1950 and which are post-January 1, 1950. Montana and Wyoming thereafter will annually inform the other State of any changes in these water rights, unless such information is publicly and readily available to the other State.

2. If requested, Montana and Wyoming also shall provide the other State annually with any data available in the ordinary course of water administration that shows the location and amount of groundwater pumping in the Tongue River and Powder River basins, except where the groundwater is used exclusively for domestic or stock water uses as defined in Article II of the Compact.

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3. Montana and Wyoming shall exchange information, as reasonable and appropriate, relevant to the effective implementation of Article V(A) of the Compact. In particular, Wyoming in response to a call shall notify Montana of the actions that it intends to take and has taken in response to the call, and when requested, provide Montana with reasonable assurances and documentation of these actions. In making a call, Montana in turn will notify Wyoming of any intrastate actions it has taken to remedy shortages of pre-1950 appropriators, and when requested, provide Wyoming with reasonable assurances and documentation of these actions.

4. The Yellowstone River Compact Commission remains free to modify or supplement the terms of the provisions of

paragraph G of this Decree pursuant to its authority under the Compact.

H. Rights of the Northern Cheyenne Tribe

Nothing in this Decree addresses or determines the water rights of any Indian Tribe or Indian reservation or the status of such rights under the Yellowstone River Compact.

I. Retention of Jurisdiction

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.

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DIGITAL REALTY TRUST, INC. *v.* SOMERS

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

No. 16–1276. Argued November 28, 2017—Decided February 21, 2018

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. § 1514A(a)(1). Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U. S. C. § 78u–6(a)(6). A whistleblower so defined is eligible for an award if original information provided to the SEC leads to a successful enforcement action. § 78u–6(b)–(g). And he or she is protected from retaliation in three situations, see § 78u–6(h)(1)(A)(i)–(iii), including for "making disclosures that are required or protected under" Sarbanes-Oxley or other specified laws, § 78u–6(h)(1)(A)(iii). Sarbanes-Oxley's anti-retaliation provision contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. § 1514A(b)(1)(A), (2)(D), whereas Dodd-Frank permits a whistleblower to sue an employer directly in federal district court, with a default six-year limitation period, see § 78u–6(h)(1)(B)(i), (iii)(I)(aa).

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The SEC's regulations implementing the Dodd-Frank provision contain two discrete whistleblower definitions. For purposes of the award program, Rule 21F–2 requires a whistleblower to "provide the Commission with information" relating to possible securities-law violations. 17 CFR § 240.21F–2(a)(1). For purposes of the anti-retaliation protections, however, the Rule does not require SEC reporting. See § 240.21F–2(b)(1)(i)–(ii).

Respondent Paul Somers alleges that petitioner Digital Realty Trust, Inc. (Digital Realty), terminated his employment shortly after he reported to senior management suspected securities-law violations by the company. Somers filed suit, alleging, *inter alia*, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim on the ground that Somers was not a whistleblower under § 78u–6(h) because he did not alert the SEC prior to his termination.

The District Court denied the motion, and the Ninth Circuit affirmed. The Court of Appeals concluded that § 78u–6(h) does not necessitate recourse to the SEC prior to gaining "whistleblower" status, and it accorded deference to the SEC's regulation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Dodd-Frank's anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC. Pp. 160–169.

(a) A statute's explicit definition must be followed, even if it varies from a term's ordinary meaning. *Burgess* v. *United States*, 553 U. S. 124, 130. Section 78u–6(a) instructs that the statute's definition of "whistleblower" "shall apply" "[i]n this section," that is, throughout § 78u–6. The Court must therefore interpret the term "whistleblower" in § 78u–6(h), the anti-retaliation provision, in accordance with that definition.

The whistleblower definition operates in conjunction with the three clauses of § 78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes *who* is eligible for protection—namely, a "whistleblower" who provides pertinent information "to the Commission." § 78u–6(a)(6). The three clauses then describe what *conduct*, when engaged in by a "whistleblower," is shielded from employment discrimination. An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages. This reading is reinforced by another whistleblower-protection provision in Dodd-Frank, see 12 U. S. C. § 5567(b), which imposes no requirement that information be conveyed to a government agency. Pp. 160–162.

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(b) The Court's understanding is corroborated by Dodd-Frank's purpose and design. The core objective of Dodd-Frank's whistleblower program is to aid the Commission's enforcement efforts by "motivat[ing] people who know of securities law violations to *tell the SEC*." S. Rep. No. 111–176, p. 38 (emphasis added). To that end, Congress provided monetary awards to whistleblowers who furnish actionable information to the Commission. Congress also complemented the financial incentives for SEC reporting by heightening protection against retaliation. Pp. 162–163.

(c) Somers and the Solicitor General contend that Dodd-Frank's "whistleblower" definition applies only to the statute's award program and not, as the definition plainly states, to its anti-retaliation provision. Their concerns do not support a departure from the statutory text. Pp. 163–169.

(1) They claim that the Court's reading would vitiate the protections of clause (iii) for whistleblowers who make disclosures to persons and entities other than the SEC. See § 78u–6(h)(1)(A)(iii). But the plain-text reading of the statute leaves the third clause with substantial meaning by protecting a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. Pp. 164–166.

(2) Nor would the Court's reading jettison protections for auditors, attorneys, and other employees who are required to report information within the company before making external disclosures. Such employees would be shielded *as soon as they also provide relevant information to the Commission*. And Congress may well have considered adequate the safeguards already afforded to such employees by Sarbanes-Oxley. P. 166.

(3) Applying the "whistleblower" definition as written, Somers and the Solicitor General further protest, will allow "identical misconduct" to "go punished or not based on the happenstance of a separate report" to the SEC. Brief for Respondent 37–38. But it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve by reporting information about unlawful activity to the SEC. P. 167.

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(4) The Solicitor General observes that the statute contains no apparent requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as *Amicus Curiae* 25. The Court need not dwell on related hypotheticals, which veer far from the case at hand. Pp. 167–168.

(5) Finally, the interpretation adopted here would not undermine clause (ii) of § 78u–6(h)(1)(A), which prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. The statute delegates authority to the Commission to establish the "manner" in which a whistleblower may provide information to the SEC. § 78u–6(a)(6). Nothing prevents the Commission from enumerating additional means of SEC reporting, including through testimony protected by clause (ii). Pp. 168–169.

(d) Because "Congress has directly spoken to the precise question at issue," *Chevron*, 467 U. S., at 842, deference is not accorded to the contrary view advanced by the SEC in Rule 21F–2. P. 169.

850 F. 3d 1045, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 169. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which ALITO and GORSUCH, JJ., joined, *post*, p. 171.

Kannon K. Shanmugam argued the cause for petitioner. With him on the briefs were *Brian T. Ashe*, *Kiran A. Seldon*, *Shireen Y. Wetmore*, *Kyle A. Petersen*, *Amy Mason Saharia*, and *A. Joshua Podall*.

Daniel L. Geyser argued the cause for respondent. With him on the brief were *Stephen F. Henry*, *Peter K. Stris*, *Brendan S. Maher*, and *Douglas D. Geyser*.

Christopher G. Michel argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Deputy Solicitor General Stewart*, *Michael A. Conley*, *Thomas J. Karr*, *Stephen G. Yoder*, and *Dina B. Mishra*.*

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JUSTICE GINSBURG delivered the opinion of the Court.

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), 116 Stat. 745, and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Both Acts shield whistleblowers from retaliation, but they differ

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *Ilya Shapiro*; for the Center for Workplace Compliance by *Rae T. Vann* and *Jaime L. Novikoff*; for the Chamber of Commerce of the United States of America by *Steven J. Pearlman*, *Edward C. Young*, and *Kate Comerford Todd*; for Lime Energy Services Co. et al. by *Collin O'Connor Udell*, *Richard J. Cino*, *Joseph C. Toris*, *Kristen M. Fiore*, and *Arlene K. Kline*; and for the New England Legal Foundation et al. by *Benjamin G. Robbins* and *Martin J. Newhouse*.

Briefs of *amici curiae* urging affirmance were filed for Ethical Systems, Inc., by *Jason P. Steed*; for the National Whistleblower Center et al. by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; for the Taxpayers Against Fraud Education Fund by *Claire M. Sylvia*; and for Sen. Charles Grassley by *Tejinder Singh*.

in important respects. Most notably, Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. § 1514A(a)(1). Dodd-Frank delineates a more circumscribed class; it defines "whistleblower" to mean a person who provides "information relating to a violation of the securities laws to the Commission." 15 U. S. C. § 78u–6(a)(6). A whistleblower so defined is eligible for an award if original information he or she provides to the SEC leads to a successful enforcement action. § 78u–6(b)–(g). And, most relevant here, a whistleblower is protected from retaliation for, *inter alia*, "making disclosures that are required or protected under" Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation proscription at 18 U. S. C. § 1513(e), or any other law subject to the SEC's jurisdiction. 15 U. S. C. § 78u–6(h)(1)(A)(iii).

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The question presented: Does the anti-retaliation provision of Dodd-Frank extend to an individual who has not reported a violation of the securities laws to the SEC and therefore falls outside the Act's definition of "whistleblower"? Pet. for Cert. (I). We answer that question "No": To sue under Dodd-Frank's anti-retaliation provision, a person must first "provid[e] . . . information relating to a violation of the securities laws to the Commission." § 78u–6(a)(6).

I

A

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation," Congress enacted Sarbanes-Oxley in 2002. *Lawson* v. *FMR LLC*, 571 U. S. 429, 432 (2014). Most pertinent here, Sarbanes-Oxley created new protections for employees at risk of retaliation for reporting corporate misconduct. See 18 U. S. C. § 1514A. Section 1514A prohibits

certain companies from discharging or otherwise "discriminat[ing] against an employee in the terms and conditions of employment because" the employee "provid[es] information . . . or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." § 1514A(a)(1). An employee qualifies for protection when he or she provides information or assistance either to a federal regulatory or law enforcement agency, Congress, or any "person with supervisory authority over the employee." § 1514A(a)(1)(A)–(C).[1]

To recover under § 1514A, an aggrieved employee must exhaust administrative remedies by "filing a complaint with the Secretary of Labor." § 1514A(b)(1)(A); see *Lawson*, 571 U. S., at 436–437. Congress prescribed a 180-day limitation period for filing such a complaint. § 1514A(b)(2)(D). If the agency "does not issue a final decision within 180 days of the filing of [a] complaint, and the [agency's] delay is not due to bad faith on the claimant's part, the claimant may proceed to federal district court for *de novo* review." *Id.*, at 437 (citing § 1514A(b)). An employee who prevails in a proceeding under § 1514A is "entitled to all relief necessary to make the employee whole," including reinstatement, backpay with interest, and any "special damages sustained as a result of the discrimination," among such damages, litigation costs. § 1514A(c).

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At issue in this case is the Dodd-Frank anti-retaliation provision enacted in 2010, eight years after the enactment of

[1] Sarbanes-Oxley also prohibits retaliation against an "employee" who "file[s], . . . testif[ies], participate[s] in, or otherwise assist[s] in a proceeding filed or about to be filed . . . relating to an alleged violation of" the same provisions of federal law addressed in 18 U. S. C. § 1514A(a)(1). See § 1514A(a)(2).

Sarbanes-Oxley. Passed in the wake of the 2008 financial crisis, Dodd-Frank aimed to "promote the financial stability of the United States by improving accountability and transparency in the financial system." 124 Stat. 1376.

Dodd-Frank responded to numerous perceived shortcomings in financial regulation. Among them was the SEC's need for additional "power, assistance and money at its disposal" to regulate securities markets. S. Rep. No. 111–176, pp. 36, 37 (2010). To assist the Commission "in identifying securities law violations," the Act established "a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." *Id.*, at 38. And recognizing that "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide,'" Congress sought to protect whistleblowers from employment discrimination. *Id.*, at 111, 112.

Dodd-Frank implemented these goals by adding a new provision to the Securities Exchange Act of 1934: 15 U. S. C. § 78u–6. Section 78u–6 begins by defining a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." § 78u–6(a)(6) (emphasis added). That definition, the statute directs, "shall apply" "[i]n this section"—*i. e.*, throughout § 78u–6. § 78u–6(a).

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Section 78u–6 affords covered whistleblowers both incentives and protection. First, the section creates an award program for "whistleblowers who voluntarily provid[e] original information to the Commission that le[ads] to the successful enforcement of [a] covered judicial or administrative action." § 78u–6(b)(1). A qualifying whistleblower is entitled to a cash award of 10 to 30 percent of the monetary sanctions collected in the enforcement action. See § 78u–6(b)(1)(A)–(B).

Second, § 78u–6(h) prohibits an employer from discharging, harassing, or otherwise discriminating against a "whistle-

blower" "because of any lawful act done by the whistleblower" in three situations: first, "in providing information to the Commission in accordance with [§ 78u–6]," § 78u–6(h)(1)(A)(i); second, "in initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information provided to the SEC in accordance with § 78u–6, § 78u–6(h)(1)(A)(ii); and third, "in making disclosures that are required or protected under" either Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U. S. C. § 1513(e),[2] or "any other law, rule, or regulation subject to the jurisdiction of the Commission," § 78u–6(h)(1)(A)(iii). Clause (iii), by cross-referencing Sarbanes-Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee's reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes-Oxley. See *supra*, at 154.[3]

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[2] Section 1513(e) provides: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both."

[3] Section 78u–6(h)(1)(A) reads in full:

"No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this section;

"(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

"(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U. S. C. § 7201 et seq.), this chapter, including section 78j–l(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

The recovery procedures under the anti-retaliation provisions of Dodd-Frank and Sarbanes-Oxley differ in critical respects. First, unlike Sarbanes-Oxley, which contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. § 1514A(b)(1)(A), (2)(D), Dodd-Frank permits a whistleblower to sue a current or former employer directly in federal district court, with a default limitation period of six years, see § 78u–6(h)(1)(B)(i), (iii)(I)(aa). Second, Dodd-Frank instructs a court to award to a prevailing plaintiff double backpay with interest, see § 78u–6(h)(1)(C)(ii), while Sarbanes-Oxley limits recovery to actual backpay with interest, see 18 U. S. C. § 1514A(c)(2)(B). Like Sarbanes-Oxley, however, Dodd-Frank authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. Compare § 78u–6(h)(1)(C)(i), (iii), with 18 U. S. C. § 1514A(c)(2)(A), (C).[4]

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Congress authorized the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§ 78u–6] consistent with the purposes of this section." § 78u–6(j). Pursuant to this authority, the SEC published a notice of proposed rulemaking to "Implemen[t] the Whistleblower Provisions" of Dodd-Frank. 75 Fed. Reg. 70488 (2010). Proposed Rule 21F–2(a) defined a "whistleblower," for purposes of both the award and anti-retaliation provisions of § 78u–6, as one or more individuals who "provide the Commission with information relating to a potential violation of the securities laws." *Id.*, at 70519 (proposed 17 CFR § 240.21F–2(a)). The proposed rule, the agency noted, "tracks the statutory definition of a 'whistle-

[4] Unlike Dodd-Frank, Sarbanes-Oxley explicitly entitles a prevailing employee to "all relief necessary to make the employee whole," including "compensation for any special damages sustained as a result of the discrimination." 18 U. S. C. § 1514A(c)(1), (2)(C).

blower'" by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489.

In promulgating the final Rule, however, the agency changed course. Rule 21F–2, in finished form, contains two discrete "whistleblower" definitions. See 17 CFR § 240.21F–2(a)–(b) (2017). For purposes of the award program, the Rule states that "[y]ou are a whistleblower if . . . you *provide the Commission* with information . . . relat[ing] to a possible violation of the Federal securities laws." § 240.21F–2(a)(1) (emphasis added). The information must be provided to the SEC through its website or by mailing or faxing a specified form to the SEC Office of the Whistleblower. See *ibid.*; § 240.21F–9(a)(1)–(2).

"For purposes of the anti-retaliation protections," however, the Rule states that "[y]ou are a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation" and "[y]ou provide that information in a manner described in" clauses (i) through (iii) of § 78u–6(h)(1)(A). 17 CFR § 240.21F–2(b)(1)(i)–(ii). "The anti-retaliation protections apply," the Rule emphasizes, "whether or not you satisfy the requirements, procedures and conditions to qualify for an award." § 240.21F–2(b)(1)(iii). An individual may therefore gain anti-retaliation protection as a "whistleblower" under Rule 21F–2 without providing information to the SEC, so long as he or she provides information in a manner shielded by one of the anti-retaliation provision's three clauses. For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes-Oxley anti-retaliation provision.[5]

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C

Petitioner Digital Realty Trust, Inc. (Digital Realty), is a real estate investment trust that owns, acquires, and devel-

[5] In 2015, the SEC issued an interpretive rule reiterating that anti-retaliation protection is not contingent on a whistleblower's provision of information to the Commission. See 80 Fed. Reg. 47829 (2015).

ops data centers. See Brief for Petitioner 3. Digital Realty employed respondent Paul Somers as a Vice President from 2010 to 2014. See 119 F. Supp. 3d 1088, 1092 (ND Cal. 2015). Somers alleges that Digital Realty terminated him shortly after he reported to senior management suspected securities-law violations by the company. See *ibid.* Although nothing impeded him from alerting the SEC prior to his termination, he did not do so. See Tr. of Oral Arg. 45. Nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under Sarbanes-Oxley. See *ibid.*; 18 U. S. C. § 1514A(b)(2)(D).

Somers brought suit in the United States District Court for the Northern District of California alleging, *inter alia*, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim, arguing that "Somers does not qualify as a 'whistleblower' under [§ 78u–6(h)] because he did not report any alleged law violations to the SEC." 119 F. Supp. 3d, at 1094. The District Court denied the motion. Rule 21F–2, the court observed, does not necessitate recourse to the SEC prior to gaining "whistleblower" status under Dodd-Frank. See *id.*, at 1095–1096. Finding the statutory scheme ambiguous, the court accorded deference to the SEC's Rule under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 119 F. Supp. 3d, at 1096–1106.

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On interlocutory appeal, a divided panel of the Court of Appeals for the Ninth Circuit affirmed. 850 F. 3d 1045 (2017). The majority acknowledged that Dodd-Frank's definitional provision describes a "whistleblower" as an individual who provides information to the SEC itself. *Id.*, at 1049. But applying that definition to the anti-retaliation provision, the majority reasoned, would narrow the third clause of § 78u–6(h)(1)(A) "to the point of absurdity": The statute would protect employees only if they "reported possible securities violations both internally and to the SEC." *Ibid.* Such dual reporting, the majority believed, was unlikely to occur. *Ibid.* Therefore, the majority concluded,

the statute should be read to protect employees who make disclosures privileged by clause (iii) of § 78u–6(h)(1)(A), whether or not those employees also provide information to the SEC. *Id.*, at 1050. In any event, the majority held, the SEC's resolution of any statutory ambiguity warranted deference. *Ibid.* Judge Owens dissented. In his view, the statutory definition of whistleblower was clear, left no room for interpretation, and plainly governed. *Id.*, at 1051.

Two other Courts of Appeals have weighed in on the question before us. The Court of Appeals for the Fifth Circuit has held that employees must provide information to the SEC to avail themselves of Dodd-Frank's anti-retaliation safeguard. See *Asadi* v. *G. E. Energy (USA), L. L. C.*, 720 F. 3d 620, 630 (2013). A divided panel of the Court of Appeals for the Second Circuit reached the opposite conclusion, over a dissent by Judge Jacobs. See *Berman* v. *NEO@OGILVY LLC*, 801 F. 3d 145, 155 (2013). We granted certiorari to resolve this conflict, 582 U. S. 929 (2017), and now reverse the Ninth Circuit's judgment.

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II

"When a statute includes an explicit definition, we must follow that definition," even if it varies from a term's ordinary meaning. *Burgess* v. *United States*, 553 U. S. 124, 130 (2008) (internal quotation marks omitted). This principle resolves the question before us.

A

Our charge in this review proceeding is to determine the meaning of "whistleblower" in § 78u–6(h), Dodd-Frank's anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A "whistleblower" is "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." § 78u–6(a)(6) (emphasis added). Leaving no doubt as to the definition's reach, the statute instructs that the "definitio[n]

shall apply" "[i]n this section," that is, throughout § 78u–6. § 78u–6(a)(6).

The whistleblower definition operates in conjunction with the three clauses of § 78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes *who* is eligible for protection—namely, a whistleblower who provides pertinent information "to the Commission." § 78u–6(a)(6). The three clauses of § 78u–6(h)(1)(A) then describe what *conduct*, when engaged in by a whistleblower, is shielded from employment discrimination. See § 78u–6(h)(1)(A)(i)–(iii). An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages.

Reinforcing our reading, another whistleblower-protection provision in Dodd-Frank imposes no requirement that information be conveyed to a government agency. Title 10 of the statute, which created the Consumer Financial Protection Bureau (CFPB), prohibits discrimination against a "covered employee" who, among other things, "provide[s] . . . information to [his or her] employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to" a violation of a law subject to the CFPB's jurisdiction. 12 U. S. C. § 5567(a)(1). To qualify as a "covered employee," an individual need not provide information to the CFPB, or any other entity. See § 5567(b) ("covered employee" means "any individual performing tasks related to the offering or provision of a consumer financial product or service").

"[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 573 U. S. 351, 358 (2014) (internal quotation marks and alteration omitted). Congress placed a government-reporting requirement in § 78u–6(h), but not

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elsewhere in the same statute. Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed.

B

Dodd-Frank's purpose and design corroborate our comprehension of § 78u–6(h)'s reporting requirement. The "core objective" of Dodd-Frank's robust whistleblower program, as Somers acknowledges, Tr. of Oral Arg. 45, is "to motivate people who know of securities law violations to *tell the SEC*," S. Rep. No. 111–176, at 38 (emphasis added). By enlisting whistleblowers to "assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws," Congress undertook to improve SEC enforcement and facilitate the Commission's "recover[y] [of] money for victims of financial fraud." *Id.*, at 110. To that end, § 78u–6 provides substantial monetary rewards to whistleblowers who furnish actionable information to the SEC. See § 78u–6(b).

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Financial inducements alone, Congress recognized, may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing. Congress therefore complemented the Dodd-Frank monetary incentives for SEC reporting by heightening protection against retaliation. While Sarbanes-Oxley contains an administrative-exhaustion requirement, a 180-day administrative complaint-filing deadline, and a remedial scheme limited to actual damages, Dodd-Frank provides for immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay. See *supra*, at 157. Dodd-Frank's award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to "tell the SEC." S. Rep. No. 111–176, at 38.

When enacting Sarbanes-Oxley's whistleblower regime, in comparison, Congress had a more far-reaching objective: It sought to disturb the "corporate code of silence" that "discourage[d] employees from reporting fraudulent behavior

not only to the proper authorities, such as the FBI and the SEC, but even internally." *Lawson*, 571 U. S., at 435 (internal quotation marks omitted). Accordingly, the Sarbanes-Oxley anti-retaliation provision covers employees who report fraud not only to the SEC, but also to any other federal agency, Congress, or an internal supervisor. See 18 U. S. C. § 1514A(a)(1).

C

In sum, Dodd-Frank's text and purpose leave no doubt that the term "whistleblower" in § 78u–6(h) carries the meaning set forth in the section's definitional provision. The disposition of this case is therefore evident: Somers did not provide information "to the Commission" before his termination, § 78u–6(a)(6), so he did not qualify as a "whistleblower" at the time of the alleged retaliation. He is therefore ineligible to seek relief under § 78u–6(h).

III

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Somers and the Solicitor General tender a different view of Dodd-Frank's compass. The whistleblower definition, as they see it, applies only to the statute's award program, not to its anti-retaliation provision, and thus not, as the definition plainly states, throughout "this section," § 78u–6(a). See Brief for Respondent 30; Brief for United States as *Amicus Curiae* 10–11. For purposes of the anti-retaliation provision alone, they urge us to construe the term "whistleblower" in its "ordinary sense," *i. e.*, without any SEC-reporting requirement. Brief for Respondent 18.

Doing so, Somers and the Solicitor General contend, would align with our precedent, specifically *Lawson* v. *Suwannee Fruit & S. S. Co.*, 336 U. S. 198 (1949), and *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302 (2014). In those decisions, we declined to apply a statutory definition that ostensibly governed where doing so would have been "incompatible with . . . Congress' regulatory scheme," *id.*, at 322 (internal quotation marks omitted), or would have "de-

stroy[ed] one of the [statute's] major purposes," *Suwannee Fruit*, 336 U. S., at 201.

This case is of a piece, Somers and the Solicitor General maintain. Applying the statutory definition here, they variously charge, would "create obvious incongruities," Brief for United States as *Amicus Curiae* 19 (internal quotation marks omitted), "produce anomalous results," *id.*, at 22, "vitiate much of the [statute's] protection," *id.*, at 20 (internal quotation marks omitted), and, as the Court of Appeals put it, narrow clause (iii) of § 78u–6(h)(1)(A) "to the point of absurdity," Brief for Respondent 35 (quoting 850 F. 3d, at 1049). We next address these concerns and explain why they do not lead us to depart from the statutory text.

A

It would gut "much of the protection afforded by" the third clause of § 78u–6(h)(1)(a), Somers and the Solicitor General urge most strenuously, to apply the whistleblower definition to the anti-retaliation provision. Brief for United States as *Amicus Curiae* 20 (internal quotation marks omitted); Brief for Respondent 28–29. As earlier noted, see *supra*, at 156, clause (iii) prohibits retaliation against a "whistleblower" for "making disclosures" to various persons and entities, including *but not limited to* the SEC, to the extent those disclosures are "required or protected under" various laws other than Dodd-Frank. § 78u–6(h)(1)(A)(iii). Applying the statutory definition of whistleblower, however, would limit clause (iii)'s protection to "only those individuals who report to the Commission." Brief for United States as *Amicus Curiae* 22.

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The plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alternative proffered by Somers and the Solicitor General. But we do not agree that this consequence "vitiate[s]" clause (iii)'s protection, *id.*, at 20 (internal quotation marks omitted), or ranks as "absur[d]," Brief for Respondent 35 (internal quotation

marks omitted).[6] In fact, our reading leaves the third clause with "substantial meaning." Brief for Petitioner 32.

With the statutory definition incorporated, clause (iii) protects a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. § 78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

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While the Solicitor General asserts that limiting the protections of clause (iii) to dual reporters would "shrink to insignificance the [clause's] ban on retaliation," Brief for United States as *Amicus Curiae* 22 (internal quotation marks omitted), he offers scant evidence to support that assertion. Tugging in the opposite direction, he reports that approximately 80 percent of the whistleblowers who received awards in 2016 "reported internally before reporting to the Commission." *Id.*, at 23. And Digital Realty cites real-world examples of dual reporters seeking Dodd-Frank or Sarbanes-Oxley recovery for alleged retaliation. See Brief for Petitioner 33, and n. 4 (collecting cases). Overlooked by Somers and the Solicitor General, in dual-reporting cases, retaliation not prompted by SEC disclosures (and thus unaddressed by clause (i)) is likely commonplace: The SEC is

[6] The Solicitor General, unlike Somers, acknowledges that it would not be absurd to apply the "whistleblower" definition to the anti-retaliation provision. Tr. of Oral Arg. 52.

required to protect the identity of whistleblowers, see § 78u–6(h)(2)(A), so employers will often be unaware that an employee has reported to the Commission. In any event, even if the number of individuals qualifying for protection under clause (iii) is relatively limited, "[i]t is our function to give the statute the effect its language suggests, however modest that may be." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 270 (2010).

B

Somers and the Solicitor General express concern that our reading would jettison protection for auditors, attorneys, and other employees subject to internal-reporting requirements. See Brief for Respondent 35; Brief for United States as *Amicus Curiae* 21. Sarbanes-Oxley, for example, requires auditors and attorneys to report certain information within the company before making disclosures externally. See 15 U. S. C. §§ 78j–1(b), 7245; 17 CFR § 205.3. If the whistleblower definition applies, Somers and the Solicitor General fear, these professionals will be "le[ft] . . . vulnerable to discharge or other retaliatory action for complying with" their internal-reporting obligations. Brief for United States as *Amicus Curiae* 22 (internal quotation marks omitted).

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Our reading shields employees in these circumstances, however, *as soon as they also provide relevant information to the Commission*. True, such employees will remain ineligible for Dodd-Frank's protection until they tell the SEC, but this result is consistent with Congress' aim to encourage SEC disclosures. See S. Rep. No. 111–176, at 38; *supra*, at 155, 162. Somers worries that lawyers and auditors will face retaliation quickly, before they have a chance to report to the SEC. Brief for Respondent 35–36. But he offers nothing to show that Congress had this concern in mind when it enacted § 78u–6(h). Indeed, Congress may well have considered adequate the safeguards already afforded by Sarbanes-Oxley, protections specifically designed to shield lawyers, accountants, and similar professionals. See *Lawson*, 571 U. S., at 448.

C

Applying the whistleblower definition as written, Somers and the Solicitor General further protest, will create "an incredibly unusual statutory scheme": "[I]dentical misconduct"—*i. e.*, retaliating against an employee for internal reporting—will "go punished or not based on the happenstance of a separate report" to the SEC, of which the wrongdoer may "not even be aware." Brief for Respondent 37–38. See also Brief for United States as *Amicus Curiae* 24. The upshot, the Solicitor General warns, "would [be] substantially diminish[ed] Dodd-Fran[k] deterrent effect." *Ibid.*

Overlooked in this protest is Dodd-Frank's core objective: to prompt reporting to the SEC. *Supra*, at 155, 162. In view of that precise aim, it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve, *i. e.*, they have placed information about unlawful activity before the Commission to aid its enforcement efforts.

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D

Pointing to another purported anomaly attending the reading we adopt today, the Solicitor General observes that neither the whistleblower definition nor § 78u–6(h) contains any requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as *Amicus Curiae* 25. It is therefore possible, the Solicitor General posits, that "an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under [§ 78u–6(h)] if he had reported an insider-trading violation by his previous employer to the Commission in 2012." *Ibid.* For its part, Digital Realty agrees that this scenario could arise, but does not see it as a cause for concern: "Congress," it states, "could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should re-

ceive broad protection over time against retaliation for a variety of disclosures." Reply Brief 11.

We need not dwell on the situation hypothesized by the Solicitor General, for it veers far from the case before us. We note, however, that the interpretation offered by Somers and the Solicitor General—*i. e.*, ignoring the statutory definition when construing the anti-retaliation provision—raises an even thornier question about the law's scope. Their view, which would not require an employee to provide information relating to a securities-law violation to the SEC, could afford Dodd-Frank protection to an employee who reports information bearing no relationship whatever to the securities laws. That prospect could be imagined based on the broad array of federal statutes and regulations cross-referenced by clause (iii) of the anti-retaliation provision. *E. g.*, 18 U. S. C. § 1513(e) (criminalizing retaliation for "providing to a law enforcement officer any truthful information relating to the commission . . . of *any Federal offense*" (emphasis added)); see *supra*, at 156, and n. 2. For example, an employee fired for reporting a co-worker's drug dealing to the Federal Bureau of Investigation might be protected. Brief for Petitioner 38. It would make scant sense, however, to rank an FBI drug-trafficking informant a whistleblower under Dodd-Frank, a law concerned only with encouraging the reporting of "*securities* law violations." S. Rep. No. 111–176, at 38 (emphasis added).

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E

Finally, the interpretation we adopt, the Solicitor General adds, would undermine not just clause (iii) of § 78u–6(h)(1)(A), but clause (ii) as well. Clause (ii) prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. § 78u–6(h)(1)(A)(ii). If the whistleblower definition is applied to § 78u–6(h), the Solicitor General states, "an employer could fire an employee for giving . . . testimony [to the SEC] if the employee had

not previously reported to the Commission online or through the specified written form"—*i. e.*, the methods currently prescribed by Rule 21F–9 for a whistleblower to provide information to the Commission. Brief for United States as *Amicus Curiae* 20–21 (citing 17 CFR § 240.21F–9(a)(1)–(2)).

But the statute expressly delegates authority to the SEC to establish the "manner" in which information may be provided to the Commission by a whistleblower. See § 78u–6(a)(6). Nothing in today's opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii).

IV

For the foregoing reasons, we find the statute's definition of "whistleblower" clear and conclusive. Because "Congress has directly spoken to the precise question at issue," *Chevron*, 467 U. S., at 842, we do not accord deference to the contrary view advanced by the SEC in Rule 21F–2. See 17 CFR § 240.21F–2(b)(1); *supra*, at 158. The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term. See *Burgess*, 553 U. S., at 130.

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* * *

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion in full. I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute.

Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law.

Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.

Committee reports, like the Senate Report the Court discusses here, see *ante*, at 155, 162, 167–168, are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning. See *Garcia* v. *United States*, 469 U. S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'" (quoting *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969))). Bills presented to Congress for consideration are generally accompanied by a committee report. Such reports are typically circulated at least two days before a bill is to be considered on the floor and provide Members of Congress and their staffs with information about "a bill's context, purposes, policy implications, and details," along with information on its supporters and opponents. R. Katzmann, Judging Statutes 20, and n. 62 (2014) (citing A. LaRue, Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 107–1, p. 17 (2001)). These materials "have long been important means of informing the whole chamber about proposed legislation," Katzmann, Judging Statutes, at 19, a point Members themselves have emphasized over the years.* It is thus no surprise

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*See, *e. g.*, Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 65–66 (1986) (Sen. Charles E. Grassley) ("[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent"); Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 184 (1986) ("The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute"); Brudney,

that legislative staffers view committee and conference reports as the most reliable type of legislative history. See Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 977 (2013).

Legislative history can be particularly helpful when a statute is ambiguous or deals with especially complex matters. But even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text. See, *e. g.*, *Tapia* v. *United States*, 564 U. S. 319, 331–332 (2011); *Carr* v. *United States*, 560 U. S. 438, 457–458 (2010). Moreover, confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. See Katzmann, Judging Statutes, at 35–36.

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For these reasons, I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring in part and concurring in the judgment.

I join the Court's opinion only to the extent it relies on the text of the Dodd-Frank Wall Street Reform and Consumer

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Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response? 93 Mich. L. Rev. 1, 28 (1994) (compiling the views of former Members on "the central importance of committee reports to their own understanding of statutory text"). In fact, some Members "are more likely to vote . . . based on a reading of the legislative history than on a reading of the statute itself." Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 968 (2013).

Protection Act (Dodd-Frank), 124 Stat. 1376. The question in this case is whether the term "whistleblower" in Dodd-Frank's antiretaliation provision, 15 U. S. C. § 78u–6(h)(1), includes a person who does not report information to the Securities and Exchange Commission. The answer is in the definitions section of the statute, which states that the term "whistleblower" means a person who provides "information relating to a violation of the securities laws to the Commission." § 78u–6(a)(6). As the Court observes, this statutory definition "resolves the question before us." *Ante*, at 160. The Court goes on, however, to discuss the supposed "purpose" of the statute, which it primarily derives from a single Senate Report. See *ante*, at 155, 162–163, 167–168. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended."* *Lawson* v. *FMR LLC*, 571 U. S. 429, 459–460

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*For what it is worth, I seriously doubt that a committee report is a "particularly reliable source" for discerning "Congress' intended meaning." *Ante*, at 170 (SOTOMAYOR, J., concurring). The following exchange on the Senate floor is telling:

"Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

"Mr. DOLE. Did I write the committee report?

"Mr. ARMSTRONG. Yes.

"Mr. DOLE. No; the Senator from Kansas did not write the committee report.

"Mr. ARMSTRONG. Did any Senator write the committee report?

"Mr. DOLE. I have to check.

"Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

"Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .

"Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

"Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

(2014) (Scalia, J., concurring in part and concurring in judgment). And "it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980). For these reasons, I am unable to join the portions of the Court's opinion that venture beyond the statutory text.

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"Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

"Mr. DOLE. No.

"Mr. ARMSTRONG. . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate. . . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report. . . . [L]et me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute." *Hirschey* v. *FERC*, 777 F. 2d 1, 7–8, n. 1 (CADC 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. 16918–16919 (1982)). See also Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 317–318 (2017) (describing his experience as a Senate staffer who drafted legislative history "like being a teenager at home while your parents are away for the weekend: there was no supervision. I was able to write more or less what I pleased. . . . [M]ost members of Congress . . . have no idea at all about what is in the legislative history for a particular bill").

Syllabus

CLASS *v.* UNITED STATES

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

No. 16–424. Argued October 4, 2017—Decided February 21, 2018

A federal grand jury indicted petitioner, Rodney Class, for possessing firearms in his locked jeep, which was parked on the grounds of the United States Capitol in Washington, D. C. See 40 U. S. C. § 5104(e)(1) ("An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm"). Appearing *pro se*, Class asked the District Court to dismiss the indictment. He alleged that the statute, § 5104(e), violates the Second Amendment and the Due Process Clause. After the District Court dismissed both claims, Class pleaded guilty to "Possession of a Firearm on U. S. Capitol Grounds, in violation of 40 U. S. C. § 5104(e)." App. 30. A written plea agreement set forth the terms of Class' guilty plea, including several categories of rights that he agreed to waive. The agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction. After conducting a hearing pursuant to Rule 11(b) of the Federal Rules of Criminal Procedure, the District Court accepted Class' guilty plea and sentenced him. Soon thereafter, Class sought to raise his constitutional claims on direct appeal. The Court of Appeals held that Class could not do so because, by pleading guilty, he had waived his constitutional claims.

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Held: A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. Pp. 178–185.

(a) This holding flows directly from this Court's prior decisions. Fifty years ago, in *Haynes* v. *United States*, 390 U. S. 85, the Court addressed a similar claim challenging the constitutionality of a criminal statute. Justice Harlan's opinion for the Court stated that the defendant's "plea of guilty did not, of course, waive his previous [constitutional] claim." *Id.*, at 87, n. 2. That clear statement reflects an understanding of the nature of guilty pleas that stretches, in broad outline, nearly 150 years. Subsequent decisions have elaborated upon it. In *Blackledge* v. *Perry*, 417 U. S. 21, the Court recognized that a guilty plea bars some "'antecedent constitutional violations'" related to events (such as grand jury proceedings) that "'occu[r] prior to the entry of the guilty plea.'" *Id.*, at 30 (quoting *Tollett* v. *Henderson*, 411 U. S. 258, 266–267). However, where the claim implicates "the very power of the State" to prosecute the defendant, a guilty plea cannot by itself bar it. 417 U. S., at

30. Likewise, in *Menna* v. *New York*, 423 U. S. 61, the Court held that because the defendant's claim was that "the State may not convict [him] no matter how validly his factual guilt is established," his "guilty plea, therefore, [did] not bar the claim." *Id.*, at 63, n. 2. In more recent years, the Court has reaffirmed the *Menna-Blackledge* doctrine's basic teaching that " 'a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.' " *United States* v. *Broce*, 488 U. S. 563, 575 (quoting *Menna*, *supra*, at 63, n. 2). Pp. 178–182.

(b) In this case, Class neither expressly nor implicitly waived his constitutional claims by pleading guilty. As this Court understands them, the claims at issue here do not contradict the terms of the indictment or the written plea agreement and they can be resolved based upon the existing record. *Broce*, 488 U. S., at 575. Class challenges the Government's power to criminalize his (admitted) conduct and thereby calls into question the Government's power to " 'constitutionally prosecute' " him. *Ibid.* (quoting *Menna*, *supra*, at 61–62, n. 2). A guilty plea does not bar a direct appeal in these circumstances. Pp. 182–183.

(c) Federal Rule of Criminal Procedure 11(a)(2), which governs "conditional" guilty pleas, cannot resolve this case. By its own terms, the Rule does not say whether it sets forth the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea. And the Rule's drafters acknowledged that the "Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty" and specifically stated that Rule 11(a)(2) "has no application" to the "kinds of constitutional objections" that may be raised under the "*Menna-Blackledge* doctrine." Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 912. Because the applicability of the *Menna-Blackledge* doctrine is at issue here, Rule 11(a)(2) cannot resolve this case. Pp. 183–185.

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Reversed and remanded.

Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Sotomayor, Kagan, and Gorsuch, JJ., joined. Alito, J., filed a dissenting opinion, in which Kennedy and Thomas, JJ., joined, *post*, p. 185.

Jessica Ring Amunson argued the cause for petitioner. With her on the briefs were *Erica L. Ross* and *Joshua M. Parker*.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Acting Solicitor General Wall*,

Acting Assistant Attorney General Blanco, *Deputy Solicitor General Dreeben*, and *John-Alex Romano*.*

JUSTICE BREYER delivered the opinion of the Court.

Does a guilty plea bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution? In our view, a guilty plea by itself does not bar that appeal.

I

In September 2013, a federal grand jury indicted petitioner, Rodney Class, for possessing firearms in his locked jeep, which was parked in a lot on the grounds of the United States Capitol in Washington, D. C. See 40 U. S. C. § 5104(e)(1) ("An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm"). Soon thereafter, Class, appearing *pro se*, asked the Federal District Court for the District of Columbia to dismiss the indictment. As relevant here, Class alleged that the statute, § 5104(e), violates the Second Amendment. App. in No. 15–3015 (CADC), pp. 32–33. He also raised a due process claim, arguing that he was denied fair notice that weapons were banned in the parking lot. *Id.*, at 39. Following a hearing, the District Court denied both claims. App. to Pet. for Cert. 9a.

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Several months later, Class pleaded guilty to "Possession of a Firearm on U. S. Capitol Grounds, in violation of 40 U. S. C. § 5104(e)." App. 30. The Government agreed to drop related charges. *Id.*, at 31.

A written plea agreement set forth the terms of Class' guilty plea, including several categories of rights that he expressly agreed to waive. Those express waivers included:

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*Briefs of *amici curiae* urging reversal were filed for the Innocence Project by *James C. Dugan*; for the National Association of Criminal Defense Lawyers et al. by *Daniel N. Lerman*, *Ruthanne M. Deutsch*, *Hyland Hunt*, *Jonathan Hacker*, *David D. Cole*, and *Ezekiel Edwards*; and for Albert W. Alschuler by *Mr. Alschuler*, *pro se*, and *Matthew J. Silveira*.

(1) all defenses based upon the statute of limitations; (2) several specified trial rights; (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; (4) most collateral attacks on the conviction and sentence; and (5) various rights to request or receive information concerning the investigation and prosecution of his criminal case. *Id.*, at 38–42. At the same time, the plea agreement expressly enumerated categories of claims that Class could raise on appeal, including claims based upon (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions. *Id.*, at 41. Finally, the plea agreement stated under the heading "Complete Agreement":

> "No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements . . . be made unless committed to writing and signed . . . ." *Id.*, at 45.

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The agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional.

The District Court held a plea hearing during which it reviewed the terms of the plea agreement (with Class present and under oath) to ensure the validity of the plea. See Fed. Rule Crim. Proc. 11(b); *United States* v. *Ruiz*, 536 U. S. 622, 629 (2002) (defendant's guilty plea must be "'voluntary'" and "related waivers" must be made "'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences'"). After providing Class with the required information and warnings, the District Court accepted his guilty plea. Class was sentenced to 24 days imprisonment followed by 12 months of supervised release.

Several days later, Class appealed his conviction to the Court of Appeals for the District of Columbia Circuit. Class was appointed an *amicus* to aid him in presenting his argu-

ments. He repeated his constitutional claims, namely, that the statute violates the Second Amendment and the Due Process Clause because it fails to give fair notice of which areas fall within the Capitol Grounds where firearms are banned. The Court of Appeals held that Class could not raise his constitutional claims because, by pleading guilty, he had waived them. App. to Pet. for Cert. 1a–5a. Class filed a petition for certiorari in this Court asking us to decide whether in pleading guilty a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction. We agreed to do so.

II

The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not. Class did not relinquish his right to appeal the District Court's constitutional determinations simply by pleading guilty. As we shall explain, this holding flows directly from this Court's prior decisions.

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Fifty years ago this Court directly addressed a similar claim (a claim that the statute of conviction was unconstitutional). And the Court stated that a defendant's "plea of guilty did not . . . waive his previous [constitutional] claim." *Haynes* v. *United States*, 390 U. S. 85, 87, n. 2 (1968). Though Justice Harlan's opinion for the Court in *Haynes* offered little explanation for this statement, subsequent decisions offered a rationale that applies here.

In *Blackledge* v. *Perry*, 417 U. S. 21 (1974), North Carolina indicted and convicted Jimmy Seth Perry on a misdemeanor assault charge. When Perry exercised his right under a North Carolina statute to a *de novo* trial in a higher court, the State reindicted him, but this time the State charged a felony, which carried a heavier penalty, for the same conduct. Perry pleaded guilty. He then sought habeas relief on the grounds that the reindictment amounted to an unconsti-

tutional vindictive prosecution. The State argued that Perry's guilty plea barred him from raising his constitutional challenge. But this Court held that it did not.

The Court noted that a guilty plea bars appeal of many claims, including some "'antecedent constitutional violations'" related to events (say, grand jury proceedings) that had "'occurred prior to the entry of the guilty plea.'" *Id.*, at 30 (quoting *Tollett* v. *Henderson*, 411 U. S. 258, 266–267 (1973)). While *Tollett* claims were "of constitutional dimension," the Court explained that "the nature of the underlying constitutional infirmity is markedly different" from a claim of vindictive prosecution, which implicates "the very power of the State" to prosecute the defendant. *Blackledge*, 417 U. S., at 30. Accordingly, the Court wrote that "the right" Perry "asserts and that we today accept is the right not to be haled into court at all upon the felony charge" since "[t]he very initiation of the proceedings" against Perry "operated to deprive him due process of law." *Id.*, at 30–31.

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A year and a half later, in *Menna* v. *New York*, 423 U. S. 61 (1975) (*per curiam*), this Court repeated what it had said and held in *Blackledge*. After Menna served a 30-day jail term for refusing to testify before the grand jury on November 7, 1968, the State of New York charged him once again for (what Menna argued was) the same crime. Menna pleaded guilty, but subsequently appealed arguing that the new charge violated the Double Jeopardy Clause. U. S. Const., Amdt. 5. The lower courts held that Menna's constitutional claim had been "waived" by his guilty plea.

This Court reversed. Citing *Blackledge*, *supra*, at 30, the Court held that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Menna*, 423 U. S., at 62, 63, n. 2. Menna's claim amounted to a claim that "the State may not convict" him "no matter how validly his factual guilt is established." *Id.*, at 63, n. 2. Menna's "guilty plea, therefore, [did] not bar the claim." *Ibid.*

These holdings reflect an understanding of the nature of guilty pleas which, in broad outline, stretches back nearly 150 years. In 1869 Justice Ames wrote for the Supreme Judicial Court of Massachusetts:

> "The plea of guilty is, of course, a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant. It is a waiver also of all merely technical and formal objections of which the defendant could have availed himself by any other plea or motion. But if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." *Commonwealth* v. *Hinds*, 101 Mass. 209, 210.

Decisions of federal and state courts throughout the 19th and 20th centuries reflect a similar view of the nature of a guilty plea. See *United States* v. *Ury*, 106 F. 2d 28 (CA2 1939) (holding the "plea of guilty did not foreclose the appellant," who argued that a statute was unconstitutional, "from the review he now seeks" (citing earlier cases)); *Hocking Valley R. Co.* v. *United States*, 210 F. 735 (CA6 1914) (holding that a defendant may raise the claim that, because the indictment did not charge an offense no crime has been committed, for it is "the settled rule that," despite a guilty plea, a defendant "may urge" such a contention "in the reviewing court"); *Carper* v. *State*, 27 Ohio St. 572, 575 (1875) (same). We refer to these cases because it was against this background that Justice Harlan in his opinion for the Court made the statement to which we originally referred, namely, that a defendant's "plea of guilty did not, of course, waive his previous [constitutional] claim." *Haynes*, 390 U. S., at 87, n. 2 (citing *Ury*, *supra*, at 28).

In more recent years, we have reaffirmed the *Menna-Blackledge* doctrine and refined its scope. In *United States* v. *Broce*, 488 U. S. 563 (1989), the defendants pleaded guilty to two separate indictments in a single proceeding which "on

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their face" described two separate bid-rigging conspiracies. *Id.*, at 576. They later sought to challenge their convictions on double jeopardy grounds, arguing that they had only admitted to one conspiracy. Citing *Blackledge* and *Menna*, this Court repeated that a guilty plea does not bar a claim on appeal "where on the face of the record the court had no power to enter the conviction or impose the sentence." 488 U. S., at 569. However, because the defendants could not "prove their claim by relying on those indictments and the existing record" and "without contradicting those indictments," this Court held that their claims were "foreclosed by the admissions inherent in their guilty pleas." *Id.*, at 576.

Unlike the claims in *Broce*, Class' constitutional claims here, as we understand them, do not contradict the terms of the indictment or the written plea agreement. They are consistent with Class' knowing, voluntary, and intelligent admission that he did what the indictment alleged. Those claims can be "resolved without any need to venture beyond that record." *Id.*, at 575.

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Nor do Class' claims focus upon case-related constitutional defects that "'occurred prior to the entry of the guilty plea.'" *Blackledge*, 417 U. S., at 30. They could not, for example, "have been 'cured' through a new indictment by a properly selected grand jury." *Ibid.* (citing *Tollett*, *supra*, at 267). Because the defendant has admitted the charges against him, a guilty plea makes the latter kind of constitutional claim "irrelevant to the constitutional validity of the conviction." *Haring* v. *Prosise*, 462 U. S. 306, 321 (1983). But the cases to which we have referred make clear that a defendant's guilty plea does not make irrelevant the kind of constitutional claim Class seeks to make.

In sum, the claims at issue here do not fall within any of the categories of claims that Class' plea agreement forbids him to raise on direct appeal. They challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to

"'constitutionally prosecute'" him. *Broce*, *supra*, at 575 (quoting *Menna*, *supra*, at 61–62, n. 2). A guilty plea does not bar a direct appeal in these circumstances.

III

We are not convinced by the three basic arguments that the Government and the dissent make in reply.

First, the Government contends that by entering a guilty plea, Class inherently relinquished his constitutional claims. The Government is correct that a guilty plea does implicitly waive some claims, including some constitutional claims. However, as we explained in Part II, *supra*, Class' valid guilty plea does not, by itself, bar direct appeal of his constitutional claims in these circumstances.

As an initial matter, a valid guilty plea "forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Ruiz*, 536 U. S., at 628–629. While those "simultaneously" relinquished rights include the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers, *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969), they do not include "a waiver of the privileges which exist beyond the confines of the trial," *Mitchell* v. *United States*, 526 U. S. 314, 324 (1999). Here, Class' statutory right directly to appeal his conviction "cannot in any way be characterized as part of the trial." *Lafler* v. *Cooper*, 566 U. S. 156, 165 (2012).

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A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered. See, *e. g.*, *Haring*, *supra*, at 320 (holding a valid guilty plea "results in the defendant's loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment"). Neither can the defendant later complain that the indicting grand jury was unconstitutionally selected. *Tollett*, 411 U. S., at 266. But, as we have said, those kinds of claims are not at issue here.

Finally, a valid guilty plea relinquishes any claim that would contradict the "admissions necessarily made upon entry of a voluntary plea of guilty." *Broce*, *supra*, at 573–574. But the constitutional claim at issue here is consistent with Class' admission that he engaged in the conduct alleged in the indictment. Unlike the defendants in *Broce*, Class' challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he seeks to raise a claim which, "'judged on its face'" based upon the existing record, would extinguish the government's power to "'constitutionally prosecute'" the defendant if the claim were successful. *Broce*, *supra*, at 575 (quoting *Menna*, 423 U. S., at 63, n. 2).

Second, the Government and the dissent point to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, which governs "conditional" guilty pleas. The Rule states:

> "*Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea."

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The Government and the dissent argue that Rule 11(a)(2) means that "a defendant who pleads guilty *cannot* challenge his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing." Brief for United States 23; see also *post*, at 187–188, 201 (opinion of ALITO, J.). They support this argument by pointing to the notes of the Advisory Committee that drafted the text of Rule 11(a)(2). See Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 911 (hereinafter Advisory Committee's Notes). In particular, the dissent points to the suggestion that an unconditional guilty plea constitutes a waiver of "nonjurisdictional defects," while the Government points

to the drafters' statement that they intended the Rule's "conditional plea procedure . . . to conserve prosecutorial and judicial resources and advance speedy trial objectives," while ensuring "much needed uniformity in the federal system on this matter." *Ibid.*; see *United States* v. *Vonn*, 535 U. S. 55, 64, n. 6 (2002) (approving of Advisory Committee's Notes as relevant evidence of the drafters' intent). The Government adds that its interpretation of the Rule furthers these basic purposes. And, the argument goes, just as defendants must use Rule 11(a)(2)'s procedures to preserve, for instance, Fourth Amendment unlawful search-and-seizure claims, so must they use it to preserve the constitutional claims at issue here.

The problem with this argument is that, by its own terms, the Rule itself does not say whether it sets forth the *exclusive* procedure for a defendant to preserve a constitutional claim following a guilty plea. At the same time, the drafters' notes acknowledge that the "Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty." Advisory Committee's Notes, at 912. The notes then specifically refer to the "*Menna-Blackledge* doctrine." *Ibid.* They add that the Rule "should not be interpreted as either broadening or narrowing [that] doctrine or as establishing procedures for its application." *Ibid.* And the notes state that Rule 11(a)(2) "has no application" to the "kinds of constitutional objections" that may be raised under that doctrine. *Ibid.* The applicability of the *Menna-Blackledge* doctrine is at issue in this case. Cf. *Broce*, 488 U. S., at 569 (acknowledging *Menna* and *Blackledge* as covering claims "where on the face of the record the court had no power to enter the conviction or impose the sentence"). We therefore hold that Rule 11(a)(2) cannot resolve this case.

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Third, the Government argues that Class "expressly waived" his right to appeal his constitutional claim. Brief for United States 15. The Government concedes that the written plea agreement, which sets forth the "Complete

Agreement" between Class and the Government, see App. 45–46, does not contain this waiver. *Id.*, at 48–49. Rather, the Government relies on the fact that during the Rule 11 plea colloquy, the District Court Judge stated that, under the written plea agreement, Class was "giving up [his] right to appeal [his] conviction." *Id.*, at 76. And Class agreed.

We do not see why the District Court Judge's statement should bar Class' constitutional claims. It was made to ensure Class understood "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed. Rule Crim. Proc. 11(b)(1)(N). It does not expressly refer to a waiver of the appeal right here at issue. And if it is interpreted as expressly including that appeal right, it was wrong, as the Government acknowledged at oral argument. See Tr. of Oral Arg. 35–36. Under these circumstances, Class' acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims.

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* * *

For these reasons, we hold that Rodney Class may pursue his constitutional claims on direct appeal. The contrary judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Alito, with whom Justice Kennedy and Justice Thomas join, dissenting.

Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas.[1] Therefore it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas. In this case, the parties

[1] See United States Sentencing Commission, Overview of Federal Criminal Cases Fiscal Year 2016, p. 4 (May 2017); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006–Statistical Tables, p. 1 (rev. Nov. 22, 2010).

have asked us to identify the claims that a defendant can raise on appeal after entering an unconditional guilty plea. Regrettably, the Court provides no clear answer.

By my count, the Court identifies no fewer than five rules for ascertaining the issues that can be raised. According to the Court, a defendant who pleads guilty may assert on appeal (1) a claim that "implicates 'the very power of the State' to prosecute [him]," *ante*, at 179; (2) a claim that does not contradict the facts alleged in the charging document, *ante*, at 179–181; (3) a claim that "'the facts alleged and admitted do not constitute a crime,'" *ante*, at 180; and (4) claims other than "case-related constitutional defects that 'occurred prior to the entry of the guilty plea,'" *ante*, at 181 (some internal quotation marks omitted). In addition, the Court suggests (5) that such a defendant may not be able to assert a claim that "contradict[s] the terms of . . . [a] written plea agreement," *ibid.*, but whether this rule applies when the claim falls into one of the prior four categories is left unclear. How these rules fit together is anybody's guess. And to make matters worse, the Court also fails to make clear whether its holding is based on the Constitution or some other ground.

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I

There is no justification for the muddle left by today's decision. The question at issue is not conceptually complex. In determining whether a plea of guilty prevents a defendant in federal or state court from raising a particular issue on appeal, the first question is whether the Federal Constitution precludes waiver. If the Federal Constitution permits waiver, the next question is whether some other law nevertheless bars waiver. And if no law prevents waiver, the final question is whether the defendant knowingly and intelligently waived the right to raise the claim on appeal. *McMann* v. *Richardson*, 397 U. S. 759, 766 (1970).

Petitioner Rodney Class was charged with violating a federal statute that forbids the carrying of firearms on the

grounds of the United States Capitol. See 40 U. S. C. § 5104(e)(1). After entering an unconditional guilty plea, he appealed his conviction, asserting that his conduct was protected by the Second Amendment and that the statute he violated is unconstitutionally vague. The Court of Appeals affirmed his conviction, holding that Class had relinquished his right to litigate these claims when he entered his unconditional plea.

Analyzing this case under the framework set out above, I think the Court of Appeals was clearly correct. First, the Federal Constitution does not prohibit the waiver of the rights Class asserts. We have held that most personal constitutional rights may be waived, see, *e. g.*, *Peretz* v. *United States*, 501 U. S. 923, 936–937 (1991), and Class concedes that this is so with respect to the rights he is asserting, Tr. of Oral Arg. 5, 18.

Second, no federal statute or rule bars waiver. On the contrary, Rule 11 of the Federal Rules of Criminal Procedure makes it clear that, with one exception that I will discuss below, a defendant who enters an unconditional plea waives all nonjurisdictional claims. Although the Rule does not say this expressly, that is the unmistakable implication of subdivision (a)(2), which allows a defendant, "[w]ith the consent of the court and the government," to "enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." "Where [a law] explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary . . . intent." *Andrus* v. *Glover Constr. Co.*, 446 U. S. 608, 616–617 (1980). And here, there is strong evidence confirming that other exceptions were ruled out.

The Advisory Committee's Notes on Rule 11 make this clear, stating that an unconditional plea (with the previously mentioned exception) "constitutes a waiver of all nonjuris-

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dictional defects." Notes on 1983 Amendments, 18 U. S. C. App., p. 911. Advisory Committee's Notes on a federal rule of procedure "provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States* v. *Vonn*, 535 U. S. 55, 64, n. 6 (2002).[2] Subdivision (a)(2) was adopted against the backdrop of decisions of this Court holding that a guilty plea generally relinquishes all defenses to conviction, see, *e. g.*, *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973), and Rule 11(a)(2) creates a limited exception to that general principle. Far from prohibiting the waiver of nonjurisdictional claims, Rule 11 actually bars the raising of such claims (once again, with the previously mentioned exception).

For now, I will skip over that exception and proceed to the final question—whether Class voluntarily and intelligently waived his right to raise his Second Amendment and due process claims on appeal. It is not clear that he raised this question in the Court of Appeals, and in any event, this fact-specific inquiry is not within the scope of the question of law on which we granted review: "Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction." Pet. for Cert. i. The Court does not decide the case on that ground. Nor would I.

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II

A

I now turn to the one exception mentioned in the Advisory Committee's Notes on Rule 11—what the Notes, rather

[2] Advisory Committee's Notes should not be equated with congressional committee reports and other items of legislative history. Advisory Committee's Notes are adopted by the committee that drafts the rule; they are considered by the Judicial Conference when it recommends promulgation of the rule; they are before this Court when we prescribe the rule under the Rules Enabling Act, 28 U. S. C. § 2072; and they are submitted to Congress together with the text of the rule under 28 U. S. C. § 2074.

grandly, term the "*Menna-Blackledge* doctrine." Advisory Committee's Notes, 18 U. S. C. App., at 912. This "doctrine" consists of *Blackledge* v. *Perry*, 417 U. S. 21 (1974), a thinly reasoned decision handed down 44 years ago, and *Menna* v. *New York*, 423 U. S. 61 (1975), a *per curiam* decision issued the next year. These cases hold that a defendant has the right under the Due Process Clause of the Fourteenth Amendment to contest certain issues on appeal even if the defendant entered an unconditional guilty plea. Since a rule of procedure cannot abrogate a constitutional right, the Advisory Committee's Notes on Rule 11 specify that Rule 11(a)(2) "has no application" to the "*Menna-Blackledge* doctrine" and "should not be interpreted as either broadening or narrowing [that] doctrine or as establishing procedures for its application." Advisory Committee's Notes, 18 U. S. C. App., at 912.

Because this doctrine is the only exception recognized in Rule 11 and because the doctrine figures prominently in the opinion of the Court, it is important to examine its foundation and meaning.

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B

Blackledge and *Menna* represented marked departures from our prior decisions. Before they were handed down, our precedents were clear: When a defendant pleaded guilty to a crime, he relinquished his right to litigate all nonjurisdictional challenges to his conviction (except for the claim that his plea was not voluntary and intelligent), and the prosecution could assert this forfeiture to defeat a subsequent appeal. The theory was easy to understand. As we explained in *Tollett*, our view was that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. The defendant's decision to plead guilty extinguished his right to litigate whatever "possible defenses" or "constitutional plea[s] in abatement" he might have pursued at trial or on appeal. *Id.*, at 267–268. Guilty pleas were understood to have this

effect because a guilty plea comprises both factual and legal concessions. Hence, we said in *Tollett*, a defendant who pleads guilty is barred from contesting not only the "historical facts" but also the "*constitutional significance*" of those facts, even if he failed to "correctly apprais[e]" that significance at the time of his plea. *Id.*, at 267 (emphasis added).

When *Tollett* declared that a guilty plea encompasses all legal and factual concessions necessary to authorize the conviction, it was simply reiterating a principle we had enunciated many times before, most recently in the so-called "*Brady* trilogy." See *Brady* v. *United States*, 397 U. S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered"); *McMann*, 397 U. S., at 774 (a defendant who pleads guilty "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts"); *Parker* v. *North Carolina*, 397 U. S. 790, 797 (1970) (similar). As we put it in *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), "[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."

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On the strength of that rule, we held that defendants who pleaded guilty forfeited a variety of important constitutional claims. For instance, a defendant who pleaded guilty could not attack his conviction on the ground that the prosecution violated the Equal Protection Clause by systematically excluding African-Americans from grand juries in the county where he was indicted. *Tollett*, *supra*, at 266. Nor could he argue that the prosecution unlawfully coerced his confession—even if the confession was the only evidence supporting the conviction. *McMann*, *supra*, at 768; *Parker*, *supra*, at 796–797. Nor could he assert that his statute of conviction employed an unconstitutional penalty provision; his consent to be punished under the statute precluded this defense. *Brady*, *supra*, at 756–757. Reflecting our general thinking,

then-Judge Burger explained: "[I]f voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law." *Edwards* v. *United States*, 256 F. 2d 707, 709 (CADC 1958) (footnote omitted); see also A. Bishop, Waivers in Pleas of Guilty, 60 F. R. D. 513, 525–526 (1974) (summarizing the state of the law on the eve of *Blackledge*: "All the bulwarks of the fortress of defense are abandoned by the plea of guilty. . . . The plea of guilty surrenders all defenses whatever and all nonjurisdictional defects" (collecting cases)).

III

Blackledge and *Menna* diverged from these prior precedents, but neither case provided a clear or coherent explanation for the departure.

A

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In *Blackledge*, the Court held that a defendant who pleaded guilty could nevertheless challenge his conviction on the ground that his right to due process was violated by a vindictive prosecution. 417 U. S., at 30–31. The Court asserted that this right was "markedly different" from the equal protection and Fifth Amendment rights at stake in *Tollett* and the *Brady* trilogy because it "went to the very power of the State to bring the defendant into court to answer the charge brought against him." 417 U. S., at 30. The meaning of this distinction, however, is hard to grasp.

The most natural way to understand *Blackledge*'s reference to "the very power of the State" would be to say that an argument survives a guilty plea if it attacks the court's jurisdiction. After all, that is usually what we mean when we refer to the power to adjudicate. See, *e. g.*, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006); *United States* v. *Cotton*, 535 U. S. 625, 630 (2002); *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). But that cannot be what *Blackledge* meant.

First, the defendant in *Blackledge* had been tried in state court in North Carolina for a state-law offense, and the jurisdiction of state courts to entertain such prosecutions is purely a matter of state law (unless Congress validly and affirmatively ousts their jurisdiction—something that had not happened in that case).[3] Second, a rule that jurisdictional defects alone survive a guilty plea would not explain the result in *Blackledge* itself. Arguments attacking a court's subject-matter jurisdiction can neither be waived nor forfeited. See, *e. g.*, *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U. S. 381, 389 (1998); *Miller* v. *Roberts*, 212 N. C. 126, 129, 193 S. E. 286, 288 (1937). But the due process right at issue in *Blackledge* was perfectly capable of being waived or forfeited—as is just about every other right that is personal to a criminal defendant. See, *e. g.*, *Peretz*, 501 U. S., at 936–937.

So if the "very power to prosecute" theory does not refer to jurisdiction, what else might it mean? The only other possibility that comes to mind is that it might mean that a defendant can litigate a claim if it asserts a right not to be tried, as opposed to a right not to be convicted. But we have said that "virtually all rights of criminal defendants" are "merely . . . right[s] not to be convicted," as distinguished from "right[s] not to be tried." *Flanagan* v. *United States*, 465 U. S. 259, 267 (1984). Even when a constitutional violation requires the dismissal of an indictment, that "does not mean that [the] defendant enjoy[ed] a 'right not to be tried'" on the charges. *United States* v. *MacDonald*, 435 U. S. 850, 860, n. 7 (1978).

The rule could hardly be otherwise. Most constitutional defenses (and plenty of statutory defenses), if successfully asserted in a pretrial motion, deprive the prosecution of the "power" to proceed to trial or secure a conviction. If that remedial consequence converted them all into rights not to

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[3] Even for cases prosecuted in federal court, an alleged vindictive prosecution does not present a jurisdictional defect. See 18 U. S. C. § 3231.

be prosecuted, *Blackledge* would have no discernible limit. "We have, after all, acknowledged that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 873 (1994). Indeed, "all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 524 (1988).

It is true that we have spoken of a distinction between a right not to be tried and a right not to be convicted in one context: when defining the scope of the collateral order doctrine. *E. g.*, *Flanagan*, *supra*, at 265–267. That is, we have allowed defendants in federal criminal cases to take an immediate appeal from the denial of a pretrial motion when the right at issue is properly understood to be a right not to be tried. A prime example is a case in which a defendant claims that a prosecution would violate the Double Jeopardy Clause. See *Abney* v. *United States*, 431 U. S. 651, 662 (1977). Allowing an interlocutory appeal in that situation protects against all the harms that flow from the prolongation of a case that should never have been brought. See *id.*, at 661. But that rationale cannot justify the *Menna-Blackledge* doctrine, because allowing a defendant to appeal after a guilty plea does not cut short a prosecution that should never have been brought. On the contrary, it prolongs the litigation. So the distinction drawn in our collateral order cases makes no sense in distinguishing between the claims that should and the claims that should not survive a guilty plea.

Nor, in any event, would such a rule be consistent with the *decision* in *Blackledge*, because we have held that an unsuccessful vindictive prosecution claim may *not* be appealed before trial. *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 264 (1982) (*per curiam*). And none of this would do any good for Class, for we have never permitted a

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defendant to appeal a pretrial order rejecting a constitutional challenge to the statute the defendant allegedly violated. In fact we have repudiated the very suggestion. *Id.*, at 270.

The upshot is that the supposed "right not to be prosecuted" has no intelligible meaning in this context. And *Blackledge* identified no basis for this new right in the text of the Constitution or history or prior precedent. What is more, it did all this without bothering to consider the understanding of a guilty plea under the law of the State where the *Blackledge* defendant was convicted or anything that was said to him or that he said at the time of his plea.

B

If the thinking behind *Blackledge* is hard to follow, *Menna* may be worse. In that case, the Court held that a defendant who pleaded guilty could challenge his conviction on double jeopardy grounds. 423 U. S., at 62. The case was decided by a three-page *per curiam* opinion, its entire analysis confined to a single footnote. And the footnote, rather than elucidating what was said in *Blackledge*, substituted a different rationale. Arguing that *Tollett* and the other prior related cases did not preclude appellate review of the double jeopardy claim, the Court wrote:

> "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt." *Menna*, 423 U. S., at 62–63, n. 2.

The wording of the final sentence is not easy to parse, but I interpret the Court's reasoning as follows: A defendant who

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pleads guilty does no more than admit that he committed the essential conduct charged in the indictment; therefore a guilty plea allows the litigation on appeal of any claim that is not inconsistent with the facts that the defendant necessarily admitted. If that is the correct meaning, the sentence would overrule many of the cases that it purported to distinguish, including *Tollett*, which involved an unconstitutional grand jury claim. It would contradict much that the Court had previously said about the effect of a guilty plea. See, *e. g.*, *Boykin*, 395 U. S., at 242 ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction"). And it would permit a defendant who pleads guilty to raise on appeal a whole host of claims, including, for example, the denial of motions to suppress evidence allegedly obtained in violation of the Fourth, Fifth, or Sixth Amendments. See, *e. g.*, *Linkletter* v. *Walker*, 381 U. S. 618, 638 (1965) (most Fourth Amendment claims have "no bearing on guilt"). A holding of that scope is not what one expects to see in a footnote in a *per curiam* opinion, but if the Court meant less, its meaning is unclear.

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C

When the Court returned to *Blackledge* and *Menna* in *United States* v. *Broce*, 488 U. S. 563 (1989), the Court essentially repudiated the theories offered in those earlier cases. (The Court terms this a "reaffirm[ation]." *Ante*, at 180.) Like *Menna*, *Broce* involved a defendant (actually two defendants) who pleaded guilty but then sought to attack their convictions on double jeopardy grounds. 488 U. S., at 565. This time, however, the Court held that their guilty pleas prevented them from litigating their claims. *Ibid.*

The Court began by specifically disavowing *Menna*'s suggestion that a guilty plea admits only " 'factual guilt,' " meaning "the acts described in the indictments." *Broce*, 488 U. S., at 568–569. Instead, the Court explained, an unconditional guilty plea admits "all of the factual *and legal ele-*

ments necessary to sustain a binding, final judgment of guilt and a lawful sentence." *Id.*, at 569 (emphasis added). "By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *Id.*, at 570. Such "admissions," *Broce* continued, are "necessarily made upon entry of a voluntary plea of guilty." *Id.*, at 573–574. And invoking *Tollett*, the Court added that it makes no difference whether the defendant "'may not have correctly appraised the constitutional significance of certain historical facts.'" 488 U. S., at 572 (quoting 411 U. S., at 267). Thus, the Court concluded, a defendant's decision to plead guilty necessarily extinguishes whatever "potential defense[s]" he might have asserted in an effort to show that it would be unlawful to hold him liable for his conduct. 488 U. S., at 573. So much for *Menna*.

As for *Blackledge*, by holding that the defendants' double jeopardy rights were extinguished by their pleas, *Broce* necessarily rejected the idea that a right not to be tried survives an unconditional guilty plea. See *Abney*, 431 U. S., at 662 (holding for collateral-order-doctrine purposes that the Double Jeopardy Clause confers a right not to be tried).

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While *Broce* thus rejected the reasoning in *Blackledge* and *Menna*, the Court was content to distinguish those cases on the ground that they involved defendants who could succeed on appeal without going beyond "the existing record," whereas the defendants in *Broce* would have to present new evidence. *Broce*, *supra*, at 575.[4]

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[4] The majority asserts that, unlike the defendants in *Broce*, Class can make out his constitutional arguments without needing to undertake any factual development. *Ante*, at 181. It is difficult to see how that can be true. Class's Second Amendment argument is that banning firearms in the Maryland Avenue parking lot of the Capitol Building goes too far, at least as applied to him specifically. As his court-appointed *amicus* presented it to the Court of Appeals, this argument depends on Class's own personal characteristics, including his record of mental health and law abidingness, as well as characteristics specific to the Maryland Avenue

IV

A

This is where the *Menna-Blackledge* doctrine stood when we heard this case. Now, instead of clarifying the law, the Court sows new confusion by reiterating with seeming approval a string of catchphrases. The Court repeats the line that an argument survives if it "implicates 'the very power of the State' to prosecute the defendant," *ante*, at 179 (quoting *Blackledge*, 417 U. S., at 30), but this shibboleth is no more intelligible now than it was when first incanted in *Blackledge*. The Court also parrots the rule set out in the *Menna* footnote—that the only arguments waived by a guilty plea are those that contradict the facts alleged in the charging document, see *ante*, at 179–181, even though that rule is inconsistent with *Tollett*, the *Brady* trilogy, and *Broce*—and even though this reading would permit a defendant who pleads guilty to raise an uncertain assortment of claims never before thought to survive a guilty plea.

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For example, would this rule permit a defendant to argue that his prosecution is barred by a statute of limitations or by the Speedy Trial Act? Presumably the answer is yes.

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parking lot, including, *inter alia*, its distance from the Capitol Building, the extent to which it is unsecured, the extent to which it is publicly accessible, what business typically occurs there, who regularly congregates there, and the nature of security screening visitors must pass through upon entering. See Opening Brief of Court-Appointed *Amicus Curiae* in Support of Appellant in No. 15–3015 (CADC), pp. 34–35, 41–45. Similarly, Class's due process argument requires an assessment of how difficult it would be for an average person to determine that the Maryland Avenue lot is part of the Capitol Grounds, which turns on the extent to which the lot is publicly accessible, how heavily trafficked it is and by what types of vehicles, whether there are signs indicating it is part of the Capitol Grounds or that guns are prohibited and where such signs are located, and whether there are security gates or checkpoints nearby. See *id.*, at 51, 53. These arguments require facts. I understand the majority opinion to preclude Class from gathering any of them that are not already in the District Court record.

By admitting commission of the acts alleged in an indictment or complaint, a defendant would not concede that the charge was timely. What about the argument that a defendant's alleged conduct does not violate the statute of conviction? Here again, the rule barring only those claims inconsistent with the facts alleged in the indictment or complaint would appear to permit the issue to be raised on appeal, but the Court says that a defendant who pleads guilty "has admitted the charges against him." *Ante*, at 181. What does this mean, exactly? The majority is coy, but "admit[ing] the charges against him" would appear to mean admitting that his conduct satisfies each element of the statute he is charged with violating. It must mean that because we have held that if a defendant does *not* understand that he is admitting his conduct satisfies each element of the crime, his guilty plea is involuntary and unintelligent and therefore invalid. *Henderson* v. *Morgan*, 426 U. S. 637, 644–645 (1976). So if a defendant who pleads guilty "admit[s] the charges against him," and if he does not claim that his plea was involuntary or unintelligent, his plea must be taken as an admission that he did everything the statute forbids.

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But if that is so, then what about the rule suggested by the old Massachusetts opinion the Court touts? There, Justice Ames wrote that a guilty plea does not waive the right to argue that "'the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth.'" *Ante*, at 180 (quoting *Commonwealth* v. *Hinds*, 101 Mass. 209, 210 (1869)). Does the Court agree with Justice Ames, or not?

Approaching the question from the opposite direction, the Court says that a guilty plea precludes a defendant from litigating "the constitutionality of case-related government conduct that takes place before the plea is entered." *Ante*, at 182. This category is most mysterious. I thought Class was arguing that the Government violated the Constitution at the moment when it initiated his prosecution. That sounds like he is trying to attack "the constitutionality of case-

related government conduct that [took] place before the plea [was] entered." Yet the Court holds that he may proceed. Why?

Finally, the majority instructs that "a valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.'" *Ante*, at 183 (quoting *Broce*, 488 U. S., at 573–574). I agree with that statement of the rule, but what the Court fails to acknowledge is that the scope of this rule depends on the law of the particular jurisdiction in question. If a defendant in federal court is told that under Rule 11 an unconditional guilty plea waives all nonjurisdictional claims (or as *Broce* put it, admits "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *id.*, at 569), then that is the scope of the admissions implicit in the plea.

B

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Perhaps sensing the incoherence of its effort, the majority seeks refuge in history, asserting that today's holding "flows directly from this Court's prior decisions." *Ante*, at 178. But this history cannot prop up the Court's decision. Start with *Haynes* v. *United States*, 390 U. S. 85, 87, n. 2 (1968), in which the Court reached the merits of a defendant's constitutional challenge to his conviction despite the fact that he had pleaded guilty. *Ante*, at 178. A moment's glance reveals that this decision is irrelevant for present purposes (which presumably explains why it was not even cited in *Blackledge*, *Menna*, *Tollett*, the *Brady* trilogy, or *Broce*).

In *Haynes*, the Government did not argue that the defendant's guilty plea barred him from pressing his constitutional challenge on appeal. In fact, the Government conceded that he would be entitled to relief if his argument had merit. 390 U. S., at 100–101. No one has suggested that a defendant's guilty plea strips an appellate court of jurisdiction to entertain a constitutional challenge to his conviction, so of course a reviewing court need not dismiss an appeal *sua sponte* if

the Government does not assert the plea as a bar. But that tells us nothing about what ought to happen when, as in this case, the Government *does* argue that the defendant relinquished his right to litigate his constitutional argument when he opted to plead guilty.

One must squint even harder to figure out why the majority has dusted off *Commonwealth* v. *Hinds*, an 1869 decision of the Supreme Judicial Court of Massachusetts. *Ante*, at 180. *Hinds* involved a state-law motion ("arrest of judgment") to set aside a conviction for a state-law crime (common-law forgery), in a state-court proceeding after the defendant pleaded guilty. 101 Mass., at 210. One might already be wondering what relevance the effect of a guilty plea in state court, under state law, could have with respect to the effect of a guilty plea in federal court, under federal law. But in any event, what *Hinds* says about guilty pleas is not helpful to Class at all. In Massachusetts at that time, motions to arrest a judgment could be maintained only on the ground that the court that rendered the judgment lacked jurisdiction. Mass. Gen. Stat. § 79 (1860); *Commonwealth* v. *Eagan*, 103 Mass. 71, 72 (1860); 3 F. Wharton, Criminal Law § 3202, p. 177 (7th rev. ed. 1874). And Massachusetts, like all the other States, can define the jurisdiction of its courts as it pleases (except insofar as federal law validly prevents).

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Thus, to the extent *Hinds* "reflect[s] an understanding of the nature of guilty pleas," *ante*, at 180, it reflects nothing more than the idea that a defendant can assert jurisdictional defects even after pleading guilty. That rule is utterly unremarkable and of no help to Class. Today—as well as at the time of the founding—federal courts have jurisdiction over cases charging federal crimes. See 18 U. S. C. § 3231; § 9, 1 Stat. 76–77. And as early as 1830, the Court rejected the suggestion that a federal court is deprived of jurisdiction if "the indictment charges an offence not punishable criminally according to the law of the land." *Ex parte Watkins*, 3 Pet. 193, 203. We have repeatedly reaffirmed that propo-

sition. See, *e. g.*, *Lamar* v. *United States*, 240 U. S. 60, 64 (1916) (court not deprived of jurisdiction even if "the indictment does not charge a crime against the United States"); *United States* v. *Williams*, 341 U. S. 58, 68–69 (1951) (same, even if "the statute is wholly unconstitutional, or . . . the facts stated in the indictment do not constitute a crime"); *Cotton*, 535 U. S., at 630–631. And although a handful of our "post-1867 cases" suggested that a criminal court lacked jurisdiction if "the statute under which [the defendant] had been convicted was unconstitutional," those suggestions "reflected a 'softening' of the concept of jurisdiction" rather than that concept's originally understood—and modern—meaning. *Danforth* v. *Minnesota*, 552 U. S. 264, 272, n. 6 (2008).

* * *

In sum, the governing law in the present case is Rule 11 of the Federal Rules of Criminal Procedure. Under that Rule, an unconditional guilty plea waives all nonjurisdictional claims with the possible exception of the "*Menna-Blackledge* doctrine" created years ago by this Court. That doctrine is vacuous, has no sound foundation, and produces nothing but confusion. At a minimum, I would limit the doctrine to the particular types of claims involved in those cases. I certainly would not expand its reach.

I fear that today's decision will bedevil the lower courts. I respectfully dissent.

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RUBIN ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL.

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

No. 16–534. Argued December 4, 2017—Decided February 21, 2018

The Foreign Sovereign Immunities Act of 1976 (FSIA) grants foreign states and their agencies and instrumentalities immunity from suit in the United States and grants their property immunity from attachment and execution in satisfaction of judgments against them, see 28 U. S. C. §§ 1604, 1609, but with some exceptions. Petitioners hold a judgment against respondent Islamic Republic of Iran pursuant to an exception that applies to foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. See § 1605A. To enforce that judgment, petitioners filed an action in the District Court to attach and execute against certain Iranian assets—a collection of ancient clay tablets and fragments housed at respondent University of Chicago. The District Court concluded that § 1610(g)—which provides that certain property will be "subject to attachment in aid of execution, and execution, upon [a § 1605A] judgment as provided in this section"—does not deprive the collection of the immunity typically afforded the property of a foreign sovereign. The Seventh Circuit affirmed.

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Held: Section 1610(g) does not provide a freestanding basis for parties holding a judgment under § 1605A to attach and execute against the property of a foreign state; rather, for § 1610(g) to apply, the immunity of the property at issue must be rescinded under a separate provision within § 1610. Pp. 208–219.

(a) Congress enacted the FSIA in an effort to codify the careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions. As a default, foreign states have immunity "from the jurisdiction of the courts of the United States and of the States," § 1604, but there are express exceptions, including the one at issue here, for state sponsors of terrorism, see § 1605A(a). The FSIA similarly provides as a default that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." § 1609. But § 1610 outlines certain exceptions to this immunity. For example, § 1610(a)(7) provides that property in the United States of a foreign state that is used for a commercial activity in the United States shall

not be immune from attachment and execution where the plaintiff holds a § 1605A judgment against the foreign state. Before 2008, the FSIA did not expressly address under which circumstances a foreign state's agencies or instrumentalities could be held liable for judgments against the state. The Court had addressed that question in *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 628 (*Bancec*), and held that, as a default, agencies and instrumentalities of a foreign state are separate legal entities that cannot be held liable. It recognized the availability of exceptions, however, and left the lower courts to determine whether an exception applied on a case-by-case basis. The lower courts coalesced around five relevant factors (the *Bancec* factors) to assist in those determinations. In 2008, Congress amended the FSIA, adding § 1610(g). Subparagraphs (A) through (E) incorporate almost verbatim the *Bancec* factors, leaving no dispute that, at a minimum, § 1610(g) serves to abrogate *Bancec* where a § 1605A judgment holder seeks to satisfy a judgment held against the foreign state. The question here is whether, in addition to abrogating *Bancec*, it provides a freestanding exception to property immunity in the context of a § 1605A judgment. Pp. 208–211.

(b) The most natural reading of § 1610(g)(1)'s phrase "as provided in this section" is that it refers to § 1610 as a whole, so that § 1610(g)(1) will apply to property that is exempted from the grant of immunity as provided elsewhere in § 1610. Those § 1610 provisions that do unambiguously revoke the immunity of a foreign state's property employ phrases such as "shall not be immune," see § 1610(a)(7), and "[n]otwithstanding any other provision of law," see § 1610(f)(1)(A). Such textual markers are conspicuously absent from § 1610(g). Thus, its phrase "as provided in this section" is best read to signal only that a judgment holder seeking to take advantage of § 1610(g)(1) must identify a basis under one of § 1610's express immunity-abrogating provisions to attach and execute against a relevant property. This reading provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of *Bancec*. It is also consistent with the basic interpretive canon to construe a statute so as to give effect to all of its provisions, see *Corley* v. *United States*, 556 U. S. 303, 314, and with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts, see *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 487–488. Pp. 211–215.

(c) Petitioners' counterarguments are unpersuasive. They assert that the phrase "as provided in this section" might refer to the procedures in § 1610(f)(1), which permits § 1605A judgment holders to attach

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and execute against property associated with certain prohibited financial transactions, but which was waived by the President before it could take effect. However, it is not logical to read the phrase as indicating a congressional intent to create § 1610(g) as an alternative to § 1610(f)(1), particularly since Congress knows how to make clear when it is rescinding immunity. Nor could Congress have intended "as provided in this section" to refer only to § 1610(f)(2)'s instruction that the Federal Government assist in identifying assets, since that provision does not provide for attachment or execution at all. Finally, there is no basis to conclude that "this section" in § 1610(g) reflects a mere drafting error.

The words "property of a foreign state," which appear in the first substantive clause of § 1610(g), are not rendered superfluous under the Court's reading. Section 1610(g) serves to identify in one place all the categories of property that will be available to § 1605A judgment holders for attachment and execution, and commands that the availability of such property will not be limited by the *Bancec* factors. Also, without the opening clause, § 1610(g) would abrogate the *Bancec* presumption of separateness in all cases, not just those involving terrorism judgments under § 1605A. Although petitioners contend that any uncertainty in § 1610(g) should be resolved by giving full effect to the legislative purpose behind its enactment—removing obstacles to enforcing terrorism judgments—they offer no real support for their position that § 1610(g) was intended to divest all property of a foreign state or its agencies or instrumentalities of immunity. *Bank Markazi* v. *Peterson*, 578 U. S. 212, 217, n. 2, distinguished. Pp. 215–218.

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830 F. 3d 470, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which all other Members joined, except KAGAN, J., who took no part in the consideration or decision of the case.

Asher Perlin argued the cause and filed briefs for petitioners.

David A. Strauss argued the cause for respondents and filed a brief for respondent University of Chicago. *Jeffrey A. Lamken* and *Robert K. Kry* filed a brief for respondent Islamic Republic of Iran.

Zachary D. Tripp argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*,

Deputy Assistant Attorney General Mooppan, *Sharon Swingle*, and *Benjamin M. Shultz*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Foreign Sovereign Immunities Act of 1976 (FSIA) grants foreign states and their agencies and instrumentalities immunity from suit in the United States (called jurisdictional immunity) and grants their property immunity from attachment and execution in satisfaction of judgments against them. See 28 U. S. C. §§ 1604, 1609. But those grants of immunity are subject to exception.

Petitioners hold a judgment against respondent Islamic Republic of Iran pursuant to one such exception to jurisdictional immunity, which applies where the foreign state is designated as a state sponsor of terrorism and the claims arise out of acts of terrorism. See § 1605A. The issue presented in this case is whether certain property of Iran, specifically, a collection of antiquities owned by Iran but in the possession of respondent University of Chicago, is subject to attachment and execution by petitioners in satisfaction of that judgment. Petitioners contend that the property is stripped of its immunity by another provision of the FSIA, § 1610(g), which they maintain provides a blanket exception to the immunity typically afforded to the property of a foreign state where the party seeking to attach and execute holds a § 1605A judgment.

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We disagree. Section 1610(g) serves to identify property that will be available for attachment and execution in satisfaction of a § 1605A judgment, but it does not in itself divest property of immunity. Rather, the provision's language "as provided in this section" shows that § 1610(g) operates only

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*Briefs of *amici curiae* urging reversal were filed for Former U. S. Counterterrorism Officials et al. by *J. Carl Cecere*; for the Foundation for Defense of Democracies by *Kent A. Yalowitz* and *Susan Hu*; and for Victims of Iranian Terrorism by *Matthew D. McGill*, *Michael R. Huston*, *Thomas Fortune Fay*, and *Jane Carol Norman*.

when the property at issue is exempt from immunity as provided elsewhere in § 1610. Petitioners cannot invoke § 1610(g) to attach and execute against the antiquities at issue here, which petitioners have not established are exempt from immunity under any other provision in § 1610.

I

A

On September 4, 1997, Hamas carried out three suicide bombings on a crowded pedestrian mall in Jerusalem, resulting in the deaths of 5 people and injuring nearly 200 others. Petitioners are United States citizens who were either wounded in the attack or are the close relatives of those who were injured. In an attempt to recover for their harm, petitioners sued Iran in the District Court for the District of Columbia, alleging that Iran was responsible for the bombing because it provided material support and training to Hamas. At the time of that action, Iran was subject to the jurisdiction of the federal courts pursuant to 28 U. S. C. § 1605(a)(7) (1994 ed., Supp. II), which rescinded the immunity of foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. Iran did not appear in the action, and the District Court entered a default judgment in favor of petitioners in the amount of $71.5 million.[1]

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When Iran did not pay the judgment, petitioners brought this action in the District Court for the Northern District of

[1] Congress amended the FSIA in 2008 and replaced 28 U. S. C. § 1605(a)(7) with a separate, more expansive provision addressing the foreign sovereign immunity of foreign states that are designated as state sponsors of terrorism, § 1605A. See National Defense Authorization Act for Fiscal Year 2008 (NDAA), § 1083(a), 122 Stat. 338–341. Shortly thereafter, petitioners moved in the District Court for an order converting their judgment under § 1605(a)(7) to one under the new provision, § 1605A, which the District Court granted. See *Rubin* v. *Islamic Republic of Iran*, 563 F. Supp. 2d 38, 39, n. 3 (DC 2008).

Illinois to attach and execute against certain Iranian assets located in the United States in satisfaction of their judgment. Those assets—a collection of approximately 30,000 clay tablets and fragments containing ancient writings, known as the Persepolis Collection—are in the possession of the University of Chicago, housed at its Oriental Institute. University archeologists recovered the artifacts during an excavation of the old city of Persepolis in the 1930's. In 1937, Iran loaned the collection to the Oriental Institute for research, translation, and cataloging.[2]

Petitioners maintained in the District Court, *inter alia*, that § 1610(g) of the FSIA renders the Persepolis Collection subject to attachment and execution. The District Court concluded otherwise and held that § 1610(g) does not deprive the Persepolis Collection of the immunity typically afforded the property of a foreign sovereign. The Court of Appeals for the Seventh Circuit affirmed. 830 F. 3d 470 (2016). As relevant, the Seventh Circuit held that the text of § 1610(g) demonstrates that the provision serves to identify the property of a foreign state or its agencies or instrumentalities that are subject to attachment and execution, but it does not in itself divest that property of immunity. The Court granted certiorari to resolve a split among the Courts of Appeals regarding the effect of § 1610(g).[3] 582 U. S. 952 (2017).

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[2] Petitioners also sought to execute the judgment against three other collections that are no longer at issue in this case: the Chogha Mish Collection, the Oriental Institute Collection, and the Herzfeld Collection. The Chogha Mish Collection has been removed from the territorial jurisdiction of the federal courts, and the Court of Appeals for the Seventh Circuit determined that the Oriental Institute Collection and Herzfeld Collection are not property of Iran. See 830 F. 3d 470, 475–476 (2016). Petitioners do not challenge that decision here.

[3] Compare *Bennett* v. *Islamic Republic of Iran*, 825 F. 3d 949, 959 (CA9 2016) (holding that § 1610(g) provides a freestanding exception to attachment and execution immunity); *Weinstein* v. *Islamic Republic of Iran*, 831 F. 3d 470, 483 (CADC 2016) (same); *Kirschenbaum* v. *650 Fifth Avenue and Related Properties*, 830 F. 3d 107, 123 (CA2 2016) (same), with 830

We agree with the conclusion of the Seventh Circuit, and therefore affirm.

B

We start with a brief review of the historical development of foreign sovereign immunity law and the statutory framework at issue here, as it provides a helpful guide to our decision. This Court consistently has recognized that foreign sovereign immunity "is a matter of grace and comity on the part of the United States." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 136 (1812). In determining whether to exercise jurisdiction over suits against foreign sovereigns, courts traditionally "deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns." *Verlinden*, 461 U. S., at 486.

Prior to 1952, the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States. See *ibid.* But, as foreign states became more involved in commercial activity in the United States, the State Department recognized that such participation "makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." J. Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 Dept. State Bull. 984, 985 (1952). The Department began to follow the "restrictive" theory of foreign sovereign immunity in advising courts whether they should take jurisdiction in any given case. Immunity typically was afforded in cases involving a foreign sovereign's public acts, but not in "cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U. S., at 487.

In 1976, Congress enacted the FSIA in an effort to codify this careful balance between respecting the immunity histor-

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F. 3d, at 481 (concluding that § 1610(g) does not create a freestanding exception to immunity).

ically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions. 90 Stat. 2891, as amended, 28 U. S. C. § 1602 *et seq.* "For the most part, the Act" tracks "the restrictive theory of sovereign immunity." *Verlinden*, 461 U. S., at 488. As a default, foreign states enjoy immunity "from the jurisdiction of the courts of the United States and of the States." § 1604. But this immunity is subject to certain express exceptions. For example, in line with the restrictive theory, a foreign sovereign will be stripped of jurisdictional immunity when a claim is based upon commercial activity it carried out in the United States. See, *e. g.*, § 1605(a)(2). The FSIA also provides that a foreign state will be subject to suit when it is designated as a state sponsor of terrorism and damages are sought as a result of acts of terrorism. See § 1605A(a).

With respect to the immunity of property, the FSIA similarly provides as a default that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." § 1609. But, again, there are exceptions, and § 1610 outlines the circumstances under which property will not be immune. See § 1610. For example, subsection (a) expressly provides that property "shall not be immune" from attachment and execution where, *inter alia*, it is "used for a commercial activity in the United States" and the "judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based." § 1610(a)(7).

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Prior to 2008, the FSIA did not address expressly under what circumstances, if any, the agencies or instrumentalities of a foreign state could be held liable for judgments against the state. Faced with that question in *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611 (1983) (*Bancec*), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as

such." *Id.*, at 626–627. Thus, as a default, those agencies and instrumentalities of a foreign state were to be considered separate legal entities that cannot be held liable for acts of the foreign state. See *id.*, at 628.

Nevertheless, the Court recognized that such a stringent rule should not be without exceptions. The Court suggested that liability would be warranted, for example, "where a corporate entity is so extensively controlled by [the state] that a relationship of principal and agent is created," *id.*, at 629, or where recognizing the state and its agency or instrumentality as distinct entities "would work fraud or injustice," *ibid.* (internal quotation marks omitted). See *id.*, at 630. But the Court declined to develop a "mechanical formula for determining" when these exceptions should apply, *id.*, at 633, leaving lower courts with the task of assessing the availability of exceptions on a case-by-case basis. Over time, the Courts of Appeals coalesced around the following five factors (referred to as the *Bancec* factors) to aid in this analysis:

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> "(1) the level of economic control by the government;
> "(2) whether the entity's profits go to the government;
> "(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;
> "(4) whether the government is the real beneficiary of the entity's conduct; and
> "(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations." *Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F. 2d 1375, 1380, n. 7 (CA5 1992).

See also *Flatow* v. *Islamic Republic of Iran*, 308 F. 3d 1065, 1071, n. 9 (CA9 2002).

In 2008, Congress amended the FSIA and added § 1610(g). See NDAA § 1083(b)(3)(D), 122 Stat. 341–342. Section 1610(g)(1) provides:

> "(g) Property in Certain Actions.—

> "(1) In general. [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> "(A) the level of economic control over the property by the government of the foreign state;
>
> "(B) whether the profits of the property go to that government;
>
> "(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> "(D) whether that government is the sole beneficiary in interest of the property; or
>
> "(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations."

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Subparagraphs (A) through (E) incorporate almost verbatim the five *Bancec* factors, leaving no dispute that, at a minimum, § 1610(g) serves to abrogate *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a § 1605A judgment holder seeks to satisfy a judgment held against the foreign state. The issue at hand is whether § 1610(g) does something more; whether, like the commercial activity exception in § 1610(a)(7), it provides an independent exception to immunity so that it allows a § 1605A judgment holder to attach and execute against *any* property of the foreign state, regardless of whether the property is deprived of immunity elsewhere in § 1610.

II

We turn first to the text of the statute. Section 1610(g)(1) provides that certain property will be "subject to attachment in aid of execution, and execution, upon [a § 1605A] judgment

as provided in this section." (Emphasis added.) The most natural reading is that "this section" refers to § 1610 as a whole, so that § 1610(g)(1) will govern the attachment and execution of property that is exempted from the grant of immunity as provided elsewhere in § 1610. Cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 487 (1999) (noting that the phrase "[e]xcept as provided in this section" in one subsection serves to incorporate "the rest of" the section in which the subsection appears).

Other provisions of § 1610 unambiguously revoke the immunity of property of a foreign state, including specifically where a plaintiff holds a judgment under § 1605A, provided certain express conditions are satisfied. For example, subsection (a) provides that "property in the United States . . . used for a commercial activity in the United States . . . shall not be immune" from attachment and execution in seven enumerated circumstances, including when "the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . ." § 1610(a)(7). Subsections (b), (d), and (e) similarly set out circumstances in which certain property of a foreign state "shall not be immune."[4] And two other provisions within § 1610 specifically allow § 1605A judgment holders to attach and execute against property of a foreign state, "[n]otwithstanding any other provision of law," including those provisions otherwise granting immunity, but only with respect to assets associated with certain regulated and prohibited financial transactions. See § 1610(f)(1)(A); Terrorism Risk Insurance Act of 2002 (TRIA), § 201(a), 116 Stat. 2337, note following 28 U. S. C. § 1610.

Section 1610(g) conspicuously lacks the textual markers, "shall not be immune" or "notwithstanding any other provi-

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[4] Section 1610(b), for example, provides that "any property . . . of [the] agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune" from attachment and execution in satisfaction of a judgment on a claim for which the agency or instrumentality is not immune under § 1605A. § 1610(b)(3).

sion of law," that would have shown that it serves as an independent avenue for abrogation of immunity. In fact, its use of the phrase "as provided in this section" signals the opposite: A judgment holder seeking to take advantage of § 1610(g)(1) must identify a basis under one of § 1610's express immunity-abrogating provisions to attach and execute against a relevant property.

Reading § 1610(g) in this way still provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of this Court's decision in *Bancec*. Suppose, for instance, that plaintiffs obtain a § 1605A judgment against a foreign state and seek to collect against the assets located in the United States of a state-owned telecommunications company. Cf. *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F. 3d 1277 (CA11 1999). Prior to the enactment of § 1610(g), the plaintiffs would have had to establish that the *Bancec* factors favor holding the agency or instrumentality liable for the foreign state's misconduct. With § 1610(g), however, the plaintiffs could attach and execute against the property of the state-owned entity regardless of the *Bancec* factors, so long as the plaintiffs can establish that the property is otherwise not immune (*e. g.*, pursuant to § 1610(a)(7) because it is used in commercial activity in the United States).

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Moreover, our reading of § 1610(g)(1) is consistent "with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). Section 1610 expressly references § 1605A judgments in its immunity-abrogating provisions, such as 28 U. S. C. §§ 1610(a)(7), (b)(3), (f)(1), and § 201 of the TRIA, showing that those provisions extend to § 1605A judgment holders' ability to attach and execute against property. If the Court were to conclude

that § 1610(g) establishes a basis for the withdrawal of property immunity any time a plaintiff holds a judgment under § 1605A, each of those provisions would be rendered superfluous because a judgment holder could always turn to § 1610(g), regardless of whether the conditions of any other provision were met.[5]

The Court's interpretation of § 1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts. See *Verlinden*, 461 U. S., at 487–488. Indeed, the FSIA expressly provides in its findings and declaration of purpose that

> "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." § 1602.

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This focus of the FSIA is reflected within § 1610, as subsections (a), (b), and (d) all outline exceptions to immunity of property when that property is used for commercial activity. The Court's reading of § 1610(g) means that individuals with § 1605A judgments against a foreign state must primarily invoke other provisions revoking the grant of immunity for property related to commercial activity, including § 1610(a)(7), unless the property is expressly carved out in an exception that applies "[n]otwithstanding any other provision of law," § 1610(f)(1)(A); § 201(a) of the TRIA. That result is consistent with the history and structure of the FSIA.

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[5] To the extent petitioners suggest that those references to § 1605A were inadvertent, see Brief for Petitioners 41–44, the statutory history further supports the conclusion that § 1610(a)(7) applies to § 1605A judgment holders, as the reference to § 1605A was added to § 1610(a)(7) in the same Act that created §§ 1605A and 1610(g). See NDAA §§ 1083(a), (b)(3), 122 Stat. 338–342.

Throughout the FSIA, special avenues of relief to victims of terrorism exist, even absent a nexus to commercial activity. Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism-related judgments, however, it does so expressly. See §§ 1605A, 1610(a)(7), (b)(3), (f)(1)(A); § 201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for § 1605A judgment holders absent a clearer indication of Congress' intent.

III

A

Petitioners resist that the phrase "as provided in this section" refers to § 1610 as a whole and contend that Congress more likely was referencing a specific provision within § 1610 or a section in the NDAA. That explanation is unpersuasive.

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Petitioners first assert that "this section" might refer to procedures contained in § 1610(f). Section 1610(f) permits § 1605A judgment holders to attach and execute against property associated with certain regulated and prohibited financial transactions, § 1610(f)(1), and it provides that the United States Secretary of State and Secretary of the Treasury will make every effort to assist in "identifying, locating, and executing against the property of [a] foreign state or any agency or instrumentality of such state," § 1610(f)(2). Petitioners point out that paragraph (1) of subsection (f) has never come into effect because it was immediately waived by the President after it was enacted, pursuant to § 1610(f)(3).[6]

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[6] Section 1610(f)(3) authorizes the President to waive paragraph (1) of subsection (f) "in the interest of national security." President Clinton immediately waived the provision, and the waiver has never been withdrawn. See Pres. Determination No. 99–1, 63 Fed. Reg. 59201 (1998); Pres. Determination No. 2001–03, 65 Fed. Reg. 66483 (2000).

So, the argument goes, it would make sense that Congress created § 1610(g) as an alternative mechanism to achieve a similar result.[7]

This is a strained and unnatural reading of the phrase "as provided in this section." In enacting § 201(a) of the TRIA, which, similar to 28 U. S. C. § 1610(f), permits attachment and execution against blocked assets, Congress signaled that it was rescinding immunity by permitting attachment and execution "[n]otwithstanding any other provision of law." Had Congress likewise intended § 1610(g) to have such an effect, it knew how to say so. Cf. *Bank Markazi* v. *Peterson*, 578 U. S. 212, 217–218, n. 2 (2016) (noting that "[s]ection 1610(g) does not take precedence over 'any other provision of law,' as the TRIA does").

Petitioners fare no better in arguing that Congress may have intended "this section" to refer only to the instruction in § 1610(f)(2) that the United States Government assist in identifying assets. Section 1610(f)(2) does not provide for attachment or execution at all, so petitioners' argument does not account for the lack of textual indicators that exist in provisions like §§ 1610(a)(7) and (f)(1) that unambiguously abrogate immunity and permit attachment and execution.

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Finally, petitioners assert that "this section" could possibly reflect a drafting error that was intended to actually refer to § 1083 of the NDAA, the Public Law in which § 1610(g) was enacted. This interpretation would require not only a stark deviation from the plain text of § 1610(g), but also a departure from the clear text of the NDAA. Section 1083(b)(3) of the NDAA provides that "Section 1610 of title 28, United States Code, is amended . . . by adding at the end" the new subsection "(g)." 122 Stat. 341. The language "this section" within (g), then, clearly and expressly incorporates the NDAA's reference to "Section 1610" as a whole. There is no basis to conclude that Congress' failure to change

[7] Petitioners reference the decision of the Court of Appeals for the Ninth Circuit in *Bennett*, 825 F. 3d 949, in support of this position.

"this section" in § 1610(g) was the result of a mere drafting error.

B

In an effort to show that § 1610(g) does much more than simply abrogate the *Bancec* factors, petitioners argue that the words "property of a foreign state," which appear in the first substantive clause of § 1610(g), would otherwise be rendered superfluous because the property of a foreign state will never be subject to a *Bancec* inquiry. By its plain text, § 1610(g)(1) permits enforcement of a § 1605A judgment against both the property of a foreign state and the property of the agencies or instrumentalities of that foreign state. Because the *Bancec* factors would never have applied to the property of a foreign state, petitioners contend, those words must signal something else: that § 1610(g) provides an independent basis for the withdrawal of immunity.

The words "property of a foreign state" accomplish at least two things, however, that are consistent with the Court's understanding of the effect of § 1610(g). First, § 1610(g) serves to identify in one place all the categories of property that will be available to § 1605A judgment holders for attachment and execution, whether it is "property of the foreign state" or property of its agencies or instrumentalities, and commands that the availability of such property will not be limited by the *Bancec* factors. So long as the property is deprived of its immunity "as provided in [§ 1610]," all of the types of property identified in § 1610(g) will be available to § 1605A judgment holders.

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Second, in the context of the entire phrase, "the property of a foreign state against which a judgment is entered under section 1605A," the words "foreign state" identify the type of judgment that will invoke application of § 1610(g); specifically, a judgment held against a foreign state and entered under § 1605A. Without this opening phrase, § 1610(g) would abrogate the *Bancec* presumption of separateness in all cases, not just those involving terrorism judgments under

§ 1605A. The words "property of a foreign state," thus, are not rendered superfluous under the Court's reading because they do not merely identify a category of property that is subject to § 1610(g) but also help inform when § 1610(g) will apply in the first place. Indeed, § 1610(g) would make no sense if those words were removed.

C

All else aside, petitioners contend that any uncertainty in § 1610(g) should be resolved by giving full effect to the legislative purpose behind its enactment. Petitioners posit that Congress enacted § 1610(g) "with the specific purpose of removing the remaining obstacles to terrorism judgment enforcement." Brief for Petitioners 26. In support of that position, they reference a brief discussion of § 1610(g) in a footnote to the Court's decision in *Bank Markazi*, 578 U. S. 212, that notes that Congress "expand[ed] the availability of assets for postjudgment execution" when it added § 1610(g) by making "available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state." *Id.*, at 217, n. 2. But *Bank Markazi*'s characterization of § 1610(g) simply mirrors the text of § 1610(g) and is entirely consistent with the Court's holding today that § 1610(g) expands the assets available for attachment and execution by abrogating this Court's decision in *Bancec* with respect to judgments held under § 1605A. Beyond their citation to *Bank Markazi*, petitioners have not directed us to any evidence that supports their position that § 1610(g) was intended to divest all property of a foreign state or its agencies or instrumentalities of immunity.

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IV

For the foregoing reasons, we conclude that 28 U. S. C. § 1610(g) does not provide a freestanding basis for parties holding a judgment under § 1605A to attach and execute

against the property of a foreign state, where the immunity of the property is not otherwise rescinded under a separate provision within § 1610. The judgment of the Seventh Circuit is affirmed.

It is so ordered.

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

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Syllabus

MURPHY *v.* SMITH ET AL.

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

No. 16–1067. Argued December 6, 2017—Decided February 21, 2018

Petitioner Charles Murphy was awarded a judgment in his federal civil rights suit against two of his prison guards, including an award of attorney's fees. Pursuant to 42 U. S. C. § 1997e(d)(2), which provides that in such cases "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant," the district court ordered Mr. Murphy to pay 10% of his judgment toward the fee award, leaving defendants responsible for the remainder. The Seventh Circuit reversed, holding that § 1997e(d)(2) required the district court to exhaust 25% of the prisoner's judgment before demanding payment from the defendants.

Held: In cases governed by § 1997e(d), district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees. The specific statutory language supports the Seventh Circuit's interpretation. First, the mandatory phrase "shall be applied" suggests that the district court has some nondiscretionary duty to perform. Second, the infinitival phrase "to satisfy the amount of attorney's fees awarded" specifies the purpose or aim of the preceding verb's nondiscretionary duty. Third, "to satisfy" an obligation, especially a financial obligation, usually means to discharge the obligation in full. Together, these three clues suggest that a district court (1) *must* act (2) with the *purpose* of (3) *fully discharging* the fee award. And the district court must use as much of the judgment as necessary to satisfy the fee award without exceeding the 25% cap. Contrary to Mr. Murphy's suggestion, the district court does not have wide discretion to pick any "portion" that does not exceed the 25% cap. The larger statutory scheme supports the Seventh Circuit's interpretation. The previously governing provision, 42 U. S. C. § 1988(b), granted district courts discretion to award fees in unambiguous terms. It is doubtful that Congress, had it wished to confer the same sort of discretion in § 1997e(d), would have bothered to write a new law for prisoner civil rights suits alone; omit all of the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones. This conclusion is reinforced by § 1997e(d)'s surrounding provisions, which like paragraph (2), also limit the district court's pre-existing discretion under § 1988(b). See, *e. g.*, §§ 1997e(d)(1)(A) and (B)(ii). The discretion

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urged by Mr. Murphy is exactly the sort of unguided and freewheeling choice that this Court has sought to expunge from practice under § 1988. And his suggested cure for rudderless discretion—to have district courts apportion fees in proportion to the defendant's culpability—has no basis in the statutory text or roots in the law. Pp. 223–229.

844 F. 3d 653, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 229.

Stuart Banner argued the cause for petitioner. With him on the briefs were *Fred A. Rowley, Jr.*, *Daniel B. Levin*, *Mark R. Yohalem*, and *Fabian J. Rosati*.

Brett E. Legner, Deputy Solicitor General of Illinois, argued the cause for respondents. With him on the brief were *Lisa Madigan*, Attorney General, *David L. Franklin*, Solicitor General, and *Mary Ellen Margaret Welsh*, *Kaitlyn N. Chenevert*, and *Sarah A. Hunger*, Assistant Attorneys General.*

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JUSTICE GORSUCH delivered the opinion of the Court.

This is a case about how much prevailing prisoners must pay their lawyers. When a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney,

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**David M. Shapiro*, *David D. Cole*, *David C. Fathi*, and *Seymour W. James, Jr.*, filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *George Jepsen* of Connecticut, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

a federal statute says that "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U. S. C. § 1997e(d)(2). Whatever else you might make of this, the first sentence pretty clearly tells us that the prisoner has to pay some part of the attorney's fee award before financial responsibility shifts to the defendant. But how much is enough? Does the first sentence allow the district court discretion to take *any* amount it wishes from the plaintiff's judgment to pay the attorney, from 25% down to a penny? Or does the first sentence instead mean that the court must pay the attorney's entire fee award from the plaintiff's judgment until it reaches the 25% cap and only then turn to the defendant?

The facts of our case illustrate the problem we face. After a jury trial, the district court entered judgment for Charles Murphy in the amount of $307,733.82 against two of his prison guards, Officer Robert Smith and Lieutenant Gregory Fulk. The court also awarded Mr. Murphy's attorney $108,446.54 in fees. So far, so good. But then came the question who should pay what portion of the fee award. The defendants argued that, under the statute's terms, the court had to take 25% (or about $77,000) from Mr. Murphy's judgment before taxing them for the balance of the fee award. The court, however, refused that request. Instead, it ordered that Mr. Murphy "shall pay 10% of [his] judgment" (or about $31,000) toward the fee award, with the defendants responsible for the rest. In support of this allocation, the district court explained that it commonly varied the amount prisoners pay, though the court offered no explanation for choosing 10% instead of some other number. On appeal, a unanimous panel reversed, explaining its view that the language of § 1997e(d)(2) requires a district court to exhaust 25% of the prisoner's judgment before demanding payment from the defendants. 844 F. 3d 653, 660 (CA7 2016). So

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there we have both sides of the debate, and our question, in a nutshell: Did the district court have latitude to apply 10% (or some other discretionary amount) of the plaintiff's judgment to his attorney's fee award instead of 25%? See 582 U. S. 961 (2017) (granting certiorari to resolve this question).

As always, we start with the specific statutory language in dispute. That language (again) says "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded." § 1997e(d)(2). And we think this much tells us a few things. First, the word "shall" usually creates a mandate, not a liberty, so the verb phrase "shall be applied" tells us that the district court has some nondiscretionary duty to perform. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"). Second, immediately following the verb we find an infinitival phrase ("to satisfy the amount of attorney's fees awarded") that specifies the purpose or aim of the verb's nondiscretionary duty. Cf. R. Huddleston & G. Pullum, Cambridge Grammar of the English Language, ch. 8, §§ 1, 12.2, pp. 669, 729–730 (2002). Third, we know that when you purposefully seek or aim "to satisfy" an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full.[1] Together, then, these three clues suggest that the court (1) *must* apply judgment funds toward the fee award (2) with the *purpose* of (3) *fully discharging* the fee award. And to meet *that* duty, a district court must apply

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[1] See Black's Law Dictionary 1543 (10th ed. 2014) (defining "satisfaction" as "[t]he fulfillment of an obligation; esp., the payment in full of a debt"); 14 Oxford English Dictionary 504 (2d ed. 1989) (defining "satisfy" as "[t]o pay off or discharge fully; to liquidate (a debt); to fulfil completely (an obligation), comply with (a demand)"); Webster's New International Dictionary 2220 (2d ed. 1950) (defining "satisfy" as "1. In general, to fill up the measure of a want of (a person or a thing); hence, to gratify fully the desire of . . . . 2. a To pay to the extent of claims or deserts; to give what is due to; as, to *satisfy* a creditor. b To answer or discharge, as a claim, debt, legal demand, or the like; . . . to pay off").

as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap. If Congress had wished to afford the judge more discretion in this area, it could have easily substituted "may" for "shall." And if Congress had wished to prescribe a different purpose for the judge to pursue, it could have easily replaced the infinitival phrase "to satisfy . . . " with "to reduce . . . " or "against . . . ." But Congress didn't choose those other words. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.

Mr. Murphy's reply does more to hurt than help his cause. Consider, he says, college math credits that the college prospectus says shall be "applied to satisfy" a chemistry degree. No one, the argument goes, would understand that phrase to suggest a single math course will fully discharge all chemistry degree requirements. We quite agree, but that is beside the point. In Mr. Murphy's example, as in our statute, the word "satisfy" does not suggest some hidden empirical judgment about *how often* a math class will satisfy a chemistry degree. Instead it serves to tell the college registrar *what purpose* he must pursue when handed the student's transcript: The registrar must, without discretion, apply those credits toward the satisfaction or discharge of the student's credit obligations. No doubt a college student needing three credits to graduate who took a three-credit math course would be bewildered to learn the registrar thought he had discretion to count only two of those credits toward her degree. So too here. It doesn't matter how many fee awards will be fully satisfied from a judgment without breaking the 25% cap, or whether any particular fee award could be. The statute's point is to instruct the judge about the purpose he must pursue—to discharge the fee award using judgment funds to the extent possible, subject to the 25% cap.

Retreating now, Mr. Murphy contends that whatever the verb and the infinitival phrase mean, the subject of the sentence—"a *portion* of the judgment (not to exceed 25 per-

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cent)"—necessarily suggests wide judicial discretion. This language, he observes, anticipates a *range* of amounts (some "portion" up to 25%) that can be taken from his judgment. And the existence of the range, Mr. Murphy contends, necessarily means that the district court must enjoy discretion to pick *any* "portion" so long as it doesn't exceed the 25% cap.

But that does not logically follow. Under *either* side's reading of the statute the portion of fees taken from the plaintiff's judgment will vary over a range—whether because of the district court's discretionary choice (as Mr. Murphy contends), or because of the variance in the size of fee awards themselves, which sometimes will be less than 25% of the judgment (as Officer Smith and Lieutenant Fulk suggest). If the police have two suspects in a robbery committed with a red getaway car, the fact that one suspect drives a red sedan proves nothing if the other does too. The fact that the statute contemplates a range of possible "portion[s]" to be paid out of the judgment, thus, just doesn't help identify which of the two proposed interpretations we should adopt for both bear that feature.

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Nor does the word "portion" necessarily denote unfettered discretion. If someone told you to follow a written recipe but double the portion of sugar, you would know precisely how much sugar to put in—twice whatever's on the page. And Congress has certainly used the word "portion" in just that way. Take 16 U. S. C. § 673b, which defines the National Elk Refuge to include the "[e]ntire portion now in Jackson Hole National Monument except that portion in section 2 lying west of the east right-of-way line of United States Highway Numbered 187," among other similar plots—descriptions sufficiently determinate that the statute itself can later give the total number of acres of covered land ("six thousand three hundred and seventy-six acres, more or less"). So the question is how has Congress used the word "portion" in this statute? And as we have explained, the text persuades us that, subject to the 25% cap, the size of the relevant "portion" here is fixed by reference to the size

of the attorney's fee award, not left to a district court's unguided choice.

Even if the interpretive race in this case seems close at this point, close races still have winners. Besides, stepping back to take in the larger statutory scheme surrounding the specific language before us reveals that this case isn't quite as close as it might first appear. In 1976, Congress enacted what is now 42 U. S. C. § 1988(b) to authorize discretionary fee shifting in civil rights suits. Civil Rights Attorney's Fees Awards Act, 90 Stat. 2641. For years that statute governed the award of attorney's fees in a large variety of civil rights actions, including prisoner civil rights lawsuits like this one. But in the Prison Litigation Reform Act of 1995, Congress reentered the field and adopted § 1997e's new and specialized fee shifting rule for prisoner civil rights suits alone. See 110 Stat. 1321–71.

Comparing the terms of the old and new statutes helps to shed a good deal of light on the parties' positions. Section 1988(b) confers discretion on district courts in unambiguous terms: "[T]he court, in its *discretion*, *may* allow the prevailing party . . . a *reasonable* attorney's fee as part of the costs" against the defendant. (Emphasis added.) Meanwhile, § 1997e(d) expressly qualifies the usual operation of § 1988(b) in prisoner cases. See § 1997e(d)(1) (providing that "[i]n any action brought by a prisoner . . . in which attorney's fees are authorized under section 1988 . . . such fees shall not be awarded, except" under certain conditions). And as we've seen, § 1997e(d)(2) proceeds to use very different language to describe the district court's job in awarding fees. It does not say "may," it does not say "reasonable," and it certainly does not say anything about "discretion." If Congress had wished to confer the same discretion in § 1997e(d) that it conferred in § 1988(b), we very much doubt it would have bothered to write a new law; omit all the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones. See *Russello* v.

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United States, 464 U. S. 16, 23 (1983) (refusing to conclude that "the differing language" in two statutory provisions "has the same meaning in each").

The surrounding statutory structure of § 1997e(d) reinforces this conclusion. Like paragraph (2), the other provisions of § 1997e(d) *also* limit the district court's pre-existing discretion under § 1988(b). These provisions limit the fees that would otherwise be available under § 1988 to cover only certain kinds of lawyerly tasks, see §§ 1997e(d)(1)(A) and (B)(ii); they require proportionality between fee awards and the relief ordered, see § 1997e(d)(1)(B)(i); and they restrict the hourly rate of the prisoner's lawyer, see § 1997e(d)(3). All this suggests a statute that seeks to restrain, rather than replicate, the discretion found in § 1988(b).

Notably, too, the discretion Mr. Murphy would have us introduce into § 1997e doesn't even sit easily with our precedent under § 1988. Our cases interpreting § 1988 establish "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565 (1986). To be sure, before the lodestar became "the guiding light of our fee shifting jurisprudence," *Burlington* v. *Dague*, 505 U. S. 557, 562 (1992), many lower courts used one of your classic 12-factor balancing tests. See *Delaware Valley*, 478 U. S., at 562, and n. 7. Ultimately, though, this Court rejected undue reliance on the 12-factor test because it "gave very little actual guidance to district courts[,] . . . placed unlimited discretion in trial judges[,] and produced disparate results." *Id.*, at 563. Yet, despite this guidance, Mr. Murphy effectively seeks to (re)introduce into § 1997e(d)(2) exactly the sort of unguided and freewheeling choice—and the disparate results that come with it—that this Court has sought to expunge from practice under § 1988. And he seeks to achieve all this on the basis of considerably less helpful statutory language. To state the suggestion is to reveal its defect.

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Nor does Mr. Murphy's proposed cure solve his problem. To avoid reading § 1997e(d)(2) as affording entirely rudderless discretion, Mr. Murphy contends that district courts should apportion fees in proportion to the defendant's culpability. When a defendant has acted egregiously, he says, the court should lower the plaintiff's responsibility for the fee award and increase the defendant's—even if that means applying only a "nominal" amount of the plaintiff's judgment toward the fee. But precisely none of this appears in § 1997e(d)(2) or, for that matter, enjoys any analogue in § 1988's lodestar analysis or even the old 12-factor approach. Whatever you might have to say about Mr. Murphy's culpability formula as a matter of policy, it has no roots in the law. Nor is it clear, for what it's worth, that the culpability approach would even help him. The district court never cited the defendants' culpability (or any other reason) to justify taking only 10% rather than 25% from Mr. Murphy's judgment. And it's tough to see what the choice of 10% might have had to do with the defendant's culpability in this case. The district court actually *remitted* the jury's punitive damages award—suggesting that, if anything, the defendants' culpability had been already amply addressed.

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At the end of the day, what may have begun as a close race turns out to have a clear winner. Now with a view of the full field of textual, contextual, and precedential evidence, we think the interpretation the court of appeals adopted prevails. In cases governed by § 1997e(d), we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.[2]

[2] Even for those of us who might be inclined to entertain it, Mr. Murphy's legislative history argument fails to overcome the textual, contextual, and precedential evidence before us. He points to an early draft of § 1997e(d)(2) that read: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is *greater than 25 percent* of the judgment, the excess shall be paid by the defendant." Prison Litigation Reform Act of 1995, S. 1279, 104th Cong., 1st

The judgment is

Affirmed.

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

The Court concludes that the attorney's fee apportionment provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U. S. C. § 1997e(d)(2), requires that a district court endeavor to fulfill the entirety of an attorney's fee award from the monetary judgment awarded to a prevailing prisoner-plaintiff, and only if 25 percent of the judgment is inadequate to cover the fee award can the court require contribution from the defendant. *Ante*, at 228. I cannot agree. The text of § 1997e(d)(2)—"a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant"—and its statutory context make clear that the provision permits district courts to exercise discretion in choosing the portion of a

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Sess., § 3(d), p. 16 (1995) (emphasis added). Mr. Murphy admits that the italicized language in the second sentence suggests that it is the size of the attorney's fees award, not some invisible discretion, that determines what the defendant must pay. Yet, he notes, the second sentence was revised in the legislative process and now reads: "If the award of attorney's fees is *not greater than 150 percent* of the judgment, the excess shall be paid by the defendant." 42 U. S. C. § 1997e(d)(2) (emphasis added).

But what exactly does this amendment process prove, even taken on its own terms? It shows that, at some stage of the bill's consideration, its proponents likely shared our understanding that the (still unchanged) first sentence doesn't give district courts the discretion to allocate fees to the defendant as they please. For if such discretion were intended, it would have been incoherent for the drafters to say, in the second sentence, that defendants must pay only "[i]f the award of attorney's fees is greater than 25 percent of the judgment," instead of whenever the district court chooses. Beyond that, the amendment process tells us nothing. Did legislators voting on the measure agree with our interpretation of the first sentence and drop the confirmatory language from the second as flabby duplication? Or did they drop it because, as Mr. Murphy supposes, they thought it erroneous or even just bad policy? Did anyone voting on the measure even think about this question? There is no way to know, and we will not try to guess.

prisoner-plaintiff's monetary judgment that must be applied toward an attorney's fee award, so long as that portion is not greater than 25 percent. I therefore respectfully dissent.

I

In approaching this case, it helps to understand the background of the fee award at issue. On July 25, 2011, petitioner Charles Murphy, a prisoner at the Vandalia Correctional Center in Illinois, reported that his assigned seat at mealtime had food and water on it, which resulted in Murphy being handcuffed and escorted to a segregation building. Once there, Murphy taunted respondent Correctional Officer Robert Smith, who responded by hitting Murphy in the eye and applying a choke hold, causing Murphy to lose consciousness. When Murphy woke up, Officer Smith and respondent Lieutenant Gregory Fulk were pushing him into a cell. His hands were still cuffed behind his back and he fell face first into the cell and hit his head on a metal toilet. Officer Smith and Lieutenant Fulk then stripped Murphy of his clothes, removed his handcuffs, and left him in the cell without checking his condition. Thirty or forty minutes passed until a nurse arrived to attend to Murphy, who was sent to a hospital. Part of his eye socket had been crushed and required surgery. Despite the procedure, Murphy did not fully recover; almost five years later, his vision remained doubled and blurred.

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Murphy sued respondents under 42 U. S. C. § 1983 and state-law causes of action. After trial, a jury found Officer Smith liable for state-law battery and unconstitutional use of force under the Eighth Amendment, and found Lieutenant Fulk liable for deliberate indifference to a serious medical need in violation of the Eighth Amendment. The jury awarded Murphy $409,750.00 in compensatory and punitive damages, which the District Court reduced to $307,733.82. The District Court also awarded Murphy's attorney $108,446.54 in fees for the several hundred hours he spent on

the case and, pursuant to § 1997e(d)(2), ordered Murphy to contribute 10 percent of his money judgment toward the attorney's fee award and respondents to pay the rest.

Respondents appealed, arguing that § 1997e(d)(2) required Murphy to contribute 25 percent of his judgment toward payment of the attorney's fee award. The Court of Appeals for the Seventh Circuit agreed and reversed. In so doing, it acknowledged that its interpretation of § 1997e(d)(2) was at odds with that of all the other Courts of Appeals to have considered the question. See 844 F. 3d 653, 660 (2016) (citing *Boesing* v. *Spiess*, 540 F. 3d 886, 892 (CA8 2008); *Parker* v. *Conway*, 581 F. 3d 198, 205 (CA3 2009)).

II

A

The relevant provision in the PLRA provides:

> "Whenever a monetary judgment is awarded in [a civil rights action brought by a prisoner], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U. S. C. § 1997e(d)(2).

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The crux of the majority's reasoning is its definition of the infinitive "to satisfy." The majority contends that "when you purposefully seek or aim 'to satisfy' an obligation, especially a financial obligation, that usually means you intend to discharge the obligation in full." *Ante*, at 223. To meet its duty to act with the purpose of fully discharging the fee award, the majority reasons, "a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap." *Ante*, at 223–224.

But the phrase "to satisfy" as it is used in § 1997e(d)(2) does not bear the weight the majority places on it. Its

neighboring text and the realities of prisoner-civil-rights litigation rebut the conclusion that "to satisfy" compels a district court always to maximize the amount of the prisoner-plaintiff's judgment to be contributed to the fee award, and instead indicate that the only work "to satisfy" does in the statute is to direct a district court to contribute some amount of the judgment toward payment of the fee award.

Beginning with the neighboring text, it may well be that, standing alone, "to satisfy" is often used to mean "to completely fulfill an obligation." But the statutory provision here does not simply say "to satisfy"; it says "applied to satisfy." As a matter of everyday usage, the phrase "applied to satisfy" often means "applied toward the satisfaction of," rather than "applied in complete fulfillment of." Thus, whereas an action undertaken "to satisfy" an obligation might, as the majority suggests, naturally be understood as an effort to discharge the obligation in full, *ante*, at 223, a contribution that is "applied to satisfy" an obligation need not be intended to discharge the obligation in full.

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Take a few examples: A consumer makes a payment on her credit card, which her agreement with the card company provides shall be "applied to satisfy" her debt. A student enrolls in a particular type of math class, the credits from which her university registrar earlier announced shall be "applied to satisfy" the requirements of a physics degree. And a law firm associate contributes hours to a *pro bono* matter that her firm has provided may be "applied to satisfy" the firm's overall billable-hours requirement. In each case, pursuant to the relevant agreement, the payment, credits, and hours are applied toward the satisfaction of a larger obligation, but the inference is not that the consumer, student, or associate had to contribute or even necessarily did contribute the maximum possible credit card payment, classroom credits, or hours toward the fulfillment of those obligations. The consumer may have chosen to make the mini-

mum credit card payment because she preferred to allocate her other funds elsewhere; the student may have chosen the four-credit version of the math course over the six-credit one because the former had a better instructor; and the associate may have been judicious about the hours she dedicated to the *pro bono* matter because she knew her firm more highly valued paid over *pro bono* work. So, too, here. Section 1997e(d)(2), like the credit card agreement, university registrar announcement, and law firm policy, sets out the relevant rule—"a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy" the fee award—and the district court, like the consumer, student, and law firm associate, decides how much of the judgment to apply.

As a practical matter, moreover, a district court will almost never be able to discharge fully a fee award from 25 percent of a prisoner-plaintiff's judgment. In the vast majority of prisoner-civil-rights cases, the attorney's fee award exceeds the monetary judgment awarded to the prevailing prisoner-plaintiff. In fiscal year 2012, for instance, the median damages award in a prisoner-civil-rights action litigated to victory (*i. e.*, not settled or decided against the prisoner) was a mere $4,185. See Schlanger, Trends in Prisoner Litigation, as the PLRA Enters Adulthood, 5 U. C. Irvine L. Rev. 153, 168 (2015) (Table 7) (Trends in Prisoner Litigation). Therefore, in 2012, the maximum amount (25 percent) of the median judgment that could be applied toward an attorney's fee award was $1,046.25. The PLRA caps the hourly rate that may be awarded to a prisoner-plaintiff's attorney at 150 percent of the rate for court-appointed counsel under 18 U. S. C. § 3006A, which in 2012 was $125. 42 U. S. C. § 1997e(d)(3); App. to Pet. for Cert. 21a. Thus, a prisoner's attorney was entitled to up to $187.50 per hour worked. Even if a district court were to apply an hourly rate of just $100, well below the cap, unless the attorney put in fewer than 10.5 hours in the ordinary case—a virtually

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unimaginable scenario—25 percent of the judgment will not come close to discharging fully the attorney's fee award.[1]

Such low judgments are not a new phenomenon in prisoner-civil-rights suits; they were the norm even before Congress enacted the PLRA. In fiscal year 1993, for example, the median damages award for prisoner-plaintiffs in cases won at trial was $1,000. See Trends in Prisoner Litigation 167; Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1602–1603, and Table II.C (2003).[2]

Given the very small judgment awards in successfully litigated prisoner-civil-rights cases, it is hard to believe, as the majority contends, that Congress used "applied to satisfy" to command an effort by district courts to "discharge . . . in full," *ante*, at 223, when in most cases, full discharge will never be possible.[3] Rather, taking into account both the realities of prisoner-civil-rights litigation and the most natural reading of "applied to satisfy," the more logical inference is that § 1997e(d)(2) simply requires that a portion of the prevailing prisoner-plaintiff's judgment be applied toward the satisfaction of the attorney's fee award.[4] It does not, however, demand that the district court always order the prisoner-plaintiff to pay the maximum possible portion of the judgment (up to 25 percent) needed to discharge fully the fee

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[1] A similar conclusion obtains if one considers the average, rather than the median, damages award in a prisoner-civil-rights action litigated to victory, which in 2012 was $20,815. See Trends in Prisoner Litigation 168 (Table 7).

[2] The average such award in 1993, excluding one extreme outlier of $6.5 million, was $18,800. See *id.*, at 167; Schlanger, 116 Harv. L. Rev., at 1603.

[3] In fact, even here, where the monetary judgment awarded to Murphy was well above the average award in prisoner-civil-rights cases, 25 percent of the judgment cannot fully discharge the fees awarded to his attorney.

[4] Irrespective of what portion of the judgment the district court ultimately requires the prisoner-plaintiff to contribute to the fee award, the award will always be satisfied, *i. e.*, paid in full, for once the prisoner-plaintiff provides his contribution from the judgment, the defendant will be called upon to contribute the remainder.

award. Under that interpretation, applying any amount of Murphy's judgment toward payment of his attorney's fee award complies with § 1997e(d)(2), whether that amount is 10 percent of the judgment as ordered by the District Court or 25 percent as ordered by the Court of Appeals.

B

The majority suggests that if Congress had wanted to permit judges to pursue something other than full discharge of the fee award from the judgment, it could have replaced "to satisfy" with "to reduce" or "against." *Ante*, at 224. But the majority ignores that Congress also easily could have written § 1997e(d)(2) to more clearly express the meaning it and respondents champion. The statute, for example, simply could have said: "Twenty-five percent of the plaintiff's judgment shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant."

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In fact, Congress considered and rejected language prior to enacting the current attorney's fee apportionment provision that would have done just what the majority claims. An earlier version of § 1997e(d)(2) provided:

> "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. *If the award of attorney's fees is greater than 25 percent of the judgment*, the excess shall be paid by the defendant." Prison Litigation Reform Act of 1995, S. 1279, 104th Cong., 1st Sess., § 3(d), p. 16 (emphasis added).

The italicized clause plainly expressed what the majority contends the current provision means, *i. e.*, that a defendant's liability for the attorney's fee award begins only if any

portion of the award remains unpaid after the prevailing prisoner-plaintiff has contributed 25 percent of the judgment. But Congress removed this clause before finalizing the bill, thus electing to keep the 25-percent ceiling for the prisoner-plaintiff's contribution to the fee award and rejecting a 25-percent floor for the defendant's contribution. See H. R. Conf. Rep. No. 104–378, p. 71 (1995).

The majority alternatively disclaims the ability to discern what motivated the deletion and pronounces that "[i]t shows that, at some stage of the bill's consideration, its proponents likely shared [the majority's] understanding" of how the first sentence works. *Ante*, at 229, n. 2. In the majority's view, it is more likely that Congress drafted two redundant sentences than two conflicting ones. *Ibid.* That supposition, however, is purely speculative. Here is what is known for certain: Congress had before it language that would have accomplished exactly the statutory function the majority today endorses and Congress chose to excise that language from the text. Our precedent instructs that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U. S. 16, 23–24 (1983). See also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 442–443 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language'").

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C

The rest of the statutory text confirms that district courts have discretion to choose the amount of the judgment that must be applied toward the attorney's fee award. Specifically, that grant of discretion is evident from Congress' use of two discretion-conferring terms, "portion" and "not to exceed."

The first word, "portion," is defined as "[a] share or allotted part (as of an estate)." Black's Law Dictionary 1182

(7th ed. 1999). "Portion" thus inherently conveys an indeterminate amount. Take, for instance, the following sentence: "My dinner guest has requested a portion of apple pie for dessert." How much is a "portion" of pie? For a marathon runner, a "portion" might mean a hearty serving, perhaps an eighth of a whole pie; for someone on a diet, however, a "portion" might mean a tiny sliver. The dinner host can figure it out based on the circumstances. Similarly, in this context, referencing a "portion" of the judgment tells us that some amount of the judgment up to 25 percent of the whole is to be applied to the attorney's fee award, but not exactly what amount. That decision is left to the sound discretion of the district court, depending again on the circumstances.

The majority dismisses as insignificant Congress' use of this discretion-conferring term, arguing that under either side's reading of the statute, the "portion" of fees taken from the prisoner-plaintiff's judgment will vary. See *ante*, at 225–226. True enough,[5] but that fact does not justify the majority's brushoff. Congress' deliberate choice to use the indeterminate, discretion-conferring term "portion" in § 1997e(d)(2) reveals much about the statute's meaning.

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To illustrate the significance of Congress' use of the word "portion," imagine that § 1997e(d)(2) contained no qualifying "not to exceed" parenthetical, and instead provided only that "a portion of the judgment shall be applied to satisfy the amount of attorney's fees awarded against the defendant." As applied to the typical scenario, *i. e.*, where the attorney's fee award exceeds the prisoner-plaintiff's money judgment, the most natural reading of the statute absent the limiting parenthetical is that the amount of the judgment applied to

[5] Notably, such variation will be far less common under the majority's reading. Given that the fee awards in prisoner-civil-rights victories almost always exceed the monetary judgments, see Part II–A, *supra*, on the majority's reading, it will be the rare case indeed when the "portion" of the judgment applied to the fee award will be anything other than 25 percent.

the fee award must be more than zero and less than 100 percent. That is because, as explained above, "portion" means something less than the whole but does not have a fixed value.[6] If the majority were correct in its reading of "to satisfy," however—that it requires the district court to endeavor to discharge fully the attorney's fee award from the prisoner-plaintiff's judgment before turning to the defendant for a contribution—then, in the typical case, absent the parenthetical, we would have to conclude that "a portion of the judgment" always means "all of the judgment" or perhaps "all of the judgment save a nominal amount." I do not think it reasonable to conclude that Congress intended to ascribe such a strained meaning to "portion." That the majority's reading of one term—"to satisfy"—forces an implausible reading of another term—"portion"—strongly suggests that its reading is incorrect.

Congress' use of the word "portion," therefore, does not merely instruct that there are a range of possible portions that can be paid out of the judgment. "Portion" makes evident that the district court is afforded the discretion to choose the amount of the judgment to be paid toward the fee award. The addition of the "not to exceed 25 percent" parenthetical only enhances this conclusion. The phrase "not to exceed," which is itself discretion conferring, sets an upper, but not a lower, limit and thus cabins, but does not eliminate, the exercise of discretion that "portion" confers.

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[6] Of course, "portion" can gain a more determinate meaning by its surrounding context, as the majority's examples illustrate. See *ante*, at 225–226. But § 1997e(d)(2) is not like the recipe that quantifies the initial portion of sugar to be doubled or the statutory provision that describes with geographic precision the lands to be made part of the National Elk Refuge. "[T]o satisfy" simply instructs that some portion of the prisoner-plaintiff's judgment "not to exceed 25 percent" be applied toward the satisfaction of the fee award. See *supra*, at 234. Section 1997e(d)(2) therefore lacks the clarifying details present in the majority's examples that would give fixed meaning to the word "portion."

D

The distinction between cabining and eliminating discretion is also key to understanding the relationship between § 1997e(d) and 42 U. S. C. § 1988(b), as well as between § 1997e(d)(2) and its surrounding statutory provisions.

Section 1988(b), the Civil Rights Attorney's Fees Awards Act of 1976, authorizes a district court to award "a reasonable attorney's fee" to a prevailing party in an action to enforce one or more of several federal civil rights laws. Section 1997e(d) in turn imposes limits on the attorney's fees available under § 1988(b) when the prevailing plaintiff in one of the specified civil rights actions is a prisoner. In particular, the district court may award attorney's fees to the prisoner only if "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988," and "the amount of the fee is proportionately related to the court ordered relief for the violation" or "the fee was directly and reasonably incurred in enforcing the relief ordered for the violation." § 1997e(d)(1). In addition, as noted *supra*, at 233–234, the district court may not base an award of attorney's fees "on an hourly rate greater than 150 percent of the hourly rate established under [18 U. S. C. § 3006A] for payment of court-appointed counsel" and, if the prisoner-plaintiff was awarded damages, may not award attorney's fees in excess of 150 percent of the monetary judgment. §§ 1997e(d)(2)–(3).

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These provisions, of course, do not eliminate a district court's discretion when it comes to the award of attorney's fees to a prevailing prisoner-plaintiff; they merely compress the range of permissible options. A district court still has the discretion to decide whether to award attorney's fees, just as it ordinarily would under § 1988(b); it simply must first ensure that the threshold conditions set out in § 1997e(d)(1) are satisfied. A district court likewise still has the discretion to determine what constitutes a reasonable

amount of fees to award; it simply must abide by the two 150-percent caps in doing so.

Just as these surrounding statutory provisions in § 1997e(d) set outward bounds on a district court's exercise of discretion while still preserving the exercise of discretion within those bounds, so, too, does § 1997e(d)(2). A district court is not free to require the defendant to pay the entire attorney's fee award, nor is it free to require the prisoner-plaintiff to give up more than 25 percent of his judgment to pay the fee award. But within those boundaries, the district court is free to decide which party should pay what portion of the fee award.

The majority suggests that affording discretion to district courts when it comes to the apportionment of attorney's fee awards is in tension with our adoption of the lodestar method as the presumptive means of calculating a reasonable fee award under § 1988. *Ante*, at 227. Prior to the lodestar's development, several lower courts utilized 12 "sometimes subjective factors." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 563 (1986). Because that method "placed unlimited discretion in trial judges and produced disparate results," *ibid.*, this Court endorsed the lodestar approach, pursuant to which a court multiplies "the number of hours reasonably expended on the litigation times a reasonable hourly rate," *Blum* v. *Stenson*, 465 U. S. 886, 888 (1984), and then considers whether to make adjustments to that amount, see *id.*, at 898–901; *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983). The majority asserts that adopting Murphy's reading of § 1997e(d)(2) would lead to "exactly the sort of unguided and freewheeling choice" this Court sought to leave behind when it sanctioned the lodestar approach. *Ante*, at 227. That analogy, however, is inapt.

First, the question before us is whether § 1997e(d)(2) affords district courts any discretion in the apportionment of responsibility for payment of an attorney's fee award, not

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how district courts reasonably should exercise that discretion. When this Court embraced the lodestar approach, it did so to provide guideposts to district courts as they exercised the discretion granted to them by § 1988(b) to "allow the prevailing party . . . a reasonable attorney's fee." By no means did this Court eliminate that exercise of discretion. Rather, the Court has "reemphasize[d] that the district court has discretion in determining the amount of a fee award." *Hensley*, 461 U. S., at 437; see also *Blum*, 465 U. S., at 902, n. 19 ("A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness"); *id.*, at 896 (explaining that the proper standard of review of an attorney's fee award is abuse of discretion). As was the case for the District Court here, that exercise of discretion can include, for example, whether a defendant is entitled to a reduction in hours where a plaintiff did not succeed on all his claims, and whether certain claimed expenses are reasonable. See App. to Pet. for Cert. 22a–26a.

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If the majority is concerned that district courts are exercising the apportionment discretion afforded to them by § 1997e(d)(2) in an uneven or unguided manner, the solution is not to read the conferral of discretion out of the statute entirely. Instead, as occurred in the § 1988(b) context, the Court could endorse a method for apportioning attorney's fee awards that can consistently be applied across cases.[7] Just as courts ultimately were capable, through trial and error, of discerning an appropriate formula for assessing the reasonableness of a given fee award, see *Delaware Valley*, 478 U. S., at 562–565, so, too, are they capable of determining

[7] Such an apportionment method could, for example, account for a defendant's conduct during the litigation, just as the lodestar method considers the prevailing plaintiff's conduct in prosecuting the action. A defendant that acts in ways that unnecessarily prolong or complicate the litigation so as to increase the plaintiff's fees reasonably could be asked to bear a greater share of that expense.

a sound approach to the apportionment decision envisioned by § 1997e(d)(2).[8]

Second, even absent an equivalent method to the lodestar inquiry, § 1997e(d)(2) does not, unlike the old 12-factor analysis for calculating fee awards, afford unlimited discretion. Congress provided express bounds on a district court's apportionment discretion, requiring that it order the prevailing prisoner-plaintiff to contribute at least some part of his money judgment to the fee award but no more than 25 percent.

Finally, it is not obvious that the need for a more regimented approach with respect to calculating the amount of an attorney's fee award under § 1988(b) should dictate the need for a similarly regimented approach with respect to the apportionment of responsibility for that award under § 1997e(d)(2). The two decisions involve fundamentally different inquiries: The first is focused on the prevailing plaintiff's attorney and is concerned with determining a reasonable value for services rendered in pursuing the action, and the second is focused on the parties and is concerned with assessing the extent to which each party should bear responsibility for payment of those services (within the bounds set by Congress). In light of these distinctions, the Court should hesitate to extrapolate wholesale from the considerations that drove the adoption of the lodestar rule to constrain the apportionment discretion afforded by § 1997e(d)(2).

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III

On my reading of the plain text of § 1997e(d)(2) and its surrounding statutory provisions and context, the proper interpretation of the provision is clear: District courts may

[8] Relatedly, the majority indicates concern with the District Court's lack of explanation for its choice of 10 percent. See *ante*, at 228. That procedural failure can easily be remedied by requiring district courts to explain their apportionment decisions so as to facilitate meaningful appellate review.

exercise discretion in choosing the portion of the prisoner-plaintiff's monetary judgment that must go toward the attorney's fee award, so long as that choice is not greater than 25 percent of the judgment. Because the majority holds that a prevailing prisoner-plaintiff must always yield 25 percent of his monetary judgment or, if less, the full amount of the fee award in every case, I respectfully dissent.

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Syllabus

PATCHAK *v.* ZINKE, SECRETARY OF THE INTERIOR, ET AL.

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

No. 16–498. Argued November 7, 2017—Decided February 27, 2018

Petitioner David Patchak filed suit challenging the authority of the Secretary of the Interior to invoke the Indian Reorganization Act, 25 U. S. C. § 5108, and take into trust a property (Bradley Property) on which respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians wished to build a casino. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209 (*Patchak I*), this Court held that the Secretary lacked sovereign immunity and that Patchak had standing, and it remanded the case for further proceedings. While the suit was back in District Court, Congress enacted the Gun Lake Act, 128 Stat. 1913, which "reaffirmed as trust land" the Bradley Property, § 2(a), and provided that "an action . . . relating to [that] land shall not be filed or maintained in a Federal court and shall be promptly dismissed," § 2(b). In response, the District Court dismissed Patchak's suit, and the D. C. Circuit affirmed.

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Held: The judgment is affirmed.

828 F. 3d 995, affirmed.

JUSTICE THOMAS, joined by JUSTICE BREYER, JUSTICE ALITO, and JUSTICE KAGAN, concluded that § 2(b) of the Gun Lake Act does not violate Article III of the Constitution. Pp. 249–260.

(a) Congress may not exercise the judicial power, see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218, but the legislative power permits Congress to make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side will win, *Bank Markazi* v. *Peterson*, 578 U. S. 212, 228–232. Permissible exercises of the legislative power and impermissible infringements of the judicial power are distinguished by the following rule: Congress violates Article III when it "compel[s] . . . findings or results under old law," *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429, 438, but not when it "changes the law," *Plaut*, *supra*, at 218. Pp. 249–250.

(b) By stripping federal courts of jurisdiction over actions "relating to" the Bradley Property, § 2(b) changes the law. Pp. 250–255.

(1) Section 2(b) is best read as a jurisdiction-stripping statute. It uses jurisdictional language, imposes jurisdictional consequences, and applies "[n]otwithstanding any other provision of law," including the

general grant of federal-question jurisdiction, 28 U. S. C. § 1331. And while § 2(b) does not use the word "jurisdiction," jurisdictional statutes are not required to do so. See *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153. Indeed, § 2(b) uses language similar to language used in other jurisdictional statutes. See, *e. g.*, *Gonzalez* v. *Thaler*, 565 U. S. 134, 142. And § 2(b) cannot plausibly be read as anything other than jurisdictional. Pp. 251–252.

(2) When Congress strips federal courts of jurisdiction, it exercises a valid legislative power. This Court has held that Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases, see *Ex parte McCardle*, 7 Wall. 506, 514, and has reaffirmed these principles on many occasions, see, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95. Pp. 252–255.

(c) Patchak's two arguments for why § 2(b) violates Article III even if it does strip jurisdiction—that the provision flatly directs federal courts to dismiss lawsuits without allowing them to interpret or apply any new law, and that it attempts to interfere with this Court's decision in *Patchak I* that his suit "may proceed," 567 U. S., at 212—are unpersuasive. Pp. 255–259.

JUSTICE GINSBURG, joined by JUSTICE SOTOMAYOR, concluded that Congress' authority to forgo or retain the Government's sovereign immunity from suit suffices to decide this case. With *Patchak I* in mind, Congress acted effectively to displace the Administrative Procedure Act's waiver of immunity for suits against the United States—which enabled Patchak to launch this litigation—with a contrary command applicable to the Bradley Property. Pp. 263–264.

JUSTICE SOTOMAYOR concluded that § 2(b) of the Gun Lake Act is most naturally read as having restored the Federal Government's sovereign immunity from Patchak's suit challenging the trust status of the Bradley Property. Pp. 264–265.

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THOMAS, J., announced the judgment of the Court and delivered an opinion, in which BREYER, ALITO, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 260. GINSBURG, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, J., joined, *post*, p. 263. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 264. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY and GORSUCH, JJ., joined, *post*, p. 266.

Scott E. Gant argued the cause and filed briefs for petitioner.

Ann O'Connell argued the cause for the federal respondents. With her on the brief were *Acting Solicitor General*

Wall, *Acting Assistant Attorney General Wood*, *Deputy Assistant Attorney General Grant*, *Deputy Solicitor General Kneedler*, and *Lane N. McFadden.*

Pratik A. Shah argued the cause for respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. With him on the brief were *James E. Tysse*, *G. Michael Parsons*, *Jr.*, *Conly J. Schulte*, and *Nicole E. Ducheneaux.**

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which JUSTICE BREYER, JUSTICE ALITO, and JUSTICE KAGAN join.

Petitioner, David Patchak, sued the Secretary of the Interior for taking land into trust on behalf of an Indian Tribe. While his suit was pending in the District Court, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. 113–179, 128 Stat. 1913, which provides that suits relating to the land "shall not be filed or maintained in a Federal court and shall be promptly dismissed." Patchak contends that, in enacting this statute, Congress impermissibly infringed the judicial power that Article III of the Constitution vests exclusively in the Judicial Branch. Because we disagree, we affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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I

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) resides in southwestern Michigan, near the

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**Stephen I. Vladeck* and *Lindsay C. Harrison* filed a brief for Federal Courts Scholars as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Federal Courts and Federal Indian Law Scholars by *Ruthanne M. Deutsch*, *Hyland Hunt*, *Seth Davis*, and *Matthew L. M. Fletcher*; for National Congress of American Indians by *Ethan G. Shenkman* and *R. Stanton Jones*; for the U. S. House of Representatives by *Thomas G. Hungar* and *Kristin A. Shapiro*; for Wayland Township et al. by *Robert A. Long, Jr.*; and for Edward A. Hartnett by *Erik R. Zimmerman.*

township of Wayland. The Band traces its relationship with the United States back hundreds of years, pointing to treaties it negotiated with the Federal Government as early as 1795. But the Secretary of the Interior did not formally recognize the Band until 1999. See 63 Fed. Reg. 56936 (1998); 65 Fed. Reg. 13298 (2000).

After obtaining formal recognition, the Band identified a 147-acre parcel of land in Wayland, known as the Bradley Property, where it wanted to build a casino. The Band asked the Secretary to invoke the Indian Reorganization Act, § 5, 48 Stat. 985, 25 U. S. C. § 5108, and take the Bradley Property into trust.[1] In 2005, the Secretary agreed and posted a notice informing the public that the Bradley Property would be taken into trust for the Band. See 70 Fed. Reg. 25596.

The Michigan Gambling Opposition (MichGO) sued, alleging that the Secretary's decision violated federal environmental and gaming laws. After several years of litigation, the D. C. Circuit affirmed the dismissal of MichGO's claims, and this Court denied certiorari. *Michigan Gambling Opposition* v. *Kempthorne*, 525 F. 3d 23 (2008), cert. denied, 555 U. S. 1137 (2009). In January 2009, the Secretary formally took the Bradley Property into trust. And in February 2011, the Band opened its casino.

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Before the Secretary formally took the land into trust, a nearby landowner, David Patchak, filed another lawsuit challenging the Secretary's decision. Invoking the Administrative Procedure Act, 5 U. S. C. §§ 702, 706(2), Patchak alleged that the Secretary lacked statutory authority to take the Bradley Property into trust for the Band. The Indian Reorganization Act does not allow the Secretary to take land into trust for tribes that were not under federal jurisdiction when the statute was enacted in 1934. See *Carcieri* v. *Salazar*,

[1] Federal law allows Indian tribes to operate casinos on "Indian lands," 25 U. S. C. § 2710, which includes lands "held in trust by the United States for the benefit of any Indian tribe," § 2703(4)(B).

555 U. S. 379, 382–383 (2009). The Band was not federally recognized until 1999, which Patchak argued was more than 65 years too late. Based on this alleged statutory violation, Patchak sought to reverse the Secretary's decision to take the Bradley Property into trust.

The Secretary raised preliminary objections to Patchak's suit, contending that it was barred by sovereign immunity and that Patchak lacked prudential standing to bring it. The District Court granted the Secretary's motion to dismiss, but the D. C. Circuit reversed. *Patchak* v. *Salazar*, 646 F. Supp. 2d 72 (DC 2009), rev'd, 632 F. 3d 702 (2011). This Court granted certiorari and affirmed the D. C. Circuit. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209 (2012) (*Patchak I*). This Court's decision in *Patchak I* held that Congress had waived the Secretary's sovereign immunity from suits like Patchak's. *Id.*, at 215–224. It also held that Patchak had prudential standing because his suit arguably fell within the "zone of interests" protected by the Indian Reorganization Act. *Id.*, at 224–228. Because Patchak had standing and the Secretary lacked immunity, this Court concluded that "Patchak's suit may proceed," *id.*, at 212, and remanded for further proceedings, *id.*, at 228.

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In September 2014, while Patchak's suit was back in the District Court, Congress enacted the Gun Lake Act, 128 Stat. 1913. Section 2(a) of the Act states that the Bradley Property "is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Section 2(b) then provides the following:

> "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed."

Based on § 2(b), the District Court entered summary judgment against Patchak and dismissed his suit for lack of jurisdiction. *Patchak* v. *Jewell*, 109 F. Supp. 3d 152 (DC 2015).

The D. C. Circuit affirmed. *Patchak* v. *Jewell*, 828 F. 3d 995 (2016). It held that "[t]he language of the Gun Lake Act makes plain that Congress has stripped federal courts of subject matter jurisdiction" over suits, like Patchak's, that relate to the Bradley Property. *Id.*, at 1001. The D. C. Circuit rejected Patchak's argument that § 2(b) violates Article III of the Constitution. *Id.*, at 1001–1003. Article III prohibits Congress from "direct[ing] the result of pending litigation," the D. C. Circuit reasoned, but it does not prohibit Congress from "'supply[ing] new law.'" *Id.*, at 1002 (quoting *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429, 439 (1992)). Section 2(b) supplies new law: "[I]f an action relates to the Bradley Property, it must promptly be dismissed." 828 F. 3d, at 1003.

We granted certiorari to review whether § 2(b) violates Article III of the Constitution.[2] See 581 U. S. 959 (2017). Because it does not, we now affirm.

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II

A

The Constitution creates three branches of Government and vests each branch with a different type of power. See Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1. "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923); see also *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825) (Marshall, C. J.) ("[T]he legislature

[2] Patchak does not challenge the constitutionality of § 2(a) of the Gun Lake Act. See Reply Brief 7; Tr. of Oral Arg. 5. We thus limit our analysis to § 2(b).

makes, the executive executes, and the judiciary construes the law"). By vesting each branch with an exclusive form of power, the Framers kept those powers separate. See *INS* v. *Chadha*, 462 U. S. 919, 946 (1983). Each branch "exercise[s] . . . the powers appropriate to its own department," and no branch can "encroach upon the powers confided to the others." *Kilbourn* v. *Thompson*, 103 U. S. 168, 191 (1881). This system prevents "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (J. Madison)—an accumulation that would pose an inherent "threat to liberty," *Clinton* v. *City of New York*, 524 U. S. 417, 450 (1998) (KENNEDY, J., concurring).

The separation of powers, among other things, prevents Congress from exercising the judicial power. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218 (1995). One way that Congress can cross the line from legislative power to judicial power is by "usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it." *Bank Markazi* v. *Peterson*, 578 U. S. 212, 225 (2016). The simplest example would be a statute that says, "In *Smith* v. *Jones*, Smith wins." See *ibid.*, n. 17. At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins. See *id.*, at 228–232.

To distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court's precedents establish the following rule: Congress violates Article III when it "compel[s] . . . findings or results under old law." *Seattle Audubon*, *supra*, at 438. But Congress does not violate Article III when it "changes the law." *Plaut*, *supra*, at 218.

B

Section 2(b) changes the law. Specifically, it strips federal courts of jurisdiction over actions "relating to" the Bradley

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Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. See 28 U. S. C. § 1331. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III.

1

Section 2(b) strips federal jurisdiction over suits relating to the Bradley Property. The statute uses jurisdictional language. It states that an "action" relating to the Bradley Property "shall not be filed or maintained in a Federal court." It imposes jurisdictional consequences: Actions relating to the Bradley Property "shall be promptly dismissed." See *Ex parte McCardle*, 7 Wall. 506, 514 (1869) ("[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). Section 2(b) has no exceptions. Cf. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 165 (2010). And it applies "[n]otwithstanding any other provision of law," including the general grant of federal-question jurisdiction, 28 U. S. C. § 1331. Although § 2(b) does not use the word "jurisdiction," this Court does not require jurisdictional statutes to "incant magic words." *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013). Indeed, § 2(b) uses language similar to other statutes that this Court has deemed jurisdictional. See, *e. g.*, *Gonzalez* v. *Thaler*, 565 U. S. 134, 142 (2012) ("'an appeal may not be taken'" (quoting 28 U. S. C. § 2253(c)(1))); *Keene Corp.* v. *United States*, 508 U. S. 200, 208 (1993) ("'[n]o person shall file or prosecute'" (quoting 36 Stat. 1138)); *Weinberger* v. *Salfi*, 422 U. S. 749, 756 (1975) ("'[n]o action . . . shall be brought under [28 U. S. C. § 1331]'" (quoting 42 U. S. C. § 405(h))).

Our conclusion that § 2(b) is jurisdictional is bolstered by the fact that it cannot plausibly be read as anything else. Section 2(b) is not one of the nonjurisdictional rules that this Court's precedents have identified as "important and mandatory" but not governing "a court's adjudicatory capacity."

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Henderson v. *Shinseki*, 562 U. S. 428, 435 (2011). Section 2(b) does not identify an "element of [the] plaintiff's claim for relief" or otherwise define its "substantive adequacy." *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 516, 504 (2006). Nor is it a "claim-processing rule," like a filing deadline or an exhaustion requirement, that requires the parties to "take certain procedural steps at certain specified times." *Henderson*, *supra*, at 435. Instead, § 2(b) completely prohibits actions relating to the Bradley Property. Because § 2(b) addresses "a court's competence to adjudicate a particular category of cases," *Wachovia Bank, N. A.* v. *Schmidt*, 546 U. S. 303, 316 (2006), it is best read as a jurisdiction-stripping statute.

2

Statutes that strip jurisdiction "chang[e] the law" for the purpose of Article III, *Plaut*, *supra*, at 218, just as much as other exercises of Congress' legislative authority. Article I permits Congress "[t]o constitute Tribunals inferior to the supreme Court," § 8, and Article III vests the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," § 1. These provisions reflect the so-called Madisonian Compromise, which resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress. See *Printz* v. *United States*, 521 U. S. 898, 907 (1997); 1 Records of the Federal Convention of 1787, p. 125 (M. Farrand ed. 1911). Congress' greater power to create lower federal courts includes its lesser power to "limit the jurisdiction of those Courts." *United States* v. *Hudson*, 7 Cranch 32, 33 (1812); accord, *Lockerty* v. *Phillips*, 319 U. S. 182, 187 (1943). So long as Congress does not violate other constitutional provisions, its "control over the jurisdiction of the federal courts" is "plenary." *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 63–64 (1944); see also *Bowles* v. *Russell*, 551 U. S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider"). Thus, when Congress strips federal courts of

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jurisdiction, it exercises a valid legislative power no less than when it lays taxes, coins money, declares war, or invokes any other power that the Constitution grants it.

Indeed, this Court has held that Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases.[3] Shortly after the Civil War, for example, Congress repealed this Court's appellate jurisdiction over certain habeas corpus cases. See Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44; see also U. S. Const., Art. III, § 2 (permitting Congress to make "Exceptions" to this Court's appellate jurisdiction). William McCardle, a military prisoner whose appeal was pending at the time, argued that the repealing statute was "an exercise by the Congress of judicial power." 7 Wall., at 510. This Court disagreed. Jurisdiction-stripping statutes, the Court explained, do not involve "the exercise of judicial power" or "legislative interference with courts in the exercising of continuing jurisdiction." *Id.*, at 514. Because jurisdiction is the "power to declare the law" in the first place, "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Id.*, at 514–515.[4]

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[3] Jurisdiction-stripping statutes can violate other provisions of the Constitution. And, under our precedents, jurisdiction-stripping statutes can violate Article III if they "attemp[t] to direct the result" by effectively altering legal standards that Congress is "powerless to prescribe." *Bank Markazi* v. *Peterson*, 578 U. S. 212, 228 (2016) (citing *United States* v. *Klein*, 13 Wall. 128, 146–147 (1872)).

[4] The dissent appears to disagree with *McCardle*, questions the motives of the unanimous Court that decided it, asserts that it is "inconsistent" with *Klein*, and distinguishes it on the ground that the statute there "did not foreclose all avenues of judicial review." *Post*, at 277 (opinion of ROBERTS, C. J.). But the core holding of *McCardle*—that Congress does not exercise the judicial power when it strips jurisdiction over a class of cases—has never been questioned, has been repeatedly reaffirmed, and was reaffirmed in *Klein* itself. See 13 Wall., at 145 ("[T]here could be no doubt" that Congress can "den[y] the right of appeal in a particular class of cases"). And if there is any inconsistency between the two, this Court has said that it is *Klein*—not *McCardle*—that "cannot [be] take[n] . . . 'at

This Court has reaffirmed these principles on many occasions. Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States'" (quoting *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884))); *Cary* v. *Curtis*, 3 How. 236, 245 (1845) ("[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent . . . entirely upon the action of Congress"); *Hudson*, *supra*, at 33 (similar). "To deny this position" would undermine the separation of powers by "elevat[ing] the judicial over the legislative branch." *Cary*, *supra*, at 245. Congress' power over federal jurisdiction is "an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co.*, *supra*, at 101.

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In sum, § 2(b) strips jurisdiction over suits relating to the Bradley Property. It is a valid exercise of Congress' legis-

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face value.'" *Bank Markazi*, *supra*, at 228 (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015)). Moreover, it is true that *McCardle* emphasized that the statute there did not withdraw "the whole appellate power of the court, *in cases of habeas corpus*." 7 Wall., at 515 (emphasis added). But *McCardle*'s reservation, this Court later explained, was responding to a potential problem under the Suspension Clause, not a potential problem under Article III. See *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869) ("We agree that [jurisdiction] is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ"); *id.*, at 96 ("It would have been . . . a remarkable anomaly if this court . . . had been denied, under a constitution which absolutely prohibits suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint").

lative power. And because it changes the law, it does not infringe the judicial power. The constitutionality of jurisdiction-stripping statutes like this one is well established.

III

Patchak does not dispute Congress' power to withdraw jurisdiction from the federal courts. He instead raises two arguments why § 2(b) violates Article III, even if it strips jurisdiction. First, relying on *United States* v. *Klein*, 13 Wall. 128 (1872), Patchak argues that § 2(b) flatly directs federal courts to dismiss lawsuits without allowing them to interpret or apply any new law. Second, relying on *Plaut*, 514 U. S. 211, Patchak argues that § 2(b) attempts to interfere with this Court's decision in *Patchak I*—specifically, its conclusion that his suit "may proceed," 567 U. S., at 212. We reject both arguments.

A

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Section 2(b) does not flatly direct federal courts to dismiss lawsuits under old law. It creates new law for suits relating to the Bradley Property, and the District Court interpreted and applied that new law in Patchak's suit. Section 2(b)'s "relating to" standard effectively guaranteed that Patchak's suit would be dismissed. But "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Bank Markazi*, 578 U. S., at 230. "[I]t is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment" when the arguments before the court are "uncontested or incontestable." *Pope* v. *United States*, 323 U. S. 1, 11 (1944).

Patchak argues that the last four words of § 2(b)—"shall be promptly dismissed"—direct courts to reach a particular outcome. But a statute does not violate Article III merely because it uses mandatory language. See *Seattle Audubon*, 503 U. S., at 439. Instead of directing outcomes, the manda-

tory language in § 2(b) "simply imposes the consequences" of a court's determination that it lacks jurisdiction because a suit relates to the Bradley Property. *Miller* v. *French*, 530 U. S. 327, 349 (2000); see *McCardle*, 7 Wall., at 514.[5]

Patchak compares § 2(b) to the statute this Court held unconstitutional in *Klein*. In that case, the administrator of the estate of V. F. Wilson, a former Confederate soldier, sued to recover the value of some cotton that the Government had seized during the war. 13 Wall., at 132. The relevant statute required claimants to prove their loyalty in order to reclaim their property. Ch. 120, § 3, 12 Stat. 820. Wilson had received a pardon before he died, 13 Wall., at 132, and this Court had held that pardons conclusively prove loyalty under the statute, see *United States* v. *Padelford*, 9 Wall. 531, 543 (1870). But after Wilson's administrator secured a judgment in his favor, 13 Wall., at 132, Congress passed a statute making pardons proof of disloyalty and declaring that, if a claimant had accepted one, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." Act of July 12, 1870, 16 Stat. 235. If the court had already entered judgment in favor of a pardoned claimant and the Government had appealed, the statute instructed this Court to dismiss the whole suit for lack of jurisdiction. See *ibid.* *Klein* held that this statute infringed the executive power by attempting to "change the effect of . . . a pardon." 13 Wall., at 148. *Klein* also held that the statute infringed the judicial power, see *id.*, at 147, although its reasons for this latter holding were not entirely clear.

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[5] To prove that it does not change the law, Patchak repeatedly asserts that § 2(b) does not amend any "generally applicable" statute. Brief for Petitioner 11; Reply Brief 1, 4, 9. But this Court rejected that same argument in *Seattle Audubon*. Congress can change a law "directly," or it can change a law indirectly by passing "an entirely separate statute." 503 U. S., at 439–440. Either way, it changes the law. The same is true for jurisdictional statutes. See *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (1867).

This Court has since explained that "the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe." *Bank Markazi*, *supra*, at 228. Congress had no authority to declare that pardons are not evidence of loyalty, so it could not achieve the same result by stripping jurisdiction whenever claimants cited pardons as evidence of loyalty. See *Klein*, 13 Wall., at 147–148. Nor could Congress confer jurisdiction to a federal court but then strip jurisdiction from that same court once the court concluded that a pardoned claimant should prevail under the statute. See *id.*, at 146–147.

Patchak's attempts to compare § 2(b) to the statute in *Klein* are unpersuasive. Section 2(b) does not attempt to exercise a power that the Constitution vests in another branch. And unlike the selective jurisdiction-stripping statute in *Klein*, § 2(b) strips jurisdiction over every suit relating to the Bradley Property. Indeed, *Klein* itself explained that statutes that do "nothing more" than strip jurisdiction over "a particular class of cases" are constitutional. *Id.*, at 145. That is precisely what § 2(b) does.

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B

Section 2(b) does not unconstitutionally interfere with this Court's decision in *Patchak I*. Article III, this Court explained in *Plaut*, prohibits Congress from "retroactively commanding the federal courts to reopen final judgments." 514 U. S., at 219. But *Patchak I* did not finally conclude Patchak's case. See *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711, n. 14 (1974). When this Court said that his suit "may proceed," 567 U. S., at 212, it meant that the Secretary's preliminary defenses lacked merit and that Patchak could return to the District Court for further proceedings. It did not mean that Congress was powerless to change the

law that governs his case. As this Court emphasized in *Plaut*, Article III does not prohibit Congress from enacting new laws that apply to pending civil cases. See 514 U. S., at 226–227. When a new law clearly governs pending cases, Article III does not prevent courts from applying it because "each court, at every level, must 'decide according to existing laws.'" *Id.*, at 227 (quoting *United States* v. *Schooner Peggy*, 1 Cranch 103, 109 (1801)). This principle applies equally to statutes that strip jurisdiction. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234 (1922); *Hallowell* v. *Commons*, 239 U. S. 506, 509 (1916). Because § 2(b) expressly references "pending" cases, it applies to Patchak's suit. And because Patchak's suit is not final, applying § 2(b) here does not offend Article III.[6]

Of course, we recognize that the Gun Lake Act was a response to this Court's decision in *Patchak I*. The text of the Act, after all, cites both the administrative decision and the property at issue in that case. See §§ 2(a)–(b). And we understand why Patchak would view the Gun Lake Act as unfair. By all accounts, the Band exercised its political influence to persuade Congress to enact a narrow jurisdiction-stripping provision that effectively ends all lawsuits threatening its casino, including Patchak's.

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But the question in this case is "[n]ot favoritism, nor even corruption, but *power*." *Plaut*, *supra*, at 228; see also *McCardle*, *supra*, at 514 ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution"). Under this Court's precedents, Congress has the power to "apply newly enacted, outcome-altering legislation in pending civil cases," *Bank*

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[6] Retroactive legislation can violate other provisions of the Constitution, such as the *Ex Post Facto* Clause and the Bills of Attainder Clause. See *Bank Markazi*, 578 U. S., at 228–229. But Patchak's Article III claim is the only challenge to § 2(b) before us.

Markazi, 578 U. S., at 229, even when the legislation "govern[s] one or a very small number of specific subjects," *id.*, at 234. For example, this Court has upheld narrow statutes that identified specific cases by caption and docket number in their text. See *id.*, at 232; *Seattle Audubon*, 503 U. S., at 440. And this Court has approvingly cited a D. C. Circuit decision, which upheld a statute that retroactively stripped jurisdiction over suits challenging "a single memorial." *Bank Markazi*, *supra*, at 234 (citing *National Coalition To Save Our Mall* v. *Norton*, 269 F. 3d 1092 (2001)). If these targeted statutes did not cross the line from legislative to judicial power, then § 2(b) does not either.

IV

The dissent offers a different theory for why § 2(b) violates Article III. A statute impermissibly exercises the judicial power, the dissent contends, when it "targets" a particular suit and "manipulates" jurisdiction to direct the outcome, "practical[ly] operat[es]" to affect only one suit, and announces a legal standard that does not "imply some measure of generality" or "preserv[e] . . . an adjudicative role for the courts." *Post*, at 272, 275–276.

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We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court's doubts about Congress' unexpressed motives, the number of "cases [that] were pending when the provision was enacted," or the time left on the statute of limitations. *Post*, at 273. But even if it did, we disagree with the dissent's characterization of § 2(b). Nothing on the face of § 2(b) is limited to Patchak's case, or even to his challenge under the Indian Reorganization Act. Instead, the text extends to all suits "relating to" the Bradley Property. Thus, § 2(b) survives even under the dissent's theory: It "prospectively govern[s] an open-ended class of disputes," *post*, at 271, and its "relating to" standard "preserv[es] . . . an adjudicative role for the

courts," *post*, at 276. While § 2(b)'s "relating to" standard is not difficult to interpret or apply, this Court's precedents *encourage* Congress to draft jurisdictional statutes in this manner. See *Hertz Corp.* v. *Friend*, 559 U. S. 77, 94 (2010) ("[A]dministrative simplicity is a major virtue in a jurisdictional statute. . . . [C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case").[7]

* * *

We conclude that § 2(b) of the Gun Lake Act does not violate Article III of the Constitution. The judgment of the Court of Appeals is, therefore, affirmed.

It is so ordered.

JUSTICE BREYER, concurring.

The statutory context makes clear that this is not simply a case in which Congress has said, "In *Smith* v. *Jones*, Smith wins." See *post*, at 266, 275 (ROBERTS, C. J., dissenting). In 2005, the Secretary of the Interior announced her decision to take the Bradley Property into trust for an Indian Tribe, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. See 70 Fed. Reg. 25596 (2005). The petitioner brought suit, claiming that the Secretary lacked the statutory authority to do so. See *Carcieri* v. *Salazar*, 555 U. S. 379, 382 (2009) (the Indian Reorganization Act gives the Secretary authority to take land into trust only for a tribe under federal jurisdiction in 1934).

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[7] We also doubt that the statute this Court upheld in *Bank Markazi* would survive under the dissent's theory. The dissent notes that the statute there affected "16 different actions," while the statute here affects "a single pending case." *Post*, at 272. But if the problem is Congress "pick[ing] winners and losers in pending litigation," *post*, at 278, then it seems backwards to conclude that Congress is on *stronger* constitutional footing when it picks winners and losers in *more* pending cases.

Congress then enacted the law here at issue. Gun Lake Trust Land Reaffirmation Act, Pub. L. 113–179, 128 Stat. 1913. (I have placed the full text of that law in the Appendix, *infra*.) The first part "reaffirm[s]," "ratifie[s]," and "confirm[s]" the Secretary's "actions in taking" the Bradley Property "into trust," as well as the status of the Bradley Property "as trust land." § 2(a). The second part says that actions "relating to" the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b). Read together, Congress first made certain that federal statutes gave the Secretary the authority to take the Bradley Property into trust and second tried to dot all the i's by adding that federal courts shall not hear cases challenging the land's trust status. The second part, the jurisdictional part, perhaps gilds the lily, perhaps simplifies judicial decisionmaking (the judge need only determine whether a lawsuit relates to the Bradley Property), but, read in context, it does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the first part: The Bradley Property shall remain in trust.

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The petitioner does not argue that Congress acted unconstitutionally by ratifying the Secretary's actions and the land's trust status, and I am aware of no substantial argument to that effect. See *United States* v. *Heinszen & Co.*, 206 U. S. 370, 382–383, 387 (1907) (Congress may retroactively ratify Government action that was unauthorized when taken); Brief for Federal Courts and Federal Indian Law Scholars as *Amici Curiae* 6–11 (citing numerous examples of tribe-specific Indian-land bills). The jurisdictional part of the statute therefore need not be read to do more than eliminate the cost of litigating a lawsuit that will inevitably uphold the land's trust status.

This case is consequently unlike *United States* v. *Klein*, 13 Wall. 128 (1872), where this Court held unconstitutional a

congressional effort to use its jurisdictional authority to reach a result (involving the pardon power) that it could not constitutionally reach directly. *Id.*, at 146; see *Bank Markazi* v. *Peterson*, 578 U. S. 212, 228, and n. 19 (2016). And the plurality, in today's opinion, carefully distinguishes from the case before us other circumstances where Congress' use of its jurisdictional power could prove constitutionally objectionable. *Ante*, at 253, and n. 3, 258, n. 6. Here Congress has used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional. Under these circumstances, I find its use of that power unobjectionable. And, on this understanding, I join the plurality's opinion.

APPENDIX

Public Law 113–179

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Gun Lake Trust Land Reaffirmation Act'.

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"SEC. 2. REAFFIRMATION OF INDIAN TRUST LAND.

"(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

"(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

"(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band."

Justice Ginsburg, with whom Justice Sotomayor joins, concurring in the judgment.

What Congress grants, it may retract. That is undoubtedly true of the Legislature's authority to forgo or retain the Government's sovereign immunity from suit. The Court need venture no further to decide this case.

Patchak sought relief from the Secretary of the Interior "other than money damages," 5 U. S. C. § 702; because he confined his complaint to declaratory and injunctive relief, the Administrative Procedure Act's (APA) waiver of the Federal Government's immunity from suit, *ibid.*, enabled Patchak to launch this litigation. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209, 215–224 (2012) (*Patchak I*) (APA waiver of immunity covers Patchak's suit). But consent of the United States to suit may be withdrawn "at any time." *Lynch* v. *United States*, 292 U. S. 571, 581 (1934); see *Maricopa County* v. *Valley Nat. Bank of Phoenix*, 318 U. S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."). Congress' authority to reinstate sovereign immunity, this Court has recognized, extends to pending litigation. *District of Columbia* v. *Eslin*, 183 U. S. 62, 65–66 (1901).

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Just as it is Congress' prerogative to consent to suit, so too is it within Congress' authority to withdraw consent once given. Retraction of consent to be sued (effectively restoration of immunity) is just what Congress achieved when it directed in the Gun Lake Act: "Notwithstanding any other provision of law, an action . . . relating to the [Bradley Property]," including any pending action, "shall not be . . . maintained in a Federal Court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. 113–179, § 2(b), 128 Stat. 1913; see H. R. Rep. No. 113–590, p. 2 (2014) (framed with *Patchak I* in view, § 2(b) provides an "unusually broad grant of *immunity from lawsuits pertaining to the Bradley Property*" (emphasis added)); S. Rep. No. 113–194, p. 2 (2014) (discussing *Patchak I*); *Patchak I*, 567 U. S., at

223–224 (argument that allowing suits challenging land trust acquisitions would harm tribe's economic well-being "is not without force, but must be addressed to Congress"). Notably, the language Congress employed in the Gun Lake Act (any "action . . . relating to the [Bradley Property] . . . shall be promptly dismissed") is the mirror image of the APA's immunity waiver, which instructs that suits "against the United States" for declaratory or injunctive relief "shall *not* be dismissed." 5 U. S. C. § 702 (emphasis added).

In short, Congress acted effectively to displace the APA's waiver of immunity for suits against the United States with a contrary command applicable to the Bradley Property: No action concerning the trust status of that property is currently attended by the sovereign's consent to suit. For that reason, I would affirm the judgment of the Court of Appeals for the District of Columbia Circuit upholding the District Court's dismissal of Patchak's case.*

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JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the dissent that Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party. I also agree that an Act that merely deprives federal courts of jurisdiction over a single proceeding is not enough to be considered a change in the law and that any statute that portends to do so should be viewed with great skepticism. See *post*, at 275–276 (opinion of ROBERTS,

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*Patchak argues that restoration of sovereign immunity would not dispose of his suit, for his claim is that federal officials have acted in excess of their statutory authority. Reply Brief 18. The argument fails because his action is, "in effect, a suit against the sovereign." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 687 (1949); see *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 281–282 (1983) (officer suit is an improper vehicle for resolving property disputes with the United States); *id.*, at 284–286 (officer suit unavailable to circumvent the Quiet Title Act's reservations of immunity).

C. J.). I differ with the dissent's ultimate conclusion only because, as JUSTICE GINSBURG explains, the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act), Pub. L. 113–179, 128 Stat. 1913, should not be read to strip the federal courts of jurisdiction but rather to restore the Federal Government's sovereign immunity. See *ante*, at 263–264 (opinion concurring in judgment).

In the Court's first decision in this case, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209 (2012), the sole issue of disagreement between the majority and the dissent was whether the United States had waived its sovereign immunity from Patchak's lawsuit. The majority held that Congress had done so in the Administrative Procedure Act, 5 U. S. C. § 702, see 567 U. S., at 215–224, whereas the dissent concluded it had not because the case fell within the exceptions to the Government's waiver of sovereign immunity under the Quiet Title Act, 28 U. S. C. § 2409a(a), that apply when trust or restricted Indian lands are at issue, see 567 U. S., at 228–238 (opinion of SOTOMAYOR, J.). The majority recognized, however, that Congress was free to reinstate the Government's sovereign immunity from suits like Patchak's, observing that "[p]erhaps Congress would—perhaps Congress should" bar "the full range of lawsuits pertaining to the Government's ownership of land," regardless of whether the plaintiff claims ownership. *Id.*, at 224. Not long after, Congress enacted the Gun Lake Act.

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In addition to the reasons set forth by JUSTICE GINSBURG, *ante*, at 263–264, given this context, § 2(b) of the Gun Lake Act is most naturally read as having restored the Federal Government's sovereign immunity from Patchak's suit challenging the trust status of the Bradley Property. That conclusion avoids the separation-of-powers concerns raised here about jurisdiction stripping. On this basis alone, I would affirm the judgment of the Court of Appeals.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY and JUSTICE GORSUCH join, dissenting.

Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical pending case of *Smith* v. *Jones*, "Smith wins." *Bank Markazi* v. *Peterson*, 578 U. S. 212, 225, n. 17 (2016). Today, the plurality refuses to enforce even that limited principle in the face of a very real statute that dictates the disposition of a single pending case. Contrary to the plurality, I would not cede unqualified authority to the Legislature to decide the outcome of such a case. Article III of the Constitution vests that responsibility in the Judiciary alone.

I

A

Article III, § 1 of the Constitution confers the "judicial Power of the United States" on "one supreme Court" and such "inferior Courts" as Congress might establish. That provision, our cases have recognized, is an "inseparable element of the constitutional system of checks and balances," which sets aside for the Judiciary the authority to decide cases and controversies according to law. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 58 (1982) (plurality opinion). "Under the basic concept of separation of powers," the judicial power to interpret and apply the law "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011) (internal quotation marks omitted).

The Framers' decision to establish a judiciary "truly distinct from both the legislature and the executive," The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton), was born of their experience with legislatures "extending the sphere of [their] activity and drawing all power into

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[their] impetuous vortex," *id.*, No. 48, at 309 (J. Madison). Throughout the 17th and 18th centuries, colonial legislatures routinely functioned as courts of equity, "grant[ing] exemptions from standing law, prescrib[ing] the law to be applied to particular controversies, and even decid[ing] the merits of cases." Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 Colum. L. Rev. 1648, 1662 (2001). In Virginia, for instance, Thomas Jefferson lamented that the assembly had, "in many instances, decided rights which should have been left to judiciary controversy." Notes on the State of Virginia 120 (W. Peden ed. 1982). And in Pennsylvania, the Council of Censors—a body charged with ensuring compliance with the state constitution—denounced the state assembly's practice of "extending their deliberations to the cases of individuals" in order to ease the "hardships which will always arise from the operation of general laws." Report of the Committee of the Pennsylvania Council of Censors 38, 43 (F. Bailey ed. 1784). "[T]here is reason to think," the Censors reported, "that favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief." *Id.*, at 38.

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Given the "disarray" produced by this "system of legislative equity," the Framers resolved to take the innovative step of creating an independent judiciary. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 221 (1995). They recognized that such a structural limitation on the power of the legislative and executive branches was necessary to secure individual freedom. As James Madison put it, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." The Federalist No. 47, at 303 (citing 1 Montesquieu, The Spirit of the Laws).

The Constitution's division of power thus reflects the "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS* v.

Chadha, 462 U. S. 919, 962 (1983) (Powell, J., concurring in judgment). The Framers protected against that threat, both in "specific provisions, such as the Bill of Attainder Clause," and in the "general allocation" of the judicial power to the Judiciary alone. *Ibid.* As Chief Justice Marshall wrote, the Constitution created a straightforward distribution of authority: The Legislature wields the power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). Article III, in other words, sets out not only what the Judiciary can do, but also what Congress cannot.

Congress violates this arrangement when it arrogates the judicial power to itself and decides a particular case. We first enforced that rule in *United States* v. *Klein*, 13 Wall. 128 (1872), when the Radical Republican Congress passed a law targeting suits by pardoned Confederates. Although this Court had held that a pardon was proof of loyalty and entitled claimants to damages for property seized by the Union, see *United States* v. *Padelford*, 9 Wall. 531, 543 (1870), Congress sought to block Confederate supporters from receiving such compensation. It therefore enacted a statute barring rebels from using a pardon as evidence of loyalty, instead requiring the courts to dismiss for want of jurisdiction any suit based on a pardon. This Court declared the law unconstitutional. Congress, in addition to impairing the President's pardon power, had "prescribe[d] rules of decision to the Judicial Department . . . in cases pending before it." *Klein*, 13 Wall., at 146. The Court accordingly held that the statute "passed the limit which separates the legislative from the judicial power." *Id.*, at 147.

We have frequently reiterated this basic premise of the separation of powers. In *Pope* v. *United States*, 323 U. S. 1 (1944), the Court recognized that "changing the rules of decision for the determination of a pending case" would impermissibly interfere with judicial independence, but held that such concerns were absent when Congress consented to a

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claims settlement pursuant to its broad power "to provide for the payment of debts." *Id.*, at 9; see *Chadha*, 462 U. S., at 966, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated."). As we also explained in *United States* v. *Sioux Nation*, 448 U. S. 371, 398 (1980), because Congress has "no judicial powers" to render judgment "directly," it likewise cannot do so indirectly, by "direct[ing] . . . a court to find a judgment in a certain way." That sort of legislative intervention constitutes an exercise of the judicial power, leaving "the court no adjudicatory function to perform." *Id.*, at 392. Most recently, we reaffirmed the fundamental proposition that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *Bank Markazi*, 578 U. S., at 225, n. 17.

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B

As the plurality acknowledges, *ante*, at 258, the facts of this case are stark. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) sought land on which to build a casino. The Band identified a 147-acre tract of land in rural southwestern Michigan (called the Bradley Property), and in 2005 the Secretary of the Interior announced a final decision to take the property into trust on behalf of the Band. See 70 Fed. Reg. 25596 (2005).

Fearing an "irreversibl[e] change [to] the rural character of the area," David Patchak, a neighboring landowner, filed a lawsuit challenging the transfer. *Patchak* v. *Jewell*, 828 F. 3d 995, 1000 (CADC 2016). The suit alleged that the Secretary lacked statutory authority to take the Bradley Property into trust. The Secretary asserted several grounds for dismissing the case, but this Court ultimately granted review and determined that "Patchak's suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209, 212 (2012) (*Patchak I*).

Following remand, while summary judgment briefing was underway in the District Court, the Band persuaded Congress to enact a standalone statute, the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act), to terminate the suit. Pub. L. 113–179, 128 Stat. 1913. Section 2(a) of the Act provides that the land "described in . . . 70 Fed. Reg. 25596"—the Bradley Property—"is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."

Then Congress went further. In § 2(b) it provided:

> "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed."

When Congress passed the Act in 2014, no other suits relating to the Bradley Property were pending, and the six-year statute of limitations on challenges to the Secretary's action under the Administrative Procedure Act had expired. See 28 U. S. C. § 2401(a). The Committees that recommended the legislation affirmed that the statute would make no "changes in existing [Indian] law." H. R. Rep. No. 113–590, p. 5 (2014); S. Rep. No. 113–194, p. 4 (2014).

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Recognizing that the "clear intent" of Congress was "to moot this litigation," the District Court dismissed Patchak's case against the Secretary. *Patchak* v. *Jewell*, 109 F. Supp. 3d 152, 159 (DC 2015). The D. C. Circuit affirmed, also based on the "plain" directive of § 2(b). 828 F. 3d, at 1001.

II

Congress has previously approached the boundary between legislative and judicial power, but it has never gone so far as to target a single party for adverse treatment and direct the precise disposition of his pending case. Section 2(b)—remarkably—does just that.

The plurality cites a smattering of "narrow statutes" that this Court has previously upheld. *Ante*, at 259. Yet none is as brazen as § 2(b), either in terms of dictating a particular outcome or in singling out a particular party. Indeed, the bulk of those cases involved statutes that prospectively governed an open-ended class of disputes and left the courts to apply any new legal standard in the first instance. In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856), for example, we addressed an enactment that permanently altered the legal status of a public bridge going forward by reclassifying it as a postal road. That provision, we later said, did not prescribe an "arbitrary rule of decision" but instead "left [the court] to apply its ordinary rules" to determine whether the redesignation of the structure meant that it was an obstruction of interstate commerce. *Klein*, 13 Wall., at 146–147. And in *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429 (1992), the statute at issue made reference to specific cases only as a shorthand for identifying preexisting environmental law requirements. *Id.*, at 440. The statute applied generally—"replac[ing] the legal standards" for timber harvesting across 13 national forests—and explicitly reserved for judicial determination whether pending and future timber sales complied with the new standards. *Id.*, at 437.

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Even *Bank Markazi*, which disclaimed a number of limits on Congress's authority to intervene in ongoing litigation, did not suggest that Congress could dictate the result in a pending case. There, Congress inserted itself into a long-running dispute over whether terrorist victims could satisfy their judgments against Iran's central bank, enacting a statute that eliminated certain legal impediments to obtaining the bank's assets. We upheld the law because it "establish[ed] new substantive standards" and entrusted "application of those standards" to the court. 578 U. S., at 231.

But the Court in *Bank Markazi* did not have before it anything like § 2(b), which prevents the court from applying

any new legal standards and explicitly dictates the dismissal of a pending proceeding. The Court instead stressed that the judicial findings contemplated by the statute in *Bank Markazi* left "plenty" for the court "to adjudicate" before ruling that the bank was liable. *Id.*, at 230, n. 20. The law, for instance, did not define the terms "beneficial interest" and "equitable title." The District Court needed to resolve the scope of those phrases. Nor did it decide whether the assets were owned by the bank. That issue was also assigned to the court. And lastly, the statute did not settle whether the assets were held in New York or Luxembourg. The court had to sort that out too. See *ibid.*[1] Section 2(b) goes much further than the statute in *Bank Markazi* by disposing of the case outright, wresting any adjudicative responsibility from the courts. For all of the plurality's discussion of the Federalist Papers and "exclusive" judicial power, *ante*, at 250, it is idle to suggest that § 2(b) preserves any role for the court beyond that of stenographer.

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In addition, the Court in *Bank Markazi* repeatedly emphasized that the law was not a "one-case-only regime." 578 U. S., at 215. The law instead governed a category of post-judgment execution claims filed by over a thousand plaintiffs who, in 16 different actions, had obtained judgments against Iran in excess of $1.75 billion—facts suggesting more generality than is true of many Acts of Congress.

By contrast, § 2(b) targets a single pending case. Although the formal language of the provision—reaching any action "relating to" the Bradley Property—could theoretically suggest a broader application, its practical operation unequivocally confirms that it concerns solely Patchak's suit. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 851 (1986) (explaining that the Court "review[s] Article

[1] Not every Member of the Court thought these responsibilities adequate under Article III, see *Bank Markazi*, 578 U. S., at 212, 247–248 (ROBERTS, C. J., dissenting), but all save two did, and that's a comfortable enough margin to establish the point.

III challenges . . . with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary"). In an effort to identify a set of disputes to which § 2(b) might apply, the plurality asserts that the provision extends to any action relating to the trust status of the property. *Ante*, at 259. Yet as the D. C. Circuit recognized, no other cases were pending when the provision was enacted; § 2(b) affected "only . . . Patchak's lawsuit." 828 F. 3d, at 1003. And as the Band concedes, no additional suits challenging the transfer could have been filed under the APA—or any other statute of which we are aware—due to the expiration of the statute of limitations. Brief for Respondent Band 6. The plurality thus is simply incorrect when it asserts that the Act applies to a broad "class of cases." *Ante*, at 253, 259. What are those cases?

This is not a question of probing Congress's "unexpressed motives." *Ante*, at 259. The text and operation of the provision instead make clear that the range of potential applications is a class of one. Congress, in crafting a law tailored to Patchak's suit, has pronounced the equivalent of "Smith wins."

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III

The plurality refuses to "jealously guard[ ]" against such a basic intrusion on judicial independence. *Northern Pipeline*, 458 U. S., at 60. It instead focuses on general tenets of jurisdiction stripping. In its view, § 2(b) falls comfortably within Congress's power to regulate the jurisdiction of the federal courts, and accordingly does not constitute an exercise of judicial power.

But nothing in § 2(b) specifies that the statute is jurisdictional. That has special significance: To rein in "profligate use of the term 'jurisdiction,' " this Court in recent cases has adopted a "bright line" rule treating statutory limitations as nonjurisdictional unless Congress "clearly states" otherwise. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013); *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515–516

(2006). The Gun Lake Act does not clearly state that it imposes a jurisdictional restriction—the term is not mentioned anywhere in the title, headings, or text of the Act. Indeed, we have previously found that nearly identical statutory language "says nothing about whether a federal court has subject-matter jurisdiction." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 164 (2010). Compare 17 U. S. C. § 411(a), the statute in *Reed Elsevier* ("no civil action . . . shall be instituted"), with § 2(b) ("an action . . . shall not be filed or maintained").[2] And since the Gun Lake Act was passed well after our series of cases setting forth a clear statement rule, we may "presume" that Congress was conscious of that obligation when it drafted § 2(b). *United States* v. *Wells*, 519 U. S. 482, 495 (1997).

After stretching to read § 2(b) as jurisdictional, the plurality dedicates considerable effort to defending Congress's broad authority over the jurisdiction of the federal courts. *Ante*, at 252–255. That background principle is undoubtedly correct—and undoubtedly irrelevant for the purposes of evaluating § 2(b). For while the greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction, at a certain point that lesser exercise of authority invades the judicial function. "Congress has the power (within limits) to tell the courts what *classes* of cases they may decide, but not to prescribe or superintend how they decide those cases." *Arlington* v. *FCC*, 569 U. S. 290, 297 (2013) (majority opinion of Scalia, J.) (emphasis

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[2] The plurality suggests an analogy to *Gonzalez* v. *Thaler*, 565 U. S. 134 (2012), which addressed in passing the familiar hurdle in habeas proceedings that "an appeal may not be taken" unless a judge issues a "certificate of appealability." *Id.*, at 142 (quoting 28 U. S. C. § 2253(c)(1)). But that gatekeeping requirement—which dates back to 1908—has long been understood as a direct limitation "on the power of federal courts to grant writs of habeas corpus," *Miller-El* v. *Cockrell*, 537 U. S. 322, 336–338 (2003), and appears alongside other provisions that speak in "clear jurisdictional language," *Gonzalez*, 565 U. S., at 142 (internal quotation marks omitted). Nothing similar is at issue here.

added; citations omitted). In other words, Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding.

Klein, after all, drew precisely the same distinction when it considered the provision stripping jurisdiction over any suit based on a pardon. Chief Justice Chase's opinion for the Court explained that if the statute had "simply" removed jurisdiction over "a particular class of cases," it would be regarded as "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." 13 Wall., at 145, 146. But because the withdrawal of jurisdiction was a "means to an end," founded "solely on the application of a rule of decision," the Court held that the law violated the separation of powers. *Ibid.*; see R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015) (recognizing that "not every congressional attempt to influence the outcome of cases, even if phrased in jurisdictional language, can be justified as a valid exercise of a power over jurisdiction").

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Contrary to the plurality, I would hold that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case. Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding. Does the plurality really believe that there is a material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith* v. *Jones*, Smith wins"? In both instances, Congress has resolved the specific case in Smith's favor.

Over and over, the plurality intones that § 2(b) does not impinge on the judicial power because the provision "changes the law." See *ante*, at 250–252, 255–259. But all that § 2(b) does is deprive the court of jurisdiction in a single proceeding. If that is sufficient to change the law, the plurality's

rule "provides no limiting principle" on Congress's ability to assume the role of judge and decide the outcome of pending cases. *Northern Pipeline*, 458 U. S., at 73.

In my view, the concept of "changing the law" must imply some measure of generality or preservation of an adjudicative role for the courts. The weight of our jurisdiction stripping precedent bears this out. Almost all of the examples the plurality cites, see *ante*, at 254–255, 258, contemplated the wholesale repeal of a generally applicable jurisdictional provision. See *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916) ("The [provision] applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all."); *Cary* v. *Curtis*, 3 How. 236, 245 (1845); see also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234 (1922). The Court, to date, has never sustained a law that withdraws jurisdiction over a particular lawsuit.

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The closest analogue is of course *Ex parte McCardle*, 7 Wall. 506 (1869), which the plurality nonchalantly cites as one of its leading authorities. *McCardle* arose amid a pitched national debate over Reconstruction of the former Confederacy. William McCardle, an unreconstructed newspaper editor, was being held in military custody for inciting insurrection. After unsuccessfully applying for federal habeas relief in the Circuit Court, McCardle appealed to the Supreme Court, raising a broad challenge to the constitutionality of Reconstruction. The Court heard argument on his habeas appeal over the course of four days in March 1868. Before the Court could render its decision, however, the Radical Republican Congress—in an acknowledged effort to sweep the case from the docket—enacted a statute withdrawing the Supreme Court's appellate jurisdiction in habeas cases. Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 239–241 (1973).

The Court unanimously dismissed McCardle's appeal. In a brief opinion, Chief Justice Chase sidestepped any consid-

eration of Congress's attempt to preclude a decision in the case. Faced with a "plain[ ] instance of positive exception," the Court held that it lacked power to review McCardle's claims. 7 Wall., at 514.

The Court's decision in *McCardle* has been alternatively described as "caving to the political dominance" of the Radical Republicans or "acceding to Congress's effort to silence the Court." Meltzer, The Story of *Ex parte McCardle*, in Federal Courts Stories 73 (V. Jackson & J. Resnik eds. 2010). Read for all it is worth, the decision is also inconsistent with the approach the Court took just three years later in *Klein*, where Chief Justice Chase (a dominant character in this drama) stressed that "[i]t is of vital importance" that the legislative and judicial powers "be kept distinct." 13 Wall., at 147.

The facts of *McCardle*, however, can support a more limited understanding of Congress's power to divest the courts of jurisdiction. For starters, the repealer provision covered more than a single pending dispute; it applied to a class of cases, barring anyone from invoking the Supreme Court's appellate jurisdiction in habeas cases for the next two decades. In addition, the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint. As Chase made clear in the penultimate paragraph of the opinion—and confirmed later that year in his opinion for the Court in *Ex parte Yerger*, 8 Wall. 85 (1869)—the statute did not deny "the whole appellate power of the Court." 7 Wall., at 515. McCardle, by taking a different procedural route and filing an original habeas action, could have had his case heard on the merits.[3]

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[3] The plurality surmises that *McCardle* reserved an alternative avenue for relief in response to a perceived problem under the Suspension Clause. *Ante*, at 253, n. 4. But regardless of the basis for that reservation, our point is simply that, in sustaining a jurisdictional repeal that leaves a claimant without any prospect for relief, the plurality goes beyond what the Court in *McCardle* upheld.

Section 2(b), on the other hand, has neither saving grace. It ends Patchak's suit for good. His federal case is dismissed, and he has no alternative means of review anywhere else. See 25 U. S. C. § 1322(a) (providing that state courts, absent the consent of the tribe, may not exercise civil jurisdiction over trust land). Section 2(b) thus reaches further than the typical jurisdictional repeal, which "takes away no substantive right but simply changes the tribunal that is to hear the case," *Landgraf*, 511 U. S., at 274. Because § 2(b) singles out Patchak's suit, specifies how it must be resolved, and deprives him of any judicial forum for his claim, the decision to uphold that provision surpasses even *McCardle* as the highwater mark of legislative encroachment on Article III.

Indeed, although the stakes of this particular dispute may seem insignificant, the principle that the plurality would enshrine is of historic consequence. In no uncertain terms, the plurality disavows any limitations on Congress's power to determine judicial results, conferring on the Legislature a colonial-era authority to pick winners and losers in pending litigation as it pleases. The Court in *Bank Markazi* said it was holding the line against this sort of legislative usurpation. See 578 U. S., at 225–226, and nn. 17, 18. The plurality would yield even that last ditch.

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IV

While the plurality reaches to read the Gun Lake Act as stripping jurisdiction, JUSTICE GINSBURG's concurrence, joined by JUSTICE SOTOMAYOR, strains further to construe § 2(b) as restoring the Government's sovereign immunity from suit. To reinstate sovereign immunity after it has been waived, Congress must express "an unambiguous intention to withdraw" a remedy. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1019 (1984). Congress has not made that showing here. Section 2(b)—which provides that "an action . . . relating to the [Bradley Property] . . . shall be promptly

dismissed"—bears none of the unmistakable hallmarks of a provision withdrawing the sovereign's consent to suit.

The concurrence first relies on a hunch, based on the Court's earlier determination that Patchak's suit was not barred by sovereign immunity. See *Patchak I*, 567 U. S., at 224. But hunches do not make for an unambiguous expression of intent. Nor, of course, does one lone reference to "immunity" in the legislative history. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 37 (1992) ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon . . . cannot be supplied by a committee report.").

Saving the text for last, the concurrence fails to identify a single instance where the Court has treated a statute that does not mention "immunity," "consent to be sued," or even the "United States" as restoring sovereign immunity. The only basis for its interpretation is the purported similarity between the language of the Gun Lake Act and the waiver of immunity in the Administrative Procedure Act. In drawing this comparison, however, JUSTICE GINSBURG leaves out the critical element of that waiver. See *ante*, at 264 (opinion concurring in judgment). In full, the APA provision states that a suit "shall not be dismissed . . . *on the ground that it is against the United States*." 5 U. S. C. § 702 (emphasis added). Section 2(b), as noted, contains no such reference to the sovereign.

As for JUSTICE BREYER's concurrence, "dot[ting] all the i's," "simplif[ying] judicial decisionmaking," and "eliminat[ing] the cost of litigating a lawsuit" are nothing but cavalier euphemisms for exercising the judicial power. *Ante*, at 261. JUSTICE BREYER assumes that § 2(a) is constitutionally unobjectionable, and that § 2(b) seeks the same "real-world result." *Ibid.* But if § 2(a) is constitutional, it is because the provision establishes new substantive standards and leaves the court to apply those standards in the first instance. That is the rule set forth plainly in *Bank Markazi*. And if

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that is so, § 2(b) does not simply supplement § 2(a)—it short-circuits the requisite adjudicative process and decides the suit outright. The proper allocation of authority under the Constitution is very much part of the "real world." Pursuant to that basic equilibrium, Congress cannot "gild the lily" by relieving the Judiciary of its job—applying the law to the case before it.

* * *

The Framers saw this case coming. They knew that if Congress exercised the judicial power, it would be impossible "to guard the Constitution and the rights of individuals from . . . serious oppressions." The Federalist No. 78, at 469 (A. Hamilton). Patchak thought his rights were violated, and went to court. He expected to have his case decided by judges whose independence from political pressure was ensured by the safeguards of Article III—life tenure and salary protection. It was instead decided by Congress, in favor of the litigant it preferred, under a law adopted just for the occasion. But it is our responsibility under the Constitution to decide cases and controversies according to law. It is our responsibility to, as the judicial oath provides, "administer justice without respect to persons." 28 U. S. C. § 453. And it is our responsibility to "firm[ly]" and "inflexibl[y]" resist any effort by the Legislature to seize the judicial power for itself. The Federalist No. 78, at 470.

I respectfully dissent.

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JENNINGS ET AL. *v.* RODRIGUEZ ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

No. 15–1204. Argued November 30, 2016—Reargued October 3, 2017—Decided February 27, 2018

Immigration officials are authorized to detain certain aliens in the course of immigration proceedings while they determine whether those aliens may be lawfully present in the country. For example, § 1225(b) of Title 8 of the U. S. Code authorizes the detention of certain aliens seeking to enter the country. Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation, and to certain other aliens designated by the Attorney General in his discretion. Section 1225(b)(2) is a catchall provision that applies to most other applicants for admission not covered by § 1225(b)(1). Under § 1225(b)(1), aliens are normally ordered removed "without further hearing or review," § 1225(b)(1)(A)(i), but an alien indicating either an intention to apply for asylum or a credible fear of persecution, § 1225(b)(1)(A)(ii), "shall be detained" while that alien's asylum application is pending, § 1225(b)(1)(B)(ii). Aliens covered by § 1225(b)(2) in turn "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled" to admission. § 1225(b)(2)(A).

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The Government is also authorized to detain certain aliens already in the country. Section 1226(a)'s default rule permits the Attorney General to issue warrants for the arrest and detention of these aliens pending the outcome of their removal proceedings. The Attorney General "may release" these aliens on bond, "[e]xcept as provided in subsection (c) of this section." Section 1226(c) in turn states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities, § 1226(c)(1), and specifies that the Attorney General "may release" one of those aliens "only if the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk, § 1226(c)(2).

After a 2004 conviction, respondent Alejandro Rodriguez, a Mexican citizen and a lawful permanent resident of the United States, was detained pursuant to § 1226 while the Government sought to remove him. In May 2007, while still litigating his removal, Rodriguez filed a habeas

petition, claiming that he was entitled to a bond hearing to determine whether his continued detention was justified. As relevant here, he and the class of aliens he represents allege that §§ 1225(b), 1226(a), and 1226(c) do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that detention remains justified. The District Court entered a permanent injunction, and the Ninth Circuit affirmed. Relying on the canon of constitutional avoidance, the Ninth Circuit construed §§ 1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under those sections. After that point, the court held, the Government may continue to detain the alien only under the authority of § 1226(a). The court then construed § 1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified.

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

804 F. 3d 1060, reversed and remanded.

JUSTICE ALITO delivered the opinion of the Court, except as to Part II, concluding that §§ 1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention. The Ninth Circuit misapplied the canon of constitutional avoidance in holding otherwise. Pp. 296–314.

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(a) The canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one [plausible] construction." *Clark* v. *Martinez*, 543 U. S. 371, 385. The Ninth Circuit's interpretations of the provisions at issue, however, are implausible. Pp. 296–297.

(b) Read most naturally, §§ 1225(b)(1) and (b)(2) mandate detention of applicants for admission until certain proceedings have concluded. Until that point, nothing in the statutory text imposes a limit on the length of detention, and neither provision says anything about bond hearings. Pp. 297–303.

(1) Nothing in the text of § 1225(b)(1) or § 1225(b)(2) hints that those provisions have an implicit 6-month time limit on the length of detention. Respondents must show that this is a plausible reading in order to prevail under the canon of constitutional avoidance, but they simply invoke the canon without making any attempt to defend their reading.

The Ninth Circuit also all but ignored the statutory text, relying instead on *Zadvydas* v. *Davis*, 533 U. S. 678, as authority for grafting a time limit onto § 1225(b)'s text. There, this Court invoked the constitutional-avoidance canon, construing § 1231(a)(6)—which provides

that an alien subject to a removal order "may be detained" beyond the section's 90-day removal period—to mean that the alien may not be detained beyond "a period reasonably necessary to secure removal," *id.*, at 699, presumptively six months, *id.*, at 701. The Court detected ambiguity in the statutory phrase "may be detained" and noted the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal.

Several material differences distinguish the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6). To start, the provisions here, unlike § 1231(a)(6), mandate detention for a specified period of time: until immigration officers have finished "consider[ing]" the asylum application, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A). Section 1231(a)(6) also uses the ambiguous "may," while §§ 1225(b)(1) and (b)(2) use the unequivocal mandate "shall be detained." There is also a specific provision authorizing temporary parole from § 1225(b) detention "for urgent humanitarian reasons or significant public benefit," § 1182(d)(5)(A), but no similar release provision applies to § 1231(a)(6). That express exception implies that there are no other circumstances under which aliens detained under § 1225(b) may be released. Pp. 297–301.

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(2) Respondents also claim that the term "for" in §§ 1225(b)(1) and (b)(2) mandates detention only until the *start* of applicable proceedings. That is inconsistent with the meanings of "for"—"[d]uring [or] throughout," 6 Oxford English Dictionary 26, and "with the object or purpose of," *id.*, at 23—that make sense in the context of the statutory scheme as a whole. Nor does respondents' reading align with the historical use of "for" in § 1225. Pp. 301–303.

(c) Section 1226(c)'s language is even clearer. By allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, that provision reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. Together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope *must* continue "pending a decision" on removal. Section 1226(c) is thus not silent as to the length of detention. See *Demore* v. *Kim*, 538 U. S. 510, 529. The provision, by expressly stating that covered aliens may be released "only if" certain conditions are met, also unequivocally imposes an affirmative *prohibition* on releasing them under any other conditions. Finally, because § 1226(c) and the PATRIOT Act apply to different categories of aliens in different ways, adopting § 1226(c)'s plain meaning will not make any part of the PATRIOT Act, see § 1226a(a)(3), superfluous. Pp. 303–306.

(d) Nothing in § 1226(a), which authorizes the Attorney General to arrest and detain an alien "pending a decision" on removal and which permits the Attorney General to release the alien on bond, supports the imposition of periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that continued detention is necessary. Nor does it hint that the length of detention prior to the bond hearing must be considered in determining whether an alien should be released. P. 306.

(e) The Ninth Circuit should consider the merits of respondents' constitutional arguments in the first instance. But before doing so, it should also reexamine whether respondents can continue litigating their claims as a class. Pp. 312–314.

ALITO, J., delivered the opinion of the Court, except as to Part II. ROBERTS, C. J., and KENNEDY, J., joined that opinion in full; THOMAS and GORSUCH, JJ., joined as to Parts I, III, IV, V, and VI; and SOTOMAYOR, J., joined as to Part III–C. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined except for footnote 6, *post*, p. 314. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 326. KAGAN, J., took no part in the decision of the case.

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Deputy Solicitor General Stewart reargued the cause for petitioners. *Acting Solicitor General Gershengorn* argued the cause for petitioners on the original argument. With him on the briefs were *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorneys General Fresco* and *Branda*, *August E. Flentje*, *Zachary D. Tripp*, *Sarah S. Wilson*, and *Erez R. Reuveni*.

Ahilan T. Arulanantham reargued the cause for respondents. With him on the briefs were *Michael Kaufman*, *Jayashri Srikantiah*, *Mark H. Haddad*, *Sean A. Commons*, *Judy Rabinovitz*, *Michael K. T. Tan*, *Cecillia D. Wang*, *Steven R. Shapiro*, and *David D. Cole*.*

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*Briefs of *amici curiae* urging reversal were filed for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; and for 29 U. S. Representatives et al. by *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Xavier Becerra*, Attorney General of California, *Ed-*

JUSTICE ALITO delivered the opinion of the Court, except as to Part II.†

Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official "port of entry" (*e. g.*, an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location. Immigration officials must also determine on a daily basis whether there are grounds for removing any of the aliens who are already present inside the country. The vast majority of these determi-

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ward C. DuMont, Solicitor General, *Michael J. Mongan*, Deputy Solicitor General, and *Samuel P. Siegel* and *Max Carter-Oberstone*, Associate Deputy Solicitors General, and by the Attorneys General for their respective States as follows: *Maura Healey* of Massachusetts, *Eric T. Schneiderman* of New York, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the County of Santa Clara, California, et al. by *James R. Williams, Greta S. Hansen, David E. Ralph, G. Nicholas Herman, Paula Boggs Muething, Kristin M. Bronson, Karl A. Racine*, Attorney General of the District of Columbia, *Susan L. Segal, Dennis J. Herrera*, and *Peter S. Holmes*; for the American Bar Association by *Linda A. Klein, Jeffrey L. Bleich, Ian R. Barker, Benjamin P. Harbuck*, and *Andrew M. Legolvan*; for the American Immigration Council et al. by *Mark C. Fleming, Sameer Ahmed*, and *Paul R. Q. Wolfson*; for Americans for Immigrant Justice et al. by *Alina Das*; for Asian Americans Advancing Justice by *Anjan Choudhury, David J. Feder, Laboni A. Hoq, Anoop Prasad, Jenny Zhao, Cecelia Chang*, and *Eugene F. Chay*; for Detained Legal Services Providers by *Brian J. Murray* and *Charles Roth*; for Human Rights First et al. by *Eugene M. Gelernter*; for the National Association of Criminal Defense Lawyers et al. by *James J. Farrell* and *James H. Moon*; for the National Immigration Project of the National Lawyers Guild et al. by *David C. Frederick* and *Sejal Zota*; for Nine Retired Immigration Judges and Board of Immigration Appeals Members by *James J. Beha II* and *Brian R. Matsui*; for Professors of Constitutional Law et al. by *Dennis B. Auerbach, David M. Zionts*, and *Philip J. Levitz*; for the United Nations High Commissioner for Refugees by *Amy Mason Saharia, Ana C. Reyes*, and *Alice Farmer*; for Stephen H. Legomsky et al. by *Justin Florence, Aaron Katz, Douglas Hallward-Driemeier*, and *Jonathan Ference-Burke*; and for 43 Social Science Researchers and Professors by *Kelsi Brown Corkran*.

†JUSTICE SOTOMAYOR joins only Part III–C of this opinion.

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nations are quickly made, but in some cases deciding whether an alien should be admitted or removed is not as easy. As a result, Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.

In this case we are asked to interpret three provisions of U. S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. All parties appear to agree that the text of these provisions, when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue.

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Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must *interpret* the statute, not rewrite it. Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings.

I

A

To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.

That process of decision generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible. Under § 302, 110 Stat. 3009–579, 8 U. S. C. § 1225, an alien who "arrives in the United States," or is "present" in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1). Applicants for admission must "be inspected by immigration officers" to ensure that they may be admitted into the country consistent with U. S. immigration law. § 1225(a)(3).

As relevant here, applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. See § 1225(b)(1)(A)(i) (citing §§ 1182(a)(6)(C), (a)(7)). Section 1225(b)(1) also applies to certain other aliens designated by the Attorney General in his discretion. See § 1225(b)(1)(A)(iii). Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here). See §§ 1225(b)(2)(A), (B).

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Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens. Aliens covered by § 1225(b)(1) are normally ordered removed "without further hearing or review" pursuant to an expedited removal process. § 1225(b)(1)(A)(i). But if a § 1225(b)(1) alien "indicates either an intention to apply for asylum . . . or a fear of persecution," then that alien is referred for an asylum interview. § 1225(b)(1)(A)(ii). If an immigration officer determines after that interview that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii).

Aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process. Those aliens "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" into the country. § 1225(b)(2)(A).

Regardless of which of those two sections authorizes their detention, applicants for admission may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A); see also 8 CFR §§ 212.5(b), 235.3 (2017). Such parole, however, "shall not be regarded as an admission of the alien." 8 U. S. C. § 1182(d)(5)(A). Instead, when the purpose of the parole has been served, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." *Ibid.*

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2

Even once inside the United States, aliens do not have an absolute right to remain here. For example, an alien present in the country may still be removed if he or she falls "within one or more . . . classes of deportable aliens." § 1227(a). That includes aliens who were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission. See §§ 1227(a)(1), (2).

Section 1226 generally governs the process of arresting and detaining that group of aliens pending their removal. As relevant here, § 1226 distinguishes between two different categories of aliens. Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States." § 1226(a). "Except as provided in subsection (c) of this section," the Attorney General "may release" an alien detained under § 1226(a) "on . . . bond" or "conditional parole." *Ibid.*

Section 1226(c), however, carves out a statutory category of aliens who may *not* be released under § 1226(a). Under § 1226(c), the "Attorney General shall take into custody any alien" who falls into one of several enumerated categories involving criminal offenses and terrorist activities. § 1226(c)(1). The Attorney General may release aliens in those categories "only if the Attorney General decides . . . that release of the alien from custody is necessary" for witness-protection purposes and "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." § 1226(c)(2). Any release under those narrow conditions "shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." *Ibid.*[1]

In sum, U. S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c). The primary issue is the proper interpretation of §§ 1225(b), 1226(a), and 1226(c).

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B

Respondent Alejandro Rodriguez is a Mexican citizen. Since 1987, he has also been a lawful permanent resident of the United States. In April 2004, after Rodriguez was convicted of a drug offense and theft of a vehicle, the Gov-

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[1] Anyone who believes that he is not covered by § 1226(c) may also ask for what is known as a "*Joseph* hearing." See *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). At a *Joseph* hearing, that person "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Government] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore* v. *Kim*, 538 U. S. 510, 514, n. 3 (2003). Whether respondents are entitled to *Joseph* hearings is not before this Court.

ernment detained him under § 1226 and sought to remove him from the country. At his removal hearing, Rodriguez argued both that he was not removable and, in the alternative, that he was eligible for relief from removal. In July 2004, an Immigration Judge ordered Rodriguez deported to Mexico. Rodriguez chose to appeal that decision to the Board of Immigration Appeals, but five months later the Board agreed that Rodriguez was subject to mandatory removal. Once again, Rodriguez chose to seek further review, this time petitioning the Court of Appeals for the Ninth Circuit for review of the Board's decision.

In May 2007, while Rodriguez was still litigating his removal in the Court of Appeals, he filed a habeas petition in the District Court for the Central District of California, alleging that he was entitled to a bond hearing to determine whether his continued detention was justified. Rodriguez's case was consolidated with another, similar case brought by Alejandro Garcia, and together they moved for class certification. The District Court denied their motion, but the Court of Appeals for the Ninth Circuit reversed. See *Rodriguez* v. *Hayes*, 591 F. 3d 1105, 1111 (2010). It concluded that the proposed class met the certification requirements of Rule 23 of the Federal Rules of Civil Procedure, and it remanded the case to the District Court. *Id.*, at 1111, 1126.

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On remand, the District Court certified the following class:

> "[A]ll non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified." Class Certification Order in *Rodriguez* v. *Hayes*, No. CV 07–03239 (CD Cal., Apr. 5, 2010).

The District Court named Rodriguez as class representative of the newly certified class, *ibid.*, and then organized the

class into four subclasses based on the four "general immigration detention statutes" under which it understood the class members to be detained: Sections 1225(b), 1226(a), 1226(c), and 1231(a). See Order Granting Plaintiff's Motion for Class Certification in *Rodriguez* v. *Holder*, No. CV 07–03239 (CD Cal., Mar. 8, 2011) (2011 Order); *Rodriguez* v. *Robbins*, 715 F. 3d 1127, 1130–1131 (CA9 2013). Each of the four subclasses was certified to pursue declaratory and injunctive relief. 2011 Order. On appeal, the Court of Appeals held that the § 1231(a) subclass had been improperly certified, but it affirmed the certification of the other three subclasses. See *Rodriguez* v. *Robbins*, 804 F. 3d 1060, 1074, 1085–1086 (CA9 2015).

In their complaint, Rodriguez and the other respondents argued that the relevant statutory provisions—§§ 1225(b), 1226(a), and 1226(c)—do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that the class member's detention remains justified. Absent such a bond-hearing requirement, respondents continued, those three provisions would violate the Due Process Clause of the Fifth Amendment. In their prayer for relief, respondents thus asked the District Court to require the Government "to provide, after giving notice, individual hearings before an immigration judge for . . . each member of the class, at which [the Government] will bear the burden to prove by clear and convincing evidence that no reasonable conditions will ensure the detainee's presence in the event of removal and protect the community from serious danger, despite the prolonged length of detention at issue." Third Amended Complaint in *Rodriguez* v. *Holder*, No. CV 07–03239, p. 31 (CD Cal., Oct. 22, 2010). Respondents also sought declaratory relief. *Ibid.*

As relevant here, the District Court entered a permanent injunction in line with the relief sought by respondents, and the Court of Appeals affirmed. See 804 F. 3d, at 1065. Relying heavily on the canon of constitutional avoidance, the

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Court of Appeals construed §§ 1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under these sections. *Id.*, at 1079, 1082. After that point, the Court of Appeals held, the Government may continue to detain the alien only under the authority of § 1226(a). *Ibid.* The Court of Appeals then construed § 1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified. *Id.*, at 1085, 1087.

The Government petitioned this Court for review of that decision, and we granted certiorari. 579 U. S. 917 (2016).

II

Before reaching the merits of the lower court's interpretation, we briefly address whether we have jurisdiction to entertain respondents' claims. We discuss two potential obstacles, 8 U. S. C. §§ 1252(b)(9) and 1226(e).

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A

Under § 1252(b)(9):

> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [including §§ 1225 and 1226] shall be available only in judicial review of a final order under this section."

This provision does not deprive us of jurisdiction. We are required in this case to decide "questions of law," specifically, whether, contrary to the decision of the Court of Appeals, certain statutory provisions require detention without a bond hearing. We assume for the sake of argument that the actions taken with respect to all the aliens in the certified class constitute "action[s] taken . . . to remove [them] from

the United States."[2] On that assumption, the applicability of § 1252(b)(9) turns on whether the legal questions that we must decide "aris[e] from" the actions taken to remove these aliens.

It may be argued that this is so in the sense that if those actions had never been taken, the aliens would not be in custody at all. But this expansive interpretation of § 1252(b)(9) would lead to staggering results. Suppose, for example, that a detained alien wishes to assert a claim under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), based on allegedly inhumane conditions of confinement. See, *e. g.*, *Ziglar* v. *Abbasi*, 582 U. S. 120, 146–149 (2017). Or suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck. The "questions of law and fact" in all those cases could be said to "aris[e] from" actions taken to remove the aliens in the sense that the aliens' injuries would never have occurred if they had not been placed in detention. But cramming judicial review of those questions into the review of final removal orders would be absurd.

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Interpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

In past cases, when confronted with capacious phrases like "arising from," we have eschewed "'uncritical literalism'"

[2] It is questionable whether this is true for aliens who are detained under 8 U. S. C. § 1225(b)(1)(B)(ii) for consideration of their asylum applications.

leading to results that "'no sensible person could have intended.'" *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U. S. 312, 319 (2016) (interpreting phrase "relate to" in the Employee Retirement Income Security Act of 1974's pre-emption provision). See also, *e. g.*, *FERC* v. *Electric Power Supply Assn.*, 577 U. S. 260, 277–278 (2016) (interpreting term "affecting" in Federal Power Act); *Maracich* v. *Spears*, 570 U. S. 48, 59–61 (2013) (interpreting phrase "in connection with" in Driver's Privacy Protection Act); *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U. S. 251, 260–261 (2013) (interpreting phrase "related to" in Federal Aviation Administration Authorization Act); *Celotex Corp.* v. *Edwards*, 514 U. S. 300, 308 (1995) (interpreting phrase "related to" in Bankruptcy Act). In *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 482 (1999), we took this approach in construing the very phrase that appears in § 1252(b)(9). A neighboring provision of the Immigration and Nationality Act refers to "any cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U. S. C. § 1252(g) (emphasis added). We did not interpret this language to sweep in any claim that can technically be said to "arise from" the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves. *American-Arab Anti-Discrimination Comm.*, *supra*, at 482–483.

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The parties in this case have not addressed the scope of § 1252(b)(9), and it is not necessary for us to attempt to provide a comprehensive interpretation. For present purposes, it is enough to note that respondents are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined. Under these

circumstances, § 1252(b)(9) does not present a jurisdictional bar.[3]

B

We likewise hold that § 1226(e) does not bar us from considering respondents' claims.

That provision states:

> "The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." § 1226(e).

As we have previously explained, § 1226(e) precludes an alien from "challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Demore* v. *Kim*, 538 U. S. 510, 516 (2003). But § 1226(e) does not preclude "challenges [to] the statutory framework that permits [the alien's] detention without bail." *Id.*, at 517.

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Respondents mount that second type of challenge here. First and foremost, they are challenging the extent of the Government's detention authority under the "statutory

[3] The concurrence contends that "detention *is* an 'action taken . . . to remove' an alien" and that therefore "even the narrowest reading of 'arising from' must cover" the claims raised by respondents. *Post*, at 318 (THOMAS, J., concurring in part and concurring in judgment). We do not follow this logic. We will assume for the sake of argument that detention is an action taken "to remove an alien," *i. e.*, for the purpose of removing an alien, rather than simply an action aimed at ensuring that the alien does not flee or commit a crime while his proceedings are pending. But even if we proceed on the basis of that assumption, we do not see what it proves. The question is not whether *detention* is an action taken to remove an alien but whether *the legal questions* in this case arise from such an action. And for the reasons explained above, those legal questions are too remote from the actions taken to fall within the scope of § 1252(b)(9).

framework" as a whole. If that challenge fails, they are then contesting the constitutionality of the entire statutory scheme under the Fifth Amendment. Because the extent of the Government's detention authority is not a matter of "discretionary judgment," "action," or "decision," respondents' challenge to "the statutory framework that permits [their] detention without bail," *ibid.*, falls outside of the scope of § 1226(e). We may therefore consider the merits of their claims.

III

When "a serious doubt" is raised about the constitutionality of an Act of Congress, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Relying on this canon of constitutional avoidance, the Court of Appeals construed §§ 1225(b), 1226(a), and 1226(c) to limit the permissible length of an alien's detention without a bond hearing. Without such a construction, the Court of Appeals believed, the "'prolonged detention without adequate procedural protections'" authorized by the provisions "'would raise serious constitutional concerns.'" 804 F. 3d, at 1077 (quoting *Casas-Castrillon* v. *Department of Homeland Security*, 535 F. 3d 942, 950 (CA9 2008)).

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The canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Clark* v. *Martinez*, 543 U. S. 371, 385 (2005). In the absence of more than one plausible construction, the canon simply "'has no application.'" *Warger* v. *Shauers*, 574 U. S. 40, 50 (2014) (quoting *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001)).

The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible. In Parts III–A and III–B, we hold that, subject only to express exceptions, §§ 1225(b) and

1226(c) authorize detention until the end of applicable proceedings. And in Part III–C, we hold that there is no justification for any of the procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation.

A

As noted, § 1225(b) applies primarily to aliens seeking entry into the United States ("applicants for admission" in the language of the statute). Section 1225(b) divides these applicants into two categories. First, certain aliens claiming a credible fear of persecution under § 1225(b)(1) "shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Second, aliens falling within the scope of § 1225(b)(2) "shall be detained for a [removal] proceeding." § 1225(b)(2)(A).

Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for "further consideration of the application for asylum," and § 1225(b)(2) aliens are in turn detained for "[removal] proceeding[s]." Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.

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Despite the clear language of §§ 1225(b)(1) and (b)(2), respondents argue—and the Court of Appeals held—that those provisions nevertheless can be construed to contain implicit limitations on the length of detention. But neither of the two limiting interpretations offered by respondents is plausible.

1

First, respondents argue that §§ 1225(b)(1) and (b)(2) contain an implicit 6-month limit on the length of detention. Once that 6-month period elapses, respondents contend,

aliens previously detained under those provisions must instead be detained under the authority of § 1226(a), which allows for bond hearings in certain circumstances.

There are many problems with this interpretation. Nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months, but respondents do not engage in any analysis of the text. Instead, they simply cite the canon of constitutional avoidance and urge this Court to use that canon to read a "six-month reasonableness limitation" into § 1225(b). Brief for Respondents 48.

That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to "choos[e] between competing *plausible* interpretations of a statutory text." *Clark*, *supra*, at 381 (emphasis added). To prevail, respondents must thus show that § 1225(b)'s detention provisions may plausibly be read to contain an implicit 6-month limit. And they do not even attempt to defend that reading of the text.

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In much the same manner, the Court of Appeals all but ignored the statutory text. Instead, it read *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), as essentially granting a license to graft a time limit onto the text of § 1225(b). *Zadvydas*, however, provides no such authority.

Zadvydas concerned § 1231(a)(6), which authorizes the detention of aliens who have already been ordered removed from the country. Under this section, when an alien is ordered removed, the Attorney General is directed to complete removal within a period of 90 days, 8 U. S. C. § 1231(a)(1)(A), and the alien must be detained during that period, § 1231(a)(2). After that time elapses, however, § 1231(a)(6) provides only that certain aliens "*may* be detained" while efforts to complete removal continue. (Emphasis added.)

In *Zadvydas*, the Court construed § 1231(a)(6) to mean that an alien who has been ordered removed may not be

detained beyond "a period reasonably necessary to secure removal," 533 U. S., at 699, and it further held that six months is a presumptively reasonable period, *id.*, at 701. After that, the Court concluded, if the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the Government must either rebut that showing or release the alien. *Ibid.*

The *Zadvydas* Court justified this interpretation by invoking the constitutional-avoidance canon, and the Court defended its resort to that canon on the ground that § 1231(a)(6) is ambiguous. Specifically, the Court detected ambiguity in the statutory phrase "*may* be detained." "'[M]ay,'" the Court said, "suggests discretion" but not necessarily "unlimited discretion. In that respect the word 'may' is ambiguous." *Id.*, at 697. The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal. *Ibid.*

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Zadvydas represents a notably generous application of the constitutional-avoidance canon, but the Court of Appeals in this case went much further. It failed to address whether *Zadvydas*'s reasoning may fairly be applied in this case despite the many ways in which the provision in question in *Zadvydas*, § 1231(a)(6), differs materially from those at issue here, §§ 1225(b)(1) and (b)(2). Those differences preclude the reading adopted by the Court of Appeals.

To start, §§ 1225(b)(1) and (b)(2), unlike § 1231(a)(6), provide for detention for a specified period of time. Section 1225(b)(1) mandates detention "for further consideration of the application for asylum," § 1225(b)(1)(B)(ii), and § 1225(b)(2) requires detention "for a [removal] proceeding," § 1225(b)(2)(A). The plain meaning of those phrases is that detention must continue until immigration officers have finished "consider[ing]" the application for asylum, § 1225(b)(1)(B)(ii), or until removal proceedings have concluded, § 1225(b)(2)(A). By contrast, Congress left the permissible length of detention under § 1231(a)(6) unclear.

Moreover, in *Zadvydas*, the Court saw ambiguity in § 1231(a)(6)'s use of the word "may." Here, by contrast, §§ 1225(b)(1) and (b)(2) do not use the word "may." Instead, they unequivocally mandate that aliens falling within their scope "shall" be detained. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 171 (2016). That requirement of detention precludes a court from finding ambiguity here in the way that *Zadvydas* found ambiguity in § 1231(a)(6).

Zadvydas's reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). With a few exceptions not relevant here, the Attorney General may "for urgent humanitarian reasons or significant public benefit" temporarily parole aliens detained under §§ 1225(b)(1) and (b)(2). 8 U. S. C. § 1182(d)(5)(A). That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released. See A. Scalia & B. Garner, Reading Law 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)"). That negative implication precludes the sort of implicit time limit on detention that we found in *Zadvydas*.[4]

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In short, a series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*'s interpretation of § 1231(a)(6). While *Zadvydas* found § 1231(a)(6) to be ambiguous, the same cannot be said of §§ 1225(b)(1) and (b)(2):

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[4] According to the dissent, we could have applied the *expressio unius* canon in *Zadvydas* as well because there was also an "alternative avenue for relief, namely, bail," available for aliens detained under § 1231(a)(6). *Post*, at 349 (opinion of BREYER, J.). But the dissent overlooks the fact that the provision granting bail was precisely the same provision that the Court purported to be interpreting, so the canon was not applicable. See 533 U. S., at 683.

Both provisions mandate detention until a certain point and authorize release prior to that point only under limited circumstances. As a result, neither provision can reasonably be read to limit detention to six months.

2

In this Court, respondents advance an interpretation of the language of §§ 1225(b)(1) and (b)(2) that was never made below, namely, that the term "for," which appears in both provisions, mandates detention only until the *start* of applicable proceedings rather than all the way through to their conclusion. Respondents contrast the language of §§ 1225(b)(1) and (b)(2) authorizing detention "for" further proceedings with another provision's authorization of detention "pending" further proceedings. See 8 U. S. C. § 1225(b)(1)(B)(iii)(IV) ("Any alien . . . shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed"). According to respondents, that distinction between "for" and "pending" makes an enormous difference. As they see things, the word "pending" authorizes detention throughout subsequent proceedings, but the term "for" means that detention authority ends once subsequent proceedings begin. As a result, respondents argue, once the applicable proceedings commence, §§ 1225(b)(1) and (b)(2) no longer authorize detention, and the Government must instead look to § 1226(a) for continued detention authority.

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That interpretation is inconsistent with ordinary English usage and is incompatible with the rest of the statute. To be sure, "for" can sometimes mean "in preparation for or anticipation of." 6 Oxford English Dictionary 24 (2d ed. 1989) (OED). But "for" can also mean "[d]uring [or] throughout," *id.*, at 26, as well as "with the object or purpose of," *id.*, at 23; see also American Heritage Dictionary 709 (3d ed. 1992) ("Used to indicate the object, aim, or purpose of an action or activity"; "Used to indicate amount, extent, or

duration"); Random House Dictionary of the English Language 747 (2d ed. 1987) ("with the object or purpose of"; "during the continuance of"); Webster's Third New International Dictionary 886 (1993) ("with the purpose or object of"; "to the . . . duration of"). And here, only that second set of definitions makes sense in the context of the statutory scheme as a whole.

For example, respondents argue that, once detention authority ends under §§ 1225(b)(1) and (b)(2), aliens can be detained only under § 1226(a). But that section authorizes detention only "[o]n a warrant issued" by the Attorney General leading to the alien's arrest. § 1226(a). If respondents' interpretation of § 1225(b) were correct, then the Government could detain an alien without a warrant at the border, but once removal proceedings began, the Attorney General would have to issue an arrest warrant in order to continue detaining the alien. To put it lightly, that makes little sense.

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Nor does respondents' interpretation of the word "for" align with the way Congress has historically used that word in § 1225. Consider that section's text prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546. Under the older version of § 1225(b), "[e]very alien" within its scope "who may not appear . . . to be clearly and beyond a doubt entitled to [entry] shall be detained for further inquiry to be conducted by a special inquiry officer." 8 U. S. C. § 1225(b) (1994 ed.). It would make no sense to read "for further inquiry" as authorizing detention of the alien only until the start of the inquiry; Congress obviously did not mean to allow aliens to feel free to leave once immigration officers asked their first question.

In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin. Of course, other provisions of the immigration statutes do authorize detention "pending" other proceedings or "until" a certain

point. See *post*, at 348 (BREYER, J., dissenting) (quoting § 1225(b)(1)(B)(iii)(IV)). But there is no "canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 540 (2013). We decline to invent and apply such a canon here.

B

While the language of §§ 1225(b)(1) and (b)(2) is quite clear, § 1226(c) is even clearer. As noted, § 1226 applies to aliens already present in the United States. Section 1226(a) creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings. Section 1226(a) also permits the Attorney General to release those aliens on bond, "[e]xcept as provided in subsection (c) of this section." Section 1226(c) in turn states that the Attorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities. § 1226(c)(1). Section 1226(c) then goes on to specify that the Attorney General "may release" one of those aliens "*only if* the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk. § 1226(c)(2) (emphasis added).

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Like § 1225(b), § 1226(c) does not on its face limit the length of the detention it authorizes. In fact, by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, § 1226(c) reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope *must* continue "pending a decision on whether the alien is to be removed from the United States." § 1226(a).

In a reprise of their interpretation of § 1225(b), respondents argue, and the Court of Appeals held, that § 1226(c) should be interpreted to include an implicit 6-month time limit on the length of mandatory detention. Once again, that interpretation falls far short of a "plausible statutory construction."

In defense of their statutory reading, respondents first argue that § 1226(c)'s "silence" as to the length of detention "cannot be construed to authorize prolonged mandatory detention, because Congress must use 'clearer terms' to authorize 'long-term detention.'" Brief for Respondents 34 (quoting *Zadvydas*, 533 U. S., at 697). But § 1226(c) is *not* "silent" as to the length of detention. It mandates detention "pending a decision on whether the alien is to be removed from the United States," § 1226(a), and it expressly prohibits release from that detention except for narrow, witness-protection purposes. Even if courts were permitted to fashion 6-month time limits out of statutory silence, they certainly may not transmute existing statutory language into its polar opposite. The constitutional-avoidance canon does not countenance such textual alchemy.

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Indeed, we have held as much in connection with § 1226(c) itself. In *Demore* v. *Kim*, 538 U. S., at 529, we distinguished § 1226(c) from the statutory provision in *Zadvydas* by pointing out that detention under § 1226(c) has "a definite termination point": the conclusion of removal proceedings. As we made clear there, that "definite termination point"—and not some arbitrary time limit devised by courts—marks the end of the Government's detention authority under § 1226(c).

Respondents next contend that § 1226(c)'s limited authorization for release for witness-protection purposes does not imply that other forms of release are forbidden, but this argument defies the statutory text. By expressly stating that the covered aliens may be released "only if" certain conditions are met, § 1226(c)(2), the statute expressly and unequivocally imposes an affirmative *prohibition* on releasing detained aliens under any other conditions.

Finally, respondents point to a provision enacted as part of the PATRIOT Act[5] and contend that their reading of § 1226(c) is needed to prevent that provision from being superfluous. That argument, however, misreads both statutory provisions. Although the two provisions overlap in part, they are by no means congruent.

Two differences stand out. First, § 1226(c) and the PATRIOT Act cover different categories of aliens. Both apply to certain terrorist suspects, but only § 1226(c) reaches aliens convicted of other more common criminal offenses. See §§ 1226(c)(1)(A)–(C) (aliens inadmissible or deportable under § 1182(a)(2); §§ 1227(a)(2)(A)(ii), (A)(iii), (B), (C), and (D); and § 1227(a)(2)(A)(i) under certain conditions). For its part, the PATRIOT Act casts a wider net than § 1226(c) insofar as it encompasses certain threats to national security not covered by § 1226(c). See § 1226a(a)(3) (aliens described in §§ 1182(a)(3)(A)(i), (iii), and 1227(a)(4)(A)(i), (iii), as well as aliens "engaged in any other activity that endangers the national security of the United States"). In addition, the Government's detention authority under § 1226(c) and the PATRIOT Act is not the same. Under § 1226(c), the Government must detain an alien until "a decision on *whether* the alien is to be removed" is made. § 1226(a) (emphasis added). But, subject to exceptions not relevant here, the PATRIOT Act authorizes the Government to detain an alien "until the alien *is removed*." § 1226a(a)(2) (emphasis added).

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Far from being redundant, then, § 1226(c) and the PATRIOT Act apply to different categories of aliens in different ways. There is thus no reason to depart from the plain meaning of § 1226(c) in order to avoid making the provision superfluous.

We hold that § 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the

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[5] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act), 115 Stat. 272.

conclusion of removal proceedings "only if" the alien is released for witness-protection purposes.

C

Finally, as noted, § 1226(a) authorizes the Attorney General to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." As long as the detained alien is not covered by § 1226(c), the Attorney General "may release" the alien on "bond . . . or conditional parole." § 1226(a). Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention. See 8 CFR §§ 236.1(d)(1), 1236.1(d)(1).

The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations—namely, periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that the alien's continued detention is necessary. Nothing in § 1226(a)'s text—which says only that the Attorney General "may release" the alien "on . . . bond"—even remotely supports the imposition of either of those requirements. Nor does § 1226(a)'s text even hint that the length of detention prior to a bond hearing must specifically be considered in determining whether the alien should be released.

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IV

For these reasons, the meaning of the relevant statutory provisions is clear—and clearly contrary to the decision of the Court of Appeals. But the dissent is undeterred. It begins by ignoring the statutory language for as long as possible, devoting the first two-thirds of its opinion to a disquisition on the Constitution. Only after a 19-page prologue does the dissent acknowledge the relevant statutory provisions.

The dissent frames the question of interpretation as follows: Can §§ 1225(b), 1226(c), and 1226(a) be read to require bond hearings every six months "without doing violence to the statutory language," *post*, at 344 (opinion of BREYER, J.)? According to the dissent, the answer is "yes," but the dissent evidently has a strong stomach when it comes to inflicting linguistic trauma. Thus, when Congress mandated that an "alien shall be detained," § 1225(b)(1)(B)(ii), what Congress really meant, the dissent insists, is that the alien may be released from custody provided only that his freedom of movement is restricted in some way, such as by "the imposition of a curfew," *post*, at 345. And when Congress stressed that "[t]he Attorney General may release an alien . . . *only if* . . . release . . . from custody is necessary" to protect the safety of a witness, § 1226(c)(2) (emphasis added), what Congress meant, the dissent tells us, is that the Attorney General must release an alien even when no witness is in need of protection—so long as the alien is neither a flight risk nor a danger to the community, see *post*, at 349–351. The contortions needed to reach these remarkable conclusions are a sight to behold.

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Let us start with the simple term "detain." According to the dissent, "detain" means the absence of "unrestrained freedom." *Post*, at 345. An alien who is subject to any one of "numerous restraints"—including "a requirement to obtain medical treatment," "to report at regular intervals," or even simply to comply with "a curfew"—is "detained" in the dissent's eyes, even if that alien is otherwise free to roam the streets. *Ibid.*

This interpretation defies ordinary English usage. The dictionary cited by the dissent, the OED, defines "detain" as follows: "[t]o keep in confinement or under restraint; *to keep prisoner*." 4 OED 543 (emphasis added); see also OED (3d ed. 2012), http://www.oed.com/view/Entry/51176 (same). Other general-purpose dictionaries provide similar defini-

tions. See, *e. g.*, Webster's Third New International Dictionary 616 (1961) ("to hold or keep in or as if in custody <~*ed* by the police for questioning>"); Webster's New International Dictionary 710 (2d ed. 1934) ("[t]o hold or keep as in custody"); American Heritage Dictionary, at 508 (def. 2) ("[t]o keep in custody or temporary confinement"); Webster's New World College Dictionary 375 (3d ed. 1997) ("to keep in custody; confine"). And legal dictionaries define "detain" the same way. See, *e. g.*, Ballentine's Law Dictionary 343 (3d ed. 1969) ("[t]o hold; to keep in custody; to keep"); Black's Law Dictionary 459 (7th ed. 1999) ("[t]he act or fact of holding a person in custody; confinement or compulsory delay").

How does the dissent attempt to evade the clear meaning of "detain"? It resorts to the legal equivalent of a sleight-of-hand trick. First, the dissent cites a passage in Blackstone stating that arrestees could always seek release on bail. *Post*, at 332–333. Then, having established the obvious point that a person who is initially detained may later be released from detention, the dissent reasons that this means that a person may still be regarded as detained even after he is released from custody. *Post*, at 344–345. That, of course, is a non sequitur. Just because a person who is initially detained may later be released, it does not follow that the person is still "detained" after his period of detention comes to an end.

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If there were any doubt about the meaning of the term "detain" in the relevant statutory provisions, the context in which they appear would put that doubt to rest. Title 8 of the United States Code, the title dealing with immigration, is replete with references that distinguish between "detained" aliens and aliens who are free to walk the streets in the way the dissent imagines. Section 1226(a), for instance, distinguishes between the power to "continue to detain the arrested alien" and the power to "release the alien on . . . bond." But if the dissent were right, that distinction would

make no sense: An "alien released on bond" would *also* be a "detained alien." Here is another example: In § 1226(b), Congress gave the Attorney General the power to "revoke" at any time "a bond or parole authorized under subsection (a) of this section, rearrest the alien under the original warrant, and detain the alien." It beggars belief that Congress would have given the Attorney General the power to detain a class of aliens who, under the dissent's reading, are *already* "detained" because they are free on bond. But that is what the dissent would have us believe. Consider, finally, the example of § 1226(c). As noted, that provision obligates the Attorney General to "take into custody" certain aliens whenever they are "released, without regard to whether the alien is released on parole, supervised release, or probation." On the dissent's view, however, even aliens "released on parole, supervised release, or probation" are "in custody"—and so there would be no need for the Attorney General to take them into custody again.[6]

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Struggling to prop up its implausible interpretation, the dissent looks to our prior decisions for aid, but that too fails.

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[6] As the dissent notes, § 1158(d)(2) regulates employment authorization for certain "applicant[s] for asylum." Were all asylum applicants detained, the dissent says, that provision would make no sense, because detained aliens do not need work authorizations. *Post*, at 347–348. But § 1158(d)(2) applies not only to aliens seeking asylum status "in accordance with . . . section 1225(b)" (and thus aliens who are detained), but also to all aliens already "physically present in the United States." § 1158(a)(1). Many of those aliens will be in the country lawfully, and thus they will not be detained and will be able to work pending the outcome of their asylum application. For example, an alien may apply for asylum after being admitted into the country on a short-term visa. While the application is pending, § 1158 may offer a way for that alien to find employment.

In response, the dissent accuses us of "apply[ing] this provision to some asylum applicants but not the ones before us." *Post*, at 347–348. That is not remotely what we are doing. We do not doubt that § 1158(d)(2) "applies" to all "applicant[s] for asylum" as it says, even if some of those applicants are not as likely to receive an employment authorization (for instance, because they are detained) as others.

The best case it can find is *Tod* v. *Waldman*, 266 U. S. 547 (1925), a grant of a petition for rehearing in which the Court clarified that "[n]othing in [its original] order . . . shall prejudice an application for release on bail of the respondents pending compliance with the mandate of this Court." *Id.*, at 548. According to the dissent, that two-page decision from almost a century ago supports its reading because the underlying immigration statute in that case—like some of the provisions at issue here—mandated that the relevant class of aliens "'shall be detained'" pending the outcome of an inspection process. See *post*, at 346 (quoting Act of Feb. 5, 1917, § 16, 39 Stat. 886).

That reads far too much into *Waldman*. To start, the Court did not state that the aliens at issue were entitled to bail or even that bail was available to them. Instead, the Court merely noted that its decision should not "prejudice" any application the aliens might choose to file. That is notable, for in their petition for rehearing the aliens had asked the Court to affirmatively "*authorize* [them] to give bail." Petition for Rehearing in *Tod* v. *Waldman*, O. T. 1924, No. 95, p. 17 (emphasis added). By refusing to do so, the Court may have been signaling its skepticism about their request. But it is impossible to tell. That is precisely why we, unlike the dissent, choose not to go beyond what the sentence actually says. And *Waldman* says nothing about how the word "detain" should be read in the context of §§ 1225(b), 1226(c), and 1226(a).[7]

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Neither does *Zadvydas*. It is true, as the dissent points out, that *Zadvydas* found "that the words '"may be de-

[7] It should not be surprising by this point that even the aliens in *Waldman* understood "detention" in contradistinction to "bail." See Petition for Rehearing in *Tod* v. *Waldman*, O. T. 1924, No. 95, pp. 17–18 ("[T]he Court's mandate should authorize relators to give bail, instead of having [them] go to Ellis Island and remain there *in custody* pending an appeal . . . which may involve very long *detention* pending hearing of the appeal . . ." (capitalization omitted; emphasis added)).

tained"' [are] consistent with requiring release from long-term detention," *post*, at 347 (quoting 533 U. S., at 682), but that is not because there is any ambiguity in the term "detain." As we have explained, the key statutory provision in *Zadvydas* said that the aliens in question "may," not "shall," be detained, and that provision also failed to specify how long detention was to last. Here, the statutory provisions at issue state either that the covered aliens "shall" be detained until specified events take place, see 8 U. S. C. § 1225(b)(1)(B)(ii) ("further consideration of the application for asylum"); § 1225(b)(2)(A) ("a [removal] proceeding"), or provide that the covered aliens may be released "only if" specified conditions are met, § 1226(c)(2). The term that the *Zadvydas* Court found to be ambiguous was "may," not "detain." See 533 U. S., at 697. And the opinion in that case consistently used the words "detain" and "custody" to refer exclusively to physical confinement and restraint. See *id.*, at 690 (referring to "[f]reedom from imprisonment—from government custody, *detention, or other forms of physical restraint*" (emphasis added)); *id.*, at 683 (contrasting aliens "released on bond" with those "held in custody").[8]

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The dissent offers no plausible interpretation of §§ 1225(b), 1226(c), and 1226(a). But even if we were to accept the dissent's interpretation and hold that "detained" aliens in the "custody" of the Government include aliens released on bond, that would *still* not justify the dissent's proposed resolution of this case. The Court of Appeals held that aliens detained under the provisions at issue must be given *periodic* bond hearings, and the dissent agrees. See *post*, at 327 ("I would interpret the statute as requiring bail hearings, presump-

[8] The dissent argues that because "the question at issue [in *Zadvydas*] was release from detention," "the key word was consequently 'may.'" *Post*, at 347. We agree but fail to see the point. If, as the dissent admits, *Zadvydas* was about "release from detention" and not about what qualifies as "detention," then it is unclear why the dissent thinks that decision supports its unorthodox interpretation of the word "detention."

tively after six months of confinement"). But the dissent draws that 6-month limitation out of thin air. However broad its interpretation of the words "detain" and "custody," nothing in *any* of the relevant provisions imposes a 6-month time limit on detention without the possibility of bail. So if the dissent's interpretation is right, then aliens detained under §§ 1225(b), 1226(c), and 1226(a) are entitled to bail hearings as soon as their detention begins rather than six months later. "Detained" does not mean "released on bond," and it *certainly* does not mean "released on bond but only after six months of mandatory physical confinement."

The dissent's utterly implausible interpretation of the statutory language cannot support the decision of the court below.

V

Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), we do not reach those arguments. Instead, we remand the case to the Court of Appeals to consider them in the first instance.

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Before the Court of Appeals addresses those claims, however, it should reexamine whether respondents can continue litigating their claims as a class. When the District Court certified the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, it had their statutory challenge primarily in mind. Now that we have resolved that challenge, however, new questions emerge.

Specifically, the Court of Appeals should first decide whether it continues to have jurisdiction despite 8 U. S. C. § 1252(f)(1). Under that provision, "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–1232] other than with respect to the application of such provisions to an indi-

vidual alien against whom proceedings under such part have been initiated." Section 1252(f)(1) thus "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–123[2]." *American-Arab Anti-Discrimination Comm.*, 525 U. S., at 481. The Court of Appeals held that this provision did not affect its jurisdiction over respondents' *statutory* claims because those claims did not "seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes." 591 F. 3d, at 1120. This reasoning does not seem to apply to an order granting relief on constitutional grounds, and therefore the Court of Appeals should consider on remand whether it may issue classwide injunctive relief based on respondents' constitutional claims. If not, and if the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own. See, *e. g.*, Rule 23(b)(2) (requiring "that final injunctive relief or *corresponding* declaratory relief [be] appropriate respecting the class as a whole" (emphasis added)).

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The Court of Appeals should also consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011). We held in *Dukes* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*, at 360. That holding may be relevant on remand because the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter. See, *e. g.*, 804 F. 3d, at 1082; 715 F. 3d, at 1139–1141 (citing, *e. g.*, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953)). Assuming that is correct, then it may no longer be true that the complained-of "'conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, *supra*, at 360 (quoting Nagareda,

Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009)).

Similarly, the Court of Appeals should also consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents' Due Process Clause claims. "[D]ue process is flexible," we have stressed repeatedly, and it "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972); see also *Landon* v. *Plasencia*, 459 U. S. 21, 34 (1982).

VI

We reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings.

It is so ordered.

JUSTICE KAGAN took no part in the decision of this case.

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JUSTICE THOMAS, with whom JUSTICE GORSUCH joins except for footnote 6, concurring in Part I and Parts III–VI and concurring in the judgment.

In my view, no court has jurisdiction over this case. Congress has prohibited courts from reviewing aliens' claims related to their removal, except in a petition for review from a final removal order or in other circumstances not present here. See 8 U. S. C. § 1252(b)(9). Respondents have not brought their claims in that posture, so § 1252(b)(9) removes jurisdiction over their challenge to their detention. I would therefore vacate the judgment below with instructions to dismiss for lack of jurisdiction. But because a majority of the Court believes we have jurisdiction, and I agree with the Court's resolution of the merits, I join Part I and Parts III–VI of the Court's opinion.

I

Respondents are a class of aliens whose removal proceedings are ongoing. Respondents allege that the statutes that authorize their detention during removal proceedings do not

authorize "prolonged" detention unless they are given an individualized bond hearing at which the Government "prove[s] by clear and convincing evidence" that their detention remains justified. Third Amended Complaint in *Rodriguez* v. *Holder*, No. CV 07–03239 (CD Cal., Oct. 22, 2010), pp. 30–31 (Third Amended Complaint). If the statutes do authorize "prolonged" detention, respondents claim that the statutes violate the Due Process Clause of the Fifth Amendment. *Ibid.* In their complaint, respondents sought declaratory and injunctive relief from detention during their removal proceedings. *Id.*, at 31–32. The District Court certified a class of aliens under Federal Rule of Civil Procedure 23(b)(2) who, among other things, "are or were detained for longer than six months pursuant to one of the general immigration detention statutes." Class Certification Order in *Rodriguez* v. *Hayes*, No. CV 07–03239 (CD Cal., Apr. 5, 2010), p. 2; *Rodriguez* v. *Hayes*, 591 F. 3d 1105, 1122–1126 (CA9 2010). After the parties moved for summary judgment, the District Court entered a permanent injunction in favor of the class, which requires the named Government officials[1] to take steps to "timely identify all current and future class members," to update class member lists with the District Court every 90 days, and to provide class members with bond hearings that comply with particular substantive and procedural requirements. Order, Judgment, and Permanent Injunction in *Rodriguez* v. *Holder*, No. CV 07–03239 (CD Cal., Aug. 6, 2013), pp. 5–6 (Order, Judgment, and Permanent Injunction).

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II

A

Although neither party raises § 1252(b)(9), this Court has an "independent obligation" to assess whether it deprives us

[1] The named Government officials are the Attorney General of the United States, the Secretary of the Department of Homeland Security, the Director of the Executive Office for Immigration Review, the Director and Assistant Director of the Los Angeles District of Immigration and Customs Enforcement, and several directors of jails and detention facilities.

and the lower courts of jurisdiction. *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006). This Court has described § 1252(b)(9) as a "'zipper' clause." See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 483 (1999) (*AADC*); *INS* v. *St. Cyr*, 533 U. S. 289, 313 (2001). That description is apt because, when an alien raises a claim related to his removal, § 1252(b)(9) closes all but two avenues for judicial review:

> "**Consolidation of questions for judicial review**
>
> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [8 U. S. C. §§ 1151–1382] shall be available *only in judicial review of a final order under this section*. Except *as otherwise provided in this section*, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact." (Emphasis added.)

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The text of this provision is clear. Courts generally lack jurisdiction over "all questions of law and fact," both "constitutional" and "statutory," that "aris[e] from" an "action taken or proceeding brought to remove an alien." If an alien raises a claim arising from such an action or proceeding, courts cannot review it unless they are reviewing "a final order" under § 1252(a)(1) or exercising jurisdiction "otherwise provided" in § 1252.[2] Neither "habeas corpus" nor "any

[2] Section 1252 provides a few specific grants of jurisdiction beyond § 1252(a)(1)'s general grant of jurisdiction over final removal orders and all other related questions of law and fact. Section 1252(b)(7), for example, allows an alien to challenge the validity of his removal order during criminal proceedings if he is charged with willfully failing to depart the United States. And § 1252(e)(2) allows an alien who is denied admission to the

other provision of law" can be used to avoid § 1252(b)(9)'s jurisdictional bar. In short, if a claim arises from an action taken to remove an alien, § 1252(b)(9) permits judicial review in only two circumstances: in connection with review of a final removal order and via a specific grant of jurisdiction in § 1252.

Respondents do not argue that any specific grant of jurisdiction applies here, and they do not seek review of a final removal order under § 1252(a)(1). Thus, a court may review respondents' claims only if they can show that § 1252(b)(9)'s jurisdictional bar does not apply in the first place because their claims do not "aris[e] from any action taken or proceeding brought to remove an alien."

Respondents cannot make that showing. Section 1252(b)(9) is a "general jurisdictional limitation" that applies to "all claims arising from deportation proceedings" and the "many . . . decisions or actions that may be part of the deportation process." *AADC*, *supra*, at 482–483. Detaining an alien falls within this definition—indeed, this Court has described detention during removal proceedings as an "aspect of the deportation process." *Demore* v. *Kim*, 538 U. S. 510, 523 (2003); see also *Carlson* v. *Landon*, 342 U. S. 524, 538 (1952) ("Detention is necessarily a part of [the] deportation procedure"). As the Court explains today, Congress either mandates or permits the detention of aliens for the entire duration of their removal proceedings. See *ante*, at 296–306. This detention, the Court further explains, is meant to ensure that the Government can ultimately remove them. See *ante*, at 286; accord, *Demore*, *supra*, at 528 (explaining that detention during removal proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed"). The phrase "any ac-

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United States and ordered removed to raise certain claims in habeas corpus proceedings.

tion taken . . . to remove an alien from the United States" must at least cover congressionally authorized portions of the deportation process that necessarily serve the purpose of ensuring an alien's removal. Claims challenging detention during removal proceedings thus fall within the heartland of § 1252(b)(9).

B

The plurality, the dissent, and respondents each offer reasons why § 1252(b)(9) does not apply to this case. The plurality reasons that applying § 1252(b)(9) to detention claims requires an overly expansive reading of "arising from." See *ante*, at 293–294. The dissent contends that § 1252(b)(9) applies only to challenges to the removal order itself. *Post*, at 355 (opinion of BREYER, J.). And respondents argue that, if § 1252(b)(9) applies to their claims, they will have no meaningful way to challenge their detention during their removal proceedings.[3] Tr. of Oral Arg. 36. None of these arguments persuades me.

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1

The plurality asserts that § 1252(b)(9) covers respondents' claims only if the words "arising from" are given an "expansive interpretation." *Ante*, at 293. I am of a different view. Even if "arising from" is read narrowly, § 1252(b)(9) still covers the claims at issue in this case. That is because detention *is* an "action taken . . . to remove" an alien. And even the narrowest reading of "arising from" must cover claims that directly challenge such actions. See *AADC*, *supra*, at 482–483.

The main precedent that the plurality cites to support its narrow reading of "arising from" demonstrates that

[3] Respondents also asserted at oral argument that the Government "has said repeatedly" that § 1252(b)(9) does not apply to detention claims. Tr. of Oral Arg. 36. But our "independent obligation" to evaluate jurisdiction, *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006), means that we cannot accept the Government's concessions on this point. See *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887).

§ 1252(b)(9) applies here. See *ante*, at 294 (citing *AADC*, 525 U. S., at 482–483). In *AADC*, the Court explained that § 1252(b)(9) covers "all claims arising from deportation proceedings" and the "many . . . decisions or actions that may be part of the deportation process." *Ibid.* The Court even listed examples of the type of claims that would be covered, including challenges to the decision "to open an investigation" and the decision "to surveil the suspected [immigration-law] violator." *Id.*, at 482. If surveilling a suspected violator falls under the statute, then the detention of a known violator certainly does as well.

The plurality dismisses my "expansive interpretation" because it would lead to "staggering results," supposedly barring claims that are far afield from removal. See *ante*, at 293 (describing lawsuits challenging inhumane conditions of confinement, assaults, and negligent driving). But that is not the case. Unlike detention during removal proceedings, those actions are neither congressionally authorized nor meant to ensure that an alien can be removed. Thus, my conclusion that § 1252(b)(9) covers an alien's challenge to the *fact* of his detention (an action taken in pursuit of the lawful objective of removal) says nothing about whether it also covers claims about inhumane treatment, assaults, or negligently inflicted injuries suffered *during* detention (actions that go beyond the Government's lawful pursuit of its removal objective). Cf. *Bell* v. *Wolfish*, 441 U. S. 520, 536–539 (1979) (drawing a similar distinction).

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2

The dissent takes a different approach. Relying on the prefatory clause to § 1252(b), it asserts that § 1252(b)(9) "by its terms applies only '[w]ith respect to review of an order of removal under [§ 1252(a)(1)].'" *Post*, at 355 (quoting 8 U. S. C. § 1252(b)). The dissent reads the prefatory clause to mean that § 1252(b)(9) applies only to a "challenge [to] an order of removal." *Post*, at 355. That reading is incorrect.

Section 1252(b)(9) is not restricted to challenges to removal orders. The text refers to review of "*all* questions of law and fact" arising from removal, not just removal orders. (Emphasis added.) And it specifies that § 1252(a)(1) provides the only means for reviewing "such an order *or* such questions of law or fact." § 1252(b)(9). (emphasis added). The term "or" is "'almost always disjunctive, that is, the words it connects are to be given separate meanings.'" *Loughrin* v. *United States*, 573 U. S. 351, 357 (2014) (quoting *United States* v. *Woods*, 571 U. S. 31, 45–46 (2013); some internal quotation marks omitted). By interpreting § 1252(b)(9) as governing only removal orders, the dissent reads "or such questions of law or fact" out of the statute. It also renders superfluous § 1252(a)(5), which already specifies that the review made available under § 1252(a)(1) "shall be the sole and exclusive means for judicial review of *an order of removal*." (Emphasis added.) This Court typically disfavors such interpretations. See *AADC*, *supra*, at 483.

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The prefatory clause of § 1252(b) does not change the meaning of § 1252(b)(9). The prefatory clause states that the subparagraphs of § 1252(b), including § 1252(b)(9), impose requirements "[w]ith respect to review of an order of removal under subsection (a)(1)." The phrase "with respect to" means "referring to," "concerning," or "relat[ing] to." Oxford American Dictionary and Language Guide 853 (1999 ed.); accord, Webster's New Universal Unabridged Dictionary 1640 (2003 ed.); American Heritage Dictionary 1485 (4th ed. 2000). Read together, the prefatory clause and § 1252(b)(9) mean that review of all questions arising from removal must occur in connection with review of a final removal order under § 1252(a)(1), which makes sense given that § 1252(b)(9) is meant to "[c]onsolidat[e] . . . questions for judicial review." Tellingly, on the two previous occasions when this Court interpreted § 1252(b)(9), it did not understand § 1252(b)(9) as limited to challenges to removal orders. See *AADC*, *supra*, at 482–483 (stating that § 1252(b)(9) is a "gen-

eral jurisdictional limitation" that applies to "all claims arising from deportation proceedings" and the "many . . . decisions or actions that may be part of the deportation process"); *St. Cyr*, 533 U. S., at 313, n. 37 (clarifying that § 1252(b)(9) requires "claims that were viewed as being outside of a 'final order' " to be "consolidated in a petition for review and considered by the courts of appeals" in their review of the final removal order under § 1252(a)(1)). Thus, despite the dissent's assertion to the contrary, the prefatory clause plainly does not change the scope of § 1252(b)(9), which covers "all questions of law or fact" arising from the removal process.

3

At oral argument, respondents asserted that, if § 1252(b)(9) bars their lawsuit, then the only review available would be a "petition for review of [a] final removal order" under § 1252(a)(1), which takes place "after all the detention has already happened."[4] Tr. of Oral Arg. 36. I interpret respondents' argument as a claim that § 1252(b)(9) would be unconstitutional if it precluded meaningful review of their detention. This argument is unpersuasive and foreclosed by precedent.

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The Constitution does not guarantee litigants the most effective means of judicial review for every type of claim they want to raise. See *AADC*, 525 U. S., at 487–492 (rejecting a similar argument); *Heikkila* v. *Barber*, 345 U. S. 229, 237 (1953) (explaining that limitations on judicial review of deportation must be followed "despite [their] apparent inconvenience to the alien"). This is especially true in the con-

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[4] Contrary to respondents' argument, some of the respondents will get review before "all the detention has already happened." Respondents who successfully petition for review to the Court of Appeals from a final removal order and obtain a remand to the immigration court, like class representative Alejandro Rodriguez did here, will have an opportunity to obtain review of their detention before it is complete. See Third Amended Complaint, at 9–12.

text of deportation, where limits on the courts' jurisdiction have existed for almost as long as federal immigration laws, and where this Court has repeatedly affirmed the constitutionality of those limits.[5]

Indeed, this Court has already rejected essentially the same argument that respondents raise here. In *AADC*, the Court held that § 1252(g), a provision similar to § 1252(b)(9), barred the aliens' claim that the Government was violating the First Amendment by selectively enforcing the immigration laws against them. 525 U. S., at 487–492. The aliens argued that constitutional avoidance required the Court to interpret § 1252(g) as not applying to their claims because the only remaining avenue for review—a petition for review of a final removal order under § 1252(a)(1)—would be "unavailing" and would "come too late to prevent the 'chilling effect' upon their First Amendment rights." *Id.*, at 487–488. The Court rejected this argument because "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.*, at 488. The Court further explained that it had a duty to enforce Congress' limitations on judicial review, except perhaps in "a rare case in which the alleged basis of discrimi-

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[5] See, *e. g.*, Act of Aug. 18, 1894, 28 Stat. 390 ("In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Treasury"), upheld in *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547–550 (1895); Immigration Act of 1891, § 8, 26 Stat. 1085 ("All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of Treasury"), upheld in *Ekiu* v. *United States*, 142 U. S. 651, 660 (1892); 1917 Immigration Act, § 19, 39 Stat. 890 ("In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final"), upheld in *Heikkila* v. *Barber*, 345 U. S. 229, 233–235, 237 (1953).

nation is so outrageous that the foregoing considerations [justifying limited review could] be overcome." *Id.*, at 491.

Like in *AADC*, respondents' lack-of-meaningful-review argument does not allow us to ignore the jurisdictional limitations that Congress has imposed. This Court has never held that detention during removal proceedings is unconstitutional. To the contrary, this Court has repeatedly recognized the constitutionality of that practice. See *Demore*, 538 U. S., at 523 (explaining that detention is "a constitutionally valid aspect of the deportation process"); accord, *Reno* v. *Flores*, 507 U. S. 292, 305–306 (1993); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 215 (1953); *Carlson*, 342 U. S., at 538, 542. Nor does this lawsuit qualify as the "rare case in which the alleged [executive action] is so outrageous" that it could thwart the jurisdictional limitations in § 1252(b)(9). *AADC*, *supra*, at 491. The Government's detention of respondents is entirely routine and indistinguishable from the detention that we have repeatedly upheld in the past. Thus, regardless of the inconvenience that § 1252(b)(9) might pose for respondents, this Court must enforce it as written. Respondents must raise their claims in petitions for review of their final removal orders.[6]

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III

Because I conclude that § 1252(b)(9) bars jurisdiction to hear respondents' claims, I will also address whether its application to this case violates the Suspension Clause, see Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion

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[6] I take no position on whether some of the respondents will face other jurisdictional hurdles, even on review of their final removal orders. See, *e. g.*, §§ 1252(a)(2)(A), (B). I also continue to agree with Justice O'Connor's concurring opinion in *Demore* v. *Kim*, 538 U. S. 510 (2003), which explained that § 1226(e) "unequivocally deprives federal courts of jurisdiction to set aside 'any action or decision' by the Attorney General" regarding detention. *Id.*, at 533 (opinion concurring in part and concurring in judgment).

or Invasion the public Safety may require it"). It does not. Even assuming the Suspension Clause bars Congress from stripping habeas jurisdiction over respondents' claims, but see *St. Cyr*, 533 U. S., at 337–346 (Scalia, J., dissenting), this case does not involve a habeas petition.

Respondents do not seek habeas relief, as understood by our precedents. Although their complaint references the general habeas statute, see Third Amended Complaint, at 1, it is not a habeas petition. The complaint does not request that the District Court issue any writ. See *id.*, at 31–32. Rather, it seeks a declaration and an injunction that would provide relief for both present and future class members, including future class members not yet detained. *Ibid.* Indeed, respondents obtained class certification under Federal Rule of Civil Procedure 23(b)(2), which applies only when the class seeks "final injunctive relief or corresponding declaratory relief."[7]

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Nor did respondents obtain habeas relief. When their case concluded, respondents obtained a classwide permanent injunction. See Order, Judgment, and Permanent Injunction, at 5–6. That classwide injunction looks nothing like a typical writ. It is not styled in the form of a conditional or unconditional release order. Cf. *United States* v. *Jung Ah Lung*, 124 U. S. 621, 622 (1888) (describing habeas relief as "order[ing] the discharge from custody of the person in whose behalf the writ was sued out"); *Chin Yow* v. *United States*, 208 U. S. 8, 13 (1908) (awarding habeas relief by ordering the release of the alien if certain conditions were not satisfied). It applies to future class members, including individuals who were not in custody when the injunction was issued. Cf. 28 U. S. C. § 2241(c) (generally precluding issuance of the writ unless the petitioner is "in custody"). And

[7] This Court has never addressed whether habeas relief can be pursued in a class action. See *Schall* v. *Martin*, 467 U. S. 253, 261, n. 10 (1984) (reserving this question). I take no position on that issue here, since I conclude that respondents are not seeking habeas relief in the first place.

it is directed to at least one individual, the Director for the Executive Office for Immigration Review, who is not a custodian. Cf. *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434 (2004) (explaining that "the proper respondent to a habeas petition is 'the person who has custody over [the petitioner]'" (quoting 28 U. S. C. § 2242)).

Immigration law has long drawn a distinction between the declaratory and injunctive relief that respondents sought here and habeas relief. In *Heikkila*, for instance, this Court distinguished habeas relief from "injunctions, declaratory judgments and other types of relief" that "courts ha[d] consistently rejected" in immigration cases. 345 U. S., at 230. The Court rejected the alien's request for "injunctive and declaratory relief" because Congress had authorized courts to grant relief only in habeas proceedings. *Id.*, at 230, 237. We reaffirmed this distinction in *St. Cyr*, where we noted that the 1961 Immigration and Nationality Act, 75 Stat. 650, withdrew the district courts' "authority to grant declaratory and injunctive relief," but not habeas relief. 533 U. S., at 309–310; see also *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 49, 52–53 (1955) (holding that the Administrative Procedure Act, which authorizes courts to grant declaratory and injunctive relief, authorized "judicial review of deportation orders *other than by habeas corpus*" (emphasis added)). And Congress has confirmed this distinction in its immigration statutes by allowing one form of relief, but not the other, in particular circumstances. Compare, *e. g.*, § 1252(e)(1) (prohibiting courts from granting "declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)") with § 1252(e)(2) (allowing "[j]udicial review . . . in habeas corpus proceedings" of particular "determination[s] made under section 1225(b)(1)").

Respondents' suit for declaratory and injunctive relief, in sum, is not a habeas petition. The Suspension Clause protects "[t]he Privilege of the Writ of Habeas Corpus," not re-

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quests for injunctive relief. Because respondents have not sought a writ of habeas corpus, applying § 1252(b)(9) to bar their suit does not implicate the Suspension Clause.

* * *

Because § 1252(b)(9) deprives courts of jurisdiction over respondents' claims, we should have vacated the judgment below and remanded with instructions to dismiss this case for lack of jurisdiction. But a majority of the Court has decided to exercise jurisdiction. Because I agree with the Court's disposition of the merits, I concur in Part I and Parts III–VI of its opinion.

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

This case focuses upon three groups of noncitizens held in confinement. Each of these individuals believes he or she has the right to enter or to remain within the United States. The question is whether several statutory provisions of the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.*, forbid granting them bail.

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The noncitizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission, see *infra*, at 344, 349–350, 353. The Government has held all the members of the groups before us in confinement for many months, sometimes for years, while it looks into or contests their claims. But ultimately many members of these groups win their claims and the Government allows them to enter or to remain in the United States. Does the statute require members of these groups to receive a bail hearing, after, say, six months of confinement, with the possibility of release on bail into the community *provided* that they do not pose a risk of flight or a threat to the community's safety?

The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view,

the majority's interpretation of the statute would likely render the statute unconstitutional. Thus, I would follow this Court's longstanding practice of construing a statute "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). And I would interpret the statute as requiring bail hearings, presumptively after six months of confinement. Cf. *Zadvydas* v. *Davis*, 533 U. S. 678, 701 (2001).

I

The Respondents

Because of their importance to my conclusion, I shall repeat, with references to record support, the key characteristics of the groups of noncitizens who appear before us.

First, as I have said, the respondents in this case are members of three special classes of noncitizens, the most important of whom (1) arrive at our borders seeking asylum or (2) have committed crimes but have finished serving their sentences of imprisonment. We also consider those who (3) arrive at our borders believing they are entitled to enter the United States for reasons other than asylum seeking, but lack a clear entitlement to enter.

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Second, *all* members of the first group, the asylum seekers, have been found (by an immigration official) to have a "credible fear of persecution" in their home country should the United States deny them admittance. 8 U. S. C. § 1225(b)(1)(B)(ii). *All* members of the second group have, as I have said, finished serving their criminal sentences of confinement. § 1226(c)(1). *All* members of the third group may have (or may simply believe they have) a strong claim for admittance, but they are neither "clearly and beyond a doubt entitled to be admitted" nor conclusively determined to be inadmissible by an immigration officer on grounds of fraud or lack of required documentation. § 1225(b)(2)(A); see §§ 1225(b)(1)(A)(i), 1182(a)(6)(C), (a)(7).

Third, members of the first two classes number in the thousands. See Brief for 43 Social Science Researchers and

Professors as *Amici Curiae* 6, 8 (identifying, in 2015, 7,500 asylum seekers and 12,220 noncitizens who have finished serving sentences of criminal confinement, a portion of whom are class members detained for more than six months).

Fourth, detention is often lengthy. The classes before us consist of people who were detained for at least six months and on average one year. App. 92, 97. The record shows that the Government detained some asylum seekers for 831 days (nearly 2½ years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before they won their cases and received asylum. *Id.*, at 97, 228–236. It also shows that the Government detained one noncitizen for nearly four years *after* he had finished serving a criminal sentence, and the Government detained other members of this class for 608 days, 561 days, 446 days, 438 days, 387 days, and 305 days—all before they won their cases and received relief from removal. *Id.*, at 92, 213–220.

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Fifth, many of those whom the Government detains eventually obtain the relief they seek. Two-thirds of the asylum seekers eventually receive asylum. *Id.*, at 98 (Table 28); *id.*, at 135 (Table 38); App. to Pet. for Cert. 40a. Nearly 40% of those who have served criminal sentences receive relief from removal, because, for example, their earlier conviction involved only a short sentence. See App. 95 (Table 23); *id.*, at 135 (Table 38). See also App. to Pet. for Cert. 34a; App. 210, 216–217, 312–313 (between one-half and two-thirds of the class served sentences less than six months, *e. g.*, a 2-month sentence for being under the influence of a controlled substance, or an 8-day jail term for a minor firearms offense).

Sixth, these very asylum seekers would have received bail hearings had they first been taken into custody within the United States rather than at the border. See *In re X-K-*, 23 I. & N. Dec. 731, 734–735 (BIA 2005); 8 U. S. C. § 1226(a).

Seventh, as for those who have finished serving their sentences (for crimes), some of those who are less dangerous would (on the majority's view) be held without bail the long-

est, because their claims will take longer to adjudicate. Moreover, those noncitizens would have no opportunity to obtain bail *while they pursue their claims*, but if they *lose* their claims, the Government must release them, typically within six months, if the Government can find no other country willing to take them. See *Zadvydas*, *supra*, at 701.

Eighth, all the respondents are held in detention within the geographical boundaries of the United States, either in facilities controlled by United States Immigration and Customs Enforcement (ICE) or in state or local jails that hold them on ICE's behalf. App. 302–304; see ICE, Detention Facility Locator, online at http://www.ice.gov/detention-facilities (all Internet materials as last visited Feb. 21, 2018).

Ninth, the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails. And in some cases the conditions of their confinement are inappropriately poor. See Dept. of Homeland Security (DHS), Office of Inspector General (OIG), DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities (2017) (reporting instances of invasive procedures, substandard care, and mistreatment, *e. g.*, indiscriminate strip searches, long waits for medical care and hygiene products, and, in the case of one detainee, a multiday lock down for sharing a cup of coffee with another detainee).

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These record-based facts make evident what I said at the outset: The case concerns persons whom immigration authorities believe are not citizens and may not have a right to enter into, or remain within, the United States. Nonetheless they likely have a reasonable claim that they do have such a right. The Government detains them, often for many months while it determines the merits of, or contests, their claims. To repeat the question before us: Does the statute entitle an individual member of one of these classes to obtain, say, after six months of detention, a bail hearing to decide whether he or she poses a risk of flight or danger to the community and, if not, to receive bail?

II

The Constitutional Question

The majority reads the relevant statute as prohibiting bail and hence prohibiting a bail hearing. In my view, the relevant constitutional language, purposes, history, tradition, and case law all make clear that the majority's interpretation at the very least would raise "grave doubts" about the statute's constitutionality. See *Jin Fuey Moy*, 241 U. S., at 401.

A

Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." An alien is a "person." See *Wong Wing* v. *United States*, 163 U. S. 228, 237–238 (1896). To hold him without bail is to deprive him of bodily "liberty." See *United States* v. *Salerno*, 481 U. S. 739, 748–751 (1987). And, where there is no bail proceeding, there has been no bail-related "process" at all. The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992); see also *Demore* v. *Kim*, 538 U. S. 510, 532 (2003) (KENNEDY, J., concurring); *Zadvydas*, 533 U. S., at 718 (KENNEDY, J., dissenting).

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The Due Process Clause foresees eligibility for bail as part of "due process." See *Salerno*, *supra*, at 748–751; *Schilb* v. *Kuebel*, 404 U. S. 357, 365 (1971); *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951). Bail is "basic to our system of law." *Schilb*, *supra*, at 365. It not only "permits the unhampered preparation of a defense," but also "prevent[s] the infliction of punishment prior to conviction." *Stack*, *supra*, at 4. It consequently limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect

the public, see *Salerno*, *supra*, at 750–751, or to assure his appearance at, say, a trial or the equivalent, see *Stack*, *supra*, at 4–5. Why would this constitutional language and its bail-related purposes not apply to members of the classes of detained persons at issue here?

The Eighth Amendment reinforces the view that the Fifth Amendment's Due Process Clause does apply. The Eighth Amendment forbids "[e]xcessive bail." It does so in order to prevent bail being set so high that the level itself (rather than the reasons that might properly forbid release on bail) prevents provisional release. See *Carlson* v. *Landon*, 342 U. S. 524, 545 (1952) (explaining that the English clause from which the Eighth Amendment was copied was understood "to provide that bail shall not be excessive in those cases where it is proper to grant bail"). That rationale applies *a fortiori* to a refusal to hold any bail hearing at all. Thus, it is not surprising that this Court has held that both the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause apply in cases challenging bail procedures. See, *e. g.*, *Salerno*, *supra*, at 746–755; *Carlson*, *supra*, at 537–546.

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It is clear that the Fifth Amendment's protections extend to "all persons within the territory of the United States." *Wong Wing*, *supra*, at 238. But the Government suggests that those protections do not apply to asylum seekers or other arriving aliens because the law treats arriving aliens as if they had never entered the United States; hence they are not held within its territory.

This last-mentioned statement is, of course, false. All of these noncitizens are held within the territory of the United States at an immigration detention facility. Those who enter at JFK airport are held in immigration detention facilities in, *e. g.*, New York; those who arrive in El Paso are held in, *e. g.*, Texas. At most one might say that they are "constructively" held outside the United States: the word "constructive" signaling that we indulge in a "legal fiction," shut-

ting our eyes to the truth. But once we admit to uttering a legal fiction, we highlight, we do not answer, the relevant question: *Why* should we engage in this legal fiction here?

The legal answer to this question is clear. We cannot here engage in this legal fiction. No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? If not, then, whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention. And the reason that is so is simple: Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries. See *Zadvydas*, *supra*, at 720–721 (KENNEDY, J., dissenting) ("inadmissible aliens" who are "stopped at the border" are "entitled to be free from detention that is arbitrary or capricious").

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B

The Due Process Clause, among other things, protects "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors," and which were brought by them to this country. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). A brief look at Blackstone makes clear that at the time of the American Revolution the right to bail was "settled"—in both civil and criminal cases.

Blackstone tells us that every prisoner (except for a convict serving his sentence) was entitled to seek release on bail. 4 Commentaries on the Laws of England 296–297 (1769). This right applied in every criminal case. *Ibid.* A noncapital defendant could seek bail from a local magistrate;

a capital defendant could seek bail at a hearing before the Court of King's Bench. See *ibid.* Although a capital defendant had no right to *obtain* bail, he could always *seek* it, because "the court of king's bench . . . may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case." *Id.*, at 296. And although King Charles I initially claimed the right to hold a prisoner without bail on secret national security grounds, see *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627), Parliament responded by extracting from the King (via the 1628 Petition of Right) a promise to cease such detention, see 2 W. Hawkins, A Treatise of the Pleas of the Crown 107–110 (4th ed. 1771). From then on, bail was available even when a prisoner was held on the personal command of the King. *Ibid.* That is why Blackstone says that the King's Bench or its judges "may bail in any Case whatsoever," 4 Analysis of the Laws of England 148 (6th ed. 1771), indeed, in civil cases too, for in Blackstone's time some private civil cases might have begun with an arrest, see 3 Blackstone, Commentaries 290 (1768). And bail was likewise an alternative to detention where a judgment debtor was unable to pay a civil judgment in the era of debtor's prison. See, *e. g.*, *Beers* v. *Haughton*, 9 Pet. 329, 356 (1835) (explaining that under Ohio law, "'if a defendant, upon a [writ of] capias, does not give sufficient appearance bail, he shall be committed to prison'"); *Hamilton* v. *Dunklee*, 1 N. H. 172 (1818).

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American history makes clear that the settlers brought this practice with them to America. The Judiciary Act of 1789 conferred rights to bail proceedings in all federal criminal cases. § 33, 1 Stat. 91. It said that for a noncapital defendant "bail shall be admitted" and for a capital defendant bail may be admitted in the discretion of a district judge, a circuit judge, or a Justice of the Supreme Court, taking account of "the offence, and of the evidence, and the usages of law." *Ibid.* Congress enacted this law during its debate over the Bill of Rights, which it subsequently sent to the

States for ratification. See 1 Annals of Cong. 90 (1789); see also *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351 (1816) (Members of the First Congress were "men of great learning and ability, . . . who had acted a principal part in framing, supporting, or opposing" the Constitution itself). Colonial law had been similarly, or in some instances even more, protective. See Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959, 974–977 (1965).

Similar laws have consistently remained part of our legal tradition. In all federal criminal cases federal Acts have provided for bail proceedings. Bail Reform Act of 1984, 18 U. S. C. § 3141 *et seq.*; Bail Reform Act of 1966, 18 U. S. C. § 3146 *et seq.* (1964 ed., Supp. II). Every State has similar or more generous laws. See Appendix B, *infra*.

Standards for granting bail have changed somewhat over time. Initially the sole factor determining the outcome of a bail proceeding was risk of flight. See *Stack*, 342 U. S., at 4–5 (interpreting the 1789 bail law, applied to a noncapital defendant and in light of the Eighth Amendment, to require bail no higher than required to provide "adequate assurance" that the defendant "will stand trial and submit to sentence if found guilty," "based upon standards relevant to the purpose of assuring the presence of that defendant").

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Congress gradually added community safety as a bail factor. In 1966, Congress provided that for capital defendants and convicted defendants pursuing appeals, bail would be granted unless the appeal was frivolous or a court had "reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community." Bail Reform Act, 18 U. S. C. § 3148. In 1984, Congress modified the bail standard for noncapital defendants by adding concern for community safety. § 3142(e)(1). This Court, applying the Due Process Clause and the Excessive Bail Clause to these changes, found that the 1984 Act passed constitutional muster. See *Salerno*, 481 U. S., at 746–755. Again, the States

typically apply roughly similar or more generous standards. See Appendix B, *infra*.

The cases before us, however, are not criminal cases. Does that fact make a difference? The problem is that there are not many instances of civil confinement (aside from immigration detention, which I address below). Mental illness does sometimes provide an example. Individuals dangerous to themselves or to others may be confined involuntarily to a mental hospital. See, *e. g.*, *United States* v. *Comstock*, 560 U. S. 126 (2010); *Kansas* v. *Hendricks*, 521 U. S. 346 (1997). Those persons normally do not have what we would call "a right to a bail hearing." But they do possess equivalent rights: They have the right to a hearing prior to confinement and the right to review of the circumstances at least annually. See *Comstock*, *supra*, at 130–131 (initial hearing followed by review every six months); *Hendricks*, *supra*, at 353 (initial hearing followed by yearly review). And the mentally ill persons detained under these schemes are being detained *because* they are dangerous. That being so, there would be no point in providing a bail hearing as well. See *Salerno*, *supra*, at 748–749 (analogizing denial of bail to dangerous individuals to the civil commitment of the mentally ill). But there is every reason for providing a bail proceeding to the noncitizens at issue here, because they have received no individualized determination that they pose a risk of flight or present a danger to others, nor is there any evidence that most or all of them do.

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This Court has also protected the right to a bail hearing during extradition proceedings. *Wright* v. *Henkel*, 190 U. S. 40 (1903), concerned the arrest and confinement of Whitaker Wright, an American citizen, pending extradition for a crime that Wright was accused of having committed in Great Britain. Wright sought bail. *Id.*, at 43. Since the federal bail laws applied only to those charged with committing crimes against the United States, they did not cover Wright's confinement. *Id.*, at 61–62. The relevant extradition statute

said nothing about bail. *Id.*, at 62. Its language (stronger than the language at issue here) said that the individual was "to remain" in "the proper jail" until the "surrender shall be made" to the nation seeking extradition; and it added that he was "to remain" in custody "until delivered up"—though after two months he could seek release. Rev. Stat. §§ 5270, 5273.

In an opinion by Chief Justice Fuller, this Court unanimously wrote that, despite the lack of express statutory authorization and the risk of "embarrassment" to the United States if Wright fled, Wright could seek release on bail prior to the expiration of the 2-month period. *Wright*, 190 U. S., at 62–63. Given the universal entitlement to bail under English law, the Court was "unwilling to hold that . . . courts may not in any case, and whatever the special circumstances, extend that relief" to prisoners awaiting extradition. *Id.*, at 63. It consequently read a *silent* statute as authorizing bail proceedings (though the Court went on to hold that, under applicable standards, Wright's request for bail should be denied). *Ibid.*

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The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes.

Which class of persons—criminal defendants or asylum seekers—seems more likely to have acted in a manner that typically warrants confinement? A person charged with a crime cannot be confined at all without a finding of probable cause that he or she committed the crime. And the majority of criminal defendants lose their cases. See Dept. of Justice, Bureau of Justice Statistics, B. Reaves, Felony Defendants

in Large Urban Counties, 2009–Statistical Tables, p. 24 (Dec. 2013) (reporting that 66% of felony defendants were convicted). A high percentage of the noncitizens before us, however, ultimately win the right they seek, the right to be in the United States.

Nor am I aware of any evidence indicating that the noncitizens seeking to enter, or to remain within, the United States are more likely than criminal defendants to threaten the safety of the community if released. In any event, this is a matter to be determined, case by case, at bail hearings.

Which group is more likely to present a risk of flight? Again, I can find no evidence suggesting that asylum seekers or other noncitizens generally present a greater risk of flight than persons imprisoned for trial where there is probable cause to believe that the confined person has committed a crime. In any event, this matter too is to be determined, case by case, at bail hearings.

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If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes, 18 U. S. C. § 3142; worse than convicted criminals appealing their convictions, § 3143(b); worse than civilly committed citizens, *supra*, at 335; worse than identical noncitizens found elsewhere within the United States, *supra*, at 328; and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them), *supra*, at 328–329, their detention without bail is arbitrary. Thus, the constitutional language, purposes, and tradition that require bail in instances of criminal confinement also very likely require bail in these instances of civil confinement. That perhaps is why Blackstone wrote that the law provides for the possibility of "bail in any case whatsoever." 4 Analysis of the Laws of England, at 148.

C

My examination of the cases from this Court that considered detention of noncitizens and bail suggests that this

Court, while sometimes denying bail to individuals, generally has not held that bail proceedings are unnecessary. Indeed, it almost always has suggested the contrary.

1. In 1882, Congress enacted two laws that restricted immigration: The first prohibited the entry of "Chinese laborers." The Chinese Exclusion Act, ch. 126, 22 Stat. 58. The second prohibited the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882, 22 Stat. 214. Neither said a word about bail. But in one instance, an excluded Chinese woman was detained in jail in San Francisco pending her return to China. She sought bail. *In re Ah Moy*, 21 F. 808 (CC Cal. 1884). Justice Field, sitting as a Circuit Judge, wrote that the court lacked the authority to order bail because doing so would allow her to enter the United States—just what the statute forbade. *Id.*, at 809. The other sitting Circuit Judge (Judge Sawyer) disagreed. *Id.*, at 810 (dissenting opinion). He pointed out that the alien would remain "in the custody and control of the law while lawfully on bail." *Ibid.* He added that it "would be a great hardship, not to say a gross violation of her personal rights," to refuse bail for 15 days before her ship arrived as long as she could provide "security satisfactory to the court" that she would indeed depart when it did. *Id.*, at 809–810. Two other Circuit Judges noted their agreement with Judge Sawyer. *Id.*, at 809, n. 1. But they did not participate in the case, *ibid.*, the two participating judges split 1 to 1, and so the views of presiding Justice Field prevailed. The alien appealed to this Court, *Cheong Ah Moy* v. *United States*, 113 U. S. 216 (1885), but before this Court could decide, the ship departed with Cheong Ah Moy aboard.

2. In *Wong Wing* v. *United States*, 163 U. S. 228 (1896), the Court struck down as unconstitutional a statute that said alien Chinese laborers should be "'imprisoned at hard labor'" for up to a year before being deported. *Id.*, at 235.

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In doing so, the Court wrote that although a sentence to hard labor was unlawful, "detention, or temporary confinement," was constitutional, because "[d]etention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused." *Ibid.* But an analogy to criminal detention is an analogy to instances in which bail hearings are required.

3. In *Tod* v. *Waldman*, 266 U. S. 113 (1924), the Waldman family, like many of the respondents here, challenged their exclusion. They had arrived at Ellis Island fleeing religious persecution in Ukraine. They were detained because the immigration inspector believed the mother illiterate, one of the daughters disabled, and the whole family likely to become public charges. They appealed to the Labor Department, which ordered Mrs. Waldman retested for literacy, requiring her to read both Yiddish and Hebrew. She could not. She then petitioned for a writ of habeas corpus on the grounds that (1) as a religious refugee she was exempt from the literacy requirement; (2) in any event, she need read only one language, not two; (3) her daughter was not disabled; and (4) the Department of Labor should have allowed her to appeal administratively. *Id.*, at 114–115.

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The relevant statutory provisions, just like the present statute, see *infra*, at 344, 353, said that an arriving person, unless "clearly and beyond a doubt entitled to land *shall be detained* for examination . . . by a board of special inquiry." Act of Feb. 5, 1917, § 16, 39 Stat. 886 (emphasis added). By the time the case reached this Court, however, the family had been allowed bail. See *Waldman*, 266 U. S., at 117. This Court ordered the Department of Labor to provide the family with an administrative appeal. Then, after initially "remand[ing] the petitioners to the custody of immigration authorities" pending the outcome of the appeal, *id.*, at 120, the Court clarified in a rehearing order that "[n]othing in the order of this Court shall prejudice an application for release on bail of the respondents pending compliance with the man-

date of this Court." *Tod* v. *Waldman*, 266 U. S. 547, 548 (1925). This statement is inconsistent with the earlier opinion of Justice Field, sitting as a Circuit Judge, because it shows that even an alien challenging her exclusion could be released on bail. *Supra*, at 338.

4. In *Carlson* v. *Landon*, 342 U. S. 524 (1952), this Court upheld the denial of bail to noncitizen Communists being held pending deportation, despite a statute that permitted bail proceedings. *Id.*, at 541–546. It did so because it considered the individuals to be a risk to security. It said nothing to suggest that bail proceedings were unnecessary.

5. In *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), the Attorney General had ordered a noncitizen permanently excluded from the United States on the ground that his "entry would be prejudicial to the public interest for security reasons." *Id.*, at 208; see Subversive Activities Control Act of 1950, §§ 22–23, 64 Stat. 1006–1012. He "sat on Ellis Island because this country shut him out and others were unwilling to take him in." 345 U. S., at 209. After 21 months in confinement he filed a petition for a writ of habeas corpus seeking judicial review of the exclusion decision or release on bail until he could be removed to another country. *Id.*, at 207, 209. This Court refused to review the exclusion decision on the ground that the security matter fell totally within the President's authority, pursuant to an express congressional delegation of power. *Id.*, at 210. The Court also denied Mezei a bail proceeding because in an "exclusion proceeding grounded on danger to the national security . . . neither the rationale nor the statutory authority for" release on bail exists. *Id.*, at 216. It denied bail, however, *after* the Attorney General had already found, on an individualized basis, not only that Mezei was a security risk and consequently not entitled to either admission or bail but also that he could be denied a hearing on the matter because the basis for that decision could not be disclosed without harm to na-

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tional security. *Id.*, at 208–209. The respondents in this case have been the subject of no such individualized findings. And unlike Mezei, who was requesting bail after his exclusion proceedings had ended (while the Attorney General searched for a country that would take him—a matter that we again confronted in *Zadvydas*), the respondents here continue to litigate the lawfulness of their exclusion itself. Thus, Mezei, but not the respondents here, was in a sense in the position of a convicted criminal who had lost his appeal, not a criminal awaiting trial (or the results of an appeal).

6. *Zadvydas* v. *Davis*, 533 U. S. 678 (2001), concerned a noncitizen who had lawfully resided in this country, committed a serious crime, completed his prison sentence, and was then ordered deported. *Id.*, at 684. Zadvydas sought release on bail during the time the Government searched for a country that would take him. *Id.*, at 684–685. The governing statute said an alien such as Zadvydas "may be detained" pending his removal to another country. 8 U. S. C. § 1231(a)(6). We interpreted those words as requiring release from detention once it became clear that there was "no significant likelihood of removal in the reasonably foreseeable future"—presumptively after a period of confinement of six months. 533 U. S., at 701. We read the statute as requiring this release because a "statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.*, at 690.

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From a constitutional perspective, this case follows *a fortiori* from *Zadvydas*. Here only a bail hearing is at issue, not release on bail, much less permanent release. And here there has been no final determination that any of the respondents lacks a legal right to stay in the United States—the bail hearing at issue concerns conditional release pending that final determination. It is immaterial that detention here is not literally indefinite, because while the respondents' removal proceedings must end eventually, they last an in-

determinate period of at least six months and a year on average, thereby implicating the same constitutional right against prolonged arbitrary detention that we recognized in *Zadvydas*.

7. In *Demore* v. *Kim*, 538 U. S. 510 (2003), we held that the Government could constitutionally hold without bail noncitizens who had committed certain crimes, had completed their sentences, and were in removal proceedings. See § 1226(c). But we based our holding on the short-term nature of the confinement necessary to complete proceedings. See *id.*, at 529–530. The Court wrote that the "detention at stake . . . lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id.*, at 530. We added:

> "[I]n 85% of the cases in which aliens are detained [pursuant to the relevant statute], removal proceedings are completed in an average time of 47 days and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the immigration judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter." *Id.*, at 529 (citation omitted).

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Demore himself, an outlier, was detained for six months. *Id.*, at 530–531.

The Court then found detention constitutional "during the limited period" necessary to arrange for removal, and we contrasted that period of detention with the detention at issue in *Zadvydas*, referring to the detention in *Demore* as being "of a much shorter duration." 538 U. S., at 526, 528. JUSTICE KENNEDY stated in a concurrence that the Due Process Clause might require bail hearings "if the continued detention became unreasonable or unjustified." *Id.*, at 532. Dissenting, I wrote that, had I believed that Demore "had conceded that he [was] deportable," then, despite *Zadvydas*,

"I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order." 538 U. S., at 576 (opinion concurring in part and dissenting in part).

The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did. And, as I have pointed out, thousands of people here are held for considerably longer than six months without an opportunity to seek bail. See *supra*, at 327–328. We deal here with prolonged detention, not the short-term detention at issue in *Demore*. Hence *Demore*, itself a deviation from the history and tradition of bail and alien detention, cannot help the Government.

The upshot is the following: The Constitution's language, its basic purposes, the relevant history, our tradition, and many of the relevant cases point in the same interpretive direction. They tell us that an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution. The interpretive principle that flows from this conclusion is clear and longstanding: " '[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.' " *Rust* v. *Sullivan*, 500 U. S. 173, 190 (1991) (quoting *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (opinion of Holmes, J.)). Moreover, a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Jin Fuey Moy*, 241 U. S., at 401. These legal principles reflect a realistic assumption, namely, that Congress—particularly a Congress that did not consider a constitutional matter—would normally have preferred a constitutional interpretation to an interpretation that may render a statute an unconstitutional nullity. And that is so even where the constitutional interpretation departs from the most natural reading of the statute's lan-

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guage. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); see also *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 563, 574–576 (2012) (majority opinion and opinion of ROBERTS, C. J.).

III

The Statutory Provisions

The question remains whether it is possible to read the statute as authorizing bail. As desirable as a constitutional interpretation of a statute may be, we cannot read it to say the opposite of what its language states. The word "animal" does not include minerals, no matter how strongly one might wish that it did. Indeed, where "'Congress has made its intent' in the statute 'clear, "we must give effect to that intent,"'" even if doing so requires us to consider the constitutional question, and even if doing so means that we hold the statute unconstitutional. *Zadvydas*, 533 U. S., at 696 (quoting *Miller* v. *French*, 530 U. S. 327, 336 (2000)). In my view, however, we can, and should, read the relevant statutory provisions to require bail proceedings in instances of prolonged detention without doing violence to the statutory language or to the provisions' basic purposes.

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A

Asylum Seekers

The relevant provision governing the first class of noncitizens, the asylum seekers, is § 1225(b)(1)(B)(ii). It says that, if an immigration "officer determines at the time" of an initial interview with an alien seeking to enter the United States "that [the] alien has a credible fear of persecution . . . , the alien *shall be detained* for further consideration of the application for asylum." See Appendix A–1, *infra*. I have emphasized the three key words, namely, "shall be detained." Do those words mean that the asylum seeker *must be detained without bail*?

They do not. *First*, in ordinary English and in light of the history of bail, the word "detain" is ambiguous in respect to the relevant point. The Oxford English Dictionary (OED), surveying the history of the word, notes that Edward Hall, a famous 16th-century legal scholar and author of Hall's Chronicle, wrote: "A traytor . . . is apprehended and deteigned in prisone for his offence," a use of the word, as we know from Blackstone, that is consistent with bail. See *supra*, at 332–333; OED (3d ed., Dec. 2012), http://www.oed.com/view/Entry/51176 (annot. to def. 1). David Hume, the famous 18th-century historian and philosopher, writes of being "detained in strict confinement," thereby implying the existence of detention without strict confinement. *Ibid.* A 19th-century novelist writes, " 'Beg your pardon, sir,' said the constable, . . . 'I shall be obliged to detain you till this business is settled' "—again a use of "detain" that we know (from Blackstone) is consistent with bail. *Ibid.* And the OED concludes that the primary meaning of "detain" is "[t]o keep in confinement *or under restraint*; to keep prisoner." *Ibid.* (emphasis added). To grant bail, we know, is not to grant unrestrained freedom. Rather, where the Act elsewhere expressly permits bail, it requires "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General." 8 U. S. C. § 1226(a)(2)(A). Similarly in the criminal context, bail imposes numerous restraints, ranging from the provision of a bond, to restrictions on residences and travel, to the imposition of a curfew, to a requirement to obtain medical treatment, to report at regular intervals, or even to return to custody at specified hours. See 18 U. S. C. § 3142(c)(1)(B) (listing possible conditions for the pretrial release of federal criminal defendants).

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At the very least, because the word "detain" in this context refers to a comparatively long period of time, it can readily coexist with a word such as "bail" that refers to a shorter period of conditional release. For instance, there is

nothing inconsistent in saying: During his exile, he was permitted to pay short visits to his home country; during the period of active hostilities, the soldiers would lay down their arms and fraternize on Christmas Day; during his overseas detention, he was allowed home to see his sick mother; or during his detention pending proceedings, he was permitted bail.

Second, our precedent treats the statutory word "detain" as consistent with bail. In *Waldman*, 266 U. S. 547, we considered an immigration statute that stated (in respect to *arriving* aliens) that "[e]very alien who may not appear to the examining inspector at the port of arrival to be clearly and beyond a doubt entitled to land *shall be detained* for examination in relation thereto by a board of special inquiry." Act of Feb. 5, 1917, § 16, 39 Stat. 886 (emphasis added). The Court indicated that bail was available, stating that "[n]othing in the order of this court shall prejudice an application for release on bail." 266 U. S., at 548. In so stating, the Court was simply following precedent, such as *Wright* v. *Henkel*, where the Court wrote that bail is available even where not "specifically vested by statute." 190 U. S., at 63; see *supra*, at 335–336. When Congress passed the relevant provisions of the Act in 1996, it legislated against this historical backdrop, at a time when the precise language that it adopted had been interpreted by this Court to permit bail. See *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 338 (1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation]'" (quoting *Cannon* v. *University of Chicago*, 441 U. S. 677, 703 (1979))).

Third, the Board of Immigration Appeals reads the word "detain" as consistent with bail, for it has held that its regulations, implementing the same statutory provision as is before us, allow bail for asylum seekers who are apprehended inside the United States within 100 miles of the border,

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rather than at a border crossing. See *In re X-K-*, 23 I. & N. Dec., at 732, 734–735 (discussing 8 CFR § 1003.19(h)(2)(i) (2004)). The same statute, same language applies to the detention of those asylum seekers and the ones before us, so the statute must be consistent with bail in the Board of Immigration Appeals' view.

Fourth, in *Zadvydas* we found (to avoid similar constitutional questions) that the words "'may be detained'" were consistent with requiring release from long-term detention. 533 U. S., at 682 (quoting 8 U. S. C. § 1231(a)(6)). The majority correctly notes that here the language substitutes the word "shall" for the word "may." *Ante*, at 298–300. But the majority is wrong to distinguish *Zadvydas* on this basis. There the Court did not emphasize the word "detain," for the question at issue was release from detention. And the key word was consequently "may," suggesting discretion. Here the question concerns the right to a bail hearing during detention. And the key linguistic ambiguity concerns the word "detention." Is that word consistent with bail proceedings? The answer, for the reasons I have stated, is "yes."

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Fifth, the statute does not even mention long-term detention without bail. Whether the statute speaks in terms of discretion ("may," as in *Zadvydas*) or mandatory action ("shall," as in this case), the Government's argument is wrong for the same reason: Congress does not unambiguously authorize long-term detention without bail by failing to say when detention must end. As we recognized in *Zadvydas*, Congress anticipated long-term detention elsewhere in the Act, providing for review every six months of terrorist aliens detained under 8 U. S. C. § 1537(b)(2)(C), but it did not do so here. See 533 U. S., at 697.

Sixth, the Act provides that an asylum applicant whose proceedings last longer than six months may be given work authorization. § 1158(d)(2). The majority would apply this provision to some asylum applicants but not the ones before

us. *Ante*, at 309, n. 6. Of course, the statute does not contain that limitation. Read most naturally, the provision offers some indication that Congress, in the same statute, did not require asylum seekers to remain confined without bail at the 6-month mark.

Seventh, there is a separate statutory provision that purports to do precisely what the majority says this one does, providing that certain aliens "shall be detained . . . *until removed*." § 1225(b)(1)(B)(iii)(IV) (emphasis added); *ante*, at 299 (detention must continue until proceedings "have finished"). The problem for the majority is that this other provision applies only to those who, unlike the respondents, have no credible fear of persecution. The provision that applies here lacks similar language.

Linguistic ambiguity, while necessary, is not sufficient. I would also ask whether the statute's purposes suggest a congressional refusal to permit bail where confinement is prolonged. The answer is "no." There is nothing in the statute or in the legislative history that reveals any such congressional intent. The most likely reason for its absence is that Congress, like the Government when it appeared before us in *Demore*, believed there were no such instances, or at least that there were very few. Indeed, the Act suggests that asylum proceedings ordinarily finish quickly. See § 1158(d)(5)(A) (providing that absent "exceptional circumstances," final administrative adjudication (not including appeal) must be completed "within 180 days," and any appeal must be filed "within 30 days" of the decision). And for those proceedings that last longer than six months, we know that two-thirds of asylum seekers win their cases. Thus, legislative silence suggests not disapproval of bail, but a lack of consideration of the matter. For present purposes that is sufficient. It means that Congress did not intend to forbid bail. An interpretation that permits bail—based upon history, tradition, statutory context, and precedent—is consist-

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ent, not inconsistent, with what Congress intended the statutory provision to do.

The majority apparently finds a contrary purpose in the fact that other provisions of the statute permit the Attorney General to release an alien on parole "'for urgent humanitarian reasons or significant public benefit'" and impose bail-like conditions. *Ante*, at 300 (discussing 8 U. S. C. § 1182(d)(5)(A)). Yet under the majority's interpretation of "detain," the same argument could have been made in *Zadvydas*. We held that noncitizens presumptively are entitled to release after six months of detention, notwithstanding an available alternative avenue for relief, namely, bail. 533 U. S., at 683. There is no reason to reach a different result here. While the Government historically used this provision to take account of traditional bail factors (flight risk, safety risk), the President since issued an Executive Order directing parole to be granted "in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit." Exec. Order. No. 13767, 82 Fed. Reg. 8796 (2017). And besides, Congress' provision of parole to permit, for example, release for the purpose of medical care or to testify in a court proceeding—which *adds to* the circumstances under which a noncitizen can be released from confinement—says nothing about whether Congress intended to *cut back on* those circumstances in respect to the meaning of "detain" and the historical understanding that detention permits bail.

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B

Criminals Who Have Served Their Sentences

The relevant statutory provision, § 1226(c), says in paragraph (1) that the "Attorney General shall *take into custody* any alien who . . . is deportable [or inadmissible] by reason of having committed [certain crimes] when the alien is released," presumably (or ordinarily) after having served his

sentence. It then goes on to say, in paragraph (2), that the "Attorney General *may release [that] alien . . . only if* the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness [or to certain related others]." See Appendix A–2, *infra*.

I have emphasized the relevant phrases: "take into custody" in the first paragraph and "may release [that] alien . . . only if" in the second paragraph. We have long interpreted "in custody" as "not requir[ing] that a prisoner be physically confined." *Maleng* v. *Cook*, 490 U. S. 488, 491 (1989) (*per curiam*). In the habeas context, we have held that "a person released on bail or on his own recognizance" is "'in custody' within the meaning of the statute." *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U. S. 345, 349 (1973); *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 300–301 (1984) (same). The reason is simple, as I already have explained, *supra*, at 345: A person who is released on bail "is subject to restraints 'not shared by the public generally.'" *Hensley*, *supra*, at 351 (quoting *Jones* v. *Cunningham*, 371 U. S. 236, 240 (1963)); see also *Maleng*, *supra*, at 491 ("[A] prisoner who had been placed on parole was still 'in custody'" because his "release from physical confinement . . . was not unconditional; instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities" (citing *Jones*, *supra*, at 242)).

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Moreover, there is no reason to interpret "custody" differently than "detain." The OED defines "custody" as "[t]he state of being detained," http://www.oed.com/view/Entry/46305 (def. 5). "Detained," as I have previously pointed out, can be read consistently with bail. See *supra*, at 345–349. The OED also defines the statutory phrase, "*take* (a person) *into custody*," as "to arrest and imprison (a person)," http://www.oed.com/view/Entry/46305 (def. 5). And we know from

the history, tradition, case law, and other sources earlier discussed, including Blackstone, that arresting and imprisoning a person is consistent with a bail hearing and a subsequent grant of bail, even where a statute contains words such as "commitment" or "detain." See *supra*, at 330–344 (citing, *e. g.*, *Wright*, 190 U. S., at 62 (reading as consistent with a bail proceeding the statutory language "'shall issue [a] warrant for the commitment . . . to the proper jail, there to remain'" until "'surrender'" for extradition)).

But what about the second phrase, stating that the Attorney General "may release [that] alien . . . *only if* the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness"? Does the presence of the words "only if" show that the statute automatically denies bail for any other reason?

It does not. That is because the phrase has nothing to do with bail. It has to do with a special program, the Witness Protection Program, set forth in 18 U. S. C. § 3521. That program allows the Attorney General to relocate the witness, to give him an entirely new identity, to help his family similarly, and to pay him a stipend, among other things. §§ 3521(a)(1), (b)(1). The Attorney General may "take such action as [he] determines to be necessary to protect the person," presumably even free the witness from whatever obligations might require him to report to an immigration or judicial authority. § 3521(b)(1). Accordingly, when the Attorney General "release[s]" an alien under 8 U. S. C. § 1226(c)(2), he does not grant bail; he may well do far more, freeing the witness from a host of obligations and restraints, including those many obligations and restraints that accompany bail. See *supra*, at 345.

This understanding of "release" in § 1226(c) is consistent with the OED's definition of "release" as "to free from restraint" or even "to liberate from . . . an obligation" (not simply "to free from . . . captivity"), http://www.oed.com/

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view/Entry/161859 (def. 6(a)). And it is consistent with our earlier reading of the word "detain." *Supra*, at 345–349. Following the OED's definition of "detain" as "*under restraint*," we have understood the word "detention" to include the state of being "under" those "restraints" that typically accompany bail. *Ibid.* That is to say, both the individual on bail and the individual not on bail are "detained"; and the Attorney General, through his Witness Protection Program powers can free the individual from both. To repeat: The provision at issue means that the Attorney General "may release" the detained person from the restraints that accompany detainment—whether that individual has been detained with, or without, bail.

So understood the phrase has nothing to do with the issue before us: whether a confined individual is, or is not, entitled to bail or a bail hearing. It simply means that the Attorney General cannot free that person from all, or most, restraining conditions (including those that accompany bail) unless the alien is placed in the Witness Protection Program. So read, the words "only if" neither favor nor disfavor a reading of the statute consistent with the right to a bail proceeding.

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The purpose-related reasons that argue for a bail-favorable reading are also applicable here. Congress did not consider the problem of long-term detention. It wrote the statute with brief detention in mind. See H. R. Rep. No. 104–469, pt. 1, p. 123, and n. 25 (1996) (stating that the "average stay [was] 28 days"). Congress did not know (for apparently the Government did not know in *Demore*) that the average length of detention for this class would turn out to be about a year. Nor did Congress necessarily know that about 40% of class members eventually obtain the right to remain in the United States.

I should add that reading the statute as denying bail to those whose detention is prolonged is anomalous. Those whose removal is legally or factually questionable could be imprisoned indefinitely while the matter is being decided.

Those whose removal is not questionable (for they are under a final removal order) could be further imprisoned for no more than six months. See *supra*, at 329, 342–343. In fact, even before our decision in *Zadvydas*, the Government gave bail hearings to noncitizens under a final order of removal after six months of detention. See 533 U. S., at 683.

C

Other Applicants for Admission

The statutory provision that governs the third category of noncitizens seeking admission at the border is § 1225(b)(2)(A). It says that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." See Appendix A–3, *infra*.

The Government tells us that this miscellaneous category consists of persons who are neither (1) clearly eligible for admission, nor (2) clearly ineligible. Pet. for Cert. 3–4. A clearly eligible person is, of course, immediately admitted. A clearly ineligible person—someone who lacks the required documents, or provides fraudulent ones—is "removed . . . without further hearing or review." § 1225(b)(1)(A)(i); see §§ 1182(a)(6)(C), (a)(7). But where the matter is not clear, *i. e.*, where the immigration officer determines that an alien "is not clearly and beyond a doubt entitled to be admitted," he is detained for a removal proceeding. § 1225(b)(2)(A). Like all respondents, this class has been detained for at least six months. It may include persons returning to the United States who have work permits or other documents seemingly entitling them to entry, but whom an immigration officer suspects are inadmissible for some other reason, such as because they may have incomplete vaccinations or have committed student visa abuse or a crime of "moral turpitude." See § 1182(a) (delineating classes of aliens ineligible for admission). For instance, the Federal Register is replete with ex-

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amples of offenses that immigration authorities have thought are crimes of moral turpitude but that the courts of appeals later determine are not. See, *e. g.*, *Goldeshtein* v. *INS*, 8 F. 3d 645, 648 (CA9 1993) (structuring financial transactions to avoid currency reports); *Nunez* v. *Holder*, 594 F. 3d 1124, 1138 (CA9 2010) (indecent exposure). It also may include individuals who claim citizenship by virtue of birth or parentage but who lack documents clearly proving their claim.

The critical statutory words are the same as those I have just discussed in the context of the asylum seekers—"shall be detained." There is no more plausible reason here than there was there to believe those words foreclose bail. See *supra*, at 345–349. The constitutional considerations, the statutory language, and the purposes underlying the statute are virtually the same. Thus, the result should be the same: Given the constitutional considerations, we should interpret the statute as permitting bail.

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IV

The majority concludes in Part V, *ante*, at 312–314, by saying that, before considering bail-related constitutional arguments, the lower courts "should reexamine whether respondents can continue litigating their claims as a class." *Ante*, at 312. Relying on dicta in *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471 (1999) (*AADC*), it then suggests that the respondents may not be able to continue litigating because the Act says that

> "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation [of the statutory provisions here at issue] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U. S. C. § 1252(f)(1).

Were the majority's suggestion correct as to this jurisdictional question, it would have shown, at most, that we should

decide the constitutional question here and now. We have already asked for and received briefs on that question. But I do not believe the majority is correct. Every member of the classes before us falls within the provision's exception. Every one of them is an "individual alien against whom proceedings under such part have been initiated." *Ibid.* The Court in *AADC* did not consider, and had no reason to consider, the application of § 1252(f)(1) to such a class. Regardless, a court could order declaratory relief. Federal Rule of Civil Procedure 23(b)(2) permits a class action where "final injunctive relief or *corresponding* declaratory relief is appropriate respecting the class as a whole." (Emphasis added.) And the Advisory Committee says that declaratory relief can fall within the Rule's term "corresponding" if it "serves as a basis for later injunctive relief." Notes on Rule 23(b)(2)–1966 Amendment, 28 U. S. C. App., p. 812.

Jurisdiction also is unaffected by 8 U. S. C. § 1252(b)(9), which by its terms applies only "[w]ith respect to review of an order of removal under [§ 1252(a)(1)]." § 1252(b). The respondents challenge their detention without bail, not an order of removal.

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Neither does *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011), bar these class actions. Every member of each class seeks the same relief (a bail hearing), every member has been denied that relief, and the differences in situation among members of the class are not relevant to their entitlement to a bail hearing.

At a minimum I can find nothing in the statute or in the cases to which the majority refers that would prevent the respondents from pursuing their action, obtaining a declaratory judgment, and then using that judgment to obtain relief, namely, a bail hearing, in an individual case. Thus, I believe the lower courts are free to consider the constitutionality of the relevant statutory provisions as the majority now interprets them.

V

Conclusion

The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required. Given this serious constitutional problem, I would interpret the statutory provisions before us as authorizing bail. Their language permits that reading, it furthers their basic purposes, and it is consistent with the history, tradition, and constitutional values associated with bail proceedings. I believe that those bail proceedings should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed.

The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that *all* men and women have "certain unalienable Rights," and that among them is the right to "Liberty." We need merely remember that the Constitution's Due Process Clause protects each person's liberty from arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right. I would find it far more difficult, indeed, I would find it alarming, to believe that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail. I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail.

Because the majority does not do so, with respect, I dissent.

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APPENDIXES

A

1

Statute Applicable to Asylum Seekers

8 U. S. C. § 1225. "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

. . . . .

"(b) Inspection of applicants for admission

"(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

"(A) Screening

"(i) In general

"If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

"(ii) Claims for asylum

"If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

. . . . .

"(B) Asylum interviews

"(i) Conduct by asylum officers

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"An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

"(ii) Referral of certain aliens

"If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien *shall be detained for further consideration of the application for asylum.*" (Emphasis added.)

2

Statute Applicable to Criminal Aliens

8 U. S. C. § 1226. "Apprehension and detention of aliens

"(a) Arrest, detention, and release

"On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

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"(1) may continue to detain the arrested alien; and

"(2) may release the alien on—

"(A) *bond* of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

"(B) conditional parole;

. . . . .

"(c) Detention of criminal aliens

"(1) Custody

"The Attorney General *shall take into custody* any alien who—

"(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

"(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

"(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has

been sentence[d] to a term of imprisonment of at least 1 year, or

"(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

"when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

"(2) Release

"The Attorney General *may release* an alien described in paragraph (1) *only if* the Attorney General decides *pursuant to section 3521* of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien." (Emphasis added.)

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3

Statute Applicable to Miscellaneous Applicants for Admission

8 U. S. C. § 1225. "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

. . . . .

"(b) Inspection of applicants for admission

. . . . .

"(2) Inspection of other aliens

"(A) In general

"Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 1229a of this title.

"(B) Exception

"Subparagraph (A) shall not apply to an alien—

"(i) who is a crewman,

"(ii) to whom paragraph (1) applies, or

"(iii) who is a stowaway.

"(C) Treatment of aliens arriving from contiguous territory

"In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title." (Emphasis added.)

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B

State Bail Law

State	Key Bail Provisions
Alabama	Ala. Const., Art. I, § 16; Ala. Code §§ 15–13–3, 15–13–108, 15–13–190 (2011); Ala. Rule Crim. Proc. 7.2 (Cum. Supp. 2017)
Alaska	Alaska Const., Art. I, § 11; Alaska Stat. §§ 12.30.011, 12.30.040 (2016)
Arizona	Ariz. Const., Art. 2, § 22; Ariz. Rev. Stat. Ann. §§ 13–3961 (Cum. Supp. 2017), 13–3961.01 (2010), 13–3962; Ariz. Rule Crim. Proc. 7.2 (Cum. Supp. 2017)

Appendix B to opinion of BREYER, J.

State	Key Bail Provisions
Arkansas	Ark. Const., Art. 2, § 8; Ark. Code §§ 16–84–110 (2005), 16–91–110 (Supp. 2017); Ark. Rule App. Crim. Proc. 6 (2017)
California	Cal. Const., Art. 1, § 12; Cal. Penal Code Ann. § 1271 (West 2004)
Colorado	Colo. Const., Art. II, § 19; Colo. Rev. Stat. §§ 16–4–101, 16–4–102, 16–4–201, 16–4–201.5 (2017)
Connecticut	Conn. Const., Art. 1, § 8; Conn. Gen. Stat. §§ 54–63f, 54–64a (2017)
Delaware	Del. Const., Art. I, § 12; Del. Code Ann., Tit. 11, §§ 2103, 2104, 2112 (2015)
Florida	Fla. Const., Art. I, § 14; Fla. Stat. §§ 903.046, 903.132, 903.133 (2017)
Georgia	Ga. Code Ann. §§ 17–6–1, 17–6–15 (Supp. 2017)
Hawaii	Haw. Rev. Stat. §§ 804–3, 804–4 (2014)
Idaho	Idaho Const., Art. I, § 6; Idaho Code Ann. § 19–2903 (2017)
Illinois	Ill. Const., Art. 1, § 9; Ill. Comp. Stat., ch. 725, §§ 5/110–4, 5/110–6.2 (West 2016)
Indiana	Ind. Const., Art. 1, § 17; Ann. Ind. Code §§ 35–33–8.5–6 (West 2012), 35–33–9–1 (West Cum. Supp. 2017)
Iowa	Iowa Const., Art. 1, § 12; Iowa Code Ann. §§ 811.1, 811.5 (West 2015)

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Appendix B to opinion of BREYER, J.

State	Key Bail Provisions
Kansas	Kan. Const., Bill of Rights § 9; Kan. Stat. Ann. §§ 22–2801, 22–2804 (2007), 22–2802 (Cum. Supp. 2016)
Kentucky	Ky. Const., § 16; Ky. Rev. Stat. Ann. § 431.066 (West Cum. Supp. 2017); Ky. Rules Crim. Proc. 4.02, 4.54, 12.78 (West Cum. Supp. 2017)
Louisiana	La. Const., Art. 1, § 18; La. Code Crim. Proc. Ann., Arts. 312, 316 (West 2017)
Maine	Me. Const., Art. 1, § 10; Me. Rev. Stat. Ann., Tit. 15, §§ 1003, 1051, 1026 (Cum. Supp. 2017), 1027 (2016)
Maryland	Md. Crim. Proc. Code Ann. §§ 5–101 (Supp. 2017), 5–102, 5–207 (2008); Md. Rules 4–216.1, 4–349 (2018)
Massachusetts	Mass. Gen. Laws, ch. 276, §§ 20D, 42, 42A (2016); Mass. Rule Crim. Proc. 31 (West 2017)
Michigan	Mich. Comp. Laws Ann. §§ 765.6 (West Supp. 2017), 770.9 (West 2006)
Minnesota	Minn. Const., Art. I, § 7; Minn. Stat. § 629.16 (2016); Minn. Rules Crim. Proc. 6, 28.02 (2016)
Mississippi	Miss. Const., Art. 3, § 29; Miss. Code Ann. §§ 99–5–11, 99–35–3 (2015)
Missouri	Mo. Const., Art. I, §§ 20, 21, 34; Mo. Ann. Rev. Stat. §§ 544.455, 544.671 (Vernon Cum. Supp. 2017), 544.457, 547.170 (Vernon 2002)
Montana	Mont. Const., Art. II, § 21; Mont. Code Ann. §§ 46–9–102, 46–9–107 (2017)

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Appendix B to opinion of BREYER, J.

State	Key Bail Provisions
Nebraska	Neb. Const., Art. I, § 9; Neb. Rev. Stat. §§ 29–901 (2017 Supp.), 29–2301 (2016)
Nevada	Nev. Const., Art. 1, § 7; Nev. Rev. Stat. §§ 178.484, 178.488 (2015)
New Hampshire	N. H. Rev. Stat. Ann. §§ 597:1 (2001), 597:1–a (Cum. Supp. 2017), 597:1–c, 597:2
New Jersey	N. J. Const., Art. 1, ¶11; N. J. Stat. Ann. §§ 2A:162–11 (West 2011), 2A:162–18 (West Cum. Supp. 2017), 2A:162–20; N. J. Rule App. Proc. 2:9–4 (West 2018)
New Mexico	N. M. Const., Art. II, § 13; N. M. Dist. Ct. Rules Crim. Proc. 5–401, 5–402 (1992)
New York	N. Y. Crim. Proc. Law Ann. §§ 510.20, 530.10 (West 2009), 510.30 (West Cum. Supp. 2018)
North Carolina	N. C. Gen. Stat. Ann. §§ 15A–533, 15A–534 (2017)
North Dakota	N. D. Const., Art. I, § 11; N. D. Rule Crim. Proc. 46 (2016–2017)
Ohio	Ohio Const., Art. I, § 9; Ohio Rev. Code Ann. §§ 2937.222, 2949.02 (Lexis 2014); Ohio Rule Crim. Proc. 46 (Lexis 2017–2018)
Oklahoma	Okla. Const., Art. 2, § 8; Okla. Stat., Tit. 22, §§ 1077, 1101, 1102 (2011)
Oregon	Ore. Const., Art. I, §§ 14, 43; Ore. Rev. Stat. §§ 135.240, 138.650 (2015)

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Appendix B to opinion of BREYER, J.

State	Key Bail Provisions
Pennsylvania	Pa. Const., Art. I, § 14; 42 Pa. Cons. Stat. § 5701 (2015); Pa. Rule Crim. Proc. 521 (West 2017)
Rhode Island	R. I. Const., Art. 1, § 9; R. I. Gen. Laws §§ 12–13–1, 12–22–12 (2002); R. I. Super. Ct. Rule Crim. Proc. 46 (Supp. 2017)
South Carolina	S. C. Const., Art. I, § 15; S. C. Code Ann. §§ 17–15–10, 22–5–510 (Cum. Supp. 2017), 18–1–90 (2014)
South Dakota	S. D. Const., Art. VI, § 8; S. D. Codified Laws §§ 23A–43–2, 23A–43–2.1, 23A–43–16 (2016), 23A–43–3, 23A–43–4 (Cum. Supp. 2017)
Tennessee	Tenn. Const., Art. I, § 15; Tenn. Code Ann. §§ 40–11–102, 40–11–105, 40–11–113 (2012)
Texas	Tex. Const., Art. 1, §§ 11, 11a, 11b, 11c; Tex. Code Crim. Proc. Ann., Arts. 17.15, 17.40 (Vernon 2015), 44.04 (Vernon Cum. Supp. 2017)
Utah	Utah Const., Art. I, § 8; Utah Code §§ 77–20–1, 77–20–10 (2017)
Vermont	Vt. Const., ch. II, § 40; Vt. Stat. Ann., Tit. 13, §§ 7553, 7574 (2009), 7553a, 7554 (Cum. Supp. 2017)
Virginia	Va. Code Ann. §§ 19.2–120, 19.2–120.1, 19.2–121, 19.2–319 (2015)
Washington	Wash. Const., Art. I, § 20; Wash. Rev. Code §§ 10.21.020, 10.21.030, 10.21.040, 10.73.040 (2016)

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State	Key Bail Provisions
West Virginia	W. Va. Code Ann. § 62–1C–1 (Lexis 2014)
Wisconsin	Wis. Const., Art. 1, § 8, cl. 2; Wis. Stat. §§ 969.01, 969.03, 969.035 (2011–2012)
Wyoming	Wyo. Const., Art. 1, § 14; Wyo. Stat. Ann. § 7–10–101 (2015)

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Syllabus

MERIT MANAGEMENT GROUP, LP *v.* FTI CONSULTING, INC.

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

No. 16–784. Argued November 6, 2017—Decided February 27, 2018

The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including, as relevant here, certain fraudulent transfers "of an interest of the debtor in property." 11 U. S. C. § 548(a). It also sets out a number of limits on the exercise of these avoiding powers. Central here is the securities safe harbor, which, *inter alia*, provides that "the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." § 546(e).

Valley View Downs, LP, and Bedford Downs Management Corp. entered into an agreement under which Valley View, if it got the last harness-racing license in Pennsylvania, would purchase all of Bedford Downs' stock for $55 million. Valley View was granted the license and arranged for the Cayman Islands branch of Credit Suisse to wire $55 million to third-party escrow agent Citizens Bank of Pennsylvania. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow. Citizens Bank disbursed the $55 million over two installments according to the agreement, of which petitioner Merit received $16.5 million.

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Although Valley View secured the harness-racing license, it was unable to achieve its goal of opening a racetrack casino. Valley View and its parent company, Centaur, LLC, filed for Chapter 11 bankruptcy. Respondent FTI Consulting, Inc., was appointed to serve as trustee of the Centaur litigation trust. FTI then sought to avoid the transfer from Valley View to Merit for the sale of Bedford Downs' stock, arguing that it was constructively fraudulent under § 548(a)(1)(B). Merit contended that the § 546(e) safe harbor barred FTI from avoiding the transfer because it was a "settlement payment . . . made by or to (or for the benefit of)" two "financial institutions," Credit Suisse and Citizens Bank. The District Court agreed with Merit, but the Seventh Circuit reversed, holding that § 546(e) did not protect transfers in which financial institutions served as mere conduits.

Held: The only relevant transfer for purposes of the § 546(e) safe harbor is the transfer that the trustee seeks to avoid. Pp. 377–386.

(a) Before a court can determine whether a transfer was "made by or to (or for the benefit of)" a covered entity, it must first identify the relevant transfer to test in that inquiry. Merit posits that the relevant transfer should include not only the Valley View-to-Merit end-to-end transfer, but also all of its component parts, *i. e.*, the Credit-Suisse-to-Citizens-Bank and the Citizens-Bank-to-Merit transfers. FTI maintains that the only relevant transfer is the transfer that it sought to avoid, specifically, the overarching transfer between Valley View and Merit. Pp. 377–382.

(1) The language of § 546(e) and the specific context in which that language is used support the conclusion that the relevant transfer for purposes of the safe-harbor inquiry is the transfer the trustee seeks to avoid. The first clause of the provision—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—indicates that § 546(e) operates as an exception to trustees' avoiding powers granted elsewhere in the Code. The text makes clear that the starting point for the § 546(e) inquiry is the expressly listed avoiding powers and, consequently, the transfer that the trustee seeks to avoid in exercising those powers. The last clause—"except under section 548(a)(1)(A) of this title"—also focuses on the transfer that the trustee seeks to avoid. Creating an exception to the exception for § 548(a)(1)(A) transfers, the text refers back to a specific type of transfer that falls within the avoiding powers, signaling that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer. This reading is reinforced by the § 546 section heading, "Limitations on avoiding powers," and is confirmed by the rest of the statutory text: The provision provides that "the trustee may not avoid" certain transfers, which naturally invites scrutiny of the transfers that "the trustee . . . may avoid," the parallel language used in the avoiding powers provisions. The text further provides that the transfer that is saved from avoidance is one "that *is*" (not one that involves) a securities transaction covered under § 546(e). In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria. Pp. 378–381.

(2) The statutory structure also supports this reading of § 546(e). The Code establishes a system for avoiding transfers as well as a safe harbor from avoidance. It is thus only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers. In an avoidance action,

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the trustee must establish that the transfer it seeks to set aside meets the carefully set out criteria under the substantive avoidance provisions of the Code. The defendant in that avoidance action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e). Pp. 381–382.

(b) The primary argument Merit advances that is moored in the statutory text—concerning Congress' 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e)—is unavailing. Merit contends that Congress meant to abrogate the Eleventh Circuit decision in *In re Munford, Inc.*, 98 F. 3d 604, which held that § 546(e) was inapplicable to transfers in which a financial institution acted only as an intermediary. However, Merit points to nothing in the text or legislative history to corroborate its argument. A simpler explanation rooted in the text of the statute and consistent with the interpretation of § 546(e) adopted here is that Congress added the "or for the benefit of" language that is common in other substantive avoidance provisions to the § 546(e) safe harbor to ensure that the scope of the safe harbor and scope of the avoiding powers matched.

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That reading would not, contrary to what Merit contends, render other provisions ineffectual or superfluous. Rather, it gives full effect to the text of § 546(e). If the transfer the trustee seeks to avoid was made "by" or "to" a covered entity, then § 546(e) will bar avoidance without regard to whether the entity acted only as an intermediary. It will also bar avoidance if the transfer was made "for the benefit of" that entity, even if it was not made "by" or "to" that entity.

Finally, Merit argues that reading the safe harbor so that its application depends on the identity of the investor and the manner in which its investment is held rather than on the general nature of the transaction is incongruous with Congress' purportedly "prophylactic" approach to § 546(e). But this argument is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities. Pp. 382–386.

(c) Applying this reading of the § 546(e) safe harbor to this case yields a straightforward result. FTI sought to avoid the Valley View-to-Merit transfer. When determining whether the § 546(e) safe harbor saves that transfer from avoidance liability, the Court must look to that overarching transfer to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is

a covered entity, the transfer falls outside of the § 546(e) safe harbor. P. 386.

830 F. 3d 690, affirmed and remanded.

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

Brian C. Walsh argued the cause for petitioner. With him on the briefs was *Jason J. DeJonker*.

Paul D. Clement argued the cause for respondent. With him on the brief were *H. Christopher Bartolomucci*, *George W. Hicks, Jr.*, *Gregory S. Schwegmann*, and *Joshua J. Bruckerhoff*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

To maximize the funds available for, and ensure equity in, the distribution to creditors in a bankruptcy proceeding, the Bankruptcy Code gives a trustee the power to invalidate a limited category of transfers by the debtor or transfers of an interest of the debtor in property. Those powers, referred to as "avoiding powers," are not without limits, however, as the Code sets out a number of exceptions. The operation of one such exception, the securities safe harbor, 11 U. S. C. § 546(e), is at issue in this case. Specifically, this Court is asked to determine how the safe harbor operates in the context of a transfer that was executed via one or more transactions, *e. g.*, a transfer from A ⌫D that was executed via B and C as intermediaries, such that the component parts of the transfer include A ⌫B ⌫C ⌫D. If a trustee seeks to avoid the A ⌫D transfer, and the § 546(e) safe harbor is

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*Briefs of *amici curiae* urging reversal were filed for Opportunity Partners, L. P., by *Alan E. Golomb*; and for Various Former Tribune and Lyondell Shareholders by *Philip D. Anker*, *Alan E. Schoenfeld*, *Joel Millar*, *David M. Lehn*, *Douglas Hallward-Driemeier*, and *D. Ross Martin*.

Briefs of *amici curiae* urging affirmance were filed for the National Association of Bankruptcy Trustees by *Bradford J. Sandler* and *Dean A. Ziehl*; for Tribune Company Retirees et al. by *Lawrence S. Robbins*, *Jay Teitelbaum*, *Roy T. Englert, Jr.*, *Ariel N. Lavinbuk*, *Daniel N. Lerman*, and *Shai D. Bronshtein*; and for Ralph Brubaker et al. by *Jerrold J. Ganzfried*.

invoked as a defense, the question becomes: When determining whether the § 546(e) securities safe harbor saves the transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (*i. e.*, A ⊠D) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (*i. e.*, A ⊠B ⊠C ⊠D)? The Court concludes that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid.

I

A

Because the § 546(e) safe harbor operates as a limit to the general avoiding powers of a bankruptcy trustee,[1] we begin with a review of those powers. Chapter 5 of the Bankruptcy Code affords bankruptcy trustees the authority to "se[t] aside certain types of transfers . . . and . . . recaptur[e] the value of those avoided transfers for the benefit of the estate." Tabb § 6.2, p. 474. These avoiding powers "help implement the core principles of bankruptcy." *Id.*, § 6.1, at 468. For example, some "deter the race of diligence of creditors to dismember the debtor before bankruptcy" and promote "equality of distribution." *Union Bank* v. *Wolas*, 502 U. S. 151, 161 (1991) (internal quotation marks omitted); see also Tabb § 6.2. Others set aside transfers that "unfairly or improperly deplete . . . assets or . . . dilute the claims against those assets." 5 Collier on Bankruptcy ¶548.01, p. 548–10 (16th ed. 2017); see also Tabb § 6.2, at 475 (noting that some

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[1] Avoiding powers may be exercised by debtors, trustees, or creditors' committees, depending on the circumstances of the case. See generally C. Tabb, Law of Bankruptcy § 6.1 (4th ed. 2016) (Tabb). Because this case concerns an avoidance action brought by a trustee, we refer throughout to the trustee in discussing the avoiding power and avoidance action. The resolution of this case is not dependent on the identity of the actor exercising the avoiding power.

avoiding powers are designed "to ensure that the debtor deals fairly with its creditors").

Sections 544 through 553 of the Code outline the circumstances under which a trustee may pursue avoidance. See, *e. g.*, 11 U. S. C. § 544(a) (setting out circumstances under which a trustee can avoid unrecorded liens and conveyances); § 544(b) (detailing power to avoid based on rights that unsecured creditors have under nonbankruptcy law); § 545 (setting out criteria that allow a trustee to avoid a statutory lien); § 547 (detailing criteria for avoidance of so-called "preferential transfers"). The particular avoidance provision at issue here is § 548(a), which provides that a "trustee may avoid" certain fraudulent transfers "of an interest of the debtor in property." § 548(a)(1). Section 548(a)(1)(A) addresses so-called "actually" fraudulent transfers, which are "made . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted." Section 548(a)(1)(B) addresses "constructively" fraudulent transfers. See *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 535 (1994). As relevant to this case, the statute defines constructive fraud in part as when a debtor:

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> "(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> "(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation. 11 U. S. C. § 548(a)(1).

If a transfer is avoided, § 550 identifies the parties from whom the trustee may recover either the transferred property or the value of that property to return to the bankruptcy estate. Section 550(a) provides, in relevant part, that "to the extent that a transfer is avoided . . . the trustee may recover . . . the property transferred, or, if the court so orders, the value of such property" from "the initial transferee of such transfer or the entity for whose benefit such

transfer was made," or from "any immediate or mediate transferee of such initial transferee."

B

The Code sets out a number of limits on the exercise of these avoiding powers. See, *e. g.*, § 546(a) (setting statute of limitations for avoidance actions); §§ 546(c)–(d) (setting certain policy-based exceptions to avoiding powers); § 548(a)(2) (setting limit to avoidance of "a charitable contribution to a qualified religious or charitable entity or organization"). Central to this case is the securities safe harbor set forth in § 546(e), which provides (as presently codified and in full):

> "Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title."

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The predecessor to this securities safe-harbor, formerly codified at 11 U. S. C. § 764(c), was enacted in 1978 against the backdrop of a District Court decision in a case called *Seligson* v. *New York Produce Exchange*, 394 F. Supp. 125 (SDNY 1975), which involved a transfer by a bankrupt commodity broker. See S. Rep. No. 95–989, pp. 8, 106 (1978);

see also Brubaker, Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided, 37 Bkrtcy. L. Letter 11–12 (July 2017). The bankruptcy trustee in *Seligson* filed suit seeking to avoid over $12 million in margin payments made by the commodity broker debtor to a clearing association on the basis that the transfer was constructively fraudulent. The clearing association attempted to defend on the theory that it was a mere "conduit" for the transmission of the margin payments. 394 F. Supp., at 135. The District Court found, however, triable issues of fact on that question and denied summary judgment, leaving the clearing association exposed to the risk of significant liability. See *id.*, at 135–136. Following that decision, Congress enacted the § 764(c) safe harbor, providing that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." 92 Stat. 2619, codified at 11 U. S. C. § 764(c) (repealed 1982).

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Congress amended the securities safe-harbor exception over the years, each time expanding the categories of covered transfers or entities. In 1982, Congress expanded the safe harbor to protect margin and settlement payments "made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." § 4, 96 Stat. 236, codified at 11 U. S. C. § 546(d). Two years later Congress added "financial institution" to the list of protected entities. See § 461(d), 98 Stat. 377, codified at 11 U. S. C. § 546(e).[2] In 2005, Congress again expanded the list of pro-

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[2] The term "financial institution" is defined as:

"(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section

tected entities to include a "financial participant" (defined as an entity conducting certain high-value transactions). See § 907(b), 119 Stat. 175; 11 U. S. C. § 101(22A). And, in 2006, Congress amended the provision to cover transfers made in connection with securities contracts, commodity contracts, and forward contracts. § 5(b)(1), 120 Stat. 2697–2698. The 2006 amendment also modified the statute to its current form by adding the new parenthetical phrase "(or for the benefit of)" after "by or to," so that the safe harbor now covers transfers made "by or to (or for the benefit of)" one of the covered entities. *Id.*, at 2697.

C

With this background, we now turn to the facts of this case, which comes to this Court from the world of competitive harness racing (a form of horse racing). Harness racing is a closely regulated industry in Pennsylvania, and the Commonwealth requires a license to operate a racetrack. See *Bedford Downs Management Corp.* v. *State Harness Racing Comm'n*, 592 Pa. 475, 485–487, 926 A. 2d 908, 914–915 (2007) (*per curiam*). The number of available licenses is limited, and in 2003 two companies, Valley View Downs, LP, and Bedford Downs Management Corporation, were in competition for the last harness-racing license in Pennsylvania.

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Valley View and Bedford Downs needed the harness-racing license to open a " 'racino,' " which is a clever moniker

741) in connection with a securities contract (as defined in section 741) such customer; or

"(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940." 11 U. S. C. § 101(22).

The parties here do not contend that either the debtor or petitioner in this case qualified as a "financial institution" by virtue of its status as a "customer" under § 101(22)(A). Petitioner Merit Management Group, LP, discussed this definition only in footnotes and did not argue that it somehow dictates the outcome in this case. See Brief for Petitioner 45, n. 14; Reply Brief 14, n. 6. We therefore do not address what impact, if any, § 101(22)(A) would have in the application of the § 546(e) safe harbor.

for racetrack casino, "a racing facility with slot machines." Brief for Petitioner 8. Both companies were stopped before the finish line, because in 2005 the Pennsylvania State Harness Racing Commission denied both applications. The Pennsylvania Supreme Court upheld those denials in 2007, but allowed the companies to reapply for the license. See *Bedford Downs*, 592 Pa., at 478–479, 926 A. 2d, at 910.

Instead of continuing to compete for the last available harness-racing license, Valley View and Bedford Downs entered into an agreement to resolve their ongoing feud. Under that agreement, Bedford Downs withdrew as a competitor for the harness-racing license, and Valley View was to purchase all of Bedford Downs' stock for $55 million after Valley View obtained the license.[3]

With Bedford Downs out of the race, the Pennsylvania Harness Racing Commission awarded Valley View the last harness-racing license. Valley View proceeded with the corporate acquisition required by the parties' agreement and arranged for the Cayman Islands branch of Credit Suisse to finance the $55 million purchase price as part of a larger $850 million transaction. Credit Suisse wired the $55 million to Citizens Bank of Pennsylvania, which had agreed to serve as the third-party escrow agent for the transaction. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow as well. At closing, Valley View received the Bedford Downs stock certificates, and in October 2007 Citizens Bank disbursed $47.5 million to the Bedford Downs shareholders, with $7.5 million remaining in escrow at Citizens Bank under the multiyear indemnification holdback period provided for in the parties' agreement. Citizens Bank disbursed that $7.5 million installment to the Bedford Downs shareholders in October 2010, after the holdback period ended. All told, Merit received approximately $16.5 million

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[3] A separate provision of the agreement providing that Bedford Downs would sell land to Valley View for $20 million is not at issue in this case.

from the sale of its Bedford Downs stock to Valley View. Notably, the closing statement for the transaction reflected Valley View as the "Buyer," the Bedford Downs shareholders as the "Sellers," and $55 million as the "Purchase Price." App. 30.

In the end, Valley View never got to open its racino. Although it had secured the last harness-racing license, it was unable to secure a separate gaming license for the operation of the slot machines in the time set out in its financing package. Valley View and its parent company, Centaur, LLC, thereafter filed for Chapter 11 bankruptcy. The Bankruptcy Court confirmed a reorganization plan and appointed respondent FTI Consulting, Inc., to serve as trustee of the Centaur litigation trust.

FTI filed suit against Merit in the Northern District of Illinois, seeking to avoid the $16.5 million transfer from Valley View to Merit for the sale of Bedford Downs' stock. The complaint alleged that the transfer was constructively fraudulent under § 548(a)(1)(B) of the Code because Valley View was insolvent when it purchased Bedford Downs and "significantly overpaid" for the Bedford Downs stock.[4] Merit moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), contending that the § 546(e) safe harbor barred FTI from avoiding the Valley View-to-Merit transfer. According to Merit, the safe harbor applied because the transfer was a "settlement payment . . . made by or to (or for the benefit of)" a covered "financial institution"—here, Credit Suisse and Citizens Bank.

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The District Court granted the Rule 12(c) motion, reasoning that the § 546(e) safe harbor applied because the financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." See 541

[4] In its complaint, FTI also sought to avoid the transfer under § 544(b). See App. 20–21. The District Court did not address the claim, see 541 B. R. 850, 852–853, n. 1 (ND Ill. 2015), and neither did the Court of Appeals for the Seventh Circuit.

B. R. 850, 858 (ND Ill. 2015).[5] The Court of Appeals for the Seventh Circuit reversed, holding that the § 546(e) safe harbor did not protect transfers in which financial institutions served as mere conduits. See 830 F. 3d 690, 691 (2016). This Court granted certiorari to resolve a conflict among the Courts of Appeals as to the proper application of the § 546(e) safe harbor.[6] 581 U. S. 958 (2017).

II

The question before this Court is whether the transfer between Valley View and Merit implicates the safe-harbor exception because the transfer was "made by or to (or for the benefit of) a . . . financial institution." § 546(e). The parties and the lower courts dedicate much of their attention to the definition of the words "by or to (or for the benefit of)" as used in § 546(e), and to the question whether there is a requirement that the "financial institution" or other covered entity have a beneficial interest in or dominion and control over the transferred property in order to qualify for safe-harbor protection. In our view, those inquiries put the proverbial cart before the horse. Before a court can determine whether a transfer was made by or to or for the benefit of a covered entity, the court must first identify the relevant

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[5] The parties do not ask this Court to determine whether the transaction at issue in this case qualifies as a transfer that is a "settlement payment" or made in connection with a "securities contract" as those terms are used in § 546(e), nor is that determination necessary for resolution of the question presented.

[6] Compare *In re Quebecor World (USA) Inc.*, 719 F. 3d 94, 99 (CA2 2013) (finding the safe harbor applicable where covered entity was intermediary); *In re QSI Holdings, Inc.*, 571 F. 3d 545, 551 (CA6 2009) (same); *Contemporary Indus. Corp.* v. *Frost*, 564 F. 3d 981, 987 (CA8 2009) (same); *In re Resorts Int'l, Inc.*, 181 F. 3d 505, 516 (CA3 1999) (same); *In re Kaiser Steel Corp.*, 952 F. 2d 1230, 1240 (CA10 1991) (same), with *In re Munford, Inc.*, 98 F. 3d 604, 610 (CA11 1996) (*per curiam*) (rejecting applicability of safe harbor where covered entity was intermediary).

transfer to test in that inquiry. At bottom, that is the issue the parties dispute in this case.

On one side, Merit posits that the Court should look not only to the Valley View-to-Merit end-to-end transfer but also to all its component parts. Here, those component parts include one transaction by Credit Suisse to Citizens Bank (*i. e.*, the transmission of the $16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (*i. e.*, the transmission of $16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that § 546(e) bars avoidance.

FTI, by contrast, maintains that the only relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer between Valley View and Merit of $16.5 million for purchase of the stock, which is the transfer that the trustee seeks to avoid under § 548(a)(1)(B). Because that transfer was not made by, to, or for the benefit of a financial institution, FTI contends that the safe harbor has no application.

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The Court agrees with FTI. The language of § 546(e), the specific context in which that language is used, and the broader statutory structure all support the conclusion that the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions.

A

Our analysis begins with the text of § 546(e), and we look to both "the language itself [and] the specific context in which that language is used . . . ." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997). The pertinent language provides:

> "Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a

> transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract . . . , except under section 548(a)(1)(A) of this title."

The very first clause—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—already begins to answer the question. It indicates that § 546(e) operates as an exception to the avoiding powers afforded to the trustee under the substantive avoidance provisions. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 126 (2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers"). That is, when faced with a transfer that is otherwise avoidable, § 546(e) provides a safe harbor notwithstanding that avoiding power. From the outset, therefore, the text makes clear that the starting point for the § 546(e) inquiry is the substantive avoiding power under the provisions expressly listed in the "notwithstanding" clause and, consequently, the transfer that the trustee seeks to avoid as an exercise of those powers.

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Then again in the very last clause—"except under section 548(a)(1)(A) of this title"—the text reminds us that the focus of the inquiry is the transfer that the trustee seeks to avoid. It does so by creating an exception to the exception, providing that "the trustee may not avoid a transfer" that meets the covered transaction and entity criteria of the safe harbor, "except" for an actually fraudulent transfer under § 548(a)(1)(A). 11 U. S. C. § 546(e). By referring back to a specific type of transfer that falls within the avoiding power, Congress signaled that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer.

Reinforcing that reading of the safe-harbor provision, the section heading for § 546—within which the securities safe harbor is found—is: "Limitations on avoiding powers." Although section headings cannot limit the plain meaning of a statutory text, see *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U. S. 33, 47 (2008), "they supply cues" as to what Congress intended, see *Yates* v. *United States*, 574 U. S. 528, 540 (2015). In this case, the relevant section heading demonstrates the close connection between the transfer that the trustee seeks to avoid and the transfer that is exempted from that avoiding power pursuant to the safe harbor.

The rest of the statutory text confirms what the "notwithstanding" and "except" clauses and the section heading begin to suggest. The safe harbor provides that "the trustee may not avoid" certain transfers. § 546(e). Naturally, that text invites scrutiny of the transfers that "the trustee may avoid," the parallel language used in the substantive avoiding powers provisions. See § 544(a) (providing that "the trustee . . . may avoid" transfers falling under that provision); § 545 (providing that "[t]he trustee may avoid" certain statutory liens); § 547(b) (providing that "the trustee may avoid" certain preferential transfers); § 548(a)(1) (providing that "[t]he trustee may avoid" certain fraudulent transfers). And if any doubt remained, the language that follows dispels that doubt: The transfer that the "the trustee may not avoid" is specified to be "a transfer that *is*" either a "settlement payment" or made "in connection with a securities contract." § 546(e) (emphasis added). Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e)

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provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria.

Thus, the statutory language and the context in which it is used all point to the transfer that the trustee seeks to avoid as the relevant transfer for consideration of the § 546(e) safe-harbor criteria.

B

The statutory structure also reinforces our reading of § 546(e). See *Hall* v. *United States*, 566 U. S. 506, 516 (2012) (looking to statutory structure in interpreting the Bankruptcy Code). As the Seventh Circuit aptly put it, the Code "creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin." 830 F. 3d, at 694; see also *Fidelity Financial Services, Inc.* v. *Fink*, 522 U. S. 211, 217 (1998) ("Section 546 of the Code puts certain limits on the avoidance powers set forth elsewhere"). Given that structure, it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers.

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As noted in Part I–A, *supra*, the substantive avoidance provisions in Chapter 5 of the Code set out in detail the criteria that must be met for a transfer to fall within the ambit of the avoiding powers. These provisions, as Merit admits, "focus mostly on the characteristics of the transfer that may be avoided." Brief for Petitioner 28. The trustee, charged with exercising those avoiding powers, must establish to the satisfaction of a court that the transfer it seeks to set aside meets the characteristics set out under the substantive avoidance provisions. Thus, the trustee is not free to define the transfer that it seeks to avoid in any way it chooses. Instead, that transfer is necessarily defined by the carefully set out criteria in the Code. As FTI itself recognizes, its power as trustee to define the transfer is not

absolute because "the transfer identified must satisfy the terms of the avoidance provision the trustee invokes." Brief for Respondent 23.

Accordingly, after a trustee files an avoidance action identifying the transfer it seeks to set aside, a defendant in that action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e), see Part II–A, *supra*.

In the instant case, FTI identified the purchase of Bedford Downs' stock by Valley View from Merit as the transfer that it sought to avoid. Merit does not contend that FTI improperly identified the Valley View-to-Merit transfer as the transfer to be avoided, focusing instead on whether FTI can "ignore" the component parts at the safe-harbor inquiry. Absent that argument, however, the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under § 546(e). The focus must remain on the transfer the trustee sought to avoid.

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III

A

The primary argument Merit advances that is moored in the statutory text concerns the 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e). Merit contends that in adding the phrase "or for the benefit of" to the requirement that a transfer be "made by or to" a protected entity, Congress meant to abrogate the 1998 decision of the Court of Appeals for the Eleventh Circuit in *In re Munford, Inc.*, 98 F. 3d 604, 610 (1996) (*per curiam*), which held that the § 546(e) safe harbor was inapplicable to transfers in which

a financial institution acted only as an intermediary. Congress abrogated *Munford*, Merit reasons, by use of the disjunctive "or," so that even if a beneficial interest, *i. e.*, a transfer "for the benefit of" a financial institution or other covered entity, is sufficient to trigger safe-harbor protection, it is not necessary for the financial institution to have a beneficial interest in the transfer for the safe harbor to apply. Merit thus argues that a transaction "by or to" a financial institution such as Credit Suisse or Citizens Bank would meet the requirements of § 546(e), even if the financial institution is acting as an intermediary without a beneficial interest in the transfer.

Merit points to nothing in the text or legislative history that corroborates the proposition that Congress sought to overrule *Munford* in its 2006 amendment. There is a simpler explanation for Congress' addition of this language that is rooted in the text of the statute as a whole and consistent with the interpretation of § 546(e) the Court adopts. A number of the substantive avoidance provisions include that language, thus giving a trustee the power to avoid a transfer that was made to "or for the benefit of" certain actors. See § 547(b)(1) (avoiding power with respect to preferential transfers "to or for the benefit of a creditor"); § 548(a)(1) (avoiding power with respect to certain fraudulent transfers "including any transfer to or for the benefit of an insider . . . "). By adding the same language to the § 546(e) safe harbor, Congress ensured that the scope of the safe harbor matched the scope of the avoiding powers. For example, a trustee seeking to avoid a preferential transfer under § 547 that was made "for the benefit of a creditor," where that creditor is a covered entity under § 546(e), cannot now escape application of the § 546(e) safe harbor just because the transfer was not "made by or to" that entity.

Nothing in the amendment therefore changed the focus of the § 546(e) safe-harbor inquiry on the transfer that is otherwise avoidable under the substantive avoiding powers. If

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anything, by tracking language already included in the substantive avoidance provisions, the amendment reinforces the connection between the inquiry under § 546(e) and the otherwise avoidable transfer that the trustee seeks to set aside.

Merit next attempts to bolster its reading of the safe harbor by reference to the inclusion of securities clearing agencies as covered entities under § 546(e). Because a securities clearing agency is defined as, *inter alia*, an intermediary in payments or deliveries made in connection with securities transactions, see 15 U. S. C. § 78c(23)(A) and 11 U. S. C. § 101(48) (defining "securities clearing agency" by reference to the Securities Exchange Act of 1934), Merit argues that the § 546(e) safe harbor must be read to protect intermediaries without reference to any beneficial interest in the transfer. The contrary interpretation, Merit contends, "would run afoul of the canon disfavoring an interpretation of a statute that renders a provision ineffectual or superfluous." Brief for Petitioner 25.

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Putting aside the question whether a securities clearing agency always acts as an intermediary without a beneficial interest in a challenged transfer—a question that the District Court in *Seligson* found presented triable issues of fact in that case—the reading of the statute the Court adopts here does not yield any superfluity. Reading § 546(e) to provide that the relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid under a substantive avoiding power, the question then becomes whether that transfer was "made by or to (or for the benefit of)" a covered entity, including a securities clearing agency. If the transfer that the trustee seeks to avoid was made "by" or "to" a securities clearing agency (as it was in *Seligson*), then § 546(e) will bar avoidance, and it will do so without regard to whether the entity acted only as an intermediary. The safe harbor will, in addition, bar avoidance if the transfer was made "for the benefit of" that securities clearing agency, even if it was not made "by" or "to" that entity. This reading gives full effect to the text of § 546(e).

B

In a final attempt to support its proposed interpretation of § 546(e), Merit turns to what it perceives was Congress' purpose in enacting the safe harbor. Specifically, Merit contends that the broad language of § 546(e) shows that Congress took a "comprehensive approach to securities and commodities transactions" that "was prophylactic, not surgical," and meant to "advanc[e] the interests of parties in the finality of transactions." Brief for Petitioner 41–43. Given that purported broad purpose, it would be incongruous, according to Merit, to read the safe harbor such that its application "would depend on the identity of the investor and the manner in which it held its investment" rather than "the nature of the transaction generally." *Id.*, at 33. Moreover, Merit posits that Congress' concern was plainly broader than the risk that is posed by the imposition of avoidance liability on a securities industry entity because Congress provided a safe harbor not only for transactions "to" those entities (thus protecting the entities from direct financial liability), but also "by" these entities to noncovered entities. See Reply Brief 10–14. And, according to Merit, "[t]here is no reason to believe that Congress was troubled by the possibility that transfers *by* an industry hub could be unwound but yet was unconcerned about trustees' pursuit of transfers made *through* industry hubs." *Id.*, at 12–13 (emphasis in original).

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Even if this were the type of case in which the Court would consider statutory purpose, see, *e. g.*, *Watson* v. *Philip Morris Cos.*, 551 U. S. 142, 150–152 (2007), here Merit fails to support its purposivist arguments. In fact, its perceived purpose is actually contradicted by the plain language of the safe harbor. Because, of course, here we do have a good reason to believe that Congress was concerned about transfers "*by* an industry hub" specifically: The safe harbor saves from avoidance certain securities transactions "made by or to (or for the benefit of)" covered entities. See § 546(e). Transfers "through" a covered entity, conversely, appear nowhere in the statute. And although Merit complains that,

absent its reading of the safe harbor, protection will turn "on the identity of the investor and the manner in which it held its investment," that is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities.

For these reasons, we need not deviate from the plain meaning of the language used in § 546(e).

IV

For the reasons stated, we conclude that the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers. Applying that understanding of the safe-harbor provision to this case yields a straightforward result. FTI, the trustee, sought to avoid the $16.5 million Valley View-to-Merit transfer. FTI did not seek to avoid the component transactions by which that overarching transfer was executed. As such, when determining whether the § 546(e) safe harbor saves the transfer from avoidance liability, *i. e.*, whether it was "made by or to (or for the benefit of) a . . . financial institution," the Court must look to the overarching transfer from Valley View to Merit to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is a "financial institution" or other covered entity, the transfer falls outside of the § 546(e) safe harbor. The judgment of the Seventh Circuit is therefore affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Syllabus

U. S. BANK N. A., TRUSTEE, BY AND THROUGH CWCAPITAL ASSET MANAGEMENT LLC *v.* VILLAGE AT LAKERIDGE, LLC

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

No. 15–1509. Argued October 31, 2017—Decided March 5, 2018

Respondent Lakeridge is a corporate entity with a single owner, MBP Equity Partners. When Lakeridge filed for Chapter 11 bankruptcy, it had a pair of substantial debts: It owed petitioner U. S. Bank over $10 million and MBP another $2.76 million. Lakeridge submitted a reorganization plan, proposing to impair the interests of both U. S. Bank and MBP. U. S. Bank refused the offer, thus blocking Lakeridge's option for reorganization through a fully consensual plan. See 11 U. S. C. § 1129(a)(8). Lakeridge then turned to the so-called "cramdown" plan option for imposing a plan impairing the interests of a non-consenting class of creditors. See § 1129(b). Among the prerequisites for judicial approval of such a plan is that another impaired class of creditors has consented to it. See § 1129(a)(10). But crucially here, the consent of a creditor who is also an "insider" of the debtor does not count for that purpose. *Ibid.* The Bankruptcy Code's definition of an insider "includes" any director, officer, or "person in control" of the entity. § 101(31)(B)(i)–(iii). Courts have devised tests for identifying other, so-called "non-statutory" insiders, focusing, in whole or in part, on whether a person's transactions with the debtor were at arm's length.

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Here, MBP (an insider of Lakeridge) could not provide the partial agreement needed for a cramdown plan, and Lakeridge's reorganization was thus impeded. MBP sought to transfer its claim against Lakeridge to a non-insider who could agree to the cramdown plan. Kathleen Bartlett, an MBP board member and Lakeridge officer, offered MBP's claim to Robert Rabkin, a retired surgeon, for $5,000. Rabkin purchased the claim and consented to Lakeridge's proposed reorganization. U. S. Bank objected, arguing that Rabkin was a non-statutory insider because he had a "romantic" relationship with Bartlett and the purchase was not an arm's-length transaction. The Bankruptcy Court rejected U. S. Bank's argument. The Ninth Circuit affirmed. Viewing the Bankruptcy Court's decision as one based on a finding that the relevant transaction was conducted at arm's length, the Ninth Circuit held that that finding was entitled to clear-error review, and could not be reversed under that deferential standard.

Syllabus

Held: The Ninth Circuit was right to review the Bankruptcy Court's determination for clear error (rather than *de novo*). At the heart of this case is a so-called "mixed question" of law and fact—whether the Bankruptcy Court's findings of fact satisfy the legal test chosen for conferring non-statutory insider status. U. S. Bank contends that the Bankruptcy Court's resolution of this mixed question must be reviewed *de novo*, while Lakeridge (joined by the Federal Government) argues for a clear-error standard.

For all their differences, both parties rightly point to the same query: What is the nature of the mixed question here and which kind of court (bankruptcy or appellate) is better suited to resolve it? Mixed questions are not all alike. Some require courts to expound on the law, and should typically be reviewed *de novo*. Others immerse courts in case-specific factual issues, and should usually be reviewed with deference. In short, the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work.

Here, the Bankruptcy Court confronted the question whether the basic facts it had discovered (concerning Rabkin's relationships, motivations, etc.) were sufficient to make Rabkin a non-statutory insider. Using the transactional prong of the Ninth Circuit's legal test for identifying such insiders (whether the transaction was conducted at arm's length, *i. e.*, as though the two parties were strangers) the mixed question became: Given all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other? That is about as factual sounding as any mixed question gets. Such an inquiry primarily belongs in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and deepest understanding of the record—*i. e.*, the bankruptcy court. One can arrive at the same point by asking how much legal work applying the arm's-length test requires. It is precious little—as shown by judicial opinions applying the familiar legal term without further elaboration. Appellate review of the arm's-length issue—even if conducted *de novo*—will not much clarify legal principles or provide guidance to other courts resolving other disputes. The issue is therefore one that primarily rests with a bankruptcy court, subject only to review for clear error. Pp. 393–399.

814 F. 3d 993, affirmed.

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KAGAN, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 399. SOTOMAYOR, J., filed a concurring opinion, in which KENNEDY, THOMAS, and GORSUCH, JJ., joined, *post*, p. 400.

Gregory A. Cross argued the cause for petitioner. With him on the briefs were *Mitchell Y. Mirviss*, *Keith C. Owens*, and *Jennifer L. Nassiri*.

Daniel L. Geyser argued the cause for respondent. With him on the brief were *Peter K. Stris*, *Brendan S. Maher*, *Douglas D. Geyser*, *Alan R. Smith*, and *Holly E. Estes*.

Morgan L. Goodspeed argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, and *Dana Kaersvang*.

JUSTICE KAGAN delivered the opinion of the Court.

The Bankruptcy Code places various restrictions on anyone who qualifies as an "insider" of a debtor. The statutory definition of that term lists a set of persons related to the debtor in particular ways. See 11 U. S. C. § 101(31). Courts have additionally recognized as insiders some persons not on that list—commonly known as "non-statutory insiders." The conferral of that status often turns on whether the person's transactions with the debtor (or another of its insiders) were at arm's length. In this case, we address how an appellate court should review that kind of determination: *de novo* or for clear error? We hold that a clear-error standard should apply.

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I

Chapter 11 of the Bankruptcy Code enables a debtor company to reorganize its business under a court-approved plan governing the distribution of assets to creditors. See 11 U. S. C. § 1101 *et seq.* The plan divides claims against the debtor into discrete "classes" and specifies the "treatment" each class will receive. § 1123; see § 1122. Usually, a bankruptcy court may approve such a plan only if every affected class of creditors agrees to its terms. See § 1129(a)(8). But in certain circumstances, the court may confirm what is known as a "cramdown" plan—that is, a plan impairing

the interests of some non-consenting class. See § 1129(b). Among the prerequisites for judicial approval of a cramdown plan is that another impaired class of creditors has consented to it. See § 1129(a)(10). But crucially for this case, the consent of a creditor who is also an "insider" of the debtor does not count for that purpose. See *ibid.* (requiring "at least one" impaired class to have "accepted the plan, determined without including any acceptance of the plan by any insider").

The Code enumerates certain insiders, but courts have added to that number. According to the Code's definitional section, an insider of a corporate debtor "includes" any director, officer, or "person in control" of the entity. § 101(31)(B)(i)–(iii). Because of the word "includes" in that section, courts have long viewed its list of insiders as non-exhaustive. See § 102(3) (stating as one of the Code's "[r]ules of construction" that "'includes' and 'including' are not limiting"); 2 A. Resnick & H. Sommer, Collier on Bankruptcy ¶101.31, p. 101–142 (16th ed. 2017) (discussing cases). Accordingly, courts have devised tests for identifying other, so-called "non-statutory" insiders. The decisions are not entirely uniform, but many focus, in whole or in part, on whether a person's "transaction of business with the debtor is not at arm's length." *Ibid.* (quoting *In re U. S. Medical, Inc.*, 531 F. 3d 1272, 1280 (CA10 2008)).

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This case came about because the Code's list of insiders placed an obstacle in the way of respondent Lakeridge's attempt to reorganize under Chapter 11. Lakeridge is a corporate entity which, at all relevant times, had a single owner, MBP Equity Partners, and a pair of substantial debts. The company owed petitioner U. S. Bank over $10 million for the balance due on a loan. And it owed MBP another $2.76 million. In 2011, Lakeridge filed for Chapter 11 bankruptcy. The reorganization plan it submitted placed its two creditors in separate classes and proposed to impair both of their interests. U. S. Bank refused that offer, thus taking a fully

consensual plan off the table. But likewise, a cramdown plan based only on MBP's consent could not go forward. Recall that an insider cannot provide the partial agreement needed for a cramdown plan. See *supra*, at 390; § 1129(a)(10). And MBP was the consummate insider: It owned Lakeridge and so was—according to the Code's definition—"in control" of the debtor. § 101(31)(B)(iii). The path to a successful reorganization was thus impeded, and Lakeridge was faced with liquidation. Unless . . .

Unless MBP could transfer its claim against Lakeridge to a non-insider who would then agree to the reorganization plan. So that was what MBP attempted. Kathleen Bartlett, a member of MBP's board and an officer of Lakeridge, approached Robert Rabkin, a retired surgeon, and offered to sell him MBP's $2.76 million claim for $5,000. Rabkin took the deal. And as the new holder of MBP's old loan, he consented to Lakeridge's proposed reorganization. As long as he was not himself an insider, Rabkin's agreement would satisfy one of the prerequisites for a cramdown plan. See § 1129(a)(10); *supra*, at 390. That would bring Lakeridge a large step closer to reorganizing its business over U. S. Bank's objection.

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Hence commenced this litigation about whether Rabkin, too, was an insider. U. S. Bank argued that he qualified as a non-statutory insider because he had a "romantic" relationship with Bartlett and his purchase of MBP's loan "was not an arm's-length transaction." Motion to Designate Claim of Robert Rabkin as an Insider Claim in No. 11–51994 (Bkrtcy. Ct. Nev.), Doc. 194, p. 11 (Motion).[1] At an evidentiary hearing, both Rabkin and Bartlett testified that their relationship

[1] U. S. Bank also contended that Rabkin automatically inherited MBP's statutory insider status when he purchased its loan. See Motion, p. 10 ("[A]n entity which acquires a claim steps into the shoes of that claimant" (internal quotation marks omitted)). We did not grant review of that question and therefore do not address it in this opinion.

was indeed "romantic." App. 128, 142–143.[2] But the Bankruptcy Court still rejected U. S. Bank's view that Rabkin was a non-statutory insider. See App. to Pet. for Cert. 66a. The court found that Rabkin purchased the MBP claim as a "speculative investment" for which he did adequate due diligence. *Id.*, at 67a. And it noted that Rabkin and Bartlett, for all their dating, lived in separate homes and managed their finances independently. See *id.*, at 66a.

The Court of Appeals for the Ninth Circuit affirmed by a divided vote. According to the court, a creditor qualifies as a non-statutory insider if two conditions are met: "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in [the Code], and (2) the relevant transaction is negotiated at less than arm's length." *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1001 (2016). The majority viewed the Bankruptcy Court's decision as based on a finding that the relevant transaction here (Rabkin's purchase of MBP's claim) "was conducted at arm's length." *Id.*, at 1003, n. 15. That finding, the majority held, was entitled to clear-error review, and could not be reversed under that deferential standard. See *id.*, at 1001–1003. Rabkin's consent could therefore support the cramdown plan. See *id.*, at 1003. Judge Clifton dissented. He would have applied *de novo* review, but in any event thought the Bankruptcy Court committed clear error in declining to classify Rabkin as an insider. See *id.*, at 1006.

This Court granted certiorari to decide a single question: Whether the Ninth Circuit was right to review for clear

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[2] Perhaps Bartlett expressed some ambivalence on that score. The transcript of her direct examination reads:

"Q. Okay. And I think the term has been a romantic relationship—you have a romantic relationship?

A. I guess.

Q. Why do you say I guess?

A. Well, no—yes." App. 142–143.

One hopes Rabkin was not listening.

error (rather than *de novo*) the Bankruptcy Court's determination that Rabkin does not qualify as a non-statutory insider because he purchased MBP's claim in an arm's-length transaction. 580 U. S. 1216 (2017).

II

To decide whether a particular creditor is a non-statutory insider, a bankruptcy judge must tackle three kinds of issues—the first purely legal, the next purely factual, the last a combination of the other two. And to assess the judge's decision, an appellate court must consider all its component parts, each under the appropriate standard of review. In this case, only the standard for the final, mixed question is contested. But to resolve that dispute, we begin by describing the unalloyed legal and factual questions that both kinds of courts have to address along the way, as well as the answers that the courts below provided.

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Initially, a bankruptcy court must settle on a legal test to determine whether someone is a non-statutory insider (again, a person who should be treated as an insider even though he is not listed in the Bankruptcy Code). But that choice of standard really resides with the next court: As all parties agree, an appellate panel reviews such a legal conclusion without the slightest deference. See *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, 563 (2014) ("Traditionally, decisions on questions of law are reviewable *de novo*" (internal quotation marks omitted)); Tr. of Oral Arg. 29–30, 33. The Ninth Circuit here, as noted earlier, endorsed a two-part test for non-statutory insider status, asking whether the person's relationship with the debtor was similar to those of listed insiders and whether the relevant prior transaction was at "less than arm's length." 814 F. 3d, at 1001; see *supra*, at 392. And the Ninth Circuit held that the Bankruptcy Court had used just that standard—more specifically, that it had denied insider status under the test's second, transactional prong. See 814 F. 3d, at 1002–1003, and n. 15; *supra*, at 392. We do not

address the correctness of the Ninth Circuit's legal test; indeed, we specifically rejected U. S. Bank's request to include that question in our grant of certiorari. See 580 U. S. 1216; Pet. for Cert. i. We simply take that test as a given in deciding the standard-of-review issue we chose to resolve.

Along with adopting a legal standard, a bankruptcy court evaluating insider status must make findings of what we have called "basic" or "historical" fact—addressing questions of who did what, when or where, how or why. *Thompson* v. *Keohane*, 516 U. S. 99, 111 (1995). The set of relevant historical facts will of course depend on the legal test used: So under the Ninth Circuit's test, the facts found may relate to the attributes of a particular relationship or the circumstances and terms of a prior transaction. By well-settled rule, such factual findings are reviewable only for clear error—in other words, with a serious thumb on the scale for the bankruptcy court. See Fed. Rule Civ. Proc. 52(a)(6) (clear-error standard); Fed. Rules Bkrtcy. Proc. 7052 and 9014(c) (applying Rule 52 to various bankruptcy proceedings). Accordingly, as all parties again agree, the Ninth Circuit was right to review deferentially the Bankruptcy Court's findings about Rabkin's relationship with Bartlett (*e. g.*, that they did not "cohabitate" or pay each other's "bills or living expenses") and his motives for purchasing MBP's claim (*e. g.*, to make a "speculative investment"). App. to Pet. for Cert. 66a–67a; see Tr. of Oral Arg. 8, 39.

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What remains for a bankruptcy court, after all that, is to determine whether the historical facts found satisfy the legal test chosen for conferring non-statutory insider status. We here arrive at the so-called "mixed question" of law and fact at the heart of this case. *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982) (A mixed question asks whether "the historical facts . . . satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated"). As already described, the Bankruptcy Court below had found a set of basic facts about Rabkin; and it had adopted a legal test for non-

statutory insider status that requires (as one of its two prongs) a less-than-arm's-length transaction. See *supra*, at 392, 393. As its last move, the court compared the one to the other—and determined that the facts found did not show the kind of preferential transaction necessary to turn a creditor into a non-statutory insider. For that decisive determination, what standard of review should apply?

The parties, after traveling so far together, part ways at this crucial point. U. S. Bank contends that the Bankruptcy Court's resolution of the mixed question must be reviewed *de novo*. That is because, U. S. Bank claims, application of the Ninth Circuit's "very general" standard to a set of basic facts requires the further elaboration of legal principles—a task primarily for appellate courts. Brief for Petitioner 35; see *id.*, at 53 (The "open-ended nature of the Ninth Circuit's standard" compels courts to "develop the norms and criteria they deem most appropriate" and so should be viewed as "quasi-legal"). By contrast, Lakeridge (joined by the Federal Government as *amicus curiae*) thinks a clear-error standard should apply. In Lakeridge's view, the ultimate law-application question is all "bound up with the case-specific details of the highly factual circumstances below"—and thus falls naturally within the domain of bankruptcy courts. Brief for Respondent 17; see Brief for United States 21 (similarly describing the mixed question as "fact-intensive").

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For all their differences, both parties rightly point us to the same query: What is the nature of the mixed question here and which kind of court (bankruptcy or appellate) is better suited to resolve it? See *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985) (When an "issue falls somewhere between a pristine legal standard and a simple historical fact," the standard of review often reflects which "judicial actor is better positioned" to make the decision).[3] Mixed questions are

[3] In selecting standards of review, our decisions have also asked whether a "long history of appellate practice" supplies the answer. *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). But we cannot find any-

not all alike. As U. S. Bank suggests, some require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard. When that is so—when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*. See *Salve Regina College* v. *Russell*, 499 U. S. 225, 231–233 (1991) (discussing appellate courts' "institutional advantages" in giving legal guidance). But as Lakeridge replies, other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce* v. *Underwood*, 487 U. S. 552, 561–562 (1988) (internal quotation marks omitted). And when that is so, appellate courts should usually review a decision with deference. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574–576 (1985) (discussing trial courts' "superiority" in resolving such issues).[4] In short, the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.

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Now again, recall the mixed question the Bankruptcy Court confronted in this case. See *supra*, at 394–395. At

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thing resembling a "historical tradition" to provide a standard for reviewing the mixed question here. *Ibid.*

[4] Usually but not always: In the constitutional realm, for example, the calculus changes. There, we have often held that the role of appellate courts "in marking out the limits of [a] standard through the process of case-by-case adjudication" favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503 (1984); see *Ornelas* v. *United States*, 517 U. S. 690, 697 (1996) (reasonable suspicion and probable cause under the Fourth Amendment); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 567 (1995) (expression under the First Amendment); *Miller* v. *Fenton*, 474 U. S. 104, 115–116 (1985) (voluntariness of confession under the Fourteenth Amendment's Due Process Clause).

a high level of generality, the court needed to determine whether the basic facts it had discovered (concerning Rabkin's relationships, motivations, and so on) were sufficient to make Rabkin a non-statutory insider. But the court's use of the Ninth Circuit's legal test for identifying such insiders reduced that question to a more particular one: whether the facts found showed an arm's-length transaction between Rabkin and MBP. See *ibid.*[5] And still, we can further delineate that issue just by plugging in the widely (universally?) understood definition of an arm's-length transaction: a transaction conducted as though the two parties were strangers. See, *e. g.*, Black's Law Dictionary 1726 (10th ed. 2014). Thus the mixed question becomes: Given all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other?

That is about as factual sounding as any mixed question gets. Indeed, application of the Ninth Circuit's arm's-length legal standard really requires what we have previously described as a "factual inference[] from undisputed basic facts." *Commissioner* v. *Duberstein*, 363 U. S. 278, 291 (1960) (holding that clear-error review applied to a decision that a particular transfer was a statutory "gift"). The court takes a raft of case-specific historical facts,[6] considers them as a whole, balances them one against another—all to make a determination that when two particular persons entered into a particular transaction, they were (or were not) acting

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[5] A bankruptcy court applying the Ninth Circuit's test might, in another case, reach its separate, non-transactional prong: whether "the closeness of [a person's] relationship with the debtor is comparable to that of the enumerated insider classifications" in the Code. *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1001 (2016); see *supra*, at 392. We express no opinion on how an appellate court should review a bankruptcy court's application of that differently framed standard to a set of established facts.

[6] Or, to use the more abundant description we quoted above, "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce*, 487 U. S., at 561–562 (internal quotation marks omitted); see *supra*, at 396.

like strangers. Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record—*i. e.*, the bankruptcy court.

And we can arrive at the same point from the opposite direction—by asking how much legal work applying the arm's-length test requires. Precious little, in our view—as shown by judicial opinions addressing that concept. Our own decisions, arising in a range of contexts, have never tried to elaborate on the established idea of a transaction conducted as between strangers; nor, to our knowledge, have lower courts. See, *e. g.*, *Jones* v. *Harris Associates L. P.*, 559 U. S. 335, 346 (2010); *Commissioner* v. *Wemyss*, 324 U. S. 303, 307 (1945); *Pepper* v. *Litton*, 308 U. S. 295, 306–307 (1939). The stock judicial method is merely to state the requirement of such a transaction and then to do the fact-intensive job of exploring whether, in a particular case, it occurred. See, *e. g.*, *Wemyss*, 324 U. S., at 307. Contrary to U. S. Bank's view, there is no apparent need to further develop "norms and criteria," or to devise a supplemental multi-part test, in order to apply the familiar term. Brief for Petitioner 53; see Tr. of Oral Arg. 18; *supra*, at 395. So appellate review of the arm's-length issue—even if conducted *de novo*—will not much clarify legal principles or provide guidance to other courts resolving other disputes. And that means the issue is not of the kind that appellate courts should take over.[7]

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[7] That conclusion still leaves some role for appellate courts in this area. They of course must decide whether a bankruptcy court committed clear error in finding that a transaction was arm's length (or not). (We express no view of that aspect of the Ninth Circuit's decision because we did not grant certiorari on the question. See *supra*, at 392–393.) In addition, an appellate court must correct any legal error infecting a bankruptcy court's decision. So if the bankruptcy court somehow misunderstood the nature of the arm's-length query—or if it devised some novel multi-factor test for addressing that issue—an appellate court should apply *de novo* re-

The Court of Appeals therefore applied the appropriate standard in reviewing the Bankruptcy Court's determination that Rabkin did not qualify as an insider because his transaction with MBP was conducted at arm's length. A conclusion of that kind primarily rests with a bankruptcy court, subject only to review for clear error. We accordingly affirm the judgment below.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion for the Court and the concurring opinion by JUSTICE SOTOMAYOR. In doing so, it seems appropriate to add these further comments.

As the Court's opinion makes clear, courts of appeals may continue to elaborate in more detail the legal standards that will govern whether a person or entity is a non-statutory insider under the Bankruptcy Code. *Ante,* at 393–394, 398–399, n. 7. At this stage of the doctrine's evolution, this ongoing elaboration of the principles that underlie non-statutory insider status seems necessary to ensure uniform and accurate adjudications in this area.

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In particular, courts should consider the relevance and meaning of the phrase "arms-length transaction" in this bankruptcy context. See *ibid.* As courts of appeals address these issues and make more specific rulings based on the facts and circumstances of individual cases, it may be that instructive, more specifically defined rules will develop.

This leads to an additional point. Under the test that the Court of Appeals applied here, there is some room for doubt

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view. And finally, if an appellate court someday finds that further refinement of the arm's-length standard is necessary to maintain uniformity among bankruptcy courts, it may step in to perform that legal function. By contrast, what it may *not* do is review independently a garden-variety decision, as here, that the various facts found amount to an arm's-length (or a non-arm's-length) transaction and so do not (or do) confer insider status.

that the Bankruptcy Judge was correct in concluding that Rabkin was not an insider, especially without further inquiry into whether the offer Bartlett made to Rabkin could and should have been made to other parties who might have paid a higher price. See *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1006 (CA9 2016) (Clifton, J., concurring in part and dissenting in part) ("[E]ven if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny"). MBP's failure to offer its claim more widely could be a strong indication that the transaction was not conducted at arm's length. As the Court is careful and correct to note, however, certiorari was not granted on this question. See *ante*, at 398–399, n. 7. As a result, whether the test for non-statutory insider status as formulated and used by courts in the Ninth Circuit is sufficient is not before us; and whether on these facts it was clear error to find that Rabkin was not an insider is also not before us.

The Court's holding should not be read as indicating that the non-statutory insider test as formulated by the Court of Appeals is the proper or complete standard to use in determining insider status. Today's opinion for the Court properly limits its decision to the question whether the Court of Appeals applied the correct standard of review, and its opinion should not be read as indicating that a transaction is arm's length if the transaction was negotiated simply with a close friend, without broader solicitation of other possible buyers.

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JUSTICE SOTOMAYOR, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE GORSUCH join, concurring.

The Court granted certiorari to decide "[w]hether the appropriate standard of review for determining non-statutory insider status" under the Bankruptcy Code is *de novo* or clear error. Pet. for Cert. i. To answer that question, the Court "take[s] . . . as a given" the two-prong test that the Court of Appeals for the Ninth Circuit has adopted for deter-

mining whether a person or entity is an insider. *Ante*, at 394. I join the Court's opinion in full because, within that context, I agree with the Court's analysis that a determination whether a particular transaction was conducted at arm's length is a mixed question of law and fact that should be reviewed for clear error. See *ante*, at 397–399.

I write separately, however, because I am concerned that our holding eludes the more fundamental question whether the Ninth Circuit's underlying test is correct. If that test is not the right one, our holding regarding the standard of review may be for naught. That is because the appropriate standard of review is deeply intertwined with the test being applied. As the Court puts it, "the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work." *Ante*, at 396.

Here, the Court identifies the Ninth Circuit as having affirmed on the basis of the second prong of its test, pursuant to which the Ninth Circuit concluded that the relevant transaction between Robert Rabkin and MBP Equity Partners was conducted at arm's length. *Ante*, at 393. Because that analysis is primarily factual in nature, the Court rightly concludes that appellate review of the Bankruptcy Court's decision is for clear error. *Ante*, at 397–399. However, if the proper inquiry did not turn solely on an arm's-length analysis but rather involved a different balance of legal and factual work, the Court may have come to a different conclusion on the standard of review.

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The Court's discussion of the standard of review thus begs the question of what the appropriate test for determining non-statutory insider status is. I do not seek to answer that question, as the Court expressly declined to grant certiorari on it. I have some concerns with the Ninth Circuit's test, however, that would benefit from additional consideration by the lower courts.

As the Ninth Circuit interpreted the Code, "[a] creditor is not a non-statutory insider unless: (1) the closeness of its

relationship with the debtor is comparable to that of the enumerated insider classifications in [11 U. S. C.] § 101(31), *and* (2) the relevant transaction is negotiated at less than arm's length." *In re Village at Lakeridge, LLC*, 814 F. 3d 993, 1001 (2016) (emphasis added). Under this test, because prongs one and two are conjunctive, a court's conclusion that the relevant transaction was conducted at arm's length necessarily defeats a finding of non-statutory insider status, regardless of how close a person's relationship with the debtor is or whether he is otherwise comparable to a statutorily enumerated insider.[1]

It is not clear to me, however, that the Ninth Circuit has explained how this two-prong test is consistent with the plain meaning of the term "insider" as it appears in the Code. The concept of "insider" generally rests on the presumption that a person or entity alleged to be an insider is so connected with the debtor that any business conducted between them necessarily cannot be conducted at arm's length. See Black's Law Dictionary 915 (10th ed. 2014) (defining "insider" as "[a]n entity or person who is so closely related to a debtor that any deal between them will not be considered an arm's-length transaction and will be subject to close scrutiny"). Title 11 U. S. C. § 101(31) defines "insider" by identifying certain individuals or entities who are considered insiders merely on the basis of their status, without regard to whether any relevant transaction is conducted at arm's length. Such an individual is not under any circumstance able to vote for a reorganization plan. See § 1129(a)(10).

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In contrast, under prong two of the Ninth Circuit's test, an individual who is similar to, but does not fall precisely within, one of the categories of insiders listed in § 101(31) will not be considered an insider and will be able to vote

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[1] Other Circuits have developed analogous rules. See, *e. g.*, *Matter of Holloway*, 955 F. 2d 1008, 1011 (CA5 1992); *In re U. S. Medical, Inc.*, 531 F. 3d 1272, 1277–1278 (CA10 2008); *In re Winstar Communications, Inc.*, 554 F. 3d 382, 396–397 (CA3 2009). But see *In re Longview Aluminum, LLC*, 657 F. 3d 507, 510 (CA7 2011).

under § 1129(a)(10) so long as the transaction relevant to the bankruptcy proceeding is determined to have been conducted at arm's length. This would include, for example, a romantic partner of an insider, even one who in all or most respects acts like a spouse.

Given that courts have interpreted "non-statutory insiders" as deriving from the same statutory definition as the enumerated insiders in § 101(31), the basis for the disparate treatment of two similar individuals is not immediately apparent. Lower courts have concluded that the Code's use of the term "includes" in the definition of "insider" in § 101(31) signals that Congress contemplated that certain other persons or entities in addition to those listed would qualify as insiders. See *ante*, at 390. Notably, this Court has never addressed that issue directly, although the Court has held in other contexts that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95, 100 (1941).

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Assuming § 101(31) encompasses such "non-statutory insiders," the only clue we have as to which persons or entities fall within that category is the list of enumerated insiders and the presumption of lack of arm's length that follows from that label. Because each of those persons or entities are considered insiders regardless of whether a particular transaction appears to have been conducted at arm's length, it is not clear why the same should not be true of non-statutory insiders. That is, an enumerated "insider" does not cease being an insider just because a court finds that a relevant transaction was conducted at arm's length. Then why should a finding that a transaction was conducted at arm's length, without more, conclusively foreclose a finding that a person or entity is a "non-statutory insider"?

Of course, courts must develop some principled method of determining what other individuals or entities fall within the term "insider" other than those expressly provided. I can

conceive of at least two possible legal standards that are consistent with the understanding that insider status inherently presumes that transactions are not conducted at arm's length. First, it could be that the inquiry should focus solely on a comparison between the characteristics of the alleged non-statutory insider and the enumerated insiders, and if they share sufficient commonalities, the alleged person or entity should be deemed an insider regardless of the apparent arm's-length nature of any transaction. Cf. *In re Longview Aluminum, LLC*, 657 F. 3d 507, 510–511 (CA7 2011) (considering only whether a manager of a debtor corporation was comparable to the enumerated insiders, regardless of whether any transaction was conducted at less than arm's length).

Second, it could be that the test should focus on a broader comparison that includes consideration of the circumstances surrounding any relevant transaction. If a transaction is determined to have been conducted at less than arm's length, it may provide strong evidence in the context of the relationship as a whole that the alleged non-statutory insider should indeed be considered an insider. Relatedly, if the transaction does appear to have been undertaken at arm's length, that may be evidence, considered together with other aspects of the parties' relationship, that the alleged non-statutory insider should not, in fact, be deemed an insider.

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Neither of these conceptions reflects the Ninth Circuit's test. Rather, the Ninth Circuit considered separately whether Rabkin was comparable to an enumerated insider and whether the transaction between Rabkin and MBP was conducted at arm's length. See 814 F. 3d, at 1002–1003. Because the Ninth Circuit concluded that the transaction was undertaken at arm's length, that finding was dispositive of non-statutory insider status under their test, leading this Court, in turn, to consider the standard of review only with respect to that prong.

It is conceivable, however, that if the appropriate test were different from the one articulated by the Ninth Circuit, such as the two examples I outlined above, the applicable standard of review would be different as well. See *ante*, at 393, 397, n. 5. To make more concrete how this may play out in practice, I briefly walk through how I might apply my two proposed tests to the facts of this case.

If a comparative analysis were the right test, and assuming, *arguendo*, that it involves more legal than factual work thus resulting in *de novo* review, certain aspects of Rabkin's relationship with Kathleen Bartlett, an undisputed insider of the debtor, strike me as suggesting that Rabkin should have been designated as a non-statutory insider. Rabkin purchased the claim from MBP, but Bartlett, a member of MBP's board, facilitated the transaction. Even though Rabkin and Bartlett kept separate finances and lived separately, they shared a "romantic" relationship, see *ante*, at 392; Rabkin knew that the debtor was in bankruptcy, 814 F. 3d, at 1003; and Bartlett approached only Rabkin with the offer to sell MBP's claim, *id.*, at 1002. In a strict comparative analysis, Rabkin's interactions with Bartlett and MBP suggest that he may have been acting comparable to an enumerated insider, for example, like a relative of an officer of an insider. See § 101(31)(B)(vi).

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Even if the comparative analysis included a broader consideration of features of the transaction that suggest it was conducted at arm's length, and assuming, *arguendo*, that *de novo* review would apply, it is not obvious that those features would outweigh the aspects of the relationship that are concerning. Even though Rabkin purportedly lacked knowledge of the cramdown plan prior to his purchase and considered the purchase a "small investment" not warranting due diligence, 814 F. 3d, at 1003, there was no evidence of negotiation over the price, *id.*, at 1004 (Clifton, J., concurring in part and dissenting in part), or any concrete evidence that

MBP obtained real value in the deal aside from the prospect of Rabkin's vote in the cramdown.[2]

Even if the proper test for insider status called for clear error review, it is possible that the facts of this case when considered through the lens of that test, as opposed to one focused solely on arm's length, may have warranted a finding that Rabkin was a non-statutory insider.

This is all to say that I hope that courts will continue to grapple with the role that an arm's-length inquiry should play in a determination of insider status. In the event that the appropriate test for determining non-statutory insider status is different from the one that the Ninth Circuit applied, and involves a different balance of legal and factual work than the Court addresses here, it is possible I would view the applicable standard of review differently. Because I do not read the Court's opinion as foreclosing that result, I join it in full.

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[2] Outside the context of a determination of insider status, it is possible that the nature of a transaction is relevant to assessing the integrity of bankruptcy proceedings in other ways; for example, in assessing whether a vote in a reorganization plan was "not in good faith, or was not solicited or procured in good faith." 11 U. S. C. § 1126(e). It troubles me here that neither the Bankruptcy Court nor the Ninth Circuit considered whether Rabkin's purchase of MBP's claim for $5,000 was for value. See App. to Pet. for Cert. 67a (bankruptcy order); *In re Village at Lakeridge, LLC*, 634 Fed. Appx. 619, 621 (2016). Cf. *In re DBSD North Am., Inc.*, 634 F. 3d 79, 104 (CA2 2011) (stating that a transferee's overpayment for claims was relevant to a good-faith determination under § 1126(e)); § 548(c) (providing that a transfer will not be considered constructively fraudulent, and will not be voidable under § 548(a), where "a transferee . . . takes for value and in good faith"). Indeed, we have no concrete information about what benefit MBP received from the transaction aside from the prospect of Rabkin's vote in the cramdown. Of course, the Ninth Circuit's decision with respect to § 1126(e) is not before this Court, but it again prompts a concern with how the courts below considered the nature of the transaction.

Syllabus

TEXAS *v.* NEW MEXICO ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 141, Orig. Argued January 8, 2018—Decided March 5, 2018

To resolve their disputes over water rights in the Rio Grande, Colorado, New Mexico, and Texas, with Congress's approval, signed the Rio Grande Compact. The Compact requires Colorado to deliver a specified amount of water annually to New Mexico at the state line and directs New Mexico to deliver a specified amount of water to the Elephant Butte Reservoir. The Reservoir was completed in 1916 as part of the Federal Government's Rio Grande Project and plays a central role in fulfilling the United States's obligations to supply water under a 1906 treaty with Mexico as well as under several agreements with downstream water districts in New Mexico and Texas (Downstream Contracts).

Texas brought this original action complaining that New Mexico has violated the Compact by allowing downstream New Mexico users to siphon off water below the Reservoir in ways not anticipated in the Downstream Contracts. The United States intervened and filed a complaint with parallel allegations. The Special Master filed a report recommending that the United States's complaint be dismissed in part because the Compact does not confer on the United States the power to enforce its terms. This Court agreed to hear two exceptions to the report concerning the scope of the claims the United States can assert here: The United States says it may pursue claims for Compact violations; Colorado says the United States should be permitted to pursue claims only to the extent they arise under the 1906 treaty with Mexico.

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Held: The United States may pursue the Compact claims it has pleaded in this original action. This Court, using its unique authority to mold original actions, see *Kansas* v. *Nebraska*, 574 U. S. 445, 454, has sometimes permitted the federal government to participate in compact suits to defend "distinctively federal interests" that a normal litigant might not be permitted to pursue in traditional litigation, *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21. While this permission should not be confused with license, several considerations taken collectively lead to the conclusion that the United States may pursue the particular claims it has pleaded in this case. First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. Second, New Mexico has conceded in pleadings and at oral argument that the United States plays an integral role in the Compact's operation. Third,

a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations to Mexico. Fourth, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States. Pp. 412–415.

United States's exception sustained; all other exceptions overruled; and case remanded.

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

Ann O'Connell argued the cause for intervenor United States. With her on the briefs were *Acting Solicitor General Wall*, *Acting Assistant Attorney General Wood*, *Deputy Solicitor General Kneedler*, *R. Lee Leininger*, and *Judith E. Coleman*.

Scott A. Keller, Solicitor General of Texas, argued the cause for plaintiff. On the briefs were *Stuart L. Somach*, *Andrew M. Hitchings*, *Robert B. Hoffman*, and *Francis M. Goldsberry II*.

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Frederick R. Yarger, Solicitor General of Colorado, argued the cause for defendant Colorado. With him on the briefs were *Cynthia H. Coffman*, Attorney General, *Karen M. Kwon*, First Assistant Attorney General, *Chad M. Wallace*, Senior Assistant Attorney General, and *Preston V. Hartman*, Assistant Attorney General.

Marcus J. Rael, Jr., Special Assistant Attorney General of New Mexico, argued the cause for defendant New Mexico. With him on the briefs were *Hector H. Balderas*, Attorney General, *Tania Maestas*, Deputy Attorney General, and *David A. Roman*, *Lindsay R. Drennan*, *Bennet W. Raley*, *Lisa M. Thompson*, and *Michael A. Kopp*, Special Assistant Attorneys General.*

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*Briefs of *amici curiae* supporting plaintiff were filed for the State of Kansas by *Derek Schmidt*, Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Stephen R. McAllister*, Solicitor

JUSTICE GORSUCH delivered the opinion of the Court.

Will Rogers reportedly called the Rio Grande "the only river I ever saw that needed irrigation." In its long journey from the Colorado Rockies to the Gulf of Mexico, many and sometimes competing demands are made on the river's resources. In an effort to reconcile some of those demands, Colorado, New Mexico, and Texas, acting with the federal government's assent, signed the Rio Grande Compact in the 1930s. In today's lawsuit, Texas claims that New Mexico has defied the Compact. But at this stage in the proceedings we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has? We believe it may.

Like its namesake, the Rio Grande Compact took a long and circuitous route to ratification. Its roots trace perhaps to the 1890s, when Mexico complained to the United States that increasing demands on the river upstream left little for those below the border. The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a potential dam site near Elephant Butte, New Mexico, about 105 miles north of the Texas state line. The government presented this suggestion to representatives of Mexico and the affected States in a 1904 "'Irrigation Congress,'" where it was "'heartily endorse[d] and approve[d].'" Official Proceedings of the

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General, and *Bryan C. Clark* and *Dwight R. Carswell*, Assistant Solicitors General; for the City of El Paso, Texas, by *Douglas G. Caroom*; for El Paso County Water Improvement District No. 1 by *James M. Speer, Jr.*, *Maria O'Brien*, and *Sarah M. Stevenson*; and for Elephant Butte Irrigation District by *Samantha R. Barncastle*.

Briefs of *amici curiae* supporting defendant New Mexico were filed for Albuquerque Bernalillo County Water Utility Authority by *James C. Brockmann*, *Jay F. Stein*, and *Peter S. Auh*; for the City of Las Cruces by *Mr. Stein*, *Mr. Brockmann*, and *Harry S. Connelly, Jr.*; for New Mexico Pecan Growers by *Tessa Davidson*; and for New Mexico State University by *John W. Utton*.

Twelfth National Irrigation Congress 107 (G. Mitchell ed. 1905). So, in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, 34 Stat. 2953, T. S. No. 455. After obtaining the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.

But that still left the problem of resolving similar disputes among the various States. After a number of interim agreements and impasses, the affected parties eventually (and nearly simultaneously) negotiated several agreements. And here again the Rio Grande Project and its Elephant Butte Reservoir played a central role. In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas. We will call those agreements the "Downstream Contracts." Additionally, Colorado, New Mexico, and Texas concluded the Rio Grande Compact, which Congress approved in 1939. Act of May 31, 1939, 53 Stat. 785. In the Compact, the parties indicated that nothing in their agreement should be "construed as affecting" the federal government's treaty duties to deliver promised water to Mexico, but only as resolving disputes among themselves. *Id.*, at 792. Toward that end, the Compact required Colorado to deliver a specified amount of water annually to New Mexico at the state line. *Id.*, at 787–788. But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact directed New Mexico to deliver

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water to the Reservoir. *Id.*, at 788.† In isolation, this might have seemed a curious choice, for a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources.

Fast forward to this dispute. Texas filed an original action before this Court complaining that New Mexico has violated the Compact. According to Texas, New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate. After we permitted the United States to intervene, it also filed a complaint with allegations that parallel Texas's. In response to these complaints, New Mexico filed a motion to dismiss. A Special Master we appointed to consider the case received briefing, heard argument, and eventually issued an interim report recommending that we deny New Mexico's motion to dismiss Texas's complaint. We accepted that recommendation. At the same time, the Master recommended that we dismiss in part the complaint filed by the United States. The Master reasoned, in pertinent part, that the Compact does not confer on the United States the power to enforce its terms. In response to the Master's report, the parties filed a number of exceptions. We agreed to hear two of these exceptions—one by the United States and one by Colorado—concerning the

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†To be precise, the Compact originally required New Mexico to deliver water to a measuring station at San Marcial, New Mexico, upstream of the Elephant Butte Reservoir. 53 Stat. 788. But the Compact also established something called the Rio Grande Compact Commission and gave it the power to administer the Compact in various ways. *Id.*, at 791. In 1948, that Commission relocated the spot for measuring the delivery obligation from the measuring station to the Reservoir itself.

scope of the claims the United States can assert in this original action. The United States says it may pursue claims for violations of the Compact itself; Colorado says the United States should be permitted to pursue claims only to the extent they arise under the 1906 treaty with Mexico.

Our analysis begins with the Constitution. Its Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." Art. I, § 10, cl. 3. Congress's approval serves to "prevent any compact or agreement between any two States, which might affect injuriously the interest of the others." *Florida* v. *Georgia*, 17 How. 478, 494 (1855). It also ensures that the Legislature can "check any infringement of the rights of the national government." 3 J. Story, Commentaries on the Constitution of the United States § 1397, p. 272 (1833) (in subsequent editions, § 1403). So, for example, if a proposed interstate agreement might lead to friction with a foreign country or injure the interests of another region of our own, Congress may withhold its approval. But once Congress gives its consent, a compact between States—like any other federal statute—becomes the law of the land. *Texas* v. *New Mexico*, 462 U. S. 554, 564 (1983).

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Our role in compact cases differs from our role in ordinary litigation. The Constitution endows this Court with original jurisdiction over disputes between the States. See Art. III, § 2. And this Court's role in these cases is to serve "'as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.'" *Kansas* v. *Nebraska*, 574 U. S. 445, 453 (2015) (quoting *North Dakota* v. *Minnesota*, 263 U. S. 365, 372–373 (1923)). As a result, the Court may, "[i]n this singular sphere, . . . 'regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.'" 574 U. S., at 454 (quoting *Kentucky* v. *Dennison*, 24 How. 66, 98 (1861)).

Using that special authority, we have sometimes permitted the federal government to participate in compact suits to

defend "distinctively federal interests" that a normal litigant might not be permitted to pursue in traditional litigation. *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21 (1981). At the same time, our permission should not be confused for license. Viewed from some sufficiently abstract level of generality, almost any compact between the States will touch on some concern of the national government—foreign affairs, interstate commerce, taxing and spending. No doubt that is the very reason why the Constitution requires congressional ratification of state compacts. But just because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements.

Still, bearing in mind our unique authority to mold original actions, several considerations taken collectively persuade us that the United States may pursue the particular claims it has pleaded in this case:

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First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec[t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of "'agent' of the Compact, charged with assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2012).

However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Second, New Mexico has conceded that the United States plays an integral role in the Compact's operation. Early in these proceedings, it argued that the federal government was an indispensable party to this lawsuit because it is "responsible for . . . delivery of . . . water" as required by the Downstream Contracts and anticipated by the Compact. Brief in Opposition 33; *ibid.* ("[T]he entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the [Rio Grande] Project" contract). And at oral argument, New Mexico contended that the federal government is so integrally a part of the Compact's operation that a State could sue the United States under the Compact for interfering with its operation. Tr. of Oral Arg. 59.

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Third, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. See *Sanitary Dist. of Chicago* v. *United States*, 266 U. S. 405, 423–425 (1925) (recognizing the strong interests of the United States in preventing interference with its treaty obligations). Our treaty with Mexico requires the federal government to deliver 60,000 acre-feet of water annually from the Elephant Butte Reservoir. And to fill that Reservoir the Compact obliges New Mexico to deliver a specified amount of water to the facility. So a failure by New Mexico to meet its Compact obligations could directly impair the federal government's ability to perform its obligations under the treaty. Now the Compact says plainly that it may not be "construed as affecting the obligations of the United States of America to Mexico" under existing treaties. 53 Stat. 792. But that means only that the Compact seeks to

avoid impairing the federal government's treaty obligations. Permitting the United States to proceed here will allow it to ensure that those obligations are, in fact, honored.

Fourth, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States.

Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action. Nothing in our opinion should be taken to suggest whether a different result would obtain in the absence of any of the considerations we have outlined or in the presence of additional, countervailing considerations. The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion.

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It is so ordered.

Syllabus

CYAN, INC., ET AL. *v.* BEAVER COUNTY EMPLOYEES RETIREMENT FUND ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 15–1439. Argued November 28, 2017—Decided March 20, 2018

In the wake of the 1929 stock market crash, Congress enacted two laws, in successive years, to promote honest practices in the securities markets. The Securities Act of 1933 (1933 Act) creates private rights of action to aid the enforcement of obligations pertaining to securities offerings. The Act authorizes both federal and state courts to exercise jurisdiction over those private suits and, more unusually, bars the removal of such suits from state to federal court. The Securities Exchange Act of 1934 (1934 Act), which regulates not the original issuance of securities but all their subsequent trading, is also enforceable through private rights of action. But all suits brought under the 1934 Act fall within the exclusive jurisdiction of the federal courts.

In 1995, the Private Securities Litigation Reform Act (Reform Act) amended both Acts, in order to stem perceived abuses of the class-action vehicle in securities litigation. The Reform Act included both substantive reforms, applicable in state and federal court alike, and procedural reforms, applicable only in federal court. Rather than face these new obstacles, plaintiffs began filing securities class actions under state law.

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To prevent this end run around the Reform Act, Congress passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA), whose amendments to the 1933 Act are at issue in this case. As relevant here, those amendments include two operative provisions, two associated definitions, and two "conforming amendments."

First, 15 U. S. C. § 77p(b) completely disallows (in both state and federal courts) "covered class actions" alleging dishonest practices "in connection with the purchase or sale of a covered security." According to SLUSA's definitions, the term "covered class action" means a class action in which "damages are sought on behalf of more than 50 persons." § 77p(f)(2). And the term "covered security" refers to a security listed on a national stock exchange. § 77p(f)(3). Next, § 77p(c) provides for the removal of certain class actions to federal court, where they are subject to dismissal. Finally, SLUSA's "conforming amendments" add two new phrases to § 77v(a), the 1933 Act's jurisdictional provision. The first creates an exception to § 77v(a)'s general removal bar through the language "[e]xcept as provided in section 77p(c)." The other—the

key provision in this case—expresses a caveat to the general rule that state and federal courts have concurrent jurisdiction over all claims to enforce the 1933 Act. With this conforming amendment, § 77v(a) now provides that state and federal courts shall have concurrent jurisdiction, "except as provided in section 77p . . . with respect to covered class actions." The Court refers to this provision as the "except clause."

Respondents, three pension funds and an individual (Investors), purchased shares of stock in petitioner Cyan, Inc., in an initial public offering. After the stock declined in value, the Investors brought a damages class action against Cyan in state court, alleging 1933 Act violations. They did not assert any claims based on state law. Cyan moved to dismiss for lack of subject matter jurisdiction, arguing that SLUSA's "except clause" stripped state courts of power to adjudicate 1933 Act claims in "covered class actions." The Investors maintained that SLUSA left intact state courts' jurisdiction over all suits—including "covered class actions"—alleging only 1933 Act claims. The state courts agreed with the Investors and denied Cyan's motion to dismiss. This Court granted certiorari to decide whether SLUSA deprived state courts of jurisdiction over "covered class actions" asserting only 1933 Act claims. The Court also addresses a related question raised by the Federal Government as *amicus curiae* and addressed by the parties in briefing and argument: whether SLUSA enabled defendants to remove 1933 Act class actions from state to federal court for adjudication.

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Held:

1. SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions brought under the 1933 Act. Pp. 426–437.

(a) SLUSA's text, read most straightforwardly, leaves this jurisdiction intact. The background rule of § 77v(a)—in place since the 1933 Act's passage—gives state courts concurrent jurisdiction over all suits "brought to enforce any liability or duty created by" that statute. And the except clause—"except as provided in section 77p of this title with respect to covered class actions"—ensures that in any case in which § 77v(a) and § 77p conflict, § 77p will control. The critical question for this case is therefore whether § 77p limits state-court jurisdiction over class actions brought under the 1933 Act. It does not. Section 77p bars certain securities class actions based on *state* law but it says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law. That means § 77v(a)'s background rule—under which a state court may hear the Investors' 1933 Act suit—continues to govern.

Cyan argues that the except clause's reference to "covered class actions" points the reader to § 77p(f)(2), which defines that term to mean

a suit seeking damages on behalf of more than 50 persons—without mentioning anything about whether the suit is based on state or federal law. But that view cannot be squared with the except clause's wording for two independent reasons. First, the except clause points to "section 77p" as a whole—not to paragraph 77p(f)(2). Had Congress intended to refer to § 77p(f)(2)'s definition alone, it presumably would have done so. See *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 300. Second, a definition, like § 77p(f)(2), does not "provide[ ]" an "except[ion]," but instead gives meaning to a term—and Congress well knows the difference between those two functions. Not one of the 30-plus provisions in the 1933 and 1934 Acts using the phrase "except as provided in . . . " cross-references a *definition*.

Structure and context also support the Court's reading of the except clause. Because Cyan treats the broad definition of "covered class action" as altering § 77v(a)'s jurisdictional grant, its construction would prevent state courts from deciding any 1933 Act class suits seeking damages for more than 50 plaintiffs, thus stripping state courts of jurisdiction over suits about securities raising no particular national interest. That result is out of line with SLUSA's overall scope. Moreover, it is highly unlikely that Congress upended the 65-year practice of state courts' adjudicating all manner of 1933 Act cases (including class actions) by way of a mere conforming amendment. See *Director of Revenue of Mo.* v. *CoBank ACB*, 531 U. S. 316, 324. Pp. 427–431.

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(b) Cyan's reliance on legislative purpose and history is unavailing. Pp. 431–437.

(1) Cyan insists that the only way for SLUSA to serve the Reform Act's objectives was by divesting state courts of jurisdiction over all sizable 1933 Act class actions. Specifically, it claims that its reading is necessary to prevent plaintiffs from circumventing the Reform Act's procedural measures, which apply only in federal court, by bringing 1933 Act class actions in state court.

But Cyan ignores a different way in which SLUSA served the Reform Act's objectives—which the Court's view of the statute fully effects. The Reform Act included substantive sections protecting defendants in suits brought under the federal securities laws. Plaintiffs circumvented those provisions by bringing their complaints of securities misconduct under state law instead. Hence emerged SLUSA's bar on state-law class actions (and its removal provision to ensure their dismissal)—which guaranteed that the Reform Act's heightened substantive standards would govern all future securities class litigation. SLUSA's preamble states that the statute is designed "to limit the conduct of securities class actions under state law, and for other purposes," 112 Stat. 3227, and this Court has underscored, over and over, SLUSA's

"purpose to preclude certain vexing state-law class actions." *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633, 645, n. 12. That object—which SLUSA's text actually reflects—does not depend on stripping state courts of jurisdiction over 1933 Act class suits, as Cyan proposes. For wherever those suits go forward, the Reform Act's substantive protections necessarily apply.

SLUSA also went a good distance toward ensuring that federal courts would play the principal role in adjudicating securities class actions by means of its revisions to the *1934* Act. Because federal courts have exclusive jurisdiction over 1934 Act claims, forcing plaintiffs to bring class actions under the 1934 statute instead of state law also forced them to file in federal court. Pp. 431–434.

(2) Cyan finally argues that the except clause would serve no purpose at all unless it works as Cyan says. But Congress could have envisioned the except clause as the ultimate fail-safe device, designed to safeguard § 77p's class-action bar come whatever might. Congress has been known to legislate in that hyper-vigilant way, to "remov[e] any doubt" as to things not particularly doubtful in the first instance. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 383–384. If ever it had reason to legislate in that fashion, it was in SLUSA—whose very impetus lay in the success of class-action attorneys in "bypass[ing] . . . the Reform Act." *Kircher*, 547 U. S., at 636. And regardless of any uncertainty surrounding Congress's reasons for drafting the except clause, there is no sound basis for giving that clause a broader reading than its language can bear, especially in light of the dramatic change such an interpretation would work in the 1933 Act's jurisdictional framework. Pp. 434–437.

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2. SLUSA does not permit defendants to remove class actions alleging only 1933 Act claims from state to federal court. The Government argues that § 77p(c) allows defendants to remove 1933 Act class actions to federal court as long as they allege the kinds of misconduct listed in § 77p(b). But most naturally read, § 77p(c) refutes, not supports, the Government's view. Section 77p(c) allows for removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)." The covered class actions "set forth" in § 77p(b) are state-law class actions alleging securities misconduct. Federal-law suits are not "class action[s] . . . as set forth in subsection (b)." Thus, they remain subject to the 1933 Act's removal ban. This Court has held as much, concluding that §§ 77p(b) and 77p(c) apply to the exact same universe of class actions. *Kircher*, 547 U. S., at 643–644. The "straightforward reading" of those two provisions is that removal under § 77p(c) is "limited to those [actions] precluded by the terms of subsection (b)." *Id.*, at 643. Pp. 437–443.

Affirmed.

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

Neal Kumar Katyal argued the cause for petitioners. With him on the briefs were *Boris Feldman*, *Gideon A. Schor*, *Frederick Liu*, *Daniel J. T. Schuker*, and *Thomas P. Schmidt*.

Allon Kedem argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco* and *Deputy Solicitor General Stewart*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Tejinder Singh*, *Andrew S. Love*, *Robert V. Prongay*, and *Ex Kano S. Sams II*.*

JUSTICE KAGAN delivered the opinion of the Court.

This case presents two questions about the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 112 Stat. 3227. First, did SLUSA strip state courts of jurisdiction over class actions alleging violations of only the Securities

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*Briefs of *amici curiae* urging reversal were filed for Alibaba Group Holding Ltd. et al. by *James G. Kreissman*, *Simona G. Strauss*, *Stephen P. Blake*, *Elizabeth H. White*, and *Jonathan K. Youngwood*; for Business Roundtable et al. by *Edmund Polubinski III* and *Daniel J. Schwartz*; for DRI–The Voice of the Defense Bar by *Mary Massaron*, *John E. Cuttino*, and *Hilary A. Ballentine*; for Former SEC Commissioners by *Jared Gerber* and *Mitchell A. Lowenthal*; for Law Professors by *John C. Dwyer* and *Matthew Ezer*; for New York Stock Exchange LLC by *Aaron M. Streett* and *Douglas W. Henkin*; for the Securities Industry and Financial Markets Association et al. by *James C. Dugan*, *Mary J. Eaton*, *Frank Scaduto*, *Kevin Carroll*, and *Kate Comerford Todd*; and for the Washington Legal Foundation by *Douglas W. Greene*, *Richard A. Samp*, and *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for Federal Jurisdiction Law Scholars et al. by *Ernest A. Young*, *pro se*, and *David J. Goldsmith*; for Institutional Investors by *David C. Frederick*, *William C. Fredericks*, and *Geoffrey M. Johnson*; for the Los Angeles County Employees Retirement Association by *Timothy T. Coates*, *Alana H. Rotter*, and *Marc J. Poster*; and for Public Citizen, Inc., by *Allison M. Zieve*, *Adam R. Pulver*, and *Scott L. Nelson*.

Act of 1933 (1933 Act), 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*? And second, even if not, did SLUSA empower defendants to remove such actions from state to federal court? We answer both questions no.

I

A

In the wake of the 1929 stock market crash, Congress enacted two laws, in successive years, to promote honest practices in the securities markets. The 1933 Act required companies offering securities to the public to make "full and fair disclosure" of relevant information. *Pinter* v. *Dahl*, 486 U. S. 622, 646 (1988). And to aid enforcement of those obligations, the statute created private rights of action. Congress authorized both federal and state courts to exercise jurisdiction over those private suits. See § 22(a), 48 Stat. 86 ("The district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title"). More unusually, Congress also barred the removal of such actions from state to federal court. *Id.*, at 87 ("No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States"). So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.

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Congress's next foray, the Securities Exchange Act of 1934 (1934 Act), operated differently. See 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* That statute regulated not the original issuance of securities but instead all their subsequent trading, most commonly on national stock exchanges. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 752 (1975). The 1934 Act, this Court held, could also be enforced through private rights of action. See *id.*, at 730, and n. 4. But Congress determined that all those suits should fall within the "exclusive jurisdiction" of the federal courts.

§ 27, 48 Stat. 902–903. So a plaintiff could never go to state court to litigate a 1934 Act claim.

In 1995, the Private Securities Litigation Reform Act (Reform Act), 109 Stat. 737, amended both the 1933 and the 1934 statutes in mostly identical ways. Congress passed the Reform Act principally to stem "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006). Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even when a 1933 Act suit was brought in state court. For instance, the statute created a "safe harbor" from federal liability for certain "forward-looking statements" made by company officials. 15 U. S. C. § 77z–2 (1933 Act); § 78u–5 (1934 Act). Other Reform Act provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court. To take one example, the statute required a lead plaintiff in any class action brought under the Federal Rules of Civil Procedure to file a sworn certification stating, among other things, that he had not purchased the relevant security "at the direction of plaintiff's counsel." § 77z–1(a)(2)(A)(ii) (1933 Act); § 78u–4(a)(2)(A)(ii) (1934 Act).

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But the Reform Act fell prey to the law of "unintended consequence[s]." *Dabit*, 547 U. S., at 82. As this Court previously described the problem: "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law." *Ibid.* That "phenomenon was a novel one"—and an unwelcome one as well. *Ibid.* To prevent plaintiffs from circumventing the Reform Act, Congress again undertook to modify both securities laws.

The result was SLUSA, whose amendments to the 1933 Act are at issue in this case. Those amendments include, as relevant here, two operative provisions, two associated definitions, and two "conforming amendments" to the 1933

law's jurisdictional section. 112 Stat. 3230. (SLUSA's amendments to the 1934 Act include essentially the same operative provisions and definitions. See *Dabit*, 547 U. S., at 82, n. 6. But Congress decided that the 1934 law's exclusive jurisdiction provision needed no conforming amendments.) The added material—now found in §§ 77p and 77v(a) and set out in full in this opinion's appendix—goes as follows.

First, § 77p(b) altogether prohibits certain securities class actions based on state law. That provision—which we sometimes (and somewhat prosaically) refer to as the state-law class-action bar—reads:

> "No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging—
>
> "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

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According to SLUSA's definitions, the term "covered class action" means a class action in which "damages are sought on behalf of more than 50 persons." § 77p(f)(2). And the term "covered security" refers to a security listed on a national stock exchange. § 77p(f)(3) (cross-referencing § 77r(b)). So taken all in all, § 77p(b) completely disallows (in both state and federal courts) sizable class actions that are founded on state law and allege dishonest practices respecting a nationally traded security's purchase or sale.

Next, § 77p(c) provides for the removal of certain class actions to federal court, as well as for their subsequent disposition:

> "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal dis-

> trict court for the district in which the action is pending, and shall be subject to subsection (b) of this section."

The first chunk of that provision identifies the removable cases, partly by way of a cross-reference ("as set forth in subsection (b)") to the just-described class-action bar. The final clause of the provision ("and shall be subject to subsection (b)") indicates what should happen to a barred class suit *after* it has been removed: The "proper course is to dismiss" the action. *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633, 644 (2006). As this Court has explained, § 77p(c) "avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether." *Id.*, at 645, n. 12. The point of providing that option, everyone here agrees, was to ensure the dismissal of a prohibited state-law class action even when a state court "would not adequately enforce" § 77p(b)'s bar. Brief for United States as *Amicus Curiae* 3; see Brief for Petitioners 7; Brief for Respondents 20.

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Finally, the 1933 Act's jurisdictional provision, codified at § 77v(a), now includes two new phrases framed as exemptions—SLUSA's self-described "conforming amendments." 112 Stat. 3230; see *supra*, at 422. The less significant of the pair, for our purposes, reflects the allowance for removing certain class actions described above. Against the backdrop of the 1933 Act's general removal bar, see *supra*, at 421, that added (italicized) material reads:

> "*Except as provided in section 77p(c) of this title*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

The more important of the conforming amendments in this case expresses a caveat to the general rule, see *ibid.*, that state and federal courts have concurrent jurisdiction over all claims to enforce the 1933 Act. As amended (again, with

the new material in italics), the relevant sentence now reads:

> "The district courts of the United States . . . shall have jurisdiction[,] concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."

Throughout this opinion, we refer to the italicized words just above as the "except clause." Its meaning is at the heart of the parties' dispute in this Court.

B

The petitioners in this case are Cyan, a telecommunications company, and its officers and directors (together, Cyan). The respondents are three pension funds and an individual (together, Investors) who purchased shares of Cyan stock in an initial public offering. After the stock declined in value, the Investors brought a damages class action against Cyan in California Superior Court. Their complaint alleges that Cyan's offering documents contained material misstatements, in violation of the 1933 Act. It does not assert any claims based on state law.

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Cyan moved to dismiss the Investors' suit for lack of subject matter jurisdiction. It argued that what we have termed SLUSA's "except clause"—*i. e.*, the amendment made to § 77v(a)'s concurrent-jurisdiction grant—stripped state courts of power to adjudicate 1933 Act claims in "covered class actions." The Investors did not dispute that their suit qualifies as such an action under SLUSA's definition, see § 77p(f)(2). But they maintained that SLUSA left intact state courts' jurisdiction over all suits—including "covered class actions"—alleging only 1933 Act claims. The California Superior Court agreed with the Investors and denied Cyan's motion to dismiss. See App. to Pet. for Cert. 6a.

The state appellate courts then denied review of that ruling. See *id.*, at 15a–16a.

We granted Cyan's petition for certiorari, 582 U. S. 951 (2017), to resolve a split among state and federal courts about whether SLUSA deprived state courts of jurisdiction over "covered class actions" asserting only 1933 Act claims.[1]

In opposing Cyan's jurisdictional position here, the Federal Government as *amicus curiae* raised another question: whether SLUSA enabled defendants to remove 1933 Act class actions from state to federal court for adjudication. See Brief for United States as *Amicus Curiae* 23–31. That question is not directly presented because Cyan never attempted to remove the Investors' suit. But the removal issue is related to the parties' jurisdictional arguments, and both Cyan and the Investors addressed it in briefing and argument. See Brief for Petitioners 39–40; Brief for Respondents 31–35; Tr. of Arg. 31, 53–56, 74–76, 80. Accordingly, we consider as well the scope of § 77p(c)'s removal authorization.

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II

By its terms, § 77v(a)'s "except clause" does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act. And Cyan's various appeals to SLUSA's purposes and legislative history fail to overcome the clear statutory language. The statute says what it says—or perhaps better put here, does not say what it does not say. State-court jurisdiction over 1933 Act claims thus continues undisturbed.[2]

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[1] Compare, *e. g.*, *Luther* v. *Countrywide Financial Corp.*, 195 Cal. App. 4th 789, 797–798, 125 Cal. Rptr. 3d 716, 721 (2011) (holding that state courts have jurisdiction over covered class actions alleging only 1933 Act claims), with, *e. g.*, *Knox* v. *Agria Corp.*, 613 F. Supp. 2d 419, 425 (SDNY 2009) (holding that state courts lack jurisdiction over such actions).

[2] This Court has often applied a "presumption in favor of concurrent state court jurisdiction" when interpreting federal statutes. *Mims* v. *Arrow Financial Services, LLC*, 565 U. S. 368, 378 (2012) (quoting *Tafflin* v. *Levitt*, 493 U. S. 455, 458–459 (1990)). Cyan argues that the presump-

A

SLUSA's text, read most straightforwardly, leaves in place state courts' jurisdiction over 1933 Act claims, including when brought in class actions. Recall that the background rule of § 77v(a)—in place since the 1933 Act's passage—gives state courts concurrent jurisdiction over all suits "brought to enforce any liability or duty created by" that statute. See *supra*, at 421. The except clause—once again, "except as provided in section 77p of this title with respect to covered class actions"—is drafted as a limitation on that rule: It ensures that in any case in which § 77v(a) and § 77p come into conflict, § 77p will control. The critical question for this case is therefore whether § 77p limits state-court jurisdiction over class actions brought under the 1933 Act. It does not. As earlier described, § 77p bars certain securities class actions based on *state* law. See § 77p(b); *supra*, at 423–424. And as a corollary of that prohibition, it authorizes removal of those suits so that a federal court can dismiss them. See § 77p(c); *supra*, at 423–424. But the section says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law. That means the background rule of § 77v(a)—under which a state court may hear the Investors' 1933 Act suit—continues to govern.

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Cyan offers an alternative reading, in which one of SLUSA's definitional provisions works to alter state-court jurisdiction. According to Cyan, the except clause's reference to "covered class actions" points the reader to, and only to, § 77p(f)(2)'s definition of that term. See Brief for Petitioners 16. And that definition states that a "covered class action" is a suit seeking damages on behalf of more than 50 persons—without mentioning anything about whether the suit is based on state or federal law. Cyan thus concludes

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tion should not apply here because SLUSA included explicit "language addressing state-court jurisdiction" and "the only question is [its] scope." Reply Brief 22. We need not address that contention because SLUSA's text precludes Cyan's position without aid from any presumption.

that the except clause exempts all sizable class actions—including the Investors' suit—from § 77v(a)'s conferral of jurisdiction on state courts.

But that view cannot be squared with the except clause's wording for two independent reasons. To start with, the except clause points to "section 77p" as a whole—not to paragraph 77p(f)(2). Cyan wants to cherry pick from the material covered by the statutory cross-reference. But if Congress had intended to refer to the definition in § 77p(f)(2) alone, it presumably would have done so—just by adding a letter, a number, and a few parentheticals. As this Court recently explained, "Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 300 (2017). And "[w]hen Congress want[s] to refer only to a particular subsection or paragraph, it sa[ys] so." *Ibid.* It said no such thing in the except clause.

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In any event, the definitional paragraph on which Cyan relies cannot be read to "provide[ ]" an "except[ion]" to the rule of concurrent jurisdiction, in the way SLUSA's except clause requires. A definition does not provide an exception, but instead gives meaning to a term—and Congress well knows the difference between those two functions. Thousands of statutory provisions use the phrase "except as provided in . . . " followed by a cross-reference in order to indicate that one rule should prevail over another in any circumstance in which the two conflict; we count more than 30 such constructions in the 1933 and 1934 Acts alone.[3] Not

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[3] See, *e. g.*, § 77k(f)(1) (announcing a general rule of joint and several liability, "[e]xcept as provided in paragraph (2)," which sets out a different liability rule for outside directors); § 77p(a) (announcing a general rule that "the rights and remedies provided" under the statute do not displace others, "[e]xcept as provided in subsection (b)," which restricts the right to bring class actions based on state law); § 77z–2(c) (announcing a general safe harbor for certain forward-looking statements, "[e]xcept as provided in subsection (b)," which excludes protection for a subset of them).

one of those 30-plus provisions cross-references a *definition*; nor has Cyan pointed to a single such example from the whole rest of the U. S. Code. And the Congress enacting SLUSA had no reason to attempt that peculiar maneuver for the first time. If Congress had wanted to deprive state courts of jurisdiction over 1933 Act class actions, it had an easy way to do so: just insert into § 77p an exclusive federal jurisdiction provision (like the 1934 Act's) for such suits. That rule, when combined with the except clause, would have done the trick because it would have "provided" an "except[ion]" to § 77v(a)'s grant of concurrent jurisdiction; by contrast, a mere definition of "covered class action" (as a damages suit on behalf of 50-plus people) does not so provide.

SLUSA's *other* conforming amendment illustrates the two ways in which Cyan's construction of the except clause departs from its language. Recall that § 77v(a) includes a general bar on removal. See *supra*, at 421. And recall that SLUSA appended to that prohibition the phrase "[e]xcept as provided in section 77p(c)" to reflect the statute's new permission to remove certain class actions. See *supra*, at 424. In *that* "except as provided" phrase—just four sentences down from the except clause central to this case—Congress pinpointed a subsection of § 77p, rather than citing the entire section for only one of its parts. Still more, that cross-referenced subsection contains an operative provision that could limit a rule, rather than a mere definition of a statutory term. In short, Congress wrote the removal bar's except clause in just the way a reader of legislation would expect—and not in the wholly irregular way Cyan proposes for the except clause at issue here. Especially given the two provisions' "interrelationship and close proximity," *Commissioner* v. *Lundy*, 516 U. S. 235, 250 (1996), the one conforming amendment highlights how far Cyan seeks to stretch the text of the other.

Cyan's interpretation also fits poorly with the remainder of the statutory scheme. Because Cyan treats the broad

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definition of "covered class action" as altering § 77v(a)'s jurisdictional grant, its construction would prevent state courts from deciding any 1933 Act class suits seeking damages for more than 50 plaintiffs. That would include suits not involving a "covered security"—*i. e.*, a security traded on a national stock exchange. § 77p(f)(3); Brief for Petitioners 29 (conceding that point). But this Court has emphasized that SLUSA's operative provisions (including its state-law class-action bar, see § 77p(b)) apply to only "transactions in covered securities": The statute "expresses no concern" with "transactions in uncovered securities"—precisely because they are not traded on national markets. *Chadbourne & Parke LLP* v. *Troice*, 571 U. S. 377, 387–388 (2014); see Brief for United States as *Amicus Curiae* 16–17 (SLUSA does not regard suits involving uncovered securities as "a matter of distinct federal concern"). Those securities, the Court explained, are "primarily of state concern," and SLUSA "maintains state legal authority" to address them. *Chadbourne*, 571 U. S., at 391–392. Except that under Cyan's view, SLUSA would not. Instead, the law would strip state courts of jurisdiction over suits about securities raising no particular national interest. That result is out of line with SLUSA's overall scope.

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And finally, Cyan's take on the except clause reads too much into a mere "conforming amendment." 112 Stat. 3230. The change Cyan claims that clause made to state-court jurisdiction is the very opposite of a minor tweak. When Congress passed SLUSA, state courts had for 65 years adjudicated all manner of 1933 Act cases, including class actions. Indeed, defendants could not even remove those cases to federal court, as schemes of concurrent jurisdiction almost always allow. See *supra*, at 421. State courts thus had as much or more power over the 1933 Act's enforcement as over any federal statute's. To think Cyan right, we would have to believe that Congress upended that entrenched practice not by any direct means, but instead by way of a conforming

amendment to § 77v(a) (linked, in its view, with only a definition). But Congress does not make "radical—but entirely implicit—change[s]" through "technical and conforming amendments." *Director of Revenue of Mo.* v. *CoBank ACB*, 531 U. S. 316, 324 (2001) (internal quotation marks omitted). Or to use the more general (and snappier) formulation of that rule, relevant to all "ancillary provisions," Congress does not "hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). That is yet one more reason to reject Cyan's view of SLUSA's text.

B

Faced with such recalcitrant statutory language, Cyan stakes much of its case on legislative purpose and history. See Brief for Petitioners 20–33, 36–37; Reply Brief 7–11, 17–21. Its claims come in two forms—one relating to the goals of SLUSA as a whole and the other relating to the aims of the except clause. Even assuming clear text can ever give way to purpose, Cyan would need some monster arguments on this score to create doubts about SLUSA's meaning. The points Cyan raises come nowhere close to that level.

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1

According to Cyan's broad purposive argument, Congress could not "make good on the promise of the Reform Act"—which was its principal intention in enacting SLUSA—without divesting state courts of jurisdiction over all sizable 1933 Act class actions. Brief for Petitioners 20. Remember that the Reform Act contained a number of procedural measures (for example, a sworn-certification requirement for lead plaintiffs, see § 77z–1(a)(2)(A)) that apply only in federal court. See *supra*, at 422. Plaintiffs bringing 1933 Act class actions could avoid those provisions simply by filing in state court; after all, those suits were not even removable by defendants. "So," Cyan claims, "Congress enacted SLUSA to finish the job"—by shutting down the state forum and shift-

ing all 1933 Act class actions to the federal one. Brief for Petitioners 21. In support of that view, Cyan cites several statements in SLUSA's legislative reports—in particular, that SLUSA's purpose was "to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." H. R. Conf. Rep. No. 105–803, p. 13 (1998); see H. R. Rep. No. 105–640, pp. 8–9 (1998); S. Rep. No. 105–182, p. 3 (1998).

But to begin with, Cyan ignores a different way in which SLUSA "serve[d] the [Reform Act's] objectives," Brief for Petitioners 11—which our view of the statute fully effects. Recall that the Reform Act also included substantive sections protecting defendants (like a safe harbor for forward-looking statements) in suits brought under the federal securities laws. See § 77z–2; *supra*, at 422. Plaintiffs could—and did—avoid those provisions by bringing their complaints of securities misconduct under state law instead. See *supra*, at 422. Hence emerged SLUSA's bar on state-law class actions (and its removal provision to ensure their dismissal)—which guaranteed that the Reform Act's heightened substantive standards would govern all future securities class litigation. SLUSA itself highlights that aim: Its preamble states that the statute is designed "to limit the conduct of securities class actions under State law, and for other purposes." 112 Stat. 3227. So too, this Court has underscored, over and over, SLUSA's "purpose to preclude certain vexing state-law class actions." *Kircher*, 547 U. S., at 645, n. 12; see *Dabit*, 547 U. S., at 82 (SLUSA stopped plaintiffs from "bringing class actions under state law"); *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. 455, 476 (2013) (SLUSA "curtailed plaintiffs' ability to evade the [Reform Act] by bringing class-action suits under state rather than federal law"). That object—which SLUSA's text actually reflects—does not depend on stripping state courts of jurisdiction over 1933 Act class suits, as Cyan proposes. For

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wherever those suits go forward, the Reform Act's substantive protections necessarily apply.

Still more, SLUSA ensured that federal courts would play the principal role in adjudicating securities class actions by means of its revisions to the *1934* Act. As explained earlier, SLUSA amended that statute in the same main way it did the 1933 Act—by adding a state-law class-action bar. See § 78bb(f)(1); *supra*, at 423. But there, the change had a double effect: Because federal courts have exclusive jurisdiction over 1934 Act claims, forcing plaintiffs to bring class actions under the 1934 statute instead of state law also forced them to file in federal court. That meant the bulk of securities class actions would proceed in federal court—because the 1934 Act regulates all trading of securities whereas the 1933 Act addresses only securities offerings. See *Blue Chip Stamps*, 421 U. S., at 752 (characterizing the 1933 Act as "a far narrower statute"). So even without Cyan's contrived reading of the except clause, SLUSA largely accomplished the purpose articulated in its Conference Report: moving securities class actions to federal court.

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To be sure, "largely" does not mean "entirely"—but then again, we do not generally expect statutes to fulfill 100% of all of their goals. See, *e. g.*, *Freeman* v. *Quicken Loans, Inc.*, 566 U. S. 624, 637 (2012) ("No legislation pursues its purposes at all costs" (internal quotation marks and alterations omitted)). Under our reading of SLUSA, all covered securities class actions must proceed under federal law; most (*i. e.*, those alleging 1934 Act claims) must proceed in federal court; some (*i. e.*, those alleging 1933 Act claims) may proceed in state court. We do not know why Congress declined to require as well that 1933 Act class actions be brought in federal court; perhaps it was because of the long and unusually pronounced tradition of according authority to state courts over 1933 Act litigation. See *supra*, at 430. But in any event, we will not revise that legislative choice, by reading a conforming amendment and a definition in a most

improbable way, in an effort to make the world of securities litigation more consistent or pure. This Court has long rejected the notion that "*whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) (*per curiam*). Even if Congress could or should have done more, still it "wrote the statute it wrote—meaning, a statute going so far and no further." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 794 (2014) (internal quotation marks omitted).

2

Yet Cyan has a final argument—that the except clause would serve no purpose at all unless it works as Cyan says. See Brief for Petitioners 32–33; Reply Brief 8–11. Here, Cyan relies on an indubitable puzzle. Section 77v(a), as amended by SLUSA, gives state courts jurisdiction over *1933 Act* suits "except as provided in section 77p." But § 77p provides a bar on only certain *state-law* suits. So, Cyan contends, unless we take up its invitation to look to § 77p(f)(2)'s definition of "covered class action," the except clause excepts "exactly nothing." Reply Brief 8. (To use an example of our own, it would be as if a parent told her child "you may have fruit after dinner, except for lollipops.") What on earth, Cyan asks, would be the point of such a provision?

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The Investors answer that question with a theory about why Congress enacted the except clause. In their view, the clause was meant to deal with "mixed" securities class actions—containing both claims brought under the 1933 Act and claims arising under state law. See Brief for Respondents 12–13. If not for the except clause, the Investors posit, state courts would have been uncertain about how to handle those suits. Section 77p clearly instructs courts not to adjudicate the state-law claims; but (the Investors continue) § 77v(a) gives state courts jurisdiction over entire "actions" brought to enforce the 1933 Act, even if they include addi-

tional state-law claims. What, then, to do? According to the Investors, the except clause's purpose was to resolve that statutory conflict by making clear that § 77p trumps § 77v(a)—in other words, that a state court may not entertain state-law claims precluded by § 77p(b) even when they are conjoined with 1933 Act claims falling within § 77v(a)'s grant of jurisdiction.

Truth be told, we are not sure whether Congress had that issue in mind. On the one hand (and contrary to what the Investors say), we doubt that the except clause was really necessary to address mixed class actions. Even without that clause, a competent state court faced with such a suit would understand that § 77p requires dismissal of the state-law claims—and that § 77v(a)'s jurisdictional grant over 1933 Act suits is not to the contrary. But on the other hand (and now supporting the Investors' principal point), Congress may have thought that class-action lawyers would still try to circumvent SLUSA by tacking a 1933 Act claim onto a forbidden state-law class action, on the off chance of finding an error-prone judge. (After all, the worst that could happen was that the court would throw out the state-law claims, leaving the plaintiff with a permissible 1933 Act suit.) To prevent such gamesmanship—to make clear beyond peradventure that courts could not entertain the state-law half of mixed class actions—Congress might have added the except clause.

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But even if Congress never specifically considered mixed suits, it could well have added the except clause in a more general excess of caution—to safeguard § 77p's class-action bar come whatever might. This Court has encountered many examples of Congress legislating in that hyper-vigilant way, to "remov[e] any doubt" as to things not particularly doubtful in the first instance. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 383–384 (2013) (citing *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 226 (2008); *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 646 (1990)). (The idea, to

return to our prior example, is to make sure that even if the child thinks orange lollipops count as fruit, she will not act on that view.) And if ever Congress had reason to legislate in that fashion, it was in SLUSA—whose very impetus lay in the success of class-action attorneys in "bypass[ing] . . . the Reform Act." *Kircher*, 547 U. S., at 636. Heedful of that history of machinations, Congress may have determined to eliminate any risk—even if unlikely or at the time unknown—that a pre-existing grant of power to state courts could be used to obstruct SLUSA's new limitation on what they could decide. And so (this alternative explanation goes) Congress enacted the except clause—which, in insisting that the limitation prevailed, would function as the ultimate (though with any luck, unneeded) fail-safe device.[4]

But the most important response to this purposive argument echoes what we have said before about the weaknesses of Cyan's own construction of the except clause. In the end, the uncertainty surrounding Congress's reasons for drafting that clause does not matter. Nor does the possibility that the risk Congress addressed (whether specific or inchoate) did not exist. Because irrespective of those points, we have no sound basis for giving the except clause a broader reading than its language can bear. And that is especially true in

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[4] In line with this precautionary function, the except clause could do some work to protect § 77p's state-law class-action bar in a set of suits beyond mixed cases. As this Court recently noted, some state-law securities claims "rise[ ] or fall[ ] on the plaintiff's ability to prove the violation" of a federal securities statute. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 578 U. S. 374, 383 (2016) (addressing the 1934 Act). In such cases, we held, the state-law claims are "brought to enforce" a liability created by the federal statute, and thus fall within that law's jurisdictional provision. See *id.*, at 384. In the absence of the except clause, then, class-action lawyers might well have argued that such state-law claims could be adjudicated under § 77v(a) notwithstanding § 77p's bar. Once again, we think most courts would have rejected that claim and decided that § 77p controls—but the except clause eliminates any chance of a contrary holding.

light of the dramatic change such an interpretation would work in the 1933 Act's jurisdictional framework. Whatever questions remain as to the except clause's precise purpose—and we do not gainsay there are some—they do not give us permission to devise a statute (and at that, a transformative one) of our own.

III

Our last task is to address the Federal Government's proposed halfway-house position. The Government rejects Cyan's view that SLUSA stripped state courts of jurisdiction over 1933 Act class actions, for roughly the same reasons we have given. See Brief for United States as *Amicus Curiae* 11–23. But like Cyan, the Government believes that "Congress would not have been content to leave" such suits "stuck in state court," where the Reform Act's procedural protections do not apply. *Id.*, at 15 (internal quotation marks omitted). So the Government offers a reading of SLUSA—in particular, of § 77p(c)—that would allow defendants to remove 1933 Act class actions to federal court, as long as they allege the kinds of misconduct listed in § 77p(b) (*e. g.*, false statements or deceptive devices in connection with a covered security's purchase or sale). See *id.*, at 24–25.

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But most naturally read, § 77p(c)—SLUSA's exception to the 1933 Act's general bar on removal—refutes, not supports, the Government's view. Once again, see *supra*, at 423–424, § 77p(c) reads as follows:

> "Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section."

In other words, the covered class actions described in § 77p(b) can be removed to federal court (and, once there, shall be subject to dismissal because precluded, see *supra*, at 424). And which are the covered class actions described

in § 77p(b)? By this point, no one should have to be reminded: They are *state-law* class actions alleging securities misconduct. See § 77p(b) (prohibiting "class action[s] based upon the statutory or common law of any State"). So those state-law suits are removable. But conversely, *federal-law* suits like this one—alleging only 1933 Act claims—are not "class action[s] . . . as set forth in subsection (b)." So they remain subject to the 1933 Act's removal ban.

In fact, this Court already held as much, by concluding in *Kircher* that §§ 77p(b) and 77p(c) apply to the exact same universe of class actions. See 547 U. S., at 643–644. *Kircher* involved a securities suit that was unaffected by § 77p(b)'s class-action bar—there, not because it was based on federal law but because it involved a form of conduct falling outside that subsection. The Court of Appeals decided that the suit could be removed under § 77p(c) even though it was not precluded by § 77p(b), thinking (as we later put it) that the removal issue and "the preclusion issue [were] distinct." *Id.*, at 638. We flatly rejected that understanding of the relationship between § 77p(b) and § 77p(c). The "straightforward reading" of those two provisions, we explained, is that removal is "limited to those [actions] precluded by the terms of subsection (b)." *Id.*, at 643. And if that were not clear enough, we said it again: Removal under § 77p(c) is "restricted to precluded actions defined by subsection (b)." *Id.*, at 643–644. And just to pound the point home, we said it yet a third time: "A covered [class] action is removable if it is precluded." *Id.*, at 646. *Kircher* thus forecloses the Government's argument. Section 77p(b) does not preclude federal-law class actions. So under our decision, § 77p(c) does not authorize their removal.[5]

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[5] In light of SLUSA's text and *Kircher*'s holding, it should come as no surprise that all seven Courts of Appeals to have considered the matter have concluded that § 77p(c) allows removal of only class actions falling within § 77p(b)'s prohibition. See *Campbell* v. *American Int'l Group, Inc.*, 760 F. 3d 62, 64 (CADC 2014); *Hidalgo-Velez* v. *San Juan Asset Man-*

The Government responds with a novel way of understanding § 77p(c), which it thinks would allow us to disregard *Kircher* when a class action like this one is based on federal law. In the Government's view, first presented at oral argument, see Tr. of Oral Arg. 32–33, the words "as set forth in subsection (b)" do not modify the entire preceding phrase (basically, any large class action involving a covered security). Instead, the Government claims, those words modify only the shorter phrase "involving a covered security." To support that view, the Government invokes the "rule of the last antecedent"—under which "the limiting clause is most naturally applied to the thing that comes immediately before it." *Id.*, at 36–37. The Government then presents a theory of how subsection (b) "set[s] forth" the "involv[ement]" of a covered security. "[T]o figure out what that means," the Government contends, "you look at [§ 77p](b)(1) and (b)(2), which talk about certain types of misconduct"—for example, false statements or deceptive devices in connection with a covered security's sale. *Id.*, at 33–34. As long as conduct of that kind is implicated in a suit, the Government concludes, it can be removed—even if it is based on federal law and thus does not fall within § 77p(b) as a whole. That view is consistent with *Kircher*'s result because the action there did not involve the conduct described in §§ 77p(b)(1) and (2). And as to *Kircher*'s rationale . . . well, we should feel free to ignore it.

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But even putting aside respect for precedent, that argument is in many ways flawed. To start with, the Government provides no good reason to think that "as set forth in subsection (b)" modifies only the phrase "involving a covered

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agement, 758 F. 3d 98, 103 (CA1 2014); *Appert* v. *Morgan Stanley Dean Witter, Inc.*, 673 F. 3d 609, 615–616 (CA7 2012); *Madden* v. *Cowen & Co.*, 576 F. 3d 957, 965 (CA9 2009); *Sofonia* v. *Principal Life Ins. Co.*, 465 F. 3d 873, 876 (CA8 2006); *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F. 3d 25, 33 (CA2 2005), vacated on other grounds, 547 U. S. 71 (2006); *Behlen* v. *Merrill Lynch*, 311 F. 3d 1087, 1092 (CA11 2002).

security." As stated above, the most natural way to view the modifier is as applying to the entire preceding clause—again, "[a]ny covered class action brought in any State court involving a covered security." See *supra*, at 437. That is so because that clause hangs together as a unified whole, referring to a single thing (a type of class action). Consider the following, grammatically identical construction: "The woman dressed to the nines carrying an umbrella, as shown in the picture . . . ." Would anyone think that "as shown in the picture" referred to anything less than the well-attired and rain-ready *woman*? No. And so too here, the modifier goes back to the beginning of the preceding clause. The rule of the last antecedent is not to the contrary. We have applied that rule when the alternative reading would "stretch[ ] the modifier too far" by asking it to qualify a remote or otherwise disconnected phrase. *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 342 (2005); *Lockhart* v. *United States*, 577 U. S. 347, 351 (2016) (using the rule "where it takes more than a little mental energy to process" a statute's component parts, "making it a heavy lift to carry the modifier across them all").[6] By contrast, we have not applied the rule when the modifier directly follows a concise and "integrated" clause. *Jama*, 543 U. S., at 344, n. 4. As it does here.

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But let us assume that the rule of the last antecedent governs: The Government then misapplies it by attaching the

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[6] The classic example comes from *Barnhart* v. *Thomas*, 540 U. S. 20 (2003). The statute at issue provided that a person is disabled if his impairment is so severe that "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work *which exists in the national economy*." *Id.*, at 23 (quoting 42 U. S. C. § 423(d)(2)(A)) (emphasis altered). Invoking the rule of the last antecedent, we concluded that the italicized phrase "which exists in the national economy" modifies only "substantial gainful work," and not the more distant "previous work." See 540 U. S., at 26. Needless to say, that statutory provision is a far cry from the one at issue here.

modifier to something *more* than the last thing before it. The rule, correctly used, would insist that "as set forth in subsection (b)" modifies only "a covered security"—because that is the closest "noun or noun phrase" that the modifier could reasonably reference. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012) (quoting R. Burchfield, Fowler's Modern English Usage (3d ed. 1996)). But that standard way of applying the rule would not aid the Government's construction, so it goes back yet another word: It attaches "as set forth in subsection (b)" to the longer phrase—and a verb phrase at that—"*involving* a covered security." Tr. of Oral Arg. 35. That maneuver has no grammatical basis. (It is as if, in the example offered above, someone claimed that "as shown in the picture" modified not the woman, nor even the umbrella, but instead the in-between verb phrase "*carrying* an umbrella.") The Government is choosing where to start in the sentence (that is, which words to qualify) based only on what best serves its argument.

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But let us even assume that "as set forth in subsection (b)" modifies "involving a covered security": The language would still fail to explain the Government's position. Remember that the Government reads the resulting phrase (again, "involving a covered security, as set forth in subsection (b)") to point only to the forms of wrongful conduct listed in §§ 77p(b)(1) and (2)—for example, false statements or deceptive devices in securities sales. See *supra*, at 439. The problem is that no one would describe those misdeeds with that phrase. If Congress had meant to refer only to that behavior, rather than to everything in § 77p(b), it would have done two things differently. First, Congress would have written "as set forth in paragraphs (b)(1) and (b)(2)" instead of "as set forth in subsection (b)" as a whole. See *supra*, at 428 (explaining that when Congress wants to refer only to a particular subsection or paragraph, it says so). And second, Congress would have written something like "involving

allegations of misconduct," rather than "involving a covered security"—because the latter phrase does not even passably describe §§ 77(b)(1) and (2)'s catalog of vices. We will not read "involving a covered security, as set forth in subsection (b)," to mean "involving allegations of misconduct, as set forth in paragraphs (b)(1) and (b)(2)," when Congress did not enact that formulation. See *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 16 (2014) ("Given that the drafters did not adopt that alternative, the natural implication is that they did not intend" to do so).

And (finally, we promise) even if we could put out of mind all these difficulties, the Government's position runs aground on § 77p(c)'s last clause, which states that removed class actions "shall be subject to subsection (b)." That clause, properly understood, points toward dismissal of a removed action. As we earlier explained, and the Government concedes, Congress enacted § 77p(c)'s removal provision out of "concern[ ] that state courts would not adequately enforce" § 77p(b)'s state-law class-action prohibition. Brief for United States as *Amicus Curiae* 3; see *supra*, at 424. The idea was to allow removal so that a federal court could act as a backstop and order a class action's dismissal—thereby "subject[ing]" it to § 77p(b)'s bar. *Kircher* specifically said as much: Section 77p(c) "avails a defendant of a federal forum in contemplation not of further litigation over the merits of a claim brought in state court, but of termination of the proceedings altogether." 547 U. S., at 645, n. 12; see *supra*, at 424. But of course, the Government contemplates "further litigation"—*not* "termination"—of a removed 1933 Act class action. See Brief for United States as *Amicus Curiae* 25. That decoupling of § 77p(c)'s linkage between removal and dismissal provides the last reason to reject the Government's argument.

At bottom, the Government makes the same mistake as Cyan: It distorts SLUSA's text because it thinks Congress simply must have wanted 1933 Act class actions to be litigated in federal court. But this Court has no license to "dis-

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regard clear language" based on an intuition that "Congress must have intended something broader." *Bay Mills*, 572 U. S., at 794 (internal quotation marks omitted). SLUSA did quite a bit to "make good on the promise of the Reform Act" (as Cyan puts it). Brief for Petitioners 20; see *supra*, at 431–433. If further steps are needed, they are up to Congress.

IV

SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court. We accordingly affirm the judgment below.

It is so ordered.

APPENDIX

"77p. Additional remedies; limitation on remedies

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. . . . .

"(b) Class action limitations

"No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) Removal of covered class actions

"Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

. . . . .

"(f) Definitions

"For purposes of this section, the following definitions shall apply:

. . . . .

"(2) Covered class action

"(A) In general

"The term "covered class action" means—

"(i) any single lawsuit in which—

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

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"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

. . . . .

"(3) Covered security

"The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission,

or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title."

"77v. Jurisdiction of offenses and suits

"(a) Federal and State courts; venue; service of process; review; removal; costs

"The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any

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State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts."

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Reporter's Note

Orders commencing with February 20, 2018, begin with page 1110. The preceding orders in 583 U. S., from October 2, 2017, through February 16, 2018, were reported in Part 1, at 801–1110. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

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insofar as it directs revision of House districts in Wake County and Mecklenburg County, is stayed pending the timely filing and disposition of an appeal in this Court. JUSTICE THOMAS and JUSTICE ALITO would grant the application for stay in its entirety. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would deny the application for stay in its entirety.

FEBRUARY 9, 2018

Dismissal Under Rule 46

No. 17–6843. TALLEY *v.* SEVIER, WARDEN. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.

FEBRUARY 16, 2018

Miscellaneous Orders

No. 16–1454. OHIO ET AL. *v.* AMERICAN EXPRESS CO. ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 931.] Motion of the Solicitor General for divided argument granted.

No. 16–1466. JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL. C. A. 7th Cir. [Certiorari granted, 582 U. S. 966.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument granted.

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No. 17–21. LOZMAN *v.* CITY OF RIVIERA BEACH, FLORIDA. C. A. 11th Cir. [Certiorari granted, *ante*, p. 972.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

FEBRUARY 20, 2018

Certiorari Granted—Reversed and Remanded. (See No. 17–515, *ante*, p. 133.)

Certiorari Granted—Vacated and Remanded

No. 17–733. MURCO WALL PRODUCTS, INC. *v.* GALIER. Ct. Civ. App. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U. S. 255 (2017).

Certiorari Dismissed

No. 17–6942. JONES *v.* GEORGIA. Sup. Ct. Ga. Motion to substitute party in place of petitioner, deceased, denied. Petition for writ of certiorari dismissed as moot. Reported below: 300 Ga. 814, 797 S. E. 2d 461.

No. 17–6981. DAVIS *v.* CRAFTS ET AL. Ct. App. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–7079. SEARS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–7128. STURGIS *v.* CIRCUIT COURT OF MICHIGAN, OAKLAND COUNTY. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–7313. LUCZAK *v.* PFISTER 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.

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Miscellaneous Orders. (See also No. 137, Orig., *ante*, p. 142.)

No. D–2994. IN RE DISBARMENT OF CARROLL. Disbarment entered. [For earlier order herein, see *ante*, p. 807.]

No. D–2995. IN RE DISBARMENT OF HOFFMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 807.]

No. D–2996. IN RE DISBARMENT OF CONWAY. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–2997. IN RE DISBARMENT OF SPARROW. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–2998. IN RE DISBARMENT OF EXUM. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–2999. IN RE DISBARMENT OF SCOTT. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–3000. IN RE DISBARMENT OF HOCH. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–3001. In re Disbarment of Kennedy. Disbarment entered. [For earlier order herein, see *ante*, p. 993.]

No. D–3002. In re Disbarment of Kellerman. Disbarment entered. [For earlier order herein, see *ante*, p. 993.]

No. D–3003. In re Disbarment of Greenman. Disbarment entered. [For earlier order herein, see *ante*, p. 993.]

No. D–3004. In re Disbarment of Eichenberger. Disbarment entered. [For earlier order herein, see *ante*, p. 993.]

No. D–3008. In re Disbarment of Willis. Disbarment entered. [For earlier order herein, see *ante*, p. 994.]

No. D–3009. In re Disbarment of Meacham. Disbarment entered. [For earlier order herein, see *ante*, p. 994.]

No. D–3011. In re Disbarment of Powell. Disbarment entered. [For earlier order herein, see *ante*, p. 994.]

No. D–3012. In re Disbarment of Graham. Disbarment entered. [For earlier order herein, see *ante*, p. 994.]

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No. 17M80. Stoller *v.* City of Phoenix, Arizona, et al.;
No. 17M81. Sparks *v.* Bell et al.;
No. 17M82. Sheppard *v.* Ohio Board of Regents et al.;
No. 17M83. Ross *v.* Rockwell Automation, Inc., et al.; and
No. 17M84. Clark *v.* Lafayette Place Lofts et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–130. Lucia et al. *v.* Securities and Exchange Commission. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1089.] Motion of petitioners to dispense with printing joint appendix granted.

No. 17–155. Hughes *v.* United States. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1036.] Motion of Law Professors in support of neither party for leave to file brief as *amici curiae* granted.

No. 17–5716. Koons et al. *v.* United States. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1037.] Motion of petitioners for leave to file supplemental volume of the joint appendix under seal granted.

No. 17–5989. Stukes *v.* Virginia Employment Commission et al. Sup. Ct. Va. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 995] denied.

No. 17–6282. Boyce *v.* Arizona. Ct. App. Ariz. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1037] denied.

No. 17–6685. Hamilton *v.* Colorado (two judgments). Ct. App. Colo. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1048] denied.

No. 17–6954. Bernstein *v.* Wells Fargo Bank, N. A., et al. C. A. 11th Cir.;

No. 17–7019. Reeves *v.* Green. C. A. 4th Cir.;

No. 17–7121. West *v.* Rieth et al. C. A. 5th Cir.; and

No. 17–7123. Eakins *v.* Wilson et al. Ct. Civ. App. Ala. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 13, 2018, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

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No. 17–7274. In re Chipley;

No. 17–7397. In re Oliver;

No. 17–7466. In re Cervantes; and

No. 17–7485. In re Rodarte. Petitions for writs of habeas corpus denied.

No. 17–7379. In re Saccoccia. Petition for writ of habeas corpus denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 17–7388. In re Davis; and

No. 17–7508. In re Young. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of habeas corpus dismissed. See this Court's Rule 39.8.

No. 17–805. In re George;

No. 17–857. In re Shane et al.;

No. 17–929. In re Junk et al.;

No. 17–7016. In re Newton;

No. 17–7060. In re Charles;

No. 17–7102. In re Frederick; and

No. 17–7130. In re Armstrong. Petitions for writs of mandamus denied.

No. 17–7158. In re Colen. Petition for writ of mandamus and/or prohibition denied.

No. 17–7367. In re Cabello. Petition for writ of prohibition denied.

Certiorari Denied

No. 16–928. Stemtech International, Inc., fka Stemtech HealthSciences, Inc. *v.* Leonard, dba APL Microscopic. C. A. 3d Cir. Certiorari denied. Reported below: 834 F. 3d 376.

No. 17–334. Center for Regulatory Reasonableness *v.* Environmental Protection Agency. C. A. D. C. Cir. Certiorari denied. Reported below: 849 F. 3d 453.

No. 17–380. CONSOL Energy Inc. et al. *v.* Equal Employment Opportunity Commission. C. A. 4th Cir. Certiorari denied. Reported below: 860 F. 3d 131.

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No. 17–469. Silais *v.* Sessions, Attorney General. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 3d 736.

No. 17–526. City of Rockingham, North Carolina, et al. *v.* Federal Energy Regulatory Commission et al. C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 106.

No. 17–531. Oak Harbor Freight Lines, Inc. *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied. Reported below: 855 F. 3d 436.

No. 17–537. Mercury Casualty Co. et al. *v.* Jones, California Insurance Commissioner, et al. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 8 Cal. App. 5th 561, 214 Cal. Rptr. 3d 313.

No. 17–542. Southern California Alliance of Publicly Owned Treatment Works *v.* Environmental Protection Agency et al. C. A. 9th Cir. Certiorari denied. Reported below: 853 F. 3d 1076.

No. 17–546. Coleman *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 17–560. IDAHO *v.* WINDOM. Sup. Ct. Idaho. Certiorari denied. Reported below: 162 Idaho 417, 398 P. 3d 150.

No. 17–576. SALOUHA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 3d 429.

No. 17–578. CACCIAPALLE ET AL. *v.* FEDERAL HOUSING FINANCE AGENCY ET AL.;

No. 17–580. PERRY CAPITAL LLC ET AL. *v.* MNUCHIN, SECRETARY OF THE TREASURY, ET AL.; and

No. 17–591. FAIRHOLME FUNDS, INC., ET AL. *v.* FEDERAL HOUSING FINANCE AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 864 F. 3d 591.

No. 17–592. FRATERNAL ORDER OF POLICE, LODGE 189 LABOR COMMITTEE *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 855 F. 3d 335.

No. 17–624. PONZO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 853 F. 3d 558.

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No. 17–632. PHILLIPS *v.* UAW INTERNATIONAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 854 F. 3d 323.

No. 17–634. CARTER *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 398 P. 3d 124.

No. 17–637. FTS USA, LLC, ET AL. *v.* MONROE ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 3d 389.

No. 17–641. CAREFIRST, INC., ET AL. *v.* ATTIAS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 865 F. 3d 620.

No. 17–672. KEIRAN ET UX. *v.* HOME CAPITAL, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 3d 1127.

No. 17–683. NORTH CAROLINA *v.* ALCOA POWER GENERATING, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 853 F. 3d 140.

No. 17–694. RITZ-CARLTON DEVELOPMENT CO., INC., ET AL. *v.* NARAYAN ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 140 Haw. 343, 400 P. 3d 544.

No. 17–699. National Railroad Passenger Corporation *v.* Union Pacific Railroad Co.; and

No. 17–714. National Association of Railroad Passengers et al. *v.* Union Pacific Railroad Co. et al. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 3d 816.

No. 17–700. National Organization of Veterans' Advocates, Inc. *v.* Shulkin, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 3d 1359.

No. 17–719. Bauer et al. *v.* Becerra, Attorney General of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 3d 1216.

No. 17–750. Madison County, Illinois, et al. *v.* Pittman. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 3d 734.

No. 17–753. Soto Enterprises, Inc., dba Miracle Delivery Armored Services *v.* City of Albuquerque, New Mexico. C. A. 10th Cir. Certiorari denied. Reported below: 864 F. 3d 1089.

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No. 17–757. McGehee et al. *v.* Kentucky Transportation Cabinet, Department of Highways. Ct. App. Ky. Certiorari denied.

No. 17–769. Filson, Warden *v.* Petrocelli. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 710.

No. 17–774. Martin *v.* AK Steel Corp. et al. C. A. 6th Cir. Certiorari denied.

No. 17–789. Renteria et al. *v.* Superior Court of California, Tulare County, et al. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 17–790. Vechery *v.* Cottet-Moine. Sup. Ct. Va. Certiorari denied.

No. 17–792. King *v.* Quint. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 17–793. Josephine Havlak Photographer, Inc., et al. *v.* Village of Twin Oaks, Missouri, et al. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 3d 905.

No. 17–798. Holbrook *v.* Ronnies LLC. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 17–800. McNeil et ux. *v.* Arnold, Judge, Circuit Court of Saline County, Arkansas, et al. Sup. Ct. Ark. Certiorari denied.

No. 17–808. Huimin Song et al. *v.* County of Santa Clara, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 492.

No. 17–810. Ramon Tarango, aka Tarango *v.* Sessions, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 318.

No. 17–813. Barth et ux. *v.* Walt Disney Parks & Resorts U. S., Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 119.

No. 17–814. Golb *v.* Schneiderman, Attorney General of New York. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 3d 89.

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No. 17–815. Vazquez *v.* City of Allentown, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 689 Fed. Appx. 695.

No. 17–822. Feng Li *v.* Peng, as Administratrix of the Estate of Peng, et al. Super. Ct. N. J., App. Div. Certiorari denied.

No. 17–823. Von Maack *v.* Wyckoff Heights Medical Center et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 3d 1019, 38 N. Y. S. 3d 447.

No. 17–824. Payn *v.* Kelley et al. C. A. 10th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 730.

No. 17–829. Saskatchewan Mutual Insurance Co. *v.* CE Design, Ltd. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 537.

No. 17–833. Lucas *v.* Colorado State Public Defender et al. C. A. 10th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 700.

No. 17–837. Drexler *v.* Brown. Dist. Ct. Colo., Denver County. Certiorari denied.

No. 17–841. Ten's Cabaret, Inc., fka Stringfellow's of New York, Inc., et al. *v.* City of New York, New York, et al.; and

No. 17–844. JGJ Merchandise Corp. *v.* City of New York, New York, et al. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 3d 340, 79 N. E. 3d 461.

No. 17–845. Husain *v.* Layng. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 3d 832.

No. 17–846. Almond et al. *v.* Singing River Health System et al. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 3d 285.

No. 17–847. Home Care Providers, Inc., et al. *v.* Hemmelgarn et al. C. A. 7th Cir. Certiorari denied. Reported below: 861 F. 3d 615.

No. 17–848. Werkheiser *v.* Pocono Township Board of Supervisors et al. C. A. 3d Cir. Certiorari denied. Reported below: 704 Fed. Appx. 156.

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No. 17–853. Wilson *v.* Aldridge, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 196.

No. 17–854. Zokaites *v.* Lansaw et ux. C. A. 3d Cir. Certiorari denied. Reported below: 853 F. 3d 657.

No. 17–856. Layne *v.* Brewer, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–858. Finch *v.* Allstate Property & Casualty Insurance Co. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 783.

No. 17–860. Bernard et al. *v.* East Stroudsburg University et al. C. A. 3d Cir. Certiorari denied. Reported below: 700 Fed. Appx. 159.

No. 17–861. Curwood, Inc. *v.* Roberts Technology Group, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 695 Fed. Appx. 48.

No. 17–865. Coggins et al., dba Cherokee Bear Zoo *v.* Hill et al. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 3d 499.

No. 17–866. Ornstein *v.* Bank of New York Mellon. Ct. App. Ariz. Certiorari denied.

No. 17–868. Bryan *v.* Shulkin, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied.

No. 17–870. Pou *v.* California. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied. Reported below: 11 Cal. App. 5th 143, 216 Cal. Rptr. 3d 920.

No. 17–873. Vasquez-Ramirez *v.* Sessions, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 626.

No. 17–875. Cantrell et al. *v.* Capital One, N. A. C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 699.

No. 17–876. Medina-Leon, aka Medina *v.* Sessions, Attorney General. C. A. 5th Cir. Certiorari denied.

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No. 17–877. Long *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 535 S. W. 3d 511.

No. 17–879. Smyth-Riding *v.* Sciences & Engineering Services, LLC, et al. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 146.

No. 17–880. Blough *v.* Nazaretian et al. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 820.

No. 17–881. Scott Timber Co. et al. *v.* Oregon Wild et al. C. A. 9th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 987.

No. 17–882. Raiser *v.* Tri-City Healthcare District et al. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 17–885. Farhoumand *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 200.

No. 17–888. Hernandez, Individually and as Personal Representative of the Estate of Hernandez, Deceased,

ET AL. *v.* KROGER TEXAS, L. P. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 17–891. BOBERTZ ET AL. *v.* CUSHMAN & WAKEFIELD OF CALIFORNIA, INC., ET AL. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 17–892. BODY BY COOK, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 3d 381.

No. 17–893. UNITED STATES EX REL. BROOKS *v.* ORMSBY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 3d 356.

No. 17–894. BIRCH VENTURES, LLC, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 3d 684.

No. 17–896. HINES *v.* PORCH ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 251 So. 3d 6.

No. 17–898. MEYER *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 453.

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No. 17–899. MCMILLAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 489.

No. 17–907. MCMUNN, PERSONAL REPRESENTATIVE OF THE ESTATE OF MYERS, ET AL. *v.* BABCOCK & WILCOX POWER GENERATION GROUP, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 3d 246.

No. 17–916. JOHNSON ET AL. *v.* COMMISSION ON PRESIDENTIAL DEBATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 869 F. 3d 976.

No. 17–919. SEDLAK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 667.

No. 17–920. RUIZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 978.

No. 17–921. SAFETY NATIONAL CASUALTY CORP. *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT. Ct. App. Cal., 2d App.

Dist., Div. 8. Certiorari denied. Reported below: 13 Cal. App. 5th 471, 220 Cal. Rptr. 3d 546.

No. 17–926. Breck *v.* Hernandez et al. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 992, 403 P. 3d 683.

No. 17–927. Kerrigan *v.* Otsuka America Pharmaceutical, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 706 Fed. Appx. 769.

No. 17–947. Jackson *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 17–954. Chaffin *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 143962–U.

No. 17–960. Illinois Bible Colleges Assn. et al. *v.* Cross, Chair of the Illinois Board of Higher Education. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 3d 631.

No. 17–964. Mercer *v.* Virginia. Sup. Ct. Va. Certiorari denied.

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No. 17–966. Profita *v.* Regents of the University of Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 917.

No. 17–992. Hanlon *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 758.

No. 17–994. Ferriero *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 107.

No. 17–998. Lombardo *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 3d 547.

No. 17–1004. Tarver *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 885.

No. 17–1010. Dowling *v.* Pension Plan for Salaried Employees of Union Pacific Corporation and Affiliates et al. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 3d 239.

No. 17–1020. Lyles *v.* Medtronic Sofamor Danek, USA, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 3d 305.

No. 17–5165. SERRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 3d 210.

No. 17–5538. JOHNSON *v.* LAMAS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 3d 119.

No. 17–5563. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 3d 436.

No. 17–5676. LEE *v.* ING GROEP, N. V., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 671 Fed. Appx. 945.

No. 17–6015. HUGHES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 688 Fed. Appx. 889.

No. 17–6105. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 803.

No. 17–6146. CADET *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 3d 1216.

No. 17–6151. RAYNER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 153 A. 3d 1049.

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No. 17–6225. MIERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 686 Fed. Appx. 838.

No. 17–6247. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 298.

No. 17–6323. ELLIS *v.* RAEMISCH, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 872 F. 3d 1064.

No. 17–6404. AGRUETA-VASQUEZ, AKA ARGUETA-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 419.

No. 17–6424. MAIDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 773.

No. 17–6426. NUNEZ-GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 220.

No. 17–6434. FLETCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 3d 501.

No. 17–6459. SAMPLES *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 860 F. 3d 266.

No. 17–6509. BAUTISTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 449.

No. 17–6521. A. I. *v.* M. A. Super. Ct. N. J., App. Div. Certiorari denied.

No. 17–6523. LOMAX *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 17–6606. DIAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 3d 197.

No. 17–6649. NICHOLSON *v.* CITY OF PEORIA, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 3d 520.

No. 17–6742. SIVONGXXAY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 5th 151, 396 P. 3d 424.

No. 17–6798. KIRK *v.* MISSOURI (Reported below: 520 S. W. 3d 443); and NELSON *v.* MISSOURI (521 S. W. 3d 229). Sup. Ct. Mo. Certiorari denied.

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No. 17–6802. OROZCO-MADRIGAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 483.

No. 17–6808. HUGHLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 278.

No. 17–6819. LEDFORD *v.* SELLERS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 17–6825. HUTTO *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 227 So. 3d 963.

No. 17–6848. GUTIERREZ HERNANDEZ *v.* MCFADDEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 195.

No. 17–6863. PLATSKY *v.* NATIONAL SECURITY AGENCY ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–6867. NORTON *v.* SLOAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–6868. LOPEZ *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 861 A. 2d 1245.

No. 17–6872. LOMACK *v.* FARRIS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 757.

No. 17–6879. REGO *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 634.

No. 17–6881. CARLOS RIOS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–6882. BLACKWELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 420 S. C. 127, 801 S. E. 2d 713.

No. 17–6897. MALLETT-RATHELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–6899. KAMARA *v.* PRINCE GEORGE'S COUNTY DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 296.

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No. 17–6902. STONE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 229 Md. App. 732.

No. 17–6909. J'WEIAL *v.* SEXTON, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–6912. ESTES *v.* COLORADO. Dist. Ct. Colo., Denver County. Certiorari denied.

No. 17–6918. STANTON *v.* FLETCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–6923. PARKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 5th 1184, 395 P. 3d 208.

No. 17–6924. HAYNES *v.* ACQUINO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 692 Fed. Appx. 670.

No. 17–6928. SERRANO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 225 So. 3d 737.

No. 17–6929. RAMIREZ *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 226 So. 3d 844.

No. 17–6931. MATHEIS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 17–6934. WILKINS *v.* WAGNER, PRESIDENT JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, FAYETTE COUNTY, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 17–6940. CONNER *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–6944. MACDONALD *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 17–6952. LANKFORD *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–6953. MAPES *v.* COURT OF APPEALS OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 17–6972. DAVIS *v.* ANNUCCI, ACTING COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ET AL. C. A. 2d Cir. Certiorari denied.

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No. 17–6973. DAVIS *v.* ANNUCCI, ACTING COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–6978. FREDERICK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 160 A. 3d 257.

No. 17–6980. NEWKIRK *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 268.

No. 17–6987. THOMPSON *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–6989. WEBB *v.* ALLBAUGH, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 655.

No. 17–6992. AKINS *v.* KNIGHT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 3d 1084.

No. 17–6994. MILNER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 169 A. 3d 1139.

No. 17–6995. EDWARDS *v.* BISHOP, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 737.

No. 17–7000. SALES *v.* CASSADY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 17–7003. ROSE *v.* OFFICE OF PROFESSIONAL CONDUCT. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 50, 424 P. 3d 134.

No. 17–7009. BISHOP ET UX. *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 677 Fed. Appx. 805.

No. 17–7011. TUCKER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–7013. YOUNGBLOOD *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7017. STEPTOE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

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No. 17–7018. ENRIQUEZ SANCHEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7022. JOHNSON *v.* JOHNSON. Ct. App. N. C. Certiorari denied.

No. 17–7026. PASHA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 225 So. 3d 688.

No. 17–7027. PRATT *v.* FILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 523.

No. 17–7028. MIESEGAES *v.* SUPERIOR COURT OF CALIFORNIA, SAN LUIS OBISPO COUNTY, ET AL. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 17–7031. BAILEY *v.* WARFIELD & ROHR. C. A. 4th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 284.

No. 17–7036. WELLS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2014–0612 (La. App. 4 Cir. 9/14/16), 203 So. 3d 233.

No. 17–7037. Villecco *v.* Vail Resorts, Inc., dba Grand Teton Lodge, et al. C. A. 10th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 531.

No. 17–7038. Krohe *v.* California. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 17–7039. Odom *v.* California. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 17–7040. Williams *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 1011.

No. 17–7041. Yebra *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 17–7043. Zulveta *v.* United States District Court for the District of South Carolina (Reported below: 696 Fed. Appx. 97); and Zulveta *v.* TC Unlimited Inc. et al. (694 Fed. Appx. 928). C. A. 4th Cir. Certiorari denied.

No. 17–7047. Williams *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 224 So. 3d 861.

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No. 17–7053. Gillespie *v.* Reverse Mortgage Solutions. Sup. Ct. Fla. Certiorari denied.

No. 17–7054. Gillespie *v.* Reverse Mortgage Solutions. Sup. Ct. Fla. Certiorari denied.

No. 17–7059. Singh *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 2017 WI App 21, 374 Wis. 2d 436, 896 N. W. 2d 390.

No. 17–7062. Frederick *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2017 OK CR 12, 400 P. 3d 786.

No. 17–7063. Odejimi *v.* Town of Windsor, New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 17–7064. Ramos *v.* Johnson, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 17–7065. Stone *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 451 Md. 598, 155 A. 3d 444.

No. 17–7066. Roberts *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 150 Ohio St. 3d 47, 2017-Ohio-2998, 78 N. E. 3d 851.

No. 17–7072. Avila Salazar *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–7074. Carter *v.* Labor Ready Mid-Atlantic, Inc., et al. Sup. Ct. Va. Certiorari denied.

No. 17–7081. Jackson *v.* Marshall, Warden. C. A. 1st Cir. Certiorari denied. Reported below: 864 F. 3d 1.

No. 17–7083. Meyers *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 17–7084. Hudson *v.* Lashbrook, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 3d 652.

No. 17–7086. Hassman *v.* Seastrom & Seastrom et al. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied.

No. 17–7087. Jones *v.* Schweitzer, Warden. C. A. 6th Cir. Certiorari denied.

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No. 17–7088. Jones *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 17–7090. Lilley *v.* Thomas, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 145.

No. 17–7093. Roosa *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 228 So. 3d 580.

No. 17–7097. Hill *v.* Kelley, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 17–7098. Dietrich *v.* City of Grosse Pointe Park, Michigan, et al. C. A. 6th Cir. Certiorari denied.

No. 17–7100. Jones-Adams *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 17–7101. Green *v.* Creighton/CHI Health et al. C. A. 8th Cir. Certiorari denied.

No. 17–7103. Flores *v.* City of Lakewood, Washington, et al. C. A. 9th Cir. Certiorari denied.

No. 17–7104. GASPARD *v.* MELENDEZ. C. A. 9th Cir. Certiorari denied.

No. 17–7105. GARANIN *v.* NEW YORK CITY HOUSING PRESERVATION AND DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 673 Fed. Appx. 122.

No. 17–7108. KOOLA *v.* BANK OF AMERICA, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 128.

No. 17–7109. GRIFFIN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 883 N. W. 2d 282.

No. 17–7110. HOLLIS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–7112. GRIFFIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 231 Md. App. 711.

No. 17–7113. FRANK *v.* CLARKE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

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No. 17–7115. MOSBY *v.* SYKES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 755.

No. 17–7117. PERRY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 17–7120. VANHALST *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 532 S. W. 3d 469.

No. 17–7124. COX *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 17–7125. SHEARD *v.* KLEE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 780.

No. 17–7132. JAMES *v.* CORINO ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 17–7133. BERGERON *v.* ROY, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. Sup. Ct. Minn. Certiorari denied.

No. 17–7135. SPICER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–7136. Thomas *v.* Perry, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 112.

No. 17–7139. Presley *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 227 So. 3d 95.

No. 17–7142. Wiley *v.* Jones, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied.

No. 17–7146. Wakefield *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 168 A. 3d 331.

No. 17–7150. Wiley *v.* Jones, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied.

No. 17–7159. Resendez *v.* California. Ct. App. Cal., 2d App. Dist., Div. 8. Certiorari denied. Reported below: 13 Cal. App. 5th 181, 220 Cal. Rptr. 3d 118.

No. 17–7160. Malumphy *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 508.

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No. 17–7161. Robinson *v.* Lewis, Warden. Sup. Ct. S. C. Certiorari denied.

No. 17–7166. Jones *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 2017 S.D. 59, 903 N. W. 2d 101.

No. 17–7167. Robles *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7168. Dorsey *v.* Lankford. Ct. App. D. C. Certiorari denied.

No. 17–7170. Payton *v.* Kansas et al. C. A. 10th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 514.

No. 17–7174. Kupritz *v.* Chase Bank USA, N. A. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 226 So. 3d 843.

No. 17–7178. Holley *v.* Connecticut. App. Ct. Conn. Certiorari denied. Reported below: 174 Conn. App. 488, 167 A. 3d 1000.

No. 17–7179. LAKE *v.* RAY ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7181. CHESTNUT *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 228 So. 3d 553.

No. 17–7185. LUCAS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 265 So. 3d 373.

No. 17–7187. SHEEHAN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 388 Mont. 220, 399 P. 3d 314.

No. 17–7189. SMOOT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 233 Md. App. 765.

No. 17–7191. SANUDO *v.* ARNOLD, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7193. CARTER *v.* MARYLAND. Cir. Ct. Anne Arundel County, Md. Certiorari denied.

No. 17–7196. BREWNER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 302 Ga. 6, 804 S. E. 2d 94.

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No. 17–7206. CLARDY *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7208. KULKARNI *v.* DEPARTMENT OF STATE. C. A. 9th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 896.

No. 17–7209. DURANT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143031–U.

No. 17–7212. LOVE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 351.

No. 17–7214. CUMMINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7215. CHISHOLM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 835.

No. 17–7216. ENOCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 575.

No. 17–7217. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 687 Fed. Appx. 75.

No. 17–7219. Keller *v.* Pringle, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 3d 1072.

No. 17–7223. Rosales-Alvarado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 204.

No. 17–7225. Read *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 173.

No. 17–7226. Rivera *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 17–7227. Paniry *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 387.

No. 17–7228. Patrick *v.* Citibank, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 78.

No. 17–7229. Popovski *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 552.

No. 17–7231. Elliott *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 132201–UB.

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No. 17–7238. Miller *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–7239. Meeks *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 275.

No. 17–7241. Moultrie *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7242. Long Phi Pham *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 3d 799.

No. 17–7246. Pontefract *v.* Merlak, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7250. Remington *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 872 F. 3d 72.

No. 17–7255. Aguilar Lopez *v.* United States;
No. 17–7271. Cisneros *v.* United States; and
No. 17–7342. Lopez Hernandez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 3d 1292.

No. 17–7256. CARDONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 275.

No. 17–7258. DEWITT, AKA WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 252.

No. 17–7266. MELENDEZ-ORSINI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 709 Fed. Appx. 706.

No. 17–7267. MCKINLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 597.

No. 17–7268. METAYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7269. PABON-MANDRELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–7272. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 136.

No. 17–7273. BARR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

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No. 17–7276. ALMEIDA ZAPATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 219.

No. 17–7278. WEISSERT *v.* PALMER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 534.

No. 17–7283. TAYLOR *v.* KRUEGER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–7285. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–7287. THACKREY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 4140516–U.

No. 17–7289. STAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 17–7291. SIMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 693 Fed. Appx. 33.

No. 17–7293. ARANDA-LUNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 207.

No. 17–7300. FONTANA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7302. DAVIS *v.* CHAPMAN, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7303. ROTTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 894.

No. 17–7304. GALVAN-FUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 161.

No. 17–7305. FOYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 124.

No. 17–7307. FAULKNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 132884, 73 N. E. 3d 25.

No. 17–7308. DORISE *v.* MATEVOUSIAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 864.

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No. 17–7309. ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 222.

No. 17–7314. LILLIE *v.* HERNANDEZ, WARDEN. Gen. Ct. Justice, Super. Ct. Div., Alamance County, N. C. Certiorari denied.

No. 17–7315. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 483.

No. 17–7320. MINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 531.

No. 17–7321. ROUKIS *v.* DEPARTMENT OF THE ARMY. C. A. Armed Forces. Certiorari denied. Reported below: 77 M. J. 70.

No. 17–7322. SIMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 230.

No. 17–7323. QUINTANILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 390.

No. 17–7326. ALTAMIRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 452.

No. 17–7329. HERNANDEZ NAVARRO *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 541.

No. 17–7331. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 17–7332. YOUNG *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–7333. WHOOLERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 17–7336. CASTRO-VERDUGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 407.

No. 17–7340. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 826.

No. 17–7341. LAVARIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 236.

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No. 17–7343. JIGGETTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 400.

No. 17–7344. OLOTOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 639.

No. 17–7347. DUKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 397.

No. 17–7350. CLARK *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 17–7356. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 781.

No. 17–7358. SONGLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 226.

No. 17–7359. REDDICK *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 174 Conn. App. 536, 166 A. 3d 754.

No. 17–7361. SIMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 289.

No. 17–7371. PORTUONDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7372. PAYTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7378. CARACCIOLI *v.* FACEBOOK, INC. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 588.

No. 17–7380. JECZALIK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7381. CAMACHO *v.* ENGLISH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 811.

No. 17–7389. SPRINGER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 3d 949.

No. 17–7390. SASAKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7395. ORTIZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 768.

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No. 17–7398. LARKIN *v.* HAWKINS, CORRECTIONAL ADMINISTRATOR, NASH CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 122.

No. 17–7405. BISHOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 409.

No. 17–7408. EASTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 465.

No. 17–7409. FRYER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141409–U.

No. 17–7413. SPENCER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 1.

No. 17–7415. HALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 876.

No. 17–7417. FORSYTHE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 711 Fed. Appx. 674.

No. 17–7419. HARRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 197.

No. 17–7421. Roberts *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 803.

No. 17–7422. Jefferson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 762.

No. 17–7427. Shreeves *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 131.

No. 17–7429. Hawkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 720.

No. 17–7430. Williams *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7432. Wood *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 17–7433. Tinajero-Porras *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 609.

No. 17–7435. Williamson *v.* Morehead State University et al. Ct. App. Ky. Certiorari denied.

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No. 17–7439. Titus *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 150334–U.

No. 17–7440. Maldonado-Franco *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7441. Davis *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 343.

No. 17–7443. Chavez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 963.

No. 17–7446. Pyles *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 862 F. 3d 82.

No. 17–7448. Martinez-Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7452. St. Ange *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 17–7453. Pope *v.* Perdue. C. A. 7th Cir. Certiorari denied.

No. 17–7455. Joye *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 128.

No. 17–7456. Long *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 3d 741.

No. 17–7460. Smith *v.* Meko, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 341.

No. 17–7461. Scott *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–7462. Herrington *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 719 Fed. Appx. 106.

No. 17–7468. McCain *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 539.

No. 17–7469. Harris *v.* United States. C. A. 1st Cir. Certiorari denied.

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No. 17–7471. Glasgow *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 237.

No. 17–7472. Harris *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 141206–U.

No. 17–7473. Fillingham *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 3d 531.

No. 17–7475. Biddles *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 461.

No. 17–7477. Robinson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 857.

No. 17–7482. Smith *v.* Jarvis, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 616.

No. 17–7487. Martinez *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 3d 842.

No. 17–7488. Duncan *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 172 A. 3d 459.

No. 17–7489. CONTRERAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 280.

No. 17–7493. BELTRAN-CERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 211.

No. 17–7495. JONES *v.* WILSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 686 Fed. Appx. 237.

No. 17–7500. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 17–7501. SCOTTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7502. MCMASTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–7510. VILLARRUEL-QUINTANILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 391.

No. 17–7519. KEOWN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 478 Mass. 232, 84 N. E. 3d 820.

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No. 17–7523. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 650.

No. 17–7529. BARBOSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 206.

No. 17–7531. COSTELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 120.

No. 17–342. SILVESTER ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 843 F. 3d 816.

JUSTICE THOMAS, dissenting.

The Second Amendment protects "the right of the people to keep and bear Arms," and the Fourteenth Amendment requires the States to respect that right, *McDonald* v. *Chicago*, 561 U. S. 742, 749–750 (2010) (plurality opinion); *id.*, at 805 (THOMAS, J., concurring in part and concurring in judgment). Because the right to keep and bear arms is enumerated in the Constitution,

courts cannot subject laws that burden it to mere rational-basis review. *District of Columbia* v. *Heller*, 554 U. S. 570, 628, n. 27 (2008).

But the decision below did just that. Purporting to apply intermediate scrutiny, the Court of Appeals upheld California's 10-day waiting period for firearms based solely on its own "common sense." *Silvester* v. *Harris*, 843 F. 3d 816, 828 (CA9 2016). It did so without requiring California to submit relevant evidence, without addressing petitioners' arguments to the contrary, and without acknowledging the District Court's factual findings. This deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right.

If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court. Because I do not believe we should be in the business of choosing which constitutional rights are "*really worth* insisting upon," *Heller*, *supra*, at 634, I would have granted certiorari in this case.

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I

When the average person wants to buy a firearm in California, he must wait 10 days before the seller can give it to him. Cal. Penal Code Ann. §§ 26815 (West 2012), 27540 (West Cum. Supp. 2018). This 10-day waiting period applies to all types of firearms. But it has exceptions for certain purchasers, including peace officers, § 26950 (West 2012), and special permit holders, § 26965.

California's waiting period is the second longest in the country. Besides California, only eight States and the District of Columbia have any kind of waiting period. Four of those jurisdictions have waiting periods for all firearms.[1] The other five have waiting

[1] See Haw. Rev. Stat. Ann. § 134–2(e) (Cum. Supp. 2016) (14 days); Ill. Comp. Stat., ch. 720, § 5/24–3(A)(g) (West 2016) (3 days for handguns, 1 day for long guns); R. I. Gen. Laws §§ 11–47–35(a)(1) (Supp. 2016), 11–47–35.1 (2002), 11–47–35.2 (7 days); D. C. Code § 22–4508 (Cum. Supp. 2017) (10 days).

periods for only certain types of firearms.[2] Previous versions of California's waiting period likewise were limited to handguns.[3]

California enacted its current waiting period for two reasons. First, the waiting period gives state authorities time to run a background check. In addition to the background check required by federal law, 18 U. S. C. § 922(t), California requires its own background check, searching at least six databases to confirm a purchaser's identity, gun ownership, legal history, and mental health. One of those databases, the Automated Firearms System (AFS), collects reports to help determine who possesses a given gun at a given time. Second, California's waiting period creates a "cooling off" period. The 10-day window gives individuals who might use a firearm to harm themselves or others an opportunity to calm down.

Petitioners Jeff Silvester and Brandon Combs are lawful gun owners who live in California. They, along with two nonprofits, filed a lawsuit challenging the constitutionality of California's waiting period under the Second Amendment. Specifically, petitioners allege that the waiting period is unconstitutional as applied to "subsequent purchasers"—individuals who already own a firearm according to California's AFS database and individuals who have a valid concealed-carry license.

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A

After a 3-day bench trial, the District Court entered judgment for petitioners. *Silvester* v. *Harris*, 41 F. Supp. 3d 927, 934–935 (ED Cal. 2014). Applying intermediate scrutiny, the District Court concluded that California's waiting period was not reasonably tailored to promote an important governmental interest. Regarding background checks, the District Court found that 20 percent of background checks are autoapproved and take less than two hours to complete. *Id.*, at 964. The other 80 percent take longer, *id.*, at 954, but petitioners did not challenge the back-

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[2] See Fla. Stat. § 790.0655 (2017) (3 days for handguns); Iowa Code Ann. § 724.20 (West Cum. Supp. 2017) (3 days for handguns); Md. Pub. Saf. Code Ann. §§ 5–123 (2011), 5–124, 5–101(r) (Supp. 2017) (7 days for handguns and "assault weapons"); Minn. Stat. § 624.7132 (2016) (5 business days for handguns and "semiautomatic military-style assault weapon[s]"); N. J. Stat. Ann. § 2C:58–2(a)(5)(a) (West 2016) (7 days for handguns).

[3] See 1975 Cal. Stats. ch. 997 (15 days); 1965 Cal. Stats. ch. 1007 (5 days); 1955 Cal. Stats. chs. 1521–1522 (3 days); 1923 Cal. Stats. ch. 339, § 10 (1 day).

ground checks or the time it takes to complete them. *Id.*, at 968, and n. 38.

That left the cooling-off period. After reviewing California's studies on the relationship between waiting periods and gun casualties, the District Court found them inconclusive. See *id.*, at 954–955. The District Court also noted that the studies "seem to assume that the individual does not already possess a firearm." *Id.*, at 966. California submitted "no evidence" about subsequent purchasers, which was significant because a waiting period "will not deter an individual from committing impulsive acts of violence with a separate firearm that is already in his or her possession." *Id.*, at 965–966. Even if some cooling-off period is necessary, California made no "attempt to defend a 10-day waiting period," and the background-check process will "naturally" create "a waiting period of at least 1-day" for 80 percent of purchasers. *Ibid.* The District Court also found that individuals who meet California's requirements for a concealed-carry license are uniquely "unlikely" to "engage in impulsive acts of violence." *Id.*, at 969.

California argued that a waiting period could still work for subsequent purchasers in some circumstances, but the District Court rejected this argument as overly speculative. While a subsequent purchaser's firearm could be lost, stolen, or broken, California submitted "no evidence . . . to quantify" how often this occurs. *Id.*, at 966. And state authorities could always check the AFS database to determine whether a subsequent purchaser still had a firearm—a reliable method that law enforcement officers use in the field. *Id.*, at 966–967. Further, California did not prove that waiting periods deter subsequent purchasers who want to buy a larger capacity gun. California's expert identified only one anecdotal example of a subsequent purchaser who had committed an act of gun violence, and the expert conceded that a waiting period would not have deterred that individual. *Id.*, at 966, n. 35.

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B

The Court of Appeals for the Ninth Circuit reversed. 843 F. 3d, at 829. The Ninth Circuit spent most of its opinion summarizing the background of this litigation, Circuit precedent on the Second Amendment, and this Court's decision in *Heller* (including the dissent). See 843 F. 3d, at 819–826. The Ninth Circuit then concluded that "the test for intermediate scrutiny from First Amendment cases" applies to California's waiting period. *Id.*, at

821; see *id.*, at 826–827. Stressing that this test is "not a strict one," the Ninth Circuit held that California's law prevents gun violence by creating a cooling-off period. *Id.*, at 827. Although California's studies did not isolate the effect of waiting periods on subsequent purchasers, those studies "confirm the common sense understanding" that cooling-off periods deter violence and self-harm—an understanding that "is no less true" for subsequent purchasers. *Id.*, at 828.

The assumption that subsequent purchasers would just use the gun they already own was "not warranted," the Ninth Circuit concluded. *Ibid.* While it assumed that the AFS database would accurately report whether a subsequent purchaser still owns a gun, *id.*, at 826, the Ninth Circuit noted that a subsequent purchaser "may want to purchase a larger capacity weapon that will do more damage when fired into a crowd," *id.*, at 828. That possibility was enough for the Ninth Circuit to uphold California's waiting period, since intermediate scrutiny requires "only that the regulation 'promot[e] a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.*, at 829.

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II

The Second Amendment guarantees "a personal right to keep and bear arms for lawful purposes." *McDonald*, 561 U. S., at 780 (plurality opinion). This Court has not definitively resolved the standard for evaluating Second Amendment claims. *Heller* did not need to resolve it because the law there failed "any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U. S., at 628. After *Heller*, the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny. See Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L. J. 852, 867 (2013). Several jurists disagree with this approach, suggesting that courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment. See, *e. g.*, *Tyler* v. *Hillsdale County Sheriff's Dept.*, 837 F. 3d 678, 702–703 (CA6 2016) (en banc) (Batchelder, J., concurring in most of judgment); *Houston* v. *New Orleans*, 675 F. 3d 441, 451–452 (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F. 3d 361 (CA5 2012) (*per*

curiam); *Heller* v. *District of Columbia*, 670 F. 3d 1244, 1271 (CADC 2011) (Kavanaugh, J., dissenting).[4]

Although *Heller* did not definitively resolve the standard for evaluating Second Amendment claims, it rejected two proposed standards. The Court first rejected a "freestanding 'interest-balancing' approach," which would have weighed a law's burdens on Second Amendment rights against the governmental interests it promotes. 554 U. S., at 634. "The very enumeration of the [Second Amendment] right," *Heller* explained, eliminates courts' power "to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Ibid.* The Court also rejected "rational-basis scrutiny." *Id.*, at 628, n. 27. *Heller* found it "[o]bviou[s]" that rational-basis review "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right." *Ibid.* Otherwise, the Second Amendment "would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Ibid.*

Rational-basis review is meaningfully different from other standards for evaluating constitutional rights, including the intermediate-scrutiny standard that the Ninth Circuit invoked here. While rational-basis review allows the government to justify a law with "rational speculation unsupported by evidence or empirical data," *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 315 (1993), intermediate scrutiny requires the government to "demonstrate that the harms it recites are real" beyond "mere speculation or conjecture," *Edenfield* v. *Fane*, 507 U. S. 761, 770–771 (1993). And while rational-basis review requires only that a law be "rational . . . at a class-based level," *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 86 (2000), intermediate scrutiny requires a "'reasonable fit'" between the law's ends and means, *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 416 (1993).

The Ninth Circuit claimed to be applying intermediate scrutiny, but its analysis did not resemble anything approaching that standard. It allowed California to prove a governmental interest with speculation instead of evidence. It did not meaningfully assess whether the 10-day waiting period is reasonably tailored to California's purported interest. And it did not defer to the factual

[4] I, too, have questioned this Court's tiers-of-scrutiny jurisprudence. See *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 638–641 (2016) (dissenting opinion).

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findings that the District Court made after trial. The Ninth Circuit would not have done this for any other constitutional right, and it could not have done this unless it was applying rational-basis review.

A

The Ninth Circuit allowed California to justify its waiting period with mere "rational speculation unsupported by evidence or empirical data," *Beach Communications*, *supra*, at 315. The court rejected petitioners' as-applied challenge based solely on its "common sense understanding" that the studies about cooling-off periods apply to subsequent purchasers. 843 F. 3d, at 828. To be sure, a law can satisfy heightened scrutiny based on "[a] long history, a substantial consensus, and simple common sense." *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion). But not one of those bases was present here. The District Court found that waiting periods do not have a long historical pedigree. 41 F. Supp. 3d, at 963. It found no consensus among States that waiting periods are needed and no consensus among experts that they deter gun violence. *Id.*, at 954–955, 963. And even assuming the effectiveness of cooling-off periods is a question of "common sense," instead of statistics, the Ninth Circuit's reasoning was the opposite of common sense. Common sense suggests that subsequent purchasers contemplating violence or self-harm would use the gun they already own, instead of taking all the steps to legally buy a new one in California.[5]

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The Ninth Circuit's only response to this point was that a subsequent purchaser might want a "larger capacity weapon that will do more damage when fired into a crowd." 843 F. 3d, at 828. But California presented no evidence to substantiate this concern. According to the District Court, California's expert identified one anecdotal example of a subsequent purchaser who committed an act of gun violence, but then conceded that a waiting period would have done nothing to deter that individual. 41 F. Supp. 3d, at

[5] In fact, the Ninth Circuit's "common sense" conclusion was a logical fallacy. Studies suggesting that waiting periods decrease firearm casualties for *all* purchasers do not suggest that waiting periods decrease firearm casualties for *subsequent* purchasers; the observed decrease could be attributable solely to first-time purchasers. By assuming that a conclusion about the whole applies to each of its parts, the Ninth Circuit committed the "fallacy of division." See P. Hurley, A Concise Introduction to Logic 170–172 (6th ed. 1997).

966, n. 35. And the Ninth Circuit did not even address the District Court's finding that individuals who satisfy the requirements for a concealed-carry license are uniquely unlikely to engage in such behavior. *Id.*, at 969. Needless to say, a State that offers "*no* evidence or anecdotes in support of [a] restriction" should not prevail under intermediate scrutiny. *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 628 (1995).

B

Even if California had presented more than "speculation or conjecture" to substantiate its concern about high-capacity weapons, *Edenfield*, *supra*, at 770, the Ninth Circuit did not explain why the 10-day waiting period is "sufficiently tailored to [this] goal," *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 490 (1995). And there are many reasons to doubt that it is. California's waiting period is not limited to high-capacity weapons. Cf. *Discovery Network*, *supra*, at 417, n. 13 (courts should evaluate "less-burdensome alternatives" under intermediate scrutiny). And its waiting period already has exceptions for peace officers and special permit holders—individuals who, like subsequent purchasers, have a demonstrated history of responsible firearm ownership. Cf. *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 190 (1999) (courts should evaluate "exemptions and inconsistencies" under intermediate scrutiny). The District Court also found that California presented no evidence supporting a 10-day waiting period. 41 F. Supp. 3d, at 966. For much of its history, California's waiting period was shorter and applied only to handguns. *Id.*, at 963. And the District Court found that a 1-day waiting period is inevitable for most purchasers because their background checks are not autoapproved. *Id.*, at 965–966.

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The Ninth Circuit did not address these obvious mismatches between the ends and means of California's waiting period. It instead dismissed any tailoring concerns by observing that intermediate scrutiny requires "only that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" 843 F. 3d, at 829.[6] But that ob-

[6] The Ninth Circuit also cited its decision in *Jackson* v. *City and County of San Francisco*, 746 F. 3d 953 (2014)—another case where it applied an overly lenient standard to reject a Second Amendment claim, see 576 U. S. 1013, 1013–1018 (2015) (THOMAS, J., dissenting from denial of certiorari).

servation was incomplete. Intermediate scrutiny also requires that a law not "burden substantially more [protected activity] than is necessary to further [the government's] interest." *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 214 (1997) (internal quotation marks omitted). The Ninth Circuit did not ask this second question—a question that is, of course, irrelevant to a court applying rational-basis review, see *Kimel*, 528 U. S., at 85–86.

C

Lastly, the Ninth Circuit ignored several ordinary principles of appellate review. While rational-basis review "is not subject to courtroom factfinding," *Beach Communications*, *supra*, at 315, intermediate scrutiny is. And here, the District Court presided over a 3-day trial and made several findings of fact. The Ninth Circuit was supposed to review those findings for clear error. See Fed. Rule Civ. Proc. 52(a)(6). Yet the Ninth Circuit barely mentioned them. And it never explained why it had the "definite and firm conviction" that they were wrong. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

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California contends that the District Court did not make the kind of "historical or adjudicative" findings that warrant deference. Brief in Opposition 9. But the Federal Rules do not "exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982). A court of appeals must defer to a district court's factual findings, even when the findings "do not rest on credibility determinations, but are based instead on physical or documentary evidence." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). In fact, deference is "[p]articularly" appropriate when the issues require familiarity with "principles not usually contained in the general storehouse of knowledge and experience." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 610 (1950). And "no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case." *Maine* v. *Taylor*, 477 U. S. 131, 145 (1986).

III

The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of

petitioners' challenge is emblematic of a larger trend. As I have previously explained, the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights. See *Friedman* v. *Highland Park*, 577 U. S. 1039, 1039–1043 (2015) (THOMAS, J., dissenting from denial of certiorari); *Jackson* v. *City and County of San Francisco*, 576 U. S. 1013, 1013–1018 (2015) (same).

This double standard is apparent from other cases where the Ninth Circuit applies heightened scrutiny. The Ninth Circuit invalidated an Arizona law, for example, partly because it "delayed" women seeking an abortion. *Planned Parenthood Arizona, Inc.* v. *Humble*, 753 F. 3d 905, 917 (2014). The court found it important there, but not here, that the State "presented no evidence whatsoever that the law furthers [its] interest" and "no evidence that [its alleged danger] exists or has ever [occurred]." *Id.*, at 914–915. Similarly, the Ninth Circuit struck down a county's 5-day waiting period for nude-dancing licenses because it "unreasonably prevent[ed] a dancer from exercising first amendment rights while an application [was] pending." *Kev, Inc.* v. *Kitsap County*, 793 F. 2d 1053, 1060 (1986). The Ninth Circuit found it dispositive there, but not here, that the county "failed to demonstrate a need for [the] five-day delay period." *Ibid.* In another case, the Ninth Circuit held that laws embracing traditional marriage failed heightened scrutiny because the States presented "no evidence" other than "speculation and conclusory assertions" to support them. *Latta* v. *Otter*, 771 F. 3d 456, 476 (2014). While those laws reflected the wisdom of "thousands of years of human history in every society known to have populated the planet," *Obergefell* v. *Hodges*, 576 U. S. 644, 708 (2015) (ROBERTS, C. J., dissenting), they faced a much tougher time in the Ninth Circuit than California's new and unusual waiting period for firearms. In the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text.

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Our continued refusal to hear Second Amendment cases only enables this kind of defiance. We have not heard argument in a Second Amendment case for nearly eight years. *Peruta* v. *California*, 582 U. S. 943, 948 (2017) (THOMAS, J., dissenting from denial of certiorari). And we have not clarified the standard for

assessing Second Amendment claims for almost 10. Meanwhile, in this Term alone, we have granted review in at least five cases involving the First Amendment and four cases involving the Fourth Amendment—even though our jurisprudence is much more developed for those rights.

If this case involved one of the Court's more favored rights, I sincerely doubt we would have denied certiorari. I suspect that four Members of this Court would vote to review a 10-day waiting period for abortions, notwithstanding a State's purported interest in creating a "cooling off" period. Cf. *Akron Center for Reproductive Health, Inc.* v. *Akron*, 651 F. 2d 1198, 1208 (CA6 1981) (invalidating a 24-hour waiting period for abortions that was meant to create a "'cooling off period'"), aff'd in relevant part, 462 U. S. 416, 450 (1983); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 887 (1992) (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (disavowing *Akron* but upholding a 24-hour waiting period only "on the record before us, and in the context of this facial challenge"). I also suspect that four Members of this Court would vote to review a 10-day waiting period on the publication of racist speech, notwithstanding a State's purported interest in giving the speaker time to calm down. Cf. *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992) (holding that the First Amendment prohibits a county from charging even a small permitting fee to offset the costs of providing security for a white-nationalist rally); *Virginia* v. *Black*, 538 U. S. 343 (2003) (holding that the First Amendment protects the burning of a 25-foot cross at a Ku Klux Klan rally); *Brandenburg* v. *Ohio*, 395 U. S. 444, 446, n. 1 (1969) (*per curiam*) (holding that the First Amendment protects a film featuring Klan members wielding firearms, burning a cross, and chanting "'Bury the niggers'"). Similarly, four Members of this Court would vote to review even a 10-*minute* delay of a traffic stop. Cf. *Rodriguez* v. *United States*, 575 U. S. 348 (2015) (holding that the Fourth Amendment prohibits the police from delaying a traffic stop seven or eight minutes to conduct a dog sniff). The Court would take these cases because abortion, speech, and the Fourth Amendment are three of its favored rights. The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message.

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* * *

Nearly eight years ago, this Court declared that the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U. S., at 780 (plurality opinion). By refusing to review decisions like the one below, we undermine that declaration. Because I still believe that the Second Amendment cannot be "singled out for special—and specially unfavorable—treatment," *id.*, at 778–779 (majority opinion), I respectfully dissent from the denial of certiorari.

No. 17–351. Bais Yaakov of Spring Valley et al. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 852 F. 3d 1078.

No. 17–395. Taylor Farms Pacific, Inc., dba Taylor Farms *v.* Del Carmen Pena et al., Individually and on Behalf of All Others Similarly Situated. C. A. 9th Cir. Motions of Center for Workplace Compliance, DRI–The Voice of the Defense Bar, and Cato Institute for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 690 Fed. Appx. 526.

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No. 17–690. Foot Locker, Inc., et al. *v.* Osberg. C. A. 2d Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 862 F. 3d 198.

No. 17–752. Pfizer Inc. et al. *v.* Rite Aid Corp. et al. C. A. 3d Cir. Motions of Washington Legal Foundation and Pharmaceutical Research and Manufacturers of America et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 868 F. 3d 231.

No. 17–771. Wyeth LLC et al. *v.* Rite Aid Corp. et al. C. A. 3d Cir. Motion of Pharmaceutical Research and Manufacturers of America et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 868 F. 3d 231.

No. 17–784. Lin *v.* Rohm & Haas Co., dba Dow Advanced Materials. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 685 Fed. Appx. 125.

No. 17–855. Norton et al. *v.* Ute Indian Tribe of the Uintah and Ouray Reservation et al. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 862 F. 3d 1236.

No. 17–889. Rinis *v.* Public Employees' Retirement System of Mississippi et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 17–928. Jones et al. *v.* Parmley et al. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 714 Fed. Appx. 42.

No. 17–6971. Duncan *v.* Allbaugh, Director, Oklahoma Department of Corrections. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 702 Fed. Appx. 713.

No. 17–7082. Mickens *v.* Clarke, Superintendent, State Correctional Institution at Albion, et al. C. A. 3d Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

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No. 17–7524. Ellis *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 868 F. 3d 1155.

Rehearing Denied

No. 16–8992. Weathersby *v.* Illinois Commerce Commission et al., *ante*, p. 834;

No. 16–9071. Bailey *v.* Carson et al., *ante*, p. 906;

No. 16–9082. Belyew *v.* Superior Court of California, Butte County, et al., *ante*, p. 836;

No. 16–9268. Lee *v.* Florida, *ante*, p. 841;

No. 16–9342. Brenson *v.* Marquis, Warden, *ante*, p. 844;

No. 16–9454. Zanders *v.* U. S. Bank N. A., *ante*, p. 973;

No. 16–9711. Gordon *v.* Kelley, Director, Arkansas Department of Correction, *ante*, p. 864;

No. 17–407. Smith *v.* Los Angeles County Metropolitan Transportation Authority et al., *ante*, p. 997;

No. 17–453. Miranda *v.* Selig et al., *ante*, p. 1013;

No. 17–821. Dailey *v.* United States, *ante*, p. 1059;
No. 17–5087. Joyner *v.* Virginia, *ante*, p. 879;
No. 17–5200. Chamblin *v.* Jenkins, Warden, *ante*, p. 885;
No. 17–5286. Jones *v.* Cranford, *ante*, p. 889;
No. 17–5351. Olawale-Ayinde, aka Williams *v.* United States, *ante*, p. 1016;
No. 17–5417. Adkins *v.* Public Storage, *ante*, p. 1016;
No. 17–5498. Burns *v.* United States, *ante*, p. 898;
No. 17–5550. Williams *v.* Berryhill, Acting Commissioner of Social Security, *ante*, p. 923;
No. 17–5592. Middlebrooks *v.* Mays, Acting Warden, *ante*, p. 1016;
No. 17–5808. Franklin *v.* Jenkins, Warden, *ante*, p. 951;
No. 17–5868. Maps *v.* Fernandez-Rundle et al., *ante*, p. 975;
No. 17–5930. Woodson *v.* Jones, Secretary, Florida Department of Corrections, *ante*, p. 976;
No. 17–5960. Nunn *v.* Hammer, Warden, *ante*, p. 954;
No. 17–5970. Ball *v.* Maricopa County, Arizona, et al., *ante*, p. 999;
No. 17–5981. Phillips *v.* United States, *ante*, p. 954;
No. 17–5985. Noguero *v.* American Family Mutual Insurance Co., *ante*, p. 1000;
No. 17–5986. Polson *v.* Alabama et al., *ante*, p. 1000;
No. 17–5988. Torres Rivera *v.* Jones, Secretary, Florida Department of Corrections, et al., *ante*, p. 977;
No. 17–6012. Makau *v.* Meyer, Judge, District Court of North Carolina, Orange County, et al., *ante*, p. 1000;
No. 17–6033. Juengain *v.* Louisiana et al., *ante*, p. 977;
No. 17–6138. McGarity *v.* United States, *ante*, p. 958;
No. 17–6150. In re Scheckel, *ante*, p. 1011;
No. 17–6176. Dobbs *v.* Georgia, *ante*, p. 1002;
No. 17–6183. Fan Gu *v.* INVISTA S. a. r. l., *ante*, p. 967;
No. 17–6188. Hives *v.* Bisk Education, Inc., *ante*, p. 1002;
No. 17–6206. Wije *v.* Stuart et al., *ante*, p. 1019;
No. 17–6244. Harris *v.* Gipson, Warden, *ante*, p. 1041;
No. 17–6322. Dietrich *v.* Patti, *ante*, p. 1042;
No. 17–6330. Thomas *v.* United States, *ante*, p. 978;
No. 17–6356. In re Brewer, *ante*, p. 962;
No. 17–6363. Kelley *v.* Aldine Independent School District, *ante*, p. 1020;

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No. 17–6595. LINDSEY *v.* COLORADO, *ante*, p. 1070;
No. 17–6684. SOLIZ *v.* UNITED STATES, *ante*, p. 1044;
No. 17–6784. BASS *v.* NEW JERSEY ET AL., *ante*, p. 1095; and
No. 17–6982. MORAL *v.* KANSAS, *ante*, p. 1081. Petitions for rehearing denied.

No. 17–6107. GARCIA CUEVAS *v.* HARTLEY, WARDEN, *ante*, p. 1008. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

FEBRUARY 22, 2018

Dismissal Under Rule 46

No. 17–762. KIRK *v.* INVESCO, LTD. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 700 Fed. Appx. 334.

Certiorari Denied

No. 17–7758 (17A865). BRANCH *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 234 So. 3d 548.

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No. 17–7825 (17A885). BRANCH *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 236 So. 3d 981.

No. 17–7855 (17A900). HAMM *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion for leave to file documents under seal with redacted copies for the public record granted. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by JUSTICE THOMAS is vacated. Reported below: 725 Fed. Appx. 836.

Statement of JUSTICE BREYER respecting the denial of the application for stay and the denial of certiorari.

This case reflects the special circumstances of trying to execute a person who has been on death row for 30 years and has cancer. As I have previously written, rather than develop a "constitutional jurisprudence that focuses upon the special circumstances

of the aged," I would reconsider the constitutionality of the death penalty itself. *Dunn* v. *Madison*, *ante*, at 14–16 (concurring opinion).

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting from the denial of the application for stay and the denial of certiorari.

Petitioner Doyle Lee Hamm is a 61-year-old Alabama inmate whose medical conditions leave him in a vulnerable physical state. An independent physician, appointed by the District Court, determined that "no veins in either [of his arms] would be readily accessible" for the placement of the two intravenous catheters Alabama's lethal-injection execution protocol requires. *Hamm* v. *Commissioner, Ala. Dept. of Corrections*, 725 Fed. Appx. 836, 839 (CA11 2018) (*per curiam*). Nonetheless, a panel of the Eleventh Circuit has affirmed the District Court's denial of Hamm's request for a preliminary injunction barring intravenous lethal injection. The District Court and Eleventh Circuit erroneously premised their rejection of Hamm's claims on novel understandings about how Hamm's execution would be carried out—understandings gleaned from a stipulation and an affidavit to which Hamm was given no opportunity to respond. An adversarial process should have tested the risk of "serious illness and needless suffering," *Glossip* v. *Gross*, 576 U. S. 863, 875 (2015) (quoting *Baze* v. *Rees*, 553 U. S. 35, 50 (2008)), presented by the insertion of intravenous catheters into Hamm's leg or central veins. That method of execution, although it fits within the compass of the State's execution protocol, has, by all accounts before us, never been tried before in Alabama. I therefore respectfully dissent from the denial of certiorari.

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FEBRUARY 26, 2018

Certiorari Granted—Vacated and Remanded

No. 17–908. KELSEY-HAYES CO. ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *CNH Industrial N.V.* v. *Reese*, *ante*, p. 133 (*per curiam*). Reported below: 854 F. 3d 862.

Miscellaneous Orders

No. 17M85. SKRBIC *v.* SOMMERS; and

No. 17M86. KORZYBSKI *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17–1194. INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 4th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari granted in part. Respondents are directed to file a response to the petition for writ of certiorari no later than noon on March 1, 2018.

No. 17–7629. IN RE EASLEY; and

No. 17–7630. IN RE CONTRERAS. Petitions for writs of habeas corpus denied.

No. 17–1028. IN RE WU ET UX. Petition for writ of mandamus denied.

No. 17–7211. IN RE CLOUD. Petition for writ of mandamus and/or prohibition denied.

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Certiorari Granted

No. 17–340. NEW PRIME INC. *v.* OLIVEIRA. C. A. 1st Cir. Certiorari granted. Reported below: 857 F. 3d 7.

No. 17–587. MOUNT LEMMON FIRE DISTRICT *v.* GUIDO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 859 F. 3d 1168.

No. 17–7505. MADISON *v.* ALABAMA. Cir. Ct. Mobile County, Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 17–418. NEW YORK ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 17–446. RIVERKEEPER, INC., ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 846 F. 3d 492.

No. 17–608. ESTATE OF BROOKS ET AL. *v.* CONNECTICUT COMMISSIONER OF REVENUE SERVICES. Sup. Ct. Conn. Certiorari denied. Reported below: 325 Conn. 705, 159 A. 3d 1149.

No. 17–802. R. J. Reynolds Tobacco Co. *v.* Izzarelli. C. A. 2d Cir. Certiorari denied. Reported below: 701 Fed. Appx. 26.

No. 17–878. McLaughlin *v.* McLaughlin. Sup. Ct. Ariz. Certiorari denied. Reported below: 243 Ariz. 29, 401 P. 3d 492.

No. 17–895. Bustillo-Formoso *v.* Million Air San Juan Corp. et al. C. A. 1st Cir. Certiorari denied. Reported below: 691 Fed. Appx. 1.

No. 17–902. Rivera Perez *v.* Sessions, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 891.

No. 17–906. Mendel, as Personal Representative of the Estate of Mendel, et al. *v.* Morgan Keegan & Co., Inc. C. A. 11th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 994.

No. 17–910. Carroll et al. *v.* Dodaro, Comptroller General of the United States, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 1.

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No. 17–917. Lawrence et al. *v.* Bank of America, N. A., et al. C. A. 11th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 980.

No. 17–922. Siena at Old Orchard, L. L. C., et al. *v.* Siena at Old Orchard Condominium Assn. et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 151846, 75 N. E. 3d 420.

No. 17–930. Louisiana Department of Corrections et al. *v.* Ware. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 3d 263.

No. 17–932. Newark Electric Corp. et al. *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied.

No. 17–939. Midwest Terminals of Toledo International, Inc. *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied.

No. 17–944. Rainer *v.* Kelley, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1035.

No. 17–946. David Netzer Consulting Engineer, LLC *v.* Shell Oil Co. et al. C. A. 5th Cir. Certiorari denied.

No. 17–948. Managed Care Insurance Consultants, Inc. *v.* United Healthcare Insurance Co. et al. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 228 So. 3d 588.

No. 17–987. Carnicella *v.* Mercy Hospital. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2017 ME 161, 168 A. 3d 768.

No. 17–1032. Ross, Individually and as Next Friend of Minor K. R. *v.* Klesius et al. C. A. 4th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 224.

No. 17–1039. Appleby *v.* Schnurr, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 459.

No. 17–1064. Gatza et al. *v.* DCC Litigation Facility, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 519.

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No. 17–1092. AFMS LLC *v.* United Parcel Service, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 293.

No. 17–5686. Bernard *v.* Jarvis, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 686 Fed. Appx. 730.

No. 17–6855. Griffith *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 17–7144. Windham *v.* Harmon Law Offices, P. C., et al. C. A. 1st Cir. Certiorari denied.

No. 17–7145. Waddy *v.* Ohio. Ct. App. Ohio, 12th App. Dist., Franklin County. Certiorari denied. Reported below: 2016-Ohio-4911, 68 N. E. 3d 381.

No. 17–7152. Willis *v.* Dentists Benefits Insurance Co. et al. Ct. App. Ariz. Certiorari denied.

No. 17–7201. Dortch *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 17–7204. Esquivel *v.* Martinez, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–7205. Levy *v.* Sessions, Attorney General. C. A. 11th Cir. Certiorari denied. Reported below: 882 F. 3d 1364.

No. 17–7218. Jean-Baptiste *v.* SAP, National Security Services, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 257.

No. 17–7221. Chae Chang *v.* Frauenheim, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–7236. Mahjor *v.* Greenpoint Mortgage Funding, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 231.

No. 17–7237. Arvelo *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 901.

No. 17–7243. Piccone *v.* Matal, Interim Director, United States Patent and Trademark Office, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 663.

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No. 17–7244. Belyew *v.* Superior Court of California, Butte County, et al. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 17–7252. Jefferson *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 252 N. C. App. 174, 798 S. E. 2d 121.

No. 17–7265. Payne *v.* Horton, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7284. Williams *v.* Victoria's Secret. C. A. 2d Cir. Certiorari denied.

No. 17–7363. Gray *v.* Nebraska Department of Correctional Services. Ct. App. Neb. Certiorari denied. Reported below: 24 Neb. App. xiii.

No. 17–7386. Smith *v.* Bowser, Superintendent, Two Rivers Correctional Institution. C. A. 9th Cir. Certiorari denied.

No. 17–7396. PRINGLE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 643.

No. 17–7437. WILKERSON *v.* LANE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 3d 221.

No. 17–7442. LEE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 17–7447. JONES *v.* FOSTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–7450. DARBY *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS. C. A. D. C. Cir. Certiorari denied.

No. 17–7457. COLEMAN *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 241 Ariz. 190, 385 P. 3d 420.

No. 17–7478. MCNEAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

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No. 17–7480. ROCHA *v.* UNITED STATES (Reported below: 699 Fed. Appx. 402); and IGNACIO-FRANCISCO *v.* UNITED STATES (705 Fed. Appx. 329). C. A. 5th Cir. Certiorari denied.

No. 17–7498. PHILLIPS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 142553–U.

No. 17–7506. WHITAKER ET AL. *v.* COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 3d 490.

No. 17–7512. WILKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 337.

No. 17–7513. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 367.

No. 17–7514. ANTONIO TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7516. BRUNDIDGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 608.

No. 17–7518. JONES *v.* NEBRASKA. Ct. App. Neb. Certiorari denied. Reported below: 24 Neb. App. lvii.

No. 17–7520. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 325.

No. 17–7525. LEBRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 265.

No. 17–7526. SNELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 422.

No. 17–7530. ABRAMYAN *v.* BAUGHMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 893.

No. 17–7534. STEPHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 343.

No. 17–7535. MADISON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 17–7537. SPEED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 692.

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No. 17–7538. ORTEGA-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 382.

No. 17–7539. JUDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 591.

No. 17–7540. KISACK *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2016–0797 (La. 10/18/17), 236 So. 3d 1201.

No. 17–7543. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 217.

No. 17–7549. HEAD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 612.

No. 17–7553. MOORE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7554. MORRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 387.

No. 17–7557. Coker *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7558. Lessner *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 385.

No. 17–7562. Frazier *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7564. Laureano-Perez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 17–7565. Jackson *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7566. Ward *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 178.

No. 17–7571. Graco *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 403.

No. 17–7572. Brown *v.* United States. C. A. 8th Cir. Certiorari denied.

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No. 17–7573. Igboanugo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 623.

No. 17–7574. Acoff *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 708 Fed. Appx. 3.

No. 17–7584. Gill *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 3d 62.

No. 17–7588. Martin Torres *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 751.

No. 17–7591. Kamer *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7594. Williams *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 386.

No. 17–7595. Porter *v.* Genovese. C. A. 6th Cir. Certiorari denied. Reported below: 676 Fed. Appx. 428.

No. 17–7596. Jay *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 587.

No. 17–7599. LANG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 523.

No. 17–7602. CHAVEZ-CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 729.

No. 17–7604. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 874 F. 3d 412.

No. 17–7612. PERALTA-CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 407.

No. 17–7614. GIBSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 544.

No. 17–7627. KITTERMAN *v.* SULLIVAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–7637. IVERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 3d 855.

No. 17–1003. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari before judgment denied without prejudice. It is assumed that the Court of Appeals will proceed expeditiously to decide this case.

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No. 17–6580. MIDDLETON *v.* FLORIDA; and

No. 17–6735. TUNDIDOR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 17–6580, 220 So. 3d 1152; No. 17–6735, 221 So. 3d 587.

JUSTICE BREYER, dissenting.

For the reasons set forth in my concurring opinions in *Hurst* v. *Florida*, 577 U. S. 92, 103 (2016) (opinion concurring in judgment), and *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (same), I would vacate and remand these cases for the Florida Supreme Court to address the Eighth Amendment issue in the first instance. I therefore agree with the dissenting opinion of JUSTICE SOTOMAYOR. In my view, "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Id.*, at 619. I respectfully dissent.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Yet again, the Florida Supreme Court has failed to address an important Eighth Amendment claim raised by capital defendants

regarding the propriety of jury instructions that repeatedly emphasized that the jurors' role in sentencing the defendants to death was merely advisory. I dissented once before from the denial of certiorari in *Truehill* v. *Florida*, *ante*, p. 939, based on the same failure. Because two more capital cases have now come and gone without any change, from either the court below or this Court, I feel compelled to elaborate further.

Like the two petitioners in *Truehill*, Dale Middleton and Randy Tundidor were sentenced to death under a Florida capital sentencing scheme that this Court has since declared unconstitutional. See *Hurst* v. *Florida*, 577 U. S. 92 (2016). Relying on the unanimity of the juries' recommendations of death, the Florida Supreme Court post-*Hurst* declined to disturb the petitioners' death sentences, reasoning that the unanimity ensured that jurors had made the necessary findings of fact under *Hurst*. By doing so, the Florida Supreme Court effectively transformed the pre-*Hurst* jury recommendations into binding findings of fact with respect to the petitioners' death sentences.

Having so concluded, the Florida Supreme Court continually refuses to grapple with the Eighth Amendment implications of that holding. If those then-advisory jury findings are now binding and sufficient to satisfy *Hurst*, petitioners contend that their sentences violate the Eighth Amendment because the jury instructions in their cases repeatedly emphasized the nonbinding, advisory nature of the jurors' role and that the judge was the final decisionmaker. This Court has unequivocally held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985).

At least four times now, capital defendants in Florida have come to this Court, their last resort before their death sentences become final, seeking our intervention on this issue. Each time, this Court has refused to act, letting stand the petitioners' death sentences despite the substantiality of their unaddressed Eighth Amendment challenges. Because I continue to believe that "the stakes in capital cases are too high to ignore such constitutional challenges," *Truehill*, *ante*, at 940, I again dissent from this inaction and would vacate and remand these cases to the Florida Supreme Court.

Help Prevent Harmful Hurricanes

No. 17–7548. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 677 Fed. Appx. 628.

No. 17–7559. GRANTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 704 Fed. Appx. 1.

No. 17–7598. INGRAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 720 Fed. Appx. 461.

Rehearing Denied

No. 16–9739. GONZALEZ *v.* DUCART, WARDEN, *ante*, p. 865;

No. 17–311. PUI-KWONG CHAN ET AL. *v.* BAIZHEN YANG ET AL., *ante*, p. 1052;

No. 17–599. SAIA *v.* FLYING J. INC., DBA FJ MANAGEMENT, INC., ET AL., *ante*, p. 1055;

No. 17–613. SHAO *v.* TSAN-KUEN WANG, *ante*, p. 1084;

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No. 17–5724. SMITH *v.* UNITED STATES, *ante*, p. 1061;

No. 17–6068. ABDUR'RAHMAN ET AL. *v.* PARKER, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL., *ante*, p. 1062;

No. 17–6071. MERCER *v.* FAIRFAX COUNTY BOARD OF SUPERVISORS ET AL., *ante*, p. 1062;

No. 17–6072. MERCER *v.* POWERS, *ante*, p. 1062;

No. 17–6083. BUCHANAN *v.* TALLAHATCHIE COUNTY CORRECTIONAL FACILITY, *ante*, p. 1017;

No. 17–6099. VENTA *v.* JARVIS, WARDEN, *ante*, p. 1062;

No. 17–6221. BALADEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1019;

No. 17–6307. TERRELL *v.* HOFFNER, WARDEN, *ante*, p. 1042;

No. 17–6327. SOTELO CANTU *v.* C. R. FISCHER & SONS, INC., ET AL., *ante*, p. 1063;

No. 17–6385. SANDOVAL *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 1064;

No. 17–6414. COLLINS ET AL. *v.* JPMORGAN CHASE BANK, N. A., ET AL., *ante*, p. 1065;

No. 17–6462. SHAPIRO *v.* ACCU ET AL.; SHAPIRO *v.* U-HAUL ET AL.; and SHAPIRO *v.* UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL., *ante*, p. 1066;

No. 17–6598. MILLER *v.* WEST VIRGINIA DEPARTMENT OF CORRECTIONS ET AL., *ante*, p. 1070;

No. 17–6613. IN RE CHRISTIAN, *ante*, p. 1051;

No. 17–6693. KUN *v.* STATE BAR OF CALIFORNIA, *ante*, p. 1073; and

No. 17–6792. SHEPPARD *v.* TEXAS, *ante*, p. 1095. Petitions for rehearing denied.

MARCH 2, 2018

Miscellaneous Order

No. 17A859. HENRY SCHEIN, INC., ET AL. *v.* ARCHER & WHITE SALES, INC. Application for stay, presented to JUSTICE ALITO, and by him referred to the Court, granted, and the proceedings in the United States District Court for the Eastern District of Texas, case No. 2:12–cv–572, are stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

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MARCH 5, 2018

Dismissal Under Rule 46

No. 17–301. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION ET AL. *v.* WHITAKER, BY HIS MOTHER AND NEXT FRIEND, WHITAKER. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 858 F. 3d 1034.

Certiorari Granted—Vacated and Remanded

No. 15–1205. SHANAHAN ET AL. *v.* LORA. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jennings* v. *Rodriguez*, *ante*, p. 281. Reported below: 804 F. 3d 601.

Miscellaneous Orders

No. 16–1140. NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL. *v.* BECERRA, ATTORNEY GENERAL

of California, et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 972.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–368. Salt River Project Agricultural Improvement and Power District *v.* Tesla Energy Operations, Inc., fka SolarCity Corp. C. A. 9th Cir. [Certiorari granted *sub nom. Salt River Project Agricultural Improvement and Power District* v. *SolarCity Corp.*, *ante*, p. 1009.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–1060. United States ex rel. Carter *v.* Halliburton Co. et al. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–5639. Chavez-Meza *v.* United States. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1089.] Motion of petitioner for appointment of counsel granted, and Todd A. Coberly, Esq., of Santa Fe, N. M., is appointed to serve as counsel for petitioner in this case. Justice Gorsuch took no part in the consideration or decision of this motion.

Legal Insight Publishing Publication

No. 17–6582. Wanzer *v.* Gloor et al. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1048] denied.

No. 17–7665. In re Trout. Petition for writ of habeas corpus denied.

No. 17–6390. In re Eggers. Petition for writ of mandamus denied.

Certiorari Granted

No. 17–647. Knick *v.* Township of Scott, Pennsylvania, et al. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 862 F. 3d 310.

No. 17–6086. Gundy *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 4 presented by the petition. Reported below: 695 Fed. Appx. 639.

Certiorari Denied

No. 17–552. Wilson *v.* Callahan, Individually and as Administrator of the Estate of Callahan, et al. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 3d 144.

No. 17–567. Scott et al. *v.* Federal Deposit Insurance Corporation. C. A. 5th Cir. Certiorari denied. Reported below: 684 Fed. Appx. 391.

No. 17–618. Washington Alliance of Technology Workers *v.* Department of Homeland Security. C. A. D. C. Cir. Certiorari denied. Reported below: 857 F. 3d 907.

No. 17–635. Snodgrass *v.* Messer et al. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 157.

No. 17–770. ICTSI Oregon, Inc. *v.* International Longshore and Warehouse Union et al. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 3d 1178.

No. 17–772. Nicholson et al. *v.* Thrifty Payless, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 615.

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No. 17–782. Chateau Foghorn LP *v.* Hosford. Ct. App. Md. Certiorari denied. Reported below: 455 Md. 462, 168 A. 3d 824.

No. 17–924. Cabacoff *v.* Select Portfolio Servicing, Inc. C. A. 1st Cir. Certiorari denied.

No. 17–937. Davenport *v.* Borough of Homestead, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 3d 273.

No. 17–940. Grant *v.* Bennett et al. Sup. Ct. Tex. Certiorari denied. Reported below: 525 S. W. 3d 642.

No. 17–941. Haines et al. *v.* Lange et al. C. A. 2d Cir. Certiorari denied. Reported below: 699 Fed. Appx. 8.

No. 17–943. Ostrander *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 17–956. Tanguy et al. *v.* West, as Chapter 7 Trustee of Davis, Debtor, et al. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 516 S. W. 3d 13.

No. 17–958. Williams *v.* Court Services and Offender Supervision Agency et al. C. A. D. C. Cir. Certiorari denied.

No. 17–963. Berman *v.* Kafka. C. A. 11th Cir. Certiorari denied. Reported below: 661 Fed. Appx. 621.

No. 17–968. Clark et al. *v.* City of Shawnee, Kansas. C. A. 10th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 478.

No. 17–969. Ross *v.* University of Tulsa. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 3d 1280.

No. 17–971. Macias Jaquez *v.* Sessions, Attorney General. C. A. 5th Cir. Certiorari denied.

No. 17–990. Layton *v.* Bordin. C. A. 9th Cir. Certiorari denied. Reported below: 680 Fed. Appx. 639.

No. 17–993. Koziol *v.* Attorney Grievance Committee for the Third Judicial Department. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 3d 1344, 49 N. Y. S. 3d 925.

Law Prof. Antony Hubbard

No. 17–1000. Xiu Jian Sun *v.* Dillon et al. C. A. 2d Cir. Certiorari denied. Reported below: 699 Fed. Appx. 90.

No. 17–1019. Rodriguez *v.* Bank of America, N. A., et al. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 376.

No. 17–1021. Patton *v.* T. D. C. A. 10th Cir. Certiorari denied. Reported below: 868 F. 3d 1209.

No. 17–1022. Meisner *v.* Zymogenetics, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 218.

No. 17–1040. Shutack *v.* Sidley Austin LLP et al. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 160747–U.

No. 17–1053. Batsch et al. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 166.

No. 17–1054. NGUYEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 17–1082. RECREATIONAL DATA SERVICES, INC. *v.* TRIMBLE NAVIGATION LTD. Sup. Ct. Alaska. Certiorari denied. Reported below: 404 P. 3d 120.

No. 17–1088. HERBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 170.

No. 17–1114. CALAFF *v.* CAPRA, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 714 Fed. Appx. 47.

No. 17–6070. RHOTON *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 17–6321. MINTO *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 854 F. 3d 619.

No. 17–6514. HOLLY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2017 Ark. 201, 520 S. W. 3d 677.

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No. 17–6552. FIFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 3d 759.

No. 17–6657. REAVES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 525.

No. 17–6938. TISIUS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 519 S. W. 3d 413.

No. 17–6945. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 617.

No. 17–7230. PRINCE *v.* CHOURAQUI (two judgments). Sup. Ct. Fla. Certiorari denied.

No. 17–7232. BOSSE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2017 OK CR 19, 406 P. 3d 26.

No. 17–7235. JOHNSON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied.

No. 17–7240. Morris-Calderon *v.* Randi et al. C. A. 9th Cir. Certiorari denied.

No. 17–7247. Marquez *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 17–7249. Baez Romero *v.* DHL Express (USA), Inc., et al. C. A. 2d Cir. Certiorari denied.

No. 17–7251. Holton *v.* First Coast Service Options, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 917.

No. 17–7253. Leverton *v.* Colorado. Ct. App. Colo. Certiorari denied. Reported below: 405 P. 3d 402.

No. 17–7254. Kelley *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 795.

No. 17–7259. Roberts *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

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No. 17–7260. Swinton *v.* Steuben County Jail et al. C. A. 2d Cir. Certiorari denied.

No. 17–7264. Packer *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 160 A. 3d 246.

No. 17–7275. Mason *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141199–U.

No. 17–7294. Jordan *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 17–7310. Hamilton *v.* Colorado. Dist. Ct. Colo., Pitkin County. Certiorari denied.

No. 17–7312. Kato *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied.

No. 17–7318. Smith *v.* City of Wyoming, Ohio, et al. C. A. 6th Cir. Certiorari denied.

No. 17–7324. Davis-Massey et al. *v.* Ameen et al. C. A. 8th Cir. Certiorari denied.

No. 17–7327. Cotton, aka Cornelius-Cotton *v.* Supreme Court of the United States et al. C. A. 6th Cir. Certiorari denied.

No. 17–7364. Goraya *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 234 So. 3d 681.

No. 17–7369. Harris *v.* Steadman. C. A. 3d Cir. Certiorari denied.

No. 17–7373. Passmore *v.* Department of Justice. C. A. D. C. Cir. Certiorari denied.

No. 17–7375. Gardner *v.* Burt, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7376. Griffin *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 202 So. 3d 109.

No. 17–7411. Hale *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2016-Ohio-5837.

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No. 17–7424. Sanders *v.* Family Dollar Stores, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 101.

No. 17–7438. West *v.* Bradshaw, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7449. Murphy *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 227 So. 3d 242.

No. 17–7527. Dillon *v.* Daugaard, Governor of South Dakota, et al. C. A. 8th Cir. Certiorari denied.

No. 17–7567. Williams *v.* Jackson, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7582. Simpson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 695 Fed. Appx. 17.

No. 17–7597. Carrasco-Ortiz *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 646 Fed. Appx. 655.

No. 17–7605. Wroten *v.* Gordy, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 17–7608. WOODARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 287.

No. 17–7616. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 3d 549.

No. 17–7626. SENAT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 701.

No. 17–7628. RAMKISSOON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 17–7643. NASH *v.* CAIN, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 17–7648. RAMIREZ-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 419.

No. 17–7649. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 789.

No. 17–7651. MARSHALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 3d 213.

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No. 17–7653. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7656. ALVARADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 865.

No. 17–7661. VAUGHN *v.* HOLLOWAY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7668. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–7670. MCDUFFIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7671. CRAWFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 714 Fed. Appx. 27.

No. 17–7672. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 990.

No. 16–334. BANK MELLI *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 825 F. 3d 949.

No. 17–633. Endo Pharmaceuticals Inc. et al. *v.* New Hampshire. Sup. Ct. N. H. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition. Reported below: 170 N. H. 211, 167 A. 3d 1277.

No. 17–5830. Webster *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 689 Fed. Appx. 616.

No. 17–6542. Yepa *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 862 F. 3d 1252.

No. 17–6844. Wessinger *v.* Vannoy, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 3d 387.

Justice Sotomayor, dissenting.

Petitioner Todd Wessinger was sentenced to death by a jury that was never presented with significant mitigation evidence that may have convinced its members to spare his life. For instance, Wessinger suffers from a major neurocognitive disorder that compromises his decisionmaking abilities. As a child, he experienced a stroke in his left frontal lobe that affected how the left and right sides of his brain communicate. He also suffered from childhood seizures, and he has a hole in the area of his brain associated with executive functioning that resulted from some form of cerebrovascular illness.

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The jury never considered this evidence at sentencing, or other mitigation about Wessinger's family history of poverty, alcoholism, and domestic violence, because Wessinger's trial counsel did not attempt to discover it.* Wessinger's attorneys on postconviction review similarly failed to conduct any mitigation investigation in preparation for his state habeas petition.

The first postconviction counsel to represent Wessinger suffered a mental breakdown and did no work on his petition. The second attorney was highly inexperienced and had to put together a

*Wessinger's conviction and sentence were affirmed on direct appeal without consideration of any ineffective-assistance-of-counsel claim because, in Louisiana, such claims are "customarily addressed in postconviction proceedings, not on direct appeal." *State* v. *Wessinger*, 98–1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 195.

petition on a compressed timeline. He filed a shell petition to meet the 1-year filing deadline, but failed to immediately seek funding to support a mitigation investigation. See Record in No. 15–70027 (CA5), Doc. 513312967, p. 138 (Record Doc.). He subsequently attempted to rectify that error to no avail. The court viewed his requests as delaying the case and as not sufficiently supported by facts. See *id.*, at 142–144. Counsel proceeded to file an amended petition based only on the limited facts developed in the trial record. Apparently recognizing his limitations, he then sought to withdraw from representation; but it was not until he received the State's opposition to the petition 18 months after filing the motion to withdraw that he realized the motion had been denied. Having done no work during the interim period, he pulled together a second amended petition that added discrete allegations regarding the penalty phase portion of the capital proceedings but that still were based only on the deficient trial court record. His efforts were too little, too late. Counsel had pursued no mitigation investigation, and the state court denied postconviction relief.

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On federal habeas review, the District Court granted Wessinger's 28 U. S. C. § 2254 petition on the basis that both trial counsel's and postconviction counsel's failure to investigate mitigation evidence constituted ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668 (1984). A panel majority of the Court of Appeals for the Fifth Circuit reversed. 864 F. 3d 387 (2017). The panel concluded that Wessinger had not received ineffective assistance of counsel during the postconviction proceedings, and was therefore barred from raising his ineffective-assistance-of-trial-counsel claim in federal court. See *Martinez* v. *Ryan*, 566 U. S. 1, 17 (2012). That conclusion is clearly wrong.

This Court repeatedly has held that the failure to perform mitigation investigation constitutes deficient performance. See, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000) (finding deficiency where "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Porter* v. *McCollum*, 558 U. S. 30, 40 (2009) (*per curiam*) ("The decision not to investigate did not reflect reasonable professional judgment"). There is nothing about the facts of this case that calls for a different conclusion.

The Fifth Circuit panel majority does not dispute the District Court's finding that the attorney who filed Wessinger's state habeas petitions "did no investigation" into mitigation. *Wessinger* v. *Cain*, 2015 WL 4527245, *2 (MD La., July 27, 2015). It does not disagree with the District Court's findings that counsel "did not obtain any medical records, school records, employment records or family history records," or that he did not "conduct interviews of any witnesses, friends, teachers, coaches, or family members" regarding potential mitigating factors, aside from having a couple brief conversations with Wessinger's mother and brother. *Ibid.*

Even more striking, the panel majority does not acknowledge that counsel did absolutely nothing on Wessinger's case for a period of at least 18 months after filing the first amended petition.

Despite these blatant shortcomings, the panel majority found that the failure to conduct any mitigation research was not a result of deficient performance but a product of the state postconviction court's denial of funding for a mitigation investigation. As the record demonstrates, however, the denial of funds resulted at least in significant part from counsel's deficiencies: Wessinger's first counsel did nothing on his case; his second counsel delayed in requesting funds immediately upon taking the case; and, when counsel ultimately made the requests, the court viewed them as unsupported by any facts. See Record Doc., at 138–139, 142–144.

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More important, as noted by the Fifth Circuit panel dissent, the denial of funds does not excuse counsel's failure to perform *any* independent mitigation investigation. 864 F. 3d, at 393 (opinion of Dennis, J.). In fact, conducting such an investigation may have placed the requests for funding on substantially stronger ground. The denial of funds also does not explain or justify counsel's complete abandonment of the case for 1½ years.

The Court's denial of certiorari here belies the "bedrock principle in our justice system" that a defendant has a right to effective assistance of trial counsel and undermines the protections this Court has recognized are necessary to protect that right. *Martinez*, 566 U. S., at 12. Indeed, the investigation of mitigation evidence and its presentation at sentencing are crucial to maintaining the integrity of capital proceedings. The layers of ineffective assistance of counsel that Wessinger received constitute precisely the type of error that warrants relief under this Court's precedent. Yet, Wessinger will remain on death row without a jury

ever considering the significant mitigation evidence that is now apparent. Because that outcome is contrary to precedent and deeply unjust and unfair, I dissent from the denial of certiorari.

No. 17–7666. CLARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 16–9727. MUA ET AL. *v.* CALIFORNIA CASUALTY INDEMNITY EXCHANGE, *ante*, p. 1051;

No. 17–741. MADRIGALES-RODRIGUEZ *v.* SESSIONS, ATTORNEY GENERAL, *ante*, p. 1092;

No. 17–758. ARORA ET AL. *v.* JAMES ET AL., *ante*, p. 1093;

No. 17–5848. DEATON *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ante*, p. 952;

No. 17–6182. IN RE LEGRANDE, *ante*, p. 1101;

No. 17–6314. IN RE GADSDEN, *ante*, p. 972;

No. 17–6375. DONCHEV *v.* DESIMONE, *ante*, p. 1064;

No. 17–6476. BAKER *v.* UNITED STATES, *ante*, p. 1021;

No. 17–6620. YOUNG *v.* WHITE ET AL., *ante*, p. 1071;

No. 17–6762. FRIAS *v.* UNITED STATES, *ante*, p. 1075;

No. 17–6836. MILLER *v.* DUNN, *ante*, p. 1104; and

No. 17–6907. LEI KE *v.* DREXEL UNIVERSITY ET AL., *ante*, p. 1079. Petitions for rehearing denied.

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MARCH 15, 2018

Miscellaneous Order

No. 17–8130 (17A994). IN RE GARY. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 17–8085 (17A995). GARY *v.* GEORGIA. Super. Ct. Muscogee County, Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 17–8105 (17A970). EGGERS *v.* ALABAMA. C. A. 11th Cir. Application for stay of execution of sentence of death, presented

to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 876 F. 3d 1086.

MARCH 16, 2018

Miscellaneous Order

No. 17–387. UPPER SKAGIT INDIAN TRIBE *v.* LUNDGREN ET VIR. Sup. Ct. Wash. [Certiorari granted, *ante*, p. 1036.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 19, 2018

Certiorari Dismissed

No. 17–7403. HOLMES *v.* DON KENNEDY PROPERTIES, LLC. Ct. App. Wash. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 197 Wash. App. 1031.

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No. 17–7767. KAPORDELIS *v.* FOX, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 707 Fed. Appx. 545.

Miscellaneous Orders

No. 17A838. TIMBES *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL. C. A. 11th Cir. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. 17A909. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL. *v.* LEAGUE OF WOMEN VOTERS

of Pennsylvania et al. Sup. Ct. Pa. Application for stay, presented to Justice Alito, and by him referred to the Court, denied.

No. 17M87. Gentry *v.* Thompson, Judge, Circuit Court of Tennessee, Sumner County;

No. 17M88. Gentry *v.* Tennessee et al.; and

No. 17M90. Griffin *v.* American Zurich Insurance Co. et al. Motions of petitioners for leave to proceed as veterans denied.

No. 17M89. Nwaubani *v.* Grossman et al.; and

No. 17M91. Curran *v.* United States. Motions to direct the Clerk to file petitions for writ of certiorari out of time denied.

No. 17–269. Washington *v.* United States et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1089.] Motion of Washington State Association of Counties et al. for leave to file brief as *amici curiae* granted.

No. 17–667. Pioneer Centres Holding Company Stock Ownership Plan and Trust et al. *v.* Alerus Financial, N. A. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

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No. 17–7476. Jungwirth *v.* Lee. Ct. Civ. App. Ala.; and

No. 17–7692. Stone *v.* Louisiana Department of Revenue. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 9, 2018, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 17–1171. In re Reilly;
No. 17–7755. In re Shinsako;
No. 17–7818. In re West;
No. 17–7830. In re Aldridge et ux.;
No. 17–7886. In re Calton;
No. 17–7887. In re Rudnick;
No. 17–7902. In re Alexander; and
No. 17–7906. In re Webster. Petitions for writs of habeas corpus denied.

No. 17–7349. In re Drake; and

No. 17–7393. In re Rotondo. Petitions for writs of mandamus denied.

No. 17–7338. In re Webb. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 16–1363. Nielsen, Secretary of Homeland Security, et al. *v.* Preap et al. (Reported below: 831 F. 3d 1193); and Wilcox, Acting Field Office Director, Immigration and Customs Enforcement, et al. *v.* Khoury et al. (667 Fed. Appx. 966). C. A. 9th Cir. Certiorari granted.

Certiorari Denied

No. 16–1180. Brewer, Former Governor of Arizona, et al. *v.* Arizona Dream Act Coalition et al. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 3d 957.

No. 17–473. Noonan *v.* County of Oakland, Michigan, et al. C. A. 6th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 455.

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No. 17–550. Wierszewski *v.* Thibault. C. A. 6th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 891.

No. 17–630. Karban *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–663. Green Solution Retail, Inc., et al. *v.* United States et al. C. A. 10th Cir. Certiorari denied. Reported below: 855 F. 3d 1111.

No. 17–666. Wright *v.* Mays et al.;
No. 17–901. Wyant et al. *v.* Mays et al.; and
No. 17–989. City of Flint, Michigan, et al. *v.* Boler et al. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 3d 391.

No. 17–669. Wilcoxson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 888.

No. 17–696. Gonzalez-Badillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 312.

No. 17–706. Lowry *v.* City of San Diego, California. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 3d 1248.

No. 17–722. Guerra, Individually and on Behalf of the Estate of Guerra, Deceased, et al. *v.* Bellino. C. A. 5th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 312.

No. 17–729. Yukins, Warden *v.* Tanner. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 661.

No. 17–736. Blatt, Hasenmiller, Leibsker & Moore LLC *v.* Oliva. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 3d 492.

No. 17–747. Teva Pharmaceuticals USA, Inc. *v.* Wendell et al. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 3d 1227.

No. 17–776. City of Los Angeles, California, et al. *v.* Brewster. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 3d 1194.

No. 17–779. Parker *v.* Montgomery County Correctional Facility et al. C. A. 3d Cir. Certiorari denied.

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No. 17–781. Asboth *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 2017 WI 76, 376 Wis. 2d 644, 898 N. W. 2d 541.

No. 17–803. Sandusky Wellness Center, LLC *v.* ASD Specialty Healthcare, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 3d 460.

No. 17–842. Bellevue *v.* Universal Health Services of Hartgrove, Inc., dba Hartgrove Hospital. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 712.

No. 17–863. First Agency, Inc., et al. *v.* Dakotas and Western Minnesota Electrical Industry Health and Welfare Fund, by Stainbrook et al.; and

No. 17–1008. Dakotas and Western Minnesota Electrical Industry Health and Welfare Fund *v.* First Agency, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1098.

No. 17–872. Walker *v.* Estate of Clark. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 544.

No. 17–918. Lussy *v.* Commissioner of Internal Revenue. C. A. 11th Cir. Certiorari denied. Reported below: 651 Fed. Appx. 883.

No. 17–934. Penunuri et al. *v.* Redford et al. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 54, 423 P. 3d 1150.

No. 17–953. Warmus *v.* LaRose, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–957. LaVergne *v.* Brignac et al. C. A. 5th Cir. Certiorari denied. Reported below: 654 Fed. Appx. 177.

No. 17–967. McMaster et ux. *v.* Township of Bensalem, Pennsylvania. Commw. Ct. Pa. Certiorari denied. Reported below: 161 A. 3d 1031.

No. 17–972. Nordyke *v.* Howmedica Osteonics Corp. C. A. 3d Cir. Certiorari denied. Reported below: 867 F. 3d 390.

No. 17–973. McGeehan *v.* McGeehan. Ct. App. Md. Certiorari denied. Reported below: 455 Md. 268, 167 A. 3d 579.

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No. 17–974. Ozfidan *v.* Ozfidan. Sup. Ct. Va. Certiorari denied.

No. 17–978. Robertson *v.* GMAC Mortgage, LLC, et al. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 595.

No. 17–985. Trivedi *v.* Department of Homeland Security et al. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 827.

No. 17–996. Boggala *v.* Sessions, Attorney General. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 3d 563.

No. 17–1006. Laity *v.* New York et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 153 App. Div. 3d 1079, 60 N. Y. S. 3d 572.

No. 17–1012. Chiarenza *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 217 So. 3d 128.

No. 17–1013. Sampson *v.* U. S. Bank N. A. C. A. 1st Cir. Certiorari denied.

No. 17–1023. Banner Health et al. *v.* Azar, Secretary of Health and Human Services. C. A. D. C. Cir. Certiorari denied. Reported below: 867 F. 3d 1323.

No. 17–1027. United States ex rel. Little et al. *v.* Triumph Gear Systems, Inc. C. A. 10th Cir. Certiorari denied. Reported below: 870 F. 3d 1242.

No. 17–1029. Sheshtawy et al. *v.* Gray et al. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 380.

No. 17–1037. Mirena Multidistrict Litigation *v.* Bayer Healthcare Pharmaceuticals, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 713 Fed. Appx. 11.

No. 17–1046. Pieczenik *v.* Commissioner, New Jersey Department of Environmental Protection, et al. C. A. 3d Cir. Certiorari denied. Reported below: 715 Fed. Appx. 205.

No. 17–1047. Perreault *v.* Stewart, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 516.

No. 17–1049. Gurnett *v.* Bargnesi, Acting Judge, Niagara County Court, New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 3d 1319, 47 N. Y. S. 3d 173.

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No. 17–1065. Lee-Walker *v.* New York City Department of Education et al. C. A. 2d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 43.

No. 17–1071. Paige *v.* LeGault et al. C. A. 3d Cir. Certiorari denied. Reported below: 678 Fed. Appx. 84.

No. 17–1072. Chudik *v.* Iancu, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 670.

No. 17–1075. Scopelliti *v.* City of Tampa, Florida. C. A. 11th Cir. Certiorari denied. Reported below: 677 Fed. Appx. 503.

No. 17–1102. Allen et al. *v.* City of Chicago, Illinois. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 936.

No. 17–1109. McClamma *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 664.

No. 17–1112. CONNECTICUT *v.* TORRES. App. Ct. Conn. Certiorari denied. Reported below: 175 Conn. App. 138, 167 A. 3d 365.

No. 17–1115. MASSEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–1121. ZAPPONE ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 551.

No. 17–1131. TAYLOR *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 17–1132. ROBERTS *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 17–1138. WEINGARTEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 865 F. 3d 48.

No. 17–1147. MANGINO *v.* MCKENNEY, INDIVIDUALLY AND AS NEXT FRIEND OF MCKENNEY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MCKENNEY. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 75.

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No. 17–6110. ROY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 3d 1133.

No. 17–6231. DOVE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2015–0783 (La. App. 4 Cir. 5/4/16), 194 So. 3d 92.

No. 17–6295. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–6332. WILLIAMS *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–6343. MIDDLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 846.

No. 17–6349. PEROTTI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 322.

No. 17–6398. JING GUO JIN *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 688 Fed. Appx. 458.

No. 17–6399. CASTETTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 977.

No. 17–6415. CHANDLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 863.

No. 17–6666. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 3d 1328.

No. 17–6668. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 837 F. 3d 1225.

No. 17–6690. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 851.

No. 17–6813. QUINTANILLA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 3d 315.

No. 17–6861. MORENO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 886.

No. 17–7099. KNIGHT *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 225 So. 3d 661.

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No. 17–7257. CLABOURNE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 3d 362.

No. 17–7262. SMITH *v.* SMITH. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 524 S. W. 3d 95.

No. 17–7263. STEELE-KLEIN *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 117, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 200.

No. 17–7279. WILLIAMS *v.* DISTRICT ATTORNEY OF MONROE COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 812.

No. 17–7280. KOLESNIK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 17–7281. MARTINEZ *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 227 So. 3d 598.

No. 17–7286. TOWNSEND *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–7288. WHIRTY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7290. S. C. *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 17–7292. SNEAD *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 126.

No. 17–7311. LEWIS *v.* CAVANUGH ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–7316. RIVERS *v.* SANZONE ET AL. Sup. Ct. Va. Certiorari denied.

No. 17–7317. POTEAT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 170 A. 3d 1243.

No. 17–7319. MOULTRIE *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 248.

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No. 17–7328. ISAACSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7330. ACOSTA *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7334. THOMAS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–7337. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 141036–U.

No. 17–7339. WIDI *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 170 N. H. 163, 166 A. 3d 1105.

No. 17–7345. GREEN *v.* MCGILL-JOHNSTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 811.

No. 17–7346. FOWLER *v.* TICE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 702 Fed. Appx. 44.

No. 17–7351. HAWKINS *v.* HOOKS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7352. HULLIHEN *v.* KLEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7353. COOLEY *v.* STEWART, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7354. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 17–7355. FIGUEROA *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–7357. ENRIQUEZ SANCHEZ *v.* ALLEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 17–7360. RICHMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 150642, 81 N. E. 3d 193.

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No. 17–7362. FULLER *v.* MEGHEAN. C. A. 9th Cir. Certiorari denied. Reported below: 675 Fed. Appx. 786.

No. 17–7365. GONZALEZ *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–7366. HARRIS *v.* MULLINS ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7370. FLETCHER *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 17–7374. POLLARD *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7382. FLENTROY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7384. ROSS *v.* FLEMING, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 253.

No. 17–7385. SCHOUENBORG *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 20.

No. 17–7392. Rock *v.* City of Dearborn Heights, Michigan. Ct. App. Mich. Certiorari denied.

No. 17–7394. Cook *v.* City of Philadelphia, Pennsylvania, et al. Commw. Ct. Pa. Certiorari denied. Reported below: 155 A. 3d 152.

No. 17–7399. Hayes, aka Swiss Barbie Bone *v.* Viacom Inc. et al. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 571.

No. 17–7400. Covington *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 228 So. 3d 49.

No. 17–7401. Guerrero-Yanez *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7404. Munt *v.* United States District Court for the District of Minnesota. C. A. 8th Cir. Certiorari denied.

No. 17–7406. Mike *v.* Garman, Superintendent, State Correctional Institution at Rockview. C. A. 3d Cir. Certiorari denied.

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No. 17–7412. Grace *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 495.

No. 17–7416. Gray *v.* New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 3d 1470, 57 N. Y. S. 3d 561.

No. 17–7418. Khatana *v.* Washington Metropolitan Area Transit Authority. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 243.

No. 17–7423. Johnson *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 17–7426. Sanders *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 228 So. 3d 580.

No. 17–7428. Crespo *v.* Higgins et al. C. A. 3d Cir. Certiorari denied.

No. 17–7431. Williams *v.* Blanchard et al. C. A. 2d Cir. Certiorari denied.

No. 17–7434. THOMPSON *v.* TEEBAGY ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7444. MIGLIORI *v.* MICROSOFT CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–7445. MIGLIORI *v.* HONEYWELL INC. ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–7451. BARROW *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 232 So. 3d 384.

No. 17–7454. MOORE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 227 So. 3d 1251.

No. 17–7467. EAVES *v.* CITY OF CHARLOTTE, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 198.

No. 17–7470. RIOS *v.* LEWIS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 696.

No. 17–7483. SMITH *v.* WOODALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 291.

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No. 17–7491. ALFONSO DURAN *v.* KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 629.

No. 17–7499. STRAW *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 298.

No. 17–7522. JOHNSON *v.* LOYOLA UNIVERSITY OF NEW ORLEANS. Ct. App. La., 4th Cir. Certiorari denied.

No. 17–7532. NURI *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 695 Fed. Appx. 550.

No. 17–7533. MILLS *v.* INDIANA DEPARTMENT OF CHILD SERVICES ET AL. Ct. App. Ind. Certiorari denied. Reported below: 76 N. E. 3d 879.

No. 17–7536. STRAW *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7550. Davis *v.* Spearman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 642.

No. 17–7556. Begnoche *v.* DeRose et al. C. A. 3d Cir. Certiorari denied. Reported below: 676 Fed. Appx. 117.

No. 17–7590. Wilson, aka Parker *v.* United States. C. A. Fed. Cir. Certiorari denied.

No. 17–7600. Baskin *v.* Kansas. Ct. App. Kan. Certiorari denied. Reported below: 54 Kan. App. 2d xviii, 393 P. 3d 1058.

No. 17–7610. Gray *v.* Zatecky, Superintendent, Pendleton Correctional Facility. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 3d 909.

No. 17–7619. Pierre *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 3d 236.

No. 17–7621. Lilley *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7622. Scott *v.* Georgia. Sup. Ct. Ga. Certiorari denied.

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No. 17–7623. Angel Gutierrez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 433.

No. 17–7624. Casciola *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 241 So. 3d 126.

No. 17–7652. Jones *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 17–7658. Watkins *v.* Napel, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7674. Lugo-Diaz *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 3d 1.

No. 17–7677. Rhodes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 276.

No. 17–7679. Mendoza-Romero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 457.

No. 17–7681. Manuel Castro *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 675.

No. 17–7682. Padilla-Diaz et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 856.

No. 17–7684. Driver *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 692 F. 3d 448.

No. 17–7686. Reliford *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 287.

No. 17–7687. Schwartz *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7695. Marion *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7697. Salomon-Macias *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 392.

No. 17–7698. Arias *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 998.

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No. 17–7700. Bolton *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7704. Scott *v.* Palmer et al. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 874.

No. 17–7706. Riggins *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 17–7711. Castilleja-Limon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 366.

No. 17–7712. Ellis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 366.

No. 17–7713. Daniels *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 915.

No. 17–7714. Martin *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 17–7718. Rea-Ponce *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 368.

No. 17–7719. Perez *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 136.

No. 17–7721. Lespier *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 17–7722. Jackson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 392.

No. 17–7723. Jackson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 211.

No. 17–7725. Fierro *v.* Muniz, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–7726. Hamlin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 278.

No. 17–7728. Richardson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7729. Schenck *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 422.

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No. 17–7730. Sullivan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 773.

No. 17–7736. Stewart *v.* Otts et al. C. A. 8th Cir. Certiorari denied.

No. 17–7737. Watkins *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 849.

No. 17–7739. Delva, aka Sealed Defendant *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 3d 135.

No. 17–7740. Duval *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 599.

No. 17–7741. Woodley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 449.

No. 17–7743. Johnston *v.* Mitchell, Superintendent, Old Colony Correctional Center. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 3d 52.

No. 17–7744. TATE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 17–7745. R. D. *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 17–7748. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 790.

No. 17–7749. WASHPUN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 424.

No. 17–7750. SHAHEED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 688 Fed. Appx. 120.

No. 17–7751. EPPERSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 173 A. 3d 535.

No. 17–7757. STINE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 834.

No. 17–7760. JENKINS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 232 So. 3d 167.

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No. 17–7761. JEFFERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 17–7764. PICKETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 17–7765. HARLING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 911.

No. 17–7768. CLARK *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–7770. GODINEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 691.

No. 17–7771. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 908.

No. 17–7772. BERMUDEZ HERRERA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 17–7782. PURRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 511.

No. 17–7783. PEDRAZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 390.

No. 17–7786. SIMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 609.

No. 17–7788. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 381.

No. 17–7791. MAYHEW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 232.

No. 17–7798. CHARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 879.

No. 17–7803. MCCRAY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 230 So. 3d 495.

No. 17–7808. FRIAL-CARRASCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 3d 855.

No. 17–7810. DORSEY *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 3d 359.

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No. 17–7819. TOLENTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 706 Fed. Appx. 18.

No. 17–7849. MERRITT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7872. COTTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2016 IL App (1st) 132820–U.

No. 17–7888. SHIPLEY *v.* STUBBLEFIELD PROPERTIES. App. Div., Super. Ct. Cal., County of San Bernardino. Certiorari denied.

No. 17–225. GARCO CONSTRUCTION, INC. *v.* SPEER, ACTING SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 938.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

Petitioner Garco Construction, Inc. (Garco), had a contract with the Army Corps of Engineers to build housing units on Malmstrom Air Force Base. As part of its contract, Garco agreed to

comply with all base access policies. After construction began, the base denied access to certain employees of Garco's subcontractor. Although the text of the base's access policy required only a "wants and warrants" check, App. to Pet. for Cert. 105a, the base clarified that the policy also required background checks and excluded many individuals with criminal histories—even if those individuals did not have any wants or warrants. Garco's request for an equitable adjustment of the contract was denied, and the Armed Services Board of Contract Appeals denied Garco's appeal. The Court of Appeals for the Federal Circuit affirmed. Despite acknowledging "some merit" to Garco's argument that "'wants and warrants'" means only wants and warrants, the Federal Circuit deferred to the base's interpretation of its access policy under *Auer* v. *Robbins*, 519 U. S. 452 (1997). *Garco Constr., Inc.* v. *Secretary of Army*, 856 F. 3d 938, 943 (2017).

Garco filed a petition for certiorari, asking whether this Court's decisions in *Auer*, *supra*, and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), should be overruled. I would have granted certiorari to address that question.

Seminole Rock and *Auer* require courts to give "controlling weight" to an agency's interpretation of its own regulations. *Seminole Rock*, *supra*, at 414; accord, *Auer*, *supra*, at 461. To qualify, an agency's interpretation need not be "the best" reading of the regulation. *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 613 (2013). It need only be a reading that is not "plainly erroneous or inconsistent with the regulation." *Ibid.* (internal quotation marks omitted). Although *Seminole Rock* deference was initially applied exclusively "in the price control context and only to official agency interpretations," Knudsen & Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L. J. 47, 52–53 (2015), this Court has since expanded it to many contexts and to informal interpretations, see *id.*, at 52–53, 68–77, 86–92; *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 112–133 (2015) (THOMAS, J., concurring in judgment).

Seminole Rock deference is constitutionally suspect. See *Mortgage Bankers*, 575 U. S., at 112–133. It transfers "the judge's exercise of interpretive judgment to the agency," which is "not properly constituted to exercise the judicial power." *Id.*, at 124. It also undermines "the judicial 'check' on the political branches" by ceding the courts' authority to independently interpret and apply legal texts. *Ibid.* And it results in an "accumula-

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tion of governmental powers" by allowing the same agency that promulgated a regulation to "change the meaning" of that regulation "at [its] discretion." *Id.*, at 126. This Court has never "put forward a persuasive justification" for *Seminole Rock* deference. *Decker*, *supra*, at 617 (Scalia, J. concurring in part and dissenting in part); see also *Mortgage Bankers*, *supra*, at 128–133 (opinion of THOMAS, J.) (explaining why each of the proffered explanations for the doctrine is unpersuasive).

By all accounts, *Seminole Rock* deference is "on its last gasp." *United Student Aid Funds, Inc.* v. *Bible*, 578 U. S. 989 (2016) (THOMAS, J., dissenting from denial of certiorari). Several Members of this Court have said that it merits reconsideration in an appropriate case. See, *e. g.*, *Mortgage Bankers*, 575 U. S., at 107 (ALITO, J., concurring in part and concurring in judgment); *id.*, at 112 (opinion of THOMAS, J.); *Decker*, *supra*, at 615–616 (ROBERTS, C. J., concurring). Even the author of *Auer* came to doubt its correctness. See *Mortgage Bankers*, *supra*, at 111–112 (Scalia, J., concurring in judgment); *Decker*, *supra*, at 616–621 (opinion of Scalia, J.); *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 68–69 (2011) (Scalia, J., concurring).

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This would have been an ideal case to reconsider *Seminole Rock* deference, as it illustrates the problems that the doctrine creates. While Garco was performing its obligations under the contract, the base adopted an interpretation of its access policy that read "wants and warrants" to include "wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program." App. to Pet. for Cert. 60a. The Federal Circuit deferred to that textually dubious interpretation. 856 F. 3d, at 945. Thus, an agency was able to unilaterally modify a contract by issuing a new "'clarification' with retroactive effect." *Decker*, *supra*, at 620 (opinion of Scalia, J.). This type of conduct "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America*, *supra*, at 69 (opinion of Scalia, J.).

True, the agency here is part of the military, and the military receives substantial deference on matters of policy. See *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). But nothing about the military context of this case affects the legitimacy of *Seminole Rock* deference. "The proper question faced by courts in interpreting a regulation is . . . what the regulation *means*." *Mortgage Bankers*, 575 U. S., at 128–129, (opinion of THOMAS, J.) (emphasis

added). While the military is far better equipped than the courts to decide matters of tactics and security, it is no better equipped to read legal texts. Pointing to the military's policy expertise "misidentifies the relevant inquiry." *Id.*, at 128.

Because this Court has passed up another opportunity to remedy "precisely the accumulation of governmental powers that the Framers warned against," *id.*, at 126, I respectfully dissent from the denial of certiorari.

No. 17–251. HIDALGO *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 241 Ariz. 543, 390 P. 3d 783.

Statement of JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, respecting the denial of certiorari.

The petition in this capital case asks an important Eighth Amendment question:

> "Whether Arizona's capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment." Pet. for Cert. (i).

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I

"Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994). States must comply with requirements for each decision. See *Kansas* v. *Marsh*, 548 U. S. 163, 173–174 (2006) ("Together, our decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*), and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing scheme must" comport with requirements for each decision).

In respect to the first, the "eligibility decision," our precedent imposes what is commonly known as the "narrowing" requirement. "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983)).

To satisfy the "narrowing requirement," a state *legislature* must adopt "*statutory factors* which determine death eligibility" and thereby "limit the class of murderers to which the death penalty may be applied." *Brown* v. *Sanders*, 546 U. S. 212, 216, and n. 2 (2006) (emphasis added); see also *Tuilaepa*, *supra*, at 979 ("'Once the jury finds that the defendant falls within the *legislatively* defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment'" (quoting *California* v. *Ramos*, 463 U. S. 992, 1008 (1983); emphasis added)); *Lowenfield*, *supra*, at 246 (specifying that the "*legislature*" may provide for the "narrowing function" by statute (emphasis added)); *Zant*, *supra*, at 878 ("*[S]tatutory* aggravating circumstances play a constitutionally necessary function at the stage of *legislative* definition: they circumscribe the class of persons eligible for the death penalty" (emphasis added)).

The second aspect of the capital decisionmaking process, the "selection decision," determines whether a death-eligible defendant should actually receive the death penalty. *Tuilaepa*, 512 U. S., at 972. In making this individualized determination, the jury must "consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Ibid.*; see also *Marsh*, *supra*, at 173–174 ("[A] state capital sentencing system must . . . permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime"). This second aspect of the capital punishment decision—the selection requirement—is not before us.

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II

Our precedent makes clear that the legislature may satisfy the "narrowing function . . . in either of . . . two ways." *Lowenfield*, 484 U. S., at 246. First, "[t]he legislature may itself *narrow the definition of capital offenses* . . . ." *Ibid.* (emphasis added). Second, "the legislature may more broadly define capital offenses," but set forth by statute "aggravating circumstances" which will permit the "jury . . . at the penalty phase" to make "findings" that will narrow the legislature's broad definition of the capital offense. *Ibid.*; see also *Tuilaepa*, *supra*, at 972 ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)"). The

petitioner here, Abel Daniel Hidalgo, contends that the Arizona Legislature has failed to satisfy the narrowing requirement through either of these two methods.

A

Consider the first way a state legislature may satisfy the Constitution's narrowing requirement—namely, by enacting a narrow statutory definition of capital murder. Some States have followed this approach. For example, in *Lowenfield*, this Court upheld Louisiana's use of this method because it concluded that the State's capital murder statute narrowed the class of intentional murderers to a smaller class of death-eligible murderers. 484 U. S., at 246. Specifically, Louisiana's capital murder statute was limited to cases in which "'the offender'" not only had "'specific intent to kill or to inflict great bodily harm'" but also (1) targeted one of three specifically enumerated categories of victims (children, "'a fireman or peace officer engaged'" in "'lawful duties,'" or multiple victims); or (2) was "'engaged in the perpetration or attempted perpetration of'" certain other serious specified crimes; or (3) was a murder-for-hire. *Id.*, at 242 (quoting La. Rev. Stat. Ann. §§ 14:30(A)(1)–(5) (West 1986)). The *Lowenfield* Court also noted that Texas' capital murder statute "narrowly defined the categories of murders for which a death sentence could be imposed." 484 U. S., at 245; see also *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (upholding the Texas capital murder statute, which made "a smaller class of murders in Texas" death eligible).

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Unlike the Louisiana and Texas statutes, Arizona's capital murder statute makes all first-degree murderers eligible for death and defines first-degree murder broadly to include all premeditated homicides along with felony murder based on 22 possible predicate felony offenses. See Ariz. Rev. Stat. Ann. §§ 13–1105(A)(1)–(2) (2010) (including, for example, transporting marijuana for sale). Perhaps not surprisingly, Arizona did not argue below and does not suggest now that the State's first-degree murder statute alone can meet the Eighth Amendment's narrowing requirement.

B

Because Arizona law broadly defines capital murder, the State has sought to comply with the narrowing requirement through the second method—namely, by setting forth statutory "aggravating

circumstances" designed to permit the "jury . . . at the penalty phase" to make "findings" that will narrow the legislature's broad definition of the capital offense. *Lowenfield*, *supra*, at 246. The Arizona Legislature has set forth a list of statutory aggravating factors that the jury must consider "in determining whether to impose a sentence of death." Ariz. Rev. Stat. Ann. § 13–751(F) (Cum. Supp. 2017); see Appendix, *infra*. And under Arizona law, a person convicted of first-degree murder may be sentenced to death only if at least one of these aggravating factors is present. § 13–752(E).

In this case, the petitioner sought an evidentiary hearing to establish through witnesses, expert testimony, and documentary evidence that the statutory aggravating circumstances set forth in § 13–751(F) apply to virtually every first-degree murder case in the State. The state trial court consolidated the petitioner's motion for an evidentiary hearing with similar motions filed by 17 other first-degree murder defendants. See Brief in Opposition 4. Unlike the petitioner, the other defendants had committed their crimes after the Arizona Legislature increased the number of statutory aggravating factors from 10 to 14. Compare Ariz. Rev. Stat. Ann. § 13–703(F) (2001) (10 aggravators) with Appendix, *infra* (14 aggravators).

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In his request for a hearing, the petitioner pointed to, among other things, evidence he obtained through public records requests regarding more than 860 first-degree murder cases in Maricopa County (the county where he was charged) between 2002 and 2012. As the Arizona Supreme Court noted, this evidence indicated that "one or more aggravating circumstances were present in 856 of 866" cases examined. 241 Ariz. 543, 550, 390 P. 3d 783, 789 (2017). In other words, about 98% of first-degree murder defendants were eligible for the death penalty. The petitioner adds in his briefing before this Court that this is true under either the 10 aggravating factors in effect when he was sentenced or the 14 factors set forth under the expanded provisions Arizona has since adopted. See Reply Brief 5 (citing C. Spohn, Aggravating Circumstances in First-Degree Murder Cases, Maricopa County, AZ: 2002–2012). Narrowing an impermissibly broad capital murder statute by about 2% is not, the petitioner says, sufficient under this Court's precedents.

The state trial court denied the petitioner's request for an evidentiary hearing, and the Arizona Supreme Court affirmed. 241

Ariz., at 548–549, 390 P. 3d, at 788–789. However, the Arizona Supreme Court did not dispute the petitioner's evidence. It assumed that "Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance." *Id.*, at 551, 390 P. 3d, at 791.

C

Despite assuming that the aggravating circumstances fail to materially narrow the class of death-eligible first-degree murder defendants, the Arizona Supreme Court nevertheless concluded that the State's death penalty system meets the Constitution's narrowing requirement. It said that the petitioner was "mistaken . . . insofar as he focuses only on the legislatively defined aggravating circumstances" because use of those circumstances "is not the only way in which Arizona's sentencing scheme narrows the class of persons eligible for death." *Id.*, at 551–552, 390 P. 3d, at 791–792. The Arizona Supreme Court mentioned five other ways it thought Arizona's death penalty system meets the Constitution's narrowing requirement. They were: (1) Arizona's first-degree murder statute; (2) the "identified aggravating circumstances"; (3) the fact that the State must prove "one or more" of the "alleged aggravating circumstances" "beyond a reasonable doubt"; (4) the existence of "mandatory appellate review"; and (5) Arizona's statutory provisions applicable to "individualized sentencing determinations" through consideration of "mitigating circumstances." *Id.*, at 552, 390 P. 3d, at 792.

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We have considered (and rejected) the first of these other ways since Arizona's first-degree murder statute does not "provid[e] for categorical narrowing at the definition stage." *Zant*, 462 U. S., at 879. What about the second way—that is, narrowing by means of the "statutory aggravators"? Again, the Arizona Supreme Court assumed that those factors do not, in fact, narrow the class of death-eligible first-degree murder defendants. Instead it assumed that "Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance." 241 Ariz., at 551, 390 P. 3d, at 791. That assumption, without more, would seem to deny the constitutional need to "genuinely" narrow the class of death-eligible defendants. *Zant*, *supra*, at 877. Moreover, the third and fourth narrowing methods the Arizona Supreme Court invoked are basi-

cally beside the point—they do not show the necessary *legislative* narrowing that our precedents require. And the final other way (individualized sentencing determinations) concerns an entirely different capital punishment requirement—the selection decision—which is not at issue in this case. See *supra*, at 1197.

Finally, the Arizona Supreme Court seemed to suggest that *prosecutors* may perform the narrowing requirement by choosing to ask for the death penalty only in those cases in which a particularly wrongful first-degree murder is at issue. See 241 Ariz., at 551–552, 390 P. 3d, at 791–792. However, that reasoning cannot be squared with this Court's precedent—precedent that insists that States perform the "constitutionally necessary" narrowing function "at the stage of *legislative* definition." *Zant*, *supra*, at 878 (emphasis added); see also *Tuilaepa*, 512 U. S., at 979; *Lowenfield*, 484 U. S., at 246; *Ramos*, 463 U. S., at 1008.

* * *

Although, in my view, the Arizona Supreme Court misapplied our precedent, I agree with the Court's decision today to deny certiorari. In support of his Eighth Amendment challenge, the petitioner points to empirical evidence about Arizona's capital sentence system that suggests about 98% of first-degree murder defendants in Arizona were eligible for the death penalty. That evidence is unrebutted. It points to a possible constitutional problem. And it was assumed to be true by the state courts below. Evidence of this kind warrants careful attention and evaluation. However, in this case, the opportunity to develop the record through an evidentiary hearing was denied. As a result, the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance. We do not have evidence, for instance, as to the nature of the 866 cases (perhaps they implicate only a small number of aggravating factors). Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented. Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.

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APPENDIX

ARIZ. REV. STAT. ANN. § 13–751(F) (CUM. SUPP. 2017)

"F. The trier of fact shall consider the following aggravating circumstances in determining whether to impose a sentence of death:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

"2. The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.

"3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

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"4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

"6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

"7. The defendant committed the offense while:

"(a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

"(b) On probation for a felony offense.

"8. The defendant has been convicted of one or more other homicides . . . that were committed during the commission of the offense.

"9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age, was an unborn child in the womb at any stage of its development or was seventy years of age or older.

"10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties

and the defendant knew, or should have known, that the murdered person was a peace officer.

"11. The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate.

"12. The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding.

"13. The offense was committed in a cold, calculated manner without pretense of moral or legal justification.

"14. The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense."

[Note: Since 2001, the Arizona Legislature has added aggravators 11 through 14.]

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No. 17–659. All Nippon Airways et al. *v.* Wortman et al. C. A. 9th Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 854 F. 3d 606.

No. 17–678. Bell *v.* United States. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 689 Fed. Appx. 598.

No. 17–962. Boyd *v.* Dunn, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 3d 853.

Justice Sotomayor, dissenting.

I dissent from the denial of certiorari for the reasons set out in *Arthur* v. *Dunn*, 580 U. S. 1141 (2017) (Sotomayor, J., dissenting from denial of certiorari).

No. 17–983. Donjuan-Laredo *v.* Sessions, Attorney General. C. A. 10th Cir. Certiorari denied. Justice Gorsuch took no part in the consideration or decision of this petition. Reported below: 689 Fed. Appx. 600.

No. 17–1030. SPEEDWAY LLC ET AL. *v.* WILSON ET AL. C. A. 10th Cir. Motions of Center for Constitutional Jurisprudence and National Conference on Weights and Measures for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE ALITO and JUSTICE GORSUCH took no part in the consideration or decision of these motions and this petition. Reported below: 872 F. 3d 1094.

No. 17–1033. BAIUL ET AL. *v.* NBC SPORTS. C. A. 2d Cir. Motion of Reiter, Dye & Brennan, LLP, et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 708 Fed. Appx. 710.

No. 17–6232. CAMPBELL *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2016-Ohio-7613.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

Petitioner Glen Campbell challenges the constitutionality of Ohio Rev. Code Ann. § 2953.08(D)(3) (West Supp. 2017), which provides that sentences "imposed for aggravated murder or murder" are "not subject to review." I concur in the denial of certiorari because Campbell failed adequately to present his constitutional arguments to the state courts. I nonetheless write separately because a statute that shields from judicial scrutiny sentences of life without the possibility of parole raises serious constitutional concerns.

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In Ohio, after a defendant is found guilty of aggravated murder, the State authorizes a range of penalties, including life in prison with parole eligibility after 20, 25, or 30 years, or life imprisonment without the possibility of parole. See § 2929.03(A)(1). Under that scheme, Campbell was sentenced to life imprisonment without the possibility of parole after pleading guilty to aggravated murder. He challenged his sentence on appeal, arguing in part that the trial court failed to balance the aggravating and mitigating factors as required by § 2929.12 of the Ohio statute.[1]

[1] In making sentencing determinations in felony cases, Ohio provides that courts "shall be guided by the overriding purposes of felony sentencing . . . to protect the public from future crime" and "punish the offender," § 2929.11, and "shall consider" certain statutory aggravating and mitigating factors, § 2929.12.

The Court of Appeals of Ohio found this argument "unreviewable" under § 2953.08(D)(3). App. to Pet. for Cert. A–3. That provision, contained within the appellate review section of the Ohio statute, provides: "A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." § 2953.08(D)(3). The court below relied on precedent from the Supreme Court of Ohio, which has held that § 2953.08(D)(3) is "unambiguous" and "clearly means what it says: such a sentence cannot be reviewed." *State* v. *Porterfield*, 106 Ohio St. 3d 5, 8, 2005-Ohio-3095, ¶17, 829 N. E. 2d 690, 693.

Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility, and the fact that Ohio has set up a scheme under which those determinations "cannot be reviewed" is deeply concerning. Life without parole "is the second most severe penalty permitted by law." *Harmelin* v. *Michigan*, 501 U. S. 957, 1001 (1991) (KENNEDY, J., concurring in part and concurring in judgment). In recent years this Court has recognized that, although death is different, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham* v. *Florida*, 560 U. S. 48, 69 (2010). "Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller* v. *Alabama*, 567 U. S. 460, 474–475 (2012) (quoting *Graham*, 560 U. S., at 69). A life-without-parole sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Id.*, at 70 (internal quotation marks and brackets omitted).

Because of the parallels between a sentence of death and a sentence of life imprisonment without parole, the Court has drawn on certain Eighth Amendment requirements developed in the capital sentencing context to inform the life-without-parole sentencing context. For instance, this Court imported the Eighth Amendment requirement "demanding individualized sentencing when imposing the death penalty" into the juvenile conviction context, holding that "a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." *Miller*, 567 U. S., at 475, 477. The Court also categorically banned life-

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without-parole sentences for juvenile offenders who did not commit homicide. See *Graham*, 560 U. S., at 82.

The "correspondence" between capital punishment and life sentences, *Miller*, 567 U. S., at 475, might similarly require reconsideration of other sentencing practices in the life-without-parole context. As relevant here, the Eighth Amendment demands that capital sentencing schemes ensure "measured, consistent application and fairness to the accused," *Eddings* v. *Oklahoma*, 455 U. S. 104, 111 (1982), with the purpose of avoiding "the arbitrary or irrational imposition of the death penalty," *Parker* v. *Dugger*, 498 U. S. 308, 321 (1991). To that aim, "this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." *Clemons* v. *Mississippi*, 494 U. S. 738, 749 (1990); see also *Parker*, 498 U. S., at 321 ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally"); *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner").

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In my view, this jurisprudence provides good reason to question whether § 2953.08(D)(3) really "means what it says": that a life-without-parole sentence, no matter how arbitrarily or irrationally imposed, is shielded from meaningful appellate review. Our Eighth Amendment jurisprudence developed in the capital context calls into question whether a defendant should be condemned to die in prison without an appellate court having passed on whether that determination properly took account of his circumstances, was imposed as a result of bias,[2] or was otherwise imposed in a "freakish manner." And our jurisprudence questions whether it is permissible that Campbell must now spend the rest of his days in prison without ever having had the opportunity to challenge why his trial judge chose the irrevocability of life without parole over the hope of freedom after 20, 25, or 30 years.

[2] Although the State argues that a defendant can present a claim of bias on state postconviction proceedings, see Brief in Opposition 11, those claims are limited to claims of "a consistent pattern of disparity in sentencing by the judge," Ohio Rev. Code Ann. § 2953.21(A)(5). The State does not address how a defendant convicted of aggravated murder can raise a substantial claim of bias if it is not part of a "consistent pattern."

The law, after all, granted the trial judge the discretion to impose these lower sentences. See § 2929.03(A)(1).

This case did not present either the Ohio courts or this Court the occasion to decide this important question.[3] I believe the Ohio courts will be vigilant in considering it in the appropriate case.

No. 17–7377. PARTIN *v.* TILFORD. C. A. 6th Cir. Motion of respondent to substitute Rose M. Tilford, Executrix of the Estate of Ron H. Tilford as respondent in place of Ron H. Tilford, deceased, granted. Certiorari denied.

No. 17–7660. YOUNGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 17–7701. AGUILERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 733 Fed. Appx. 875.

No. 17–7709. ALCORTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 853 F. 3d 1123.

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No. 17–7720. DERROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 707 Fed. Appx. 301.

No. 17–7727. HARDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 704 Fed. Appx. 1.

No. 17–7763. CROWE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 701 Fed. Appx. 694.

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[3] Campbell advanced his meaningful-review claim as a due process, rather than an Eighth Amendment, claim. He also argued that the Ohio statute violated the Equal Protection Clause.

No. 17–7780. Locascio *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. 17–597. Clemons *v.* Delta Airlines, Inc., *ante*, p. 1055;
No. 17–655. Ali *v.* Carnegie Institution of Washington et al., *ante*, p. 1057;
No. 17–725. Beavers *v.* Kern County Department of Child Support Services, *ante*, p. 1092;
No. 17–797. Cooke *v.* Virginia, *ante*, p. 1059;
No. 17–5507. Ackbar *v.* McPherson et al., *ante*, p. 922;
No. 17–5585. In re Sanders, *ante*, p. 813;
No. 17–5758. Hinson-Bey *v.* City of Albermarle Police Department et al., *ante*, p. 950;
No. 17–6205. Blyden *v.* United States, *ante*, p. 958;
No. 17–6335. Matelyan *v.* ASCAP et al., *ante*, p. 1002;
No. 17–6370. Williams *v.* Lashbrook, Warden, *ante*, p. 1064;
No. 17–6472. In re Weekley, *ante*, p. 995;
No. 17–6522. Lucas *v.* Ward et al., *ante*, p. 1068;
No. 17–6547. H. K. V. *v.* Florida Department of Children and Families et al., *ante*, p. 1069;
No. 17–6553. Glick *v.* Townsend et al., *ante*, p. 1069;
No. 17–6621. Watson *v.* Mylan Pharmaceuticals, Inc., *ante*, p. 1071;
No. 17–6770. Stevenson *v.* Vannoy, Warden, *ante*, p. 1095;
No. 17–6874. King *v.* Berry, Warden, *ante*, p. 1096;
No. 17–6894. Waters *v.* United States, *ante*, p. 1079;
No. 17–6901. Chappell *v.* Morgan, Warden, *ante*, p. 1104;
No. 17–6939. In re Yonamine, *ante*, p. 1050;
No. 17–7005. Fairley *v.* Fairley et al., *ante*, p. 1096; and
No. 17–7116. Okeayainneh *v.* United States, *ante*, p. 1097. Petitions for rehearing denied.

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March 20, 2018

Miscellaneous Order

No. 17A911 (17–8151). Bucklew *v.* Precythe, Director, Missouri Department of Corrections, et al. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to Justice Gorsuch, and by him referred to the Court, granted

pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. THE CHIEF JUSTICE, JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would deny the application for stay of execution.

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